



How working mothers have been left behind during the COVID-19 pandemic

A look at the state and federal laws, including those passed in response to COVID-19, that left behind many workers ensnared by the pandemic

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California is widely known as one of the most progressive states when it comes to workers' rights. The past year brought major changes and expanded existing protections, especially in the area of protected family leaves. For example, the California Family Rights Act (CFRA) – the state analog to the federal Family Medical Leave Act (FMLA) – was significantly broadened to cover smaller employers and expand the definition of who qualifies as a family member to trigger the law's protection. But while new laws such as the federal Families First Coronavirus Relief Act (FFCRA) attempted to create protections for employees who simultaneously feared for their safety and livelihood, they did not go far enough to protect working parents.

The myriad of regulations passed at the federal, state, county, and local levels, though well-intentioned, were piecemeal, difficult to navigate and interpret, and did not do enough to help working parents and caregivers faced with school and daycare closures, and thus children who had no place to go except home. The burden of caregiving fell and continues to fall disproportionately on women whose careers have been negatively impacted during the past year and will take a long time to recover, if ever. These failures have reversed progress for working women that took years, if not decades, to come to fruition, signifying another loss from this pandemic in addition to so many lives.

Laws that existed pre-pandemic and provide protections for working parents

California Family Rights Act (CFRA)

The primary California law that provides job-protected time off for parents is the California Family Rights Act, or CFRA, which is the California equivalent of the federal Family Medical Leave Act (FMLA). CFRA, codified at California Government Code sections 12945 et seq., provides employees with up to 12 weeks of job-protected leave for the birth of a child, the employee's own serious medical condition, or the serious medical condition of a close family member. It also provides a right of reinstatement to the same or similar job position following the leave. However, CFRA has some limitations in that it only protects employees who have worked for an employer for at least



a year (1,250 hours or more in the past 12 months). Moreover, prior to 2021, the law only applied to mid- or large-sized employers (with 50+ employees working within 75 miles of the worksite).

Thankfully, the law has now been expanded to cover a wider range of employers. Under the most recent expansion effective January 1, 2021, CFRA was modified by SB 1383, and now applies to smaller employers with five or more employees and eliminates the requirement that employees work within 75 miles of the worksite. With respect to workers who need to take time off to care for a family member, the definition of protected family members previously included a minor child (but not adult dependent children), a spouse, or a parent. This definition has now been expanded to include grandparents, grandchildren, siblings, domestic partners and in-laws. The definition of "child" was also amended to include all adult children even if not dependent, as well as the children of a domestic partner. Another significant change to CFRA this year was eliminating the previous caveat that where two parents worked for the same



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employer, the employer was not required to provide more than 12 weeks of leave total for the couple (in connection with the birth, adoption, or foster care placement of a child).

However, as addressed above, CFRA only applies to medical conditions and bonding with a new baby, so working parents who need time off to simply watch their healthy children whose schools and daycares are closed are not protected under CFRA. If the parent or child contracts COVID-19, CFRA kicks in to provide job protection, but that has done little to help the huge number of parents whose children have had no safe place to go during the day while the parent is at work.

For parents still needing to go physically into their offices, this has been an impossible situation, and even for parents who could work from home, they have been left in the untenable position of trying to work a full-time job while simultaneously caring for their children, and in many cases, being a full-time teacher for their child's distance learning.

Fair Employment and Housing Act (FEHA)

California's anti-discrimination law, the Fair Employment and Housing Act (FEHA), grants some limited protection for working parents caring for a disabled child or other family member (e.g., in the form of an accommodations request for a leave or remote working arrangement). However, it does not provide for any set duration of job-protected leave like FMLA and CFRA. FEHA, codified at Government Code sections 12940 et seq., makes it illegal for employers with at least five employees to discriminate against employees in certain protected classes, including disability. FEHA also requires employers to accommodate employees with disabilities, and a finite leave of absence can be a reasonable accommodation if it does not create an undue hardship for the employer. However, this law does nothing to protect parents who have needed time off during COVID-19 to care for their healthy children, nor has it allowed parents to take time off to care

for their children who are merely sick and not disabled.

Kin Care Law

California's Kin Care law is found in section 233 of the Labor Code. The Kin Care law was enacted prior to California's mandatory sick leave law and requires that employers who provide paid sick leave permit employees to use up to half of their accrued and available sick leave to care for a family member needing care due to any of the reasons listed in Labor Code section 246.5 (which include, among other things, diagnosis, care, or treatment of an existing health condition and preventative care). The Kin Care law is helpful in allowing parents to take time off when their children are in need of medical care, but because it only requires employers to provide half of the employee's sick leave for this purpose, it doesn't provide much time off in most cases, and it does nothing to help parents who have needed to stay home with their healthy children.

