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"Work and Caregiving During COVID-19" and "Pregnant Employees and New Parents"

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6 Work and Caregiving during COVID-19

Deborah A. Widiss, 2021-02-25

Even in normal times, it can be difficult to balance job duties with family responsibilities. COVID-19 has brought this conflict to a head, with schools and childcare providers operating remotely or closed, and workers called on to care for family members who become ill. Although Congress enacted limited workplace leave to address some COVID-related needs, these laws expired at the end of 2020. This Chapter explains how other laws - mostly on the books before COVID-19 - offer workers paid or unpaid leave from work for caregiving, as well as some protection from employer discrimination. These laws, while helpful, do not meet the challenge. Because women tend to pick up the slack, COVID-19 will likely worsen gender-based inequalities in ways that may persist long after the virus subsides.

6.1 Meeting Caregiving Responsibilities While Working

Many American workers regularly juggle work with caregiving for family. In 2019, before the disruption caused by the pandemic, most parents of children under 18 were employed. This is true for both married (different-sex) couples with children (in 14.7 million families out of 22.9 million, or about two-thirds, both parents were employed) and single-parent families (in 6 million out of 7.9 million families headed by mothers and 2.2 million out of 2.6 million families headed by fathers, the parent caring for children also worked) (Bureau of Labor Statistics, n.d., tbl. 4). Single or partnered LGBT parents also are typically employed (Gates 2013). Millions of workers also provide significant support for adult family members with a disability, elderly parents, or a spouse or partner (Family Caregiver Alliance 2016).

In March 2020, because of COVID-19, schools and childcare centers across the country suddenly shut down or transitioned to remote learning. As a result, many employed parents became de facto teachers for their children while simultaneously trying to meet their own work responsibilities. Adult day care centers throughout the country also closed (Flinn 2020). As the virus spread, many workers, even if not themselves sick, cared for sick family members. At the same time, because of record levels of unemployment, individuals lucky enough to stay employed may have been reluctant to ask for any kind of special dispensation at work to help meet family-related obligations.

In summer 2020, many businesses reopened, but that only heightened the challenge. School districts across the country, including many of the nation's largest, have operated entirely online or using a hybrid model with students attending only a few days a week, for much of the 2020-21 school year. Many childcare providers have closed; of those that are open, 86% are operating at reduced capacity and most are also incurring extra costs for personal protective and sanitation equipment (Hogan et al. 2020). Aid packages passed by the U.S. Congress in the spring 2020 fell far short of the $50 billion that childcare industry experts said is needed (Leonhardt 2020). Relief packages proposed in 2021 include significant additional funding for childcare (Luhby and Lobosco 2021). However, if Congress does not provide support, studies suggest that almost half of the nation's childcare capacity may be lost (Jessen-Howard and Workman 2020).

Even if child and adult care centers and schools are physically open, many families fear they pose too high a risk of infection. This is especially true if anyone in the household has underlying conditions that make them particularly vulnerable to COVID-19. Nonetheless, workers who had been furloughed or permitted to work remotely are now being asked, or required, to come back to physical workplaces. The result is a caregiving crisis, as existing laws offer only very limited support for workers torn in too many directions.

6.2 Leave Rights for Family Caregiving

The structure and duration of time off from work, or workplace flexibility, that a worker might seek to address COVID-related family needs will vary by need and job. Some employees might ask to be off work entirely to care for an ill family member. Here, leave duration will vary with illness severity. Others might seek flexible hours over an extended period, so that they can work and also care for young children or help school-age children with remote learning. And still others might seek to work remotely so they can comply with a quarantine order.

Employees typically look first to their employer's regular policies to address such needs. Unlike most developed countries, workers in the United States generally are not guaranteed sick leave, vacation days, personal days (Heymann et al. 2020). Nor is there a right to ask for schedule modifications to address caregiving needs.

