



# Think you're protected when you need leave? Think again!

Parental-leave laws in California aren't terrible, but they could be a lot better. An overview of current family-leave law

BY KATIE BAIN, LAURA MAZZA AND KATIE DEBSKI

We receive hundreds of calls every month from people who believe their rights have been violated and often have the unhappy job of having to explain to them why they are not actually protected under the law. Many of these people have been treated extremely unfairly, but fall just outside the parameters of the law. This is particularly true in the parental-leave context. Approximately 68 percent of children in the United States are part of families in which both parents work,<sup>1</sup> so parental leave is something that affects

most American families. However, in many cases, employers are not legally obligated to provide parents with any time off. For example, the California Family Rights Act (CFRA) only applies to those working for employers with 50 or more employees and to those who have been with the company for at least 12 months, so if you are employee number 45, or have worked at the company for only 11 months, you are not protected.

One such call came to our firm recently, from a father who worked for an employer that was large enough to fall under CFRA, but he had worked at the company for just under a year so he didn't qualify for CFRA protection.

His wife had a baby and he requested time off to bond with and help care for his new baby. The company initially approved his request, but then terminated his employment upon his return for a vague, unsubstantiated reason (apparently, he was not a "cultural fit" despite his 11 months of employment without incident). The potential client unfortunately had no legal protection, other than perhaps a creative argument for breach of contract based on the employer's approval of his leave request.

We have had countless similar calls – from fathers who have no legal right to take time off for the birth of their babies, from mothers who need time off to



care for a sick child, from parents who need time off when their children's school is closed due to a holiday or spring break.

Below, we'll cover the main laws that provide job protection in these situations, as well as some of the situations where there is no protection. We'll also compare California laws to the laws in other states and countries. It's important to note that none of these laws obligate employers to provide parents with paid leave, although California does offer a limited paid-family-leave program, another issue that we'll touch on in this article.

### **Laws that provide job-protected time off for parents:**

#### ***California Family Rights Act (CFRA)***

The California Family Rights Act, or CFRA, 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 an immediate family member. However, CFRA only applies if the employer has at least 50 employees working within 75 miles of the employee, if the employee has been employed for at least a year, and if the employee has worked at least 1,250 hours in the previous year. CFRA provides employees with many protections – they have to be returned to the same or equivalent position after their leave and their employer has to continue to pay for any employer-provided portion of their health insurance benefits. Unfortunately, many employees don't qualify for leave under CFRA, either because they have not worked at the company long enough, or because the company doesn't have enough employees at or near the employee's work site to fall under the law.

#### ***Fair Employment and Housing Act (FEHA)***

FEHA, codified at Government Code section 12940 et seq., is California's

analog to federal Title VII, and makes it illegal for employers with at least five employees to discriminate against employees in certain protected classes, including disability (e.g., related to pregnancy). 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 not apply to very small employers, and does nothing to protect parents who need time off to bond with an infant or to care for their sick children (although there is a 2016 case that held that an employee's association with a physically disabled person was itself treated as a disability under FEHA<sup>2</sup>).

#### ***Pregnancy Disability Leave Law (PDL)***

The PDL, found in California Government Code section 12945(a), is part of FEHA and provides employees with up to four months of job-protected leave for periods when the employee is disabled by pregnancy, childbirth, or related medical conditions. The PDL helps pregnant and new mothers take time off, as most OBGYNs will certify their patients as being disabled for some limited period prior to their due date (or longer depending on the circumstances of the pregnancy), plus six weeks following a vaginal birth and eight weeks following a Cesarean-section. This is a far-reaching law because, like FEHA, it applies to any company with at least five employees. However, also like FEHA, it provides no protection for workers at very small companies, and does not extend to fathers wanting to take time off to bond with and care for their new babies.

#### ***Kin Care Law***

California's Kin Care law is found in section 233 of the California 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 must 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 California 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 (currently California only requires employers to provide three days of sick leave per year to employees). It also doesn't help a parent who wants time off to bond with a new baby.