Family School Partnership Act

California's Family School Partnership Act, codified at Labor Code sections 230.7 and 230.8, was enacted long before the pandemic, in 1995, followed by an expansion in 2016. This law allows employees up to 40 hours of job-protected leave per year and no more than eight hours per month to deal with a childcare or school emergency (including a COVID-19 closure). Eligible employers are those with 25 or more employees at the same location. While this provides some temporary job protection for working parents, it fails to help when schools and daycare centers are closed for months on end.

Additional legal protections that arose in the era of COVID-19

The pandemic brought a slew of new laws, executive orders, and relief packages from all different levels of government, including those targeting specific industries, such as food services, for example. While we cannot address them all in this

article, we will address the primary evolving protections for working parents that occurred at the federal and state levels.

One of the earliest and most expansive forms of relief was the federal relief package titled the Families First Coronavirus Response Act (FFCRA) which went into effect on April 1, 2020, and covered workers through December 31, 2020. The FFCRA essentially provided two weeks of paid sick leave and 12 weeks of expanded FMLA (job-protected leave) for certain workers who met particular qualifying criteria, including having children at home as a result of school closures or the unavailability of childcare. Paid sick leave was granted to employees who were quarantined per government order or at the advice of healthcare providers; to those experiencing COVID-19 symptoms and seeking diagnosis; and to those who had a bona fide need to care for someone else in quarantine or for a child whose school/childcare provider was closed or unavailable due to COVID-19.

The Act provided further protections for those employees who worked for a covered employer for at least 30 days – they were also entitled to an additional 10 weeks of paid expanded family and medical leave at two-thirds the employees' regular pay when the employee was unable to work due to the need to care for a child whose school/childcare provider was closed or unavailable.

However, while the passage of the FFCRA was certainly a relief for working parents, it did not go nearly far enough to provide the job protections needed and also included some major loopholes. For example, the FFCRA was limited to employers with 500 or fewer employees, and small businesses with fewer than 50 employees could also qualify for exemption from the requirements of protected childcare leave if they could show it would jeopardize their business in the future. What about the tens of thousands who worked for large corporations?

California attempted to address this exclusion with California's COVID-19 Supplemental Paid Sick Leave law. In



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April 2020, Governor Gavin Newsom signed Executive Order N-51-20 which applied to large employers with more than 500 employees and provided their employees with a period of paid and protected leave for various qualifying reasons (including childcare needs) that echoed the FFCRA. However, this only covered employees in the food services industry.

A number of local entities such as counties and municipalities also tried to expand the FFCRA's protections by providing coverage for employees who worked for corporations larger than 500 employees, and in some cases, expanding the qualifying conditions for coverage, but the regulations were piecemeal and lacking in enforcement power. In September 2020, the California legislature went further and modified the Supplemental Paid Sick Leave Law, codified at Labor Code 248, to add stronger enforcement mechanisms and expand the law to include private employees outside the food sector industry with more than 500 employees nationwide and all employers of all sizes (both public and private) who employed first responders and health-care workers who were not eligible under FFCRA.

Nevertheless, until the fall of 2020, there were almost no protections at all for those employed by employers with 500 or more employees. Even once additional protections were put in place, many schools and childcare facilities remained closed from March 2020 until as recently as the spring of 2021 (and even then, often with reduced hours), meaning workers have needed far more than the protected time off provided.

Too little, too late, with working mothers behind

As of December 2020, the number of women who had left the labor force in the United States since the start of the pandemic had already reached 2.3 million, leaving the rate of women's participation in the work force at the lowest level seen since 1988.¹ While

women already made up a smaller percentage of the workforce in California (as of 2016, 69.75% of women in California were in the workforce compared with 81.85% of men²), with the onset of the pandemic this divergence became more pronounced, particularly for women of color.

According to research by the Public Policy Institute of California (using information obtained from the Bureau of Labor Statistics), the percentage of working women in California declined steadily in March, April, and May of 2020, especially when compared with men.³ The California Budget and Policy Center also reported that "during the first three months of the downturn, employment for Black and Latinx women fell by over 20% – more than three times the decline in employment for white men."⁴ Additionally, women who had immigrated to California, had a 20% reduction in the workforce between February and May 2020, compared to a 14% reduction for immigrant men.⁵

Sadly, none of this comes as a great surprise. Not only have women traditionally taken on more childcare responsibilities than their male counterparts, but because of the persistent gender pay gap (as of 2019 full-time working women in California earned about 89% of what their male counterparts did⁶), if one parent had to stay home to watch the kids during a pandemic, the mother was the "logical" choice, both for stereotypical gender-conforming reasons and due to financial concerns. This meant that many women who had already faced and overcome significant hardships related to taking maternity leave from work found themselves hit again with the need to take significant time off from work.