Most full-time workers receive a few weeks of paid time off per year, including paid sick days. However, lower-paid workers are less likely to receive paid sick leave than higher paid workers and fewer than half of part-time workers received paid sick days at all. Paid leave to take care of a family member who is seriously ill is relatively unusual across all wage levels (Figure 6.1 (caregiving.html#fig:lvwage); Bureau of Labor Statistics 2019b, tbl. 31).

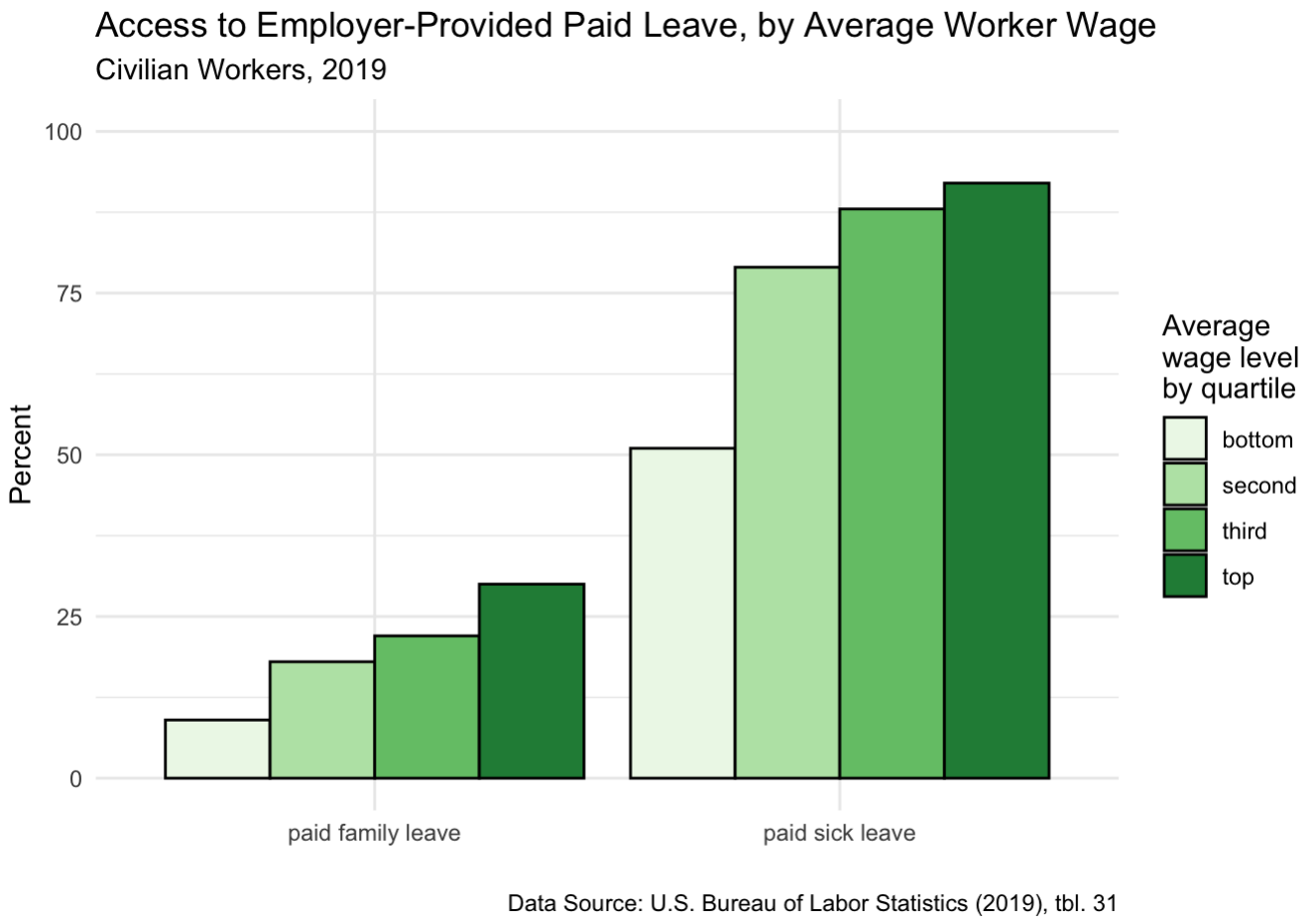

Figure 6.1: Paid Leave by Average Worker Wage

Whatever employer policies provide, some laws guarantee paid time off for certain caregiving responsibilities. These laws tend to fall into two types: (1) sick day laws, which require employers to provide a relatively limited number of days, usually at full pay, to address