#### ***Family School Partnership Act***

California Labor Code sections 230.7 and 230.8, referred to as the Family School Partnership Act, were first passed in 1995 but have recently been expanded as of January 1, 2016. The law provides parents and guardians with time off from work for various school activities for their children, including to appear at the child's school at the request of the child's teacher, when the child has been suspended for certain types of misconduct, and if the employer has at least 25 employees, to participate in activities at the child's school, for school emergencies, or to locate or enroll the child in school or with a child care provider. However, the Act provides only 40 hours off per year, and no more than eight hours per calendar month, so while helpful, it still leaves many parents without sufficient time off in many contexts.

### **A comparative view of parental-leave laws and their benefits:**

When it comes to parental-leave law and policy, the stakes are high. Numerous studies have found significant benefits to children in countries that provide for paid parental leave, including significant reductions to infant and child mortality rates.<sup>3</sup> Studies have also shown that when fathers take leave after their babies are born, they are considerably more likely to be involved in and feel re-



sponsible for childcare later in the child's life.<sup>4</sup> A study on the impact of labor policies on children's health explained, "Even though the implementation of these work protections entails inevitable financial and administrative costs, evidence has also indicated that they can have offsetting, positive economic outcomes for families and companies."<sup>5</sup>

For example, countries that offer paid maternity leave see higher rates of women returning to work after having children, as well as higher employment rates among women in general. This benefits employers, as long-term retention leads to decreased costs spent on hiring and training, as well as increased productivity by more experienced workers.<sup>6</sup> Paid leave and flexible policies that allow for parental leave and child-health leave have been found by the Families and Work Institute to create notable benefits to employers including, "increasing employee engagement and retention; reducing turnover; reducing absenteeism and sick days; increasing customer satisfaction; reducing business costs; increasing productivity and profitability; improving staffing coverage to meet business demands; [and] enhancing innovation and creativity."<sup>7</sup>

### Other countries

When comparing the United States with other countries, we are significantly behind in terms of what we offer to parents, both in terms of job-protected leave and paid leave. Of the 188 countries with accessible labor legislation, 180 provide for paid leave for mothers.<sup>8</sup> The United States is one of only eight countries that do not provide paid leave for mothers (the other seven are Suriname, Liberia, Samoa, Nauru, Palau, Tonga, and Papua New Guinea). Forty-five countries provide mothers with six months of leave, and 52 countries provide between 14 and 25 weeks. Sweden is one of the strongest examples, where the government provides almost 16 months of paid leave to be used between two parents.<sup>9</sup> For

fathers, there are fewer protections globally than for mothers, but the United States still lags significantly behind. Eighty-one other countries provide paid leave for fathers (although in 40 of those countries, they only allow for three weeks of leave for fathers).

### Other states

Within the United States itself, there is a wide variance among the individual states in parental-leave laws. Fortunately for Californians, we rank high on the list of U.S. states for going above and beyond the limited federal protections in place. The National Partnership for Women & Families published a state-by-state analysis of laws that help parents, titled, "Expecting Better."<sup>10</sup>

California is one of the more generous states in terms of coverage for time off related to children being sick or the birth of a child, and was the only state to receive an "A" grade in the Expecting Better study. All states are subject to the federal Family Medical Leave Act (FMLA). FMLA is comparable to California's CFRA, and provides 12 weeks of job-protected leave under the same conditions as CFRA, discussed above. Some states provide greater protection in some way, such as California, which provides paid leave, or Connecticut (which received an "A-" in the study), which provides for 16 weeks of job-protected leave for the birth of a child or to care for a family member with a serious medical condition. Washington, D.C., also received an "A-" in the study, and provides up to 16 weeks of family leave plus 16 weeks of medical leave for the employee's own health condition and covers any employer regardless of size. Twelve states (Alabama, Arizona, Georgia, Idaho, Michigan, Mississippi, Missouri, Nevada, Oklahoma, South Carolina, South Dakota, and Wyoming) received failing grades in the study, as they have no protections for working parents, other than the federal FMLA.

Other than California's Family School Partnership Act, a few other states

provide for time off for parents to attend school-related activities for their children (Washington, D.C., Illinois, Louisiana, Massachusetts, Minnesota, North Carolina, Rhode Island, and Vermont). Nevada makes it illegal to terminate an employee for taking time off to attend a child's school-related activities.