Studies have already shown that taking time off to care for children has a negative impact on women's long-term earnings⁷ and there is no reason to believe that having to do this related to a pandemic, as opposed to pregnancy or maternity leave, would have any less of an impact on a working mother's career

prospects. However, working mothers were failed in more than just the fact that their future earnings could be negatively impacted. What became clear was that many of these working moms lacked any protections or guarantees that they would have a job at all when the pandemic restrictions ultimately lifted. As explained above, the FFCRA provided some job protections for those who had to take leave to care for children in the wake of schools and daycares shutting down across the state. However, there were shockingly large gaps in coverage that disproportionately affected working moms.

For example, one mother contacted our firm who had a long and successful career working for a large corporation. Her children's school had to close due to COVID-19, so she explained to her supervisor that she needed leave so she could watch them and supervise their distance learning. The only other family member available to watch the children had become seriously ill. Shockingly, her supervisor refused and asked for her resignation, citing the needs of the business. The woman was understandably distraught and thought this could not possibly be legal, but she was wrong. It was absolutely legal, as the company she worked for had over 500 employees, so she was not covered by the FFCRA.

Let down by the federal law, we assumed that California (which overall provides more protections for workers than in other states) must provide some additional protection for this woman, but after scouring the newest COVID-19 legislation and amendments, we came to the sad conclusion that there was no protection for her in her industry (which was not in the food sector – the only area protected at the time) or the many other women in similar positions. While some counties and municipalities did end up creating additional protections for those working at companies with over 500 employees, these were piecemeal and varied from county to county and in some cases even depended on whether the specific area where the



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company was located was incorporated into the county or not.

What has been desperately needed, and what our government has failed to deliver, is a comprehensive law prohibiting these kinds of terminations that disproportionately affect working mothers. As referenced above, in September 2020, California did finally enact a broader supplemental paid sick leave law (AB 1867 codified and expanded Executive Order N-51-20, with new Labor Code Section 248 and 248.1, also amending enforcement procedures at 248.5)⁸, but it only allowed 80 hours of paid leave for full-time employees working outside the home (and those not working full time received even less).⁹ Thus, if a parent has had to spend more than two weeks watching their children due to school closures (which is *every* parent since schools have been closed for many months), it has left them without any job protection or right to return to their prior position. Receiving only two weeks of pay, followed by unpaid and unprotected leave, has been insufficient for the millions of working parents who found themselves in this situation, the majority of whom were women.

Conclusion

The pandemic of the past year has been a challenging and dynamic situation for families, workers, and lawmakers alike.

At the beginning, it was impossible to predict how far COVID-19 would spread, how long it would go on, and how much it would impact our lives. While some laws have been passed or expanded to help working parents, the statistics speak for themselves as to the negative and lasting career impact in our nation, particularly for women and women of color.

In our firm, we also hear stories directly from the potential clients who contact us every day – those who have been chastised by their supervisors for not being able to perform more work while simultaneously watching their children, and those who have lost their jobs or been forced to resign due to childcare and homeschooling responsibilities, because they have no other option. It is heart-breaking to receive these calls and know the lasting damage it will have on these families.

We hope that as our society emerges out of the pandemic, we will be cognizant of the unequal negative effects this pandemic has had on working mothers (particularly women of color) and their careers, and do more to support and build up these workers. Working mothers have practically performed miracles during this pandemic, often working three jobs simultaneously – mother, teacher, and employee. In the words of actress Julianne Moore, “It’s not difficult to take care of a child. It’s difficult to do



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anything else while taking care of a child.”¹⁰ As hope forms on the horizon that this pandemic may be winding down, our support for the mothers who took care of this country while it was ailing needs to be ramping up. They deserve at least that much.

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Endnotes:

- ¹ <https://nwlc.org/wp-content/uploads/2021/02/January-Jobs-Day-FS.pdf>
- ² <https://milkeninstitute.org/sites/default/files/reports-pdf/Women-in-the-Workforce-How-California-Measures-Up-FINAL.pdf> at appendix C6.
- ³ <https://www.ppic.org/blog/gender-gaps-in-the-covid-19-labor-market/>
- ⁴ <https://calbudgetcenter.org/resources/women-poc-take-hits-in-californias-job-loss/>
- ⁵ *Ibid.*
- ⁶ https://www.bls.gov/regions/west/news-release/womensearnings_california.htm
- ⁷ <https://www.ppic.org/blog/gender-gaps-in-the-covid-19-labor-market/>
- ⁸ <https://www.constangy.com/california-snapshot/california-expands-supplemental-covid-19-paid-sick>
- ⁹ See *i.e.*, <https://www.dir.ca.gov/dlse/FAQ-for-PSL.html>
- ¹⁰ <https://www.redbookmag.com/life/interviews/a4649/julianne-moore-family-life/>