illness and other health-related needs; and (2) family and medical leave laws, which let a worker to take a longer period of time off, sometimes at reduced pay or no pay, to address more serious medical conditions (Figure 6.2 (caregiving.html#fig:statemapfig)). Both can generally be used for the health needs of the employee or close family members.

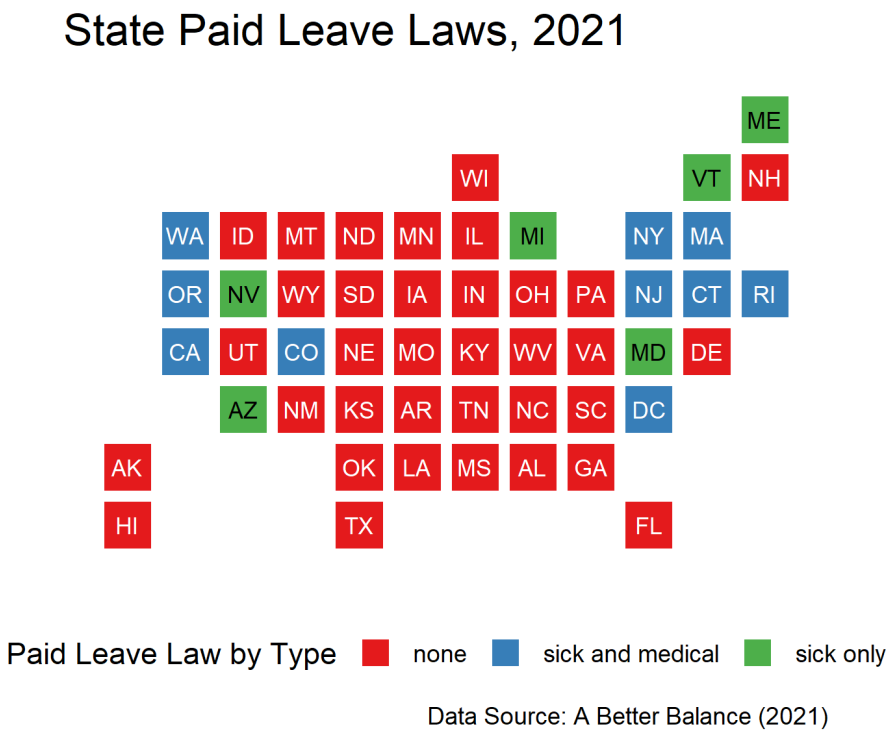

Figure 6.2: State Paid Leave Laws, 2021

While no permanent federal law guarantees paid sick days, thirteen states, the District of Columbia, and twenty-one cities and counties do (A Better Balance 2020a). Two states have laws that provide comparable amounts of paid time off for both health-related reasons and other reasons. The state and local paid sick day laws typically provide up to 40 hours per year at regular pay.