According to the National Conference of State Legislatures (NCSL),<sup>11</sup> California is one of only three states that offer paid family leave (the other two are New Jersey and Rhode Island). New York has a new law going into effect in 2018 that will also provide for paid family leave. California provides six weeks of paid family leave for time off from work to care for a seriously ill child, parent, parent-in-law, grandparent, grandchild, sibling, spouse, or registered domestic partner, as well as for new parents who need time to bond with their babies.

The state programs in California, New Jersey, and Rhode Island are all paid for by employee payroll contributions. It is important to note that at least in California, eligibility for paid family-leave benefits does not necessarily equate to job-protected leave. We have many employees call us who think that because they have been contributing through their paychecks into the state paid family-leave fund, they are protected when they attempt to use this benefit. However, if they fail to meet the eligibility criteria of the protected-leave laws listed above (i.e., work for an employer with over 50 employees for at least a year, be disabled by pregnancy or child birth, etc.), they could still be terminated for attempting to take the paid family leave, leading to an extremely unjust (but technically legal) result.

### Paid-leave benefits everyone

The science is clear that providing parents with job protection and paid leave to bond with their new babies and to care for their sick children benefits everyone – the employees, their children, the employers, and society as a whole.



The vast majority of countries seem to understand this and provide parents (especially mothers) with significant benefits. Unfortunately, the United States has not followed suit, and while employees in California are lucky to have some of the best protections and benefits in this country, we still have a long way to go to even come close to what is offered in most of the developed and developing world. Currently, the California legislature is considering a bill (SB 63, authored by Senator Jackson) to expand job-protected parental leave to employees working for companies with 20-49 employees. It is not yet clear if this bill will pass – a similar bill (SB 654) was vetoed by Governor Brown in 2016, but we are certainly hopeful.

At our firm, we are all mothers of young children. Our kids are in daycare (aka germ central) and are building up their immune systems, which means they get sick a lot. We take time off whenever our kids are sick because we want to be there to care for them, and we often don't have a choice since most daycares have strict rules about when sick children can return to school. We take time off when we have new babies to give us time to recover from childbirth, to adjust to life with a new baby, and to bond with our babies. We are lucky that we can do so without trepidation that we may lose our jobs, but most workers do not have that same assurance.

Prior to forming our own firm and becoming parents, we all had work experiences at small firms with fewer than five employees. Had we still been at those firms when we became parents, we would have had no legally protected right to time off. We hope that the United States catches up with the rest of the world and starts providing parents with significantly more protected and paid time off so that workers in this country have the opportunity to be both outstanding employees and amazing parents, without having to choose between the two.

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## Endnotes

- <sup>1</sup> Debra L. Ness, Vicki Shabo, and Sarah Fleisch Fink, *Expecting Better: A State-by-State Analysis of Laws That Help Expecting and New Parents*, National Partnership for Women & Families (2016). Pg. 4
- <sup>2</sup> *Castro-Ramirez v. Dependable Highway Express, Inc.*, 2 Cal.App.5th 1028 (2016).
- <sup>3</sup> Heymann, et al, *supra*, at 356-357.
- <sup>4</sup> Heymann, et al, *supra*, at 358.
- <sup>5</sup> Heymann, et al, *supra*, at 365.
- <sup>6</sup> Heymann, et al, *supra*, at 365-366.
- <sup>7</sup> Heymann, et al, *supra*, at 366.
- <sup>8</sup> Jody Heymann, Alison Earle, and Kristen McNeill, *The Impact of Labor Policies on the Health of Young Children in the Context of Economic Globalization*, Annual Review of Public Health, [pubhealth.annualreviews.org](http://pubhealth.annualreviews.org) (2013), 358.
- <sup>9</sup> <http://www.npr.org/2016/10/06/495839588/countries-around-the-world-beat-the-u-s-on-paid-parental-leave>
- <sup>10</sup> Ness et al, *supra*.
- <sup>11</sup> <http://www.ncsl.org/research/labor-and-employment/statefamily-and-medical-leave-laws.aspx>.