A worker may use this time to stay home if she is sick, is caring for a family member who is sick, or is seeking preventive health care. Some of these laws also apply if a business, school, or childcare provider is closed due to a public health emergency (A Better Balance 2020a). In several states, executive orders or administrative guidance issued during the pandemic has clarified that they can be used for additional COVID-specific needs, such as tests or complying with a quarantine directive. And some states and cities have passed COVID-specific paid sick day laws (A Better Balance 2021b). Additionally, in spring 2020, Congress provided a temporary right to paid sick days, which expired at the end of 2020. Emergency Paid Sick Leave Act, Pub. L. No. 116-127, §§ 5102, 5109, 134 Stat. 178, 195-198 (https://www.govinfo.gov/content/pkg/PLAW-116publ127/uslm/PLAW-116publ127.xml) (2020).

Paid sick day laws can help with short-term needs related to COVID-19. They do not, however, provide much relief for the longer-term disruptions that may be caused by schools operating remotely for several months, or serious cases of COVID-19.

The second group of laws, family and medical leave laws, address longer-term absences. The federal Family and Medical Leave Act (FMLA) requires employers to provide up to 12 weeks of unpaid, job-protected leave to care for a spouse, son, daughter, or parent with a "serious health condition." 29 U.S.C. § 2612(a)(1)(C) (https://www.govinfo.gov/content/pkg/USCODE-2018-title29/html/USCODE-2018-title29-chap28-subchapI-sec2612.htm); 29 C.F.R. § 825.112(a)(3) (https://www.ecfr.gov/cgi-bin/text-idx?SID=37e96589d012f4345da3582b7493ae24&mc=true&node=se29.3.825_1112&rgn=div8). (The FMLA also requires leave to address an employee's own serious health condition, to care for a new child, and for certain military-related care needs.) The permanent provisions of the FMLA only apply to workplaces with at least 50 employees, and employees who have worked at least 1250 hours (about 25 hours per week) for the employer in the prior year. 29 U.S.C. § 2611 (https://www.govinfo.gov/content/pkg/USCODE-2018-title29/html/USCODE-2018-title29-chap28-subchapI-sec2611.htm). These restrictions exclude about 40% of the private sector workforce (Klerman, Daley, and Pozniak 2014).

Even if an employee qualifies for FMLA leave, the permanent provisions of the FMLA address only some COVID-related caregiving needs. The FMLA regulations define "serious health condition" as a condition that causes an incapacity to work and requires either inpatient care in a hospital or continuing treatment by a health care provider. 29 C.F.R. § 825.113 (https://www.ecfr.gov/cgi-bin/text-idx?SID=7fb26651da323c8e88f516274232d90b&mc=true&node=se29.3.825_1113&rgn=div8). A COVID-19 case that requires hospitalization or is gravely debilitating would meet this standard. A relatively mild case is less likely to qualify; the flu and colds typically do not unless they involve complications. 29 C.F.R. § 825.113(d). However, if a patient were instructed by her doctor or applicable public health orders to quarantine, and thus could not work or attend school for several days, that might satisfy the incapacity requirements. According to the U.S. Department of Labor, the FMLA does not provide leave to take care of healthy children, even if they are home because of school or childcare closures (Department of Labor n.d.a). FMLA leave is also unpaid. Many workers cannot afford to be home for very long without a paycheck. (Temporary COVID-specific provisions provided some paid leave. See Chap. 6. However, these provisions expired at the end of 2020.)

Some states offer more robust support by guaranteeing *paid* leave for similar purposes as the FMLA provides unpaid leave. As of September 2020, eight states, and the District of Columbia, have such family and medical leave laws; approximately one quarter of Americans live in a state with a paid leave law (Widiss 2020). Typically funded by a small payroll tax, they generally offer employees between 60% and 100% of regular wages, up to a cap set at the median state wage.

These State laws cover many more workers than the FMLA, because generally there are no limits on employer size and most part-time workers are eligible (A Better Balance 2021a). In many states, independent contractors may also opt into the system. The states differ in the length of permitted leave. More recently-enacted laws generally authorize 12 weeks of benefits (although some are not yet fully phased in), while some older laws offer only 6 or 8 weeks of benefits. Like the FMLA, these laws may apply if a worker is caring for a family member with COVID-19 if it qualifies as a “serious health condition,” but they will not cover workers caring for healthy children at home because their schools or childcare providers are closed.

In sum, non-COVID-specific leave laws can offer some important to protections to workers, but they are far from sufficient to meet the full range of caregiving needs related to the pandemic.

6.3 Family Responsibilities Discrimination

While the law rarely requires employers to provide leave or otherwise accommodate their employees’ caregiving responsibilities, employers may not treat employees differently on the basis of sex, disability, race, and other prohibited factors. This means that an employer must be even-handed in how it enforces its policies, including those related to caregiving. Failure to do so may violate antidiscrimination laws (Equal Employment Opportunity Commission 2007). These cases are often known as “family responsibilities discrimination.”

Many of these claims concern sex discrimination. The relevant federal law, Title VII of the Civil Rights Act of 1964, prohibits employer discrimination against an individual employee because of that employee’s sex. 42 U.S.C. § 2000e-2(a) (https://www.govinfo.gov/content/pkg/USCODE-2018-title42/html/USCODE-2018-title42-chap21-subchapVI-sec2000e-2.htm). State and local laws offer analogous protections. Although employers may require that employees complete their regular workplace tasks despite caregiving responsibilities, they may not assume that women will have a harder time doing so than men, and accordingly deny women workplace opportunities. Nor may they unfairly punish men who seek to share the family caregiving load.

Under employment discrimination law, either form of differential treatment may give rise to a viable claim if the worker suffers an adverse employment action as a result. This could include being denied a job, fired, or denied a promotion. It can also include workplace harassment if the harassment is severe or pervasive enough. Additionally, the FMLA and similar state and local leave laws prohibit employers from retaliating against employees for seeking or taking authorized leave. E.g., 29 U.S.C. § 2615 (https://www.govinfo.gov/content/pkg/USCODE-2018-title29/html/USCODE-2018-title29-chap28-subchapI-sec2615.htm).

The disruptions caused by COVID-19 may increase family responsibilities discrimination by employers. If an employer considering candidates for a promotion asks a female employee, but not a male employee, whether she will be able to do the job and also care for her kids, the interviewer may have improperly relied on a sex-based stereotype. Likewise, if an employer modifies its usual policies to allow a woman to work at home because her children's school is closed, but refuses to allow a male employee to do the same, the man may have suffered unlawful discrimination. Or if a supervisor regularly harasses an employee in sexist terms because the employee's children are visible during Zoom-based meetings, the supervisor may have acted illegally.

Anecdotal reports suggest such discrimination may be widespread in the COVID-era. Between April and June 2020, caregiver-related calls to The Center for WorkLife Law's hotline for employees increased by 250% compared to the same time in 2019 (Williams 2020). And, in a July 2020 online survey of salaried employees in the U.S. (n = 1,051), 34% of men with children at home, as compared to 9% of women with children at home, said they received a promotion while working remotely (Rogers 2020).

6.4 Effects on Gender Equality

Women typically bear a disproportionate share of the caregiving burden, even if they are also working full time for pay outside the home (e.g., Patten 2015). Emerging studies suggest that the pandemic has, in many families, exacerbated such inequalities. Women are far more likely than men to disrupt their work days to meet their children's needs or other caregiving responsibilities (e.g., Zamarro and Prados 2020; Collins et al. 2021).

The caregiving challenges caused by COVID are likely to persist or worsen, particularly since many schools are operating remotely in fall 2020. Workers are, quite simply, being stretched too thin – and women are far more likely to leave the workforce than men. This is already happening. In September 2020, 865,000 women, as compared to 216,000 men, dropped out of the labor

force (Bureau of Labor Statistics 2020a, tbl. A-1). This will cause significant financial hardship to many families, and it will widen gender gaps in earnings and retirement security. Parents who can't afford to quit working, particularly single parents, may have to rely on inadequate and unstable childcare arrangements, or simply leave kids home alone.

There is, however, a glimmer of hope. Although women are doing a greater share of caregiving, men are also shouldering enhanced responsibilities (e.g. Krentz et al. 2020). Fathers may remain more involved even when the crisis subsides. The pandemic has also spotlighted how essential childcare, schools, and adult care facilities are for a productive workforce. This has bolstered public support for policies such as paid family leave and universal childcare. Already, a few states have responded to the COVID crisis by enacting permanent leave provisions. E.g., SB 20-205 (https://leg.colorado.gov/sites/default/files/2020a_205_signed.pdf) (Colorado). If this trend continues, the pandemic could spur more general legislative reform that could help families better balance work and caregiving needs, both now and in the future.

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8 Pregnant Employees and New Parents

Deborah A. Widiss, 2020-12-01

Pregnant women and new parents may have specific challenges connected to work during the COVID pandemic. This chapter summarizes federal and state laws that pregnant women may use to reduce risk of exposure to COVID; that provide new parents time off after a birth; and that protect against discrimination for employees who ask for support. Existing laws, however, provide expecting and new parents inadequate support.

8.1 Reducing COVID-19 Exposure When Pregnant

Early studies suggest pregnant women who contract COVID-19 are more likely to suffer serious complications requiring admission to an intensive care unit, and they are more likely to have a pre-term birth (Allotey et al. 2020; Zambrano et al. 2020; Woodworth et al. 2020). Moreover, we do not yet know how a mother's illness might affect a fetus, particularly if the mother were sick during early months of pregnancy (Wadman 2020).

To reduce the risk of contracting COVID-19, many pregnant women may ask for accommodations at work. Common requests include seeking to work remotely, even if other employees are returning to physical workplaces; transfer to a position with a low amount of contact with customers or co-workers; or high-quality personal protective equipment or physical barriers that can reduce the risk of exposure. Employees might also seek a job-protected paid or unpaid leave. Some employers voluntarily grant such requests. If an employer refuses to do so, federal and state legal protections can be helpful in some cases, but are insufficient to fully meet these needs.

First, temporary federal laws, passed in response to the crisis, provide short-term paid sick leave and family leave. (See Chapter 7 (https://worklawcovid19book.netlify.app/ffcra.html)). These laws are relevant if the worker, or someone in her family, has already contracted COVID-19, or if schools or daycares have been closed because of COVID. However, they generally will not apply to workers who simply seek to avoid exposure to the virus.

The second set of laws that may be relevant are disability laws. The Americans with Disabilities Act prohibits discrimination on the basis of a disability and requires employers to provide "reasonable accommodations" to individuals with a disability, unless doing so would be an undue hardship. 42 U.S.C. § 12112(b) (https://www.govinfo.gov/content/pkg/USCODE-2018-title42/html/USCODE-2018-title42-chap126-subchapI-sec12112.htm). State and local disability laws often offer similar protections, and sometimes cover smaller employers than the ADA does. E.g., Colo. Rev. Stat. § 24-34-402 (https://codes.findlaw.com/co/title-24-government-state/co-rev-st-sect-24-34-402.html); Conn. Gen. Stat. § 46a-60 (https://www.cga.ct.gov/current/pub/chap_814c.htm#sec_46a-60). Under the ADA, a disability is defined in part as an "impairment" that "substantially limits" an individual's ability to conduct "one or more major life activities". 42 U.S.C. § 12102(1) (https://www.govinfo.gov/content/pkg/USCODE-2018-title42/html/USCODE-2018-title42-chap126-sec12102.htm). A COVID-19 infection may qualify as a disability, depending on the level of impairment it causes (See § 13.1 (https://worklawcovid19book.netlify.app/disability.html)).

Although healthy pregnancies are generally not considered a disability, 29 C.F.R. § 1630.2(h) (https://ecfr.federalregister.gov/current/title-29/subtitle-B/chapter-XIV/part-1630#p-1630.2(h)), pregnancy-related complications may be (Equal Employment Opportunity Commission 2020b, J.2). A pregnant worker may also have other pre-existing disabilities that interact with the pregnancy and the pandemic in ways that might call for special supports. For example, if an employee has gestational diabetes or respiratory conditions connected to the pregnancy, those could likely qualify as a disability. And since such conditions might put the employee at greater risk if she were to contract COVID, she might be able to ask for measures that reduce such risk as a reasonable accommodation (Equal Employment Opportunity Commission 2020b, G3). Likewise, if the employee had a preexisting mental health condition, such as an anxiety disorder, that qualifies as a disability, the employee might be able to request to work at home or take other steps to mitigate the risk of infection as way of accommodating anxiety that is exacerbated by being pregnant during pandemic (Equal Employment Opportunity Commission 2020b, D.2).

Third, the Pregnancy Discrimination Act (PDA) prohibits discrimination against pregnant employees and requires that employers provide the "same" level of support to pregnant employees that they provide to other employees with comparable ability or inability to work. 42 U.S.C. § 2000e(k) (https://www.govinfo.gov/content/pkg/USCODE-2018-title42/html/USCODE-2018-title42-chap21-subchapVI-sec2000e.htm). If an employer has allowed other workers to take steps to reduce exposure to the virus, it may be required to provide comparable support to

pregnant employees or at least a sufficient legitimate non-discriminatory rationale for the different treatment. Young v. United Parcel Service, 135 S. Ct. 1338 (2015) (https://www.courtlistener.com/opinion/2788982/young-v-united-parcel-service-inc/).

Finally, thirty states have passed laws that explicitly require employers to provide reasonable accommodations for pregnancy, childbirth, and related medical conditions (**???**). These laws sidestep the question of whether the medical condition at issue can qualify as a "disability", as well as the comparative assessment required by the PDA. Under these laws, pregnant employees might be able to request accommodations that would reduce the risk of COVID infection, such as the option to work at home, or otherwise respond to the particular needs of pregnant women during the pandemic.

8.2 Time Off During Pregnancy or to Care for a New Baby

Most birth mothers need to take some time off work to recover from childbirth, and new parents – both male and female – often want to take some time to bond with a new baby. Additionally, a pregnant women might seek a job-protected leave during her pregnancy. The United States is the only developed country that fails to guarantee paid time off for new parents (Widiss 2020). Instead, parents rely on a patchwork of protections, and their employers' own discretionary policies.

Under federal law, the primary source of leave rights for new parents is the Family and Medical Leave Act (FMLA). 29 U.S.C. § 2612(a)(1)(A) (https://www.govinfo.gov/content/pkg/USCODE-2018-title29/html/USCODE-2018-title29-chap28-subchapI-sec2612.htm). The FMLA only applies to workplaces with at least 50 employees, and to employees who have worked for the employer for at least a year on a full-time or close to full-time basis. 29 U.S.C. § 2611 (https://www.govinfo.gov/content/pkg/USCODE-2018-title29/html/USCODE-2018-title29-chap28-subchapI-sec2611.htm). These restrictions exclude about 40% of employees, as well as independent contractors and self-employed workers (Klerman, Daley, and Pozniak 2014).

If eligible, a new parent, including adoptive or foster parents, can take up to 12 weeks of unpaid leave under the FMLA. The FMLA also provides leave for an individual's own serious medical condition, or to care for a family member with a serious medical condition. The 12-week cap, however, is cumulative within a calendar year, or alternative 12-month period chosen by the employer (Department of Labor 2013). This means that if a pregnant employee has taken time off

under the FMLA for a medical condition, including the emergency paid leave provided under the FMLA for coronavirus-related needs, she may have exhausted her leave rights before the baby is even born (Department of Labor n.d.b, Question 45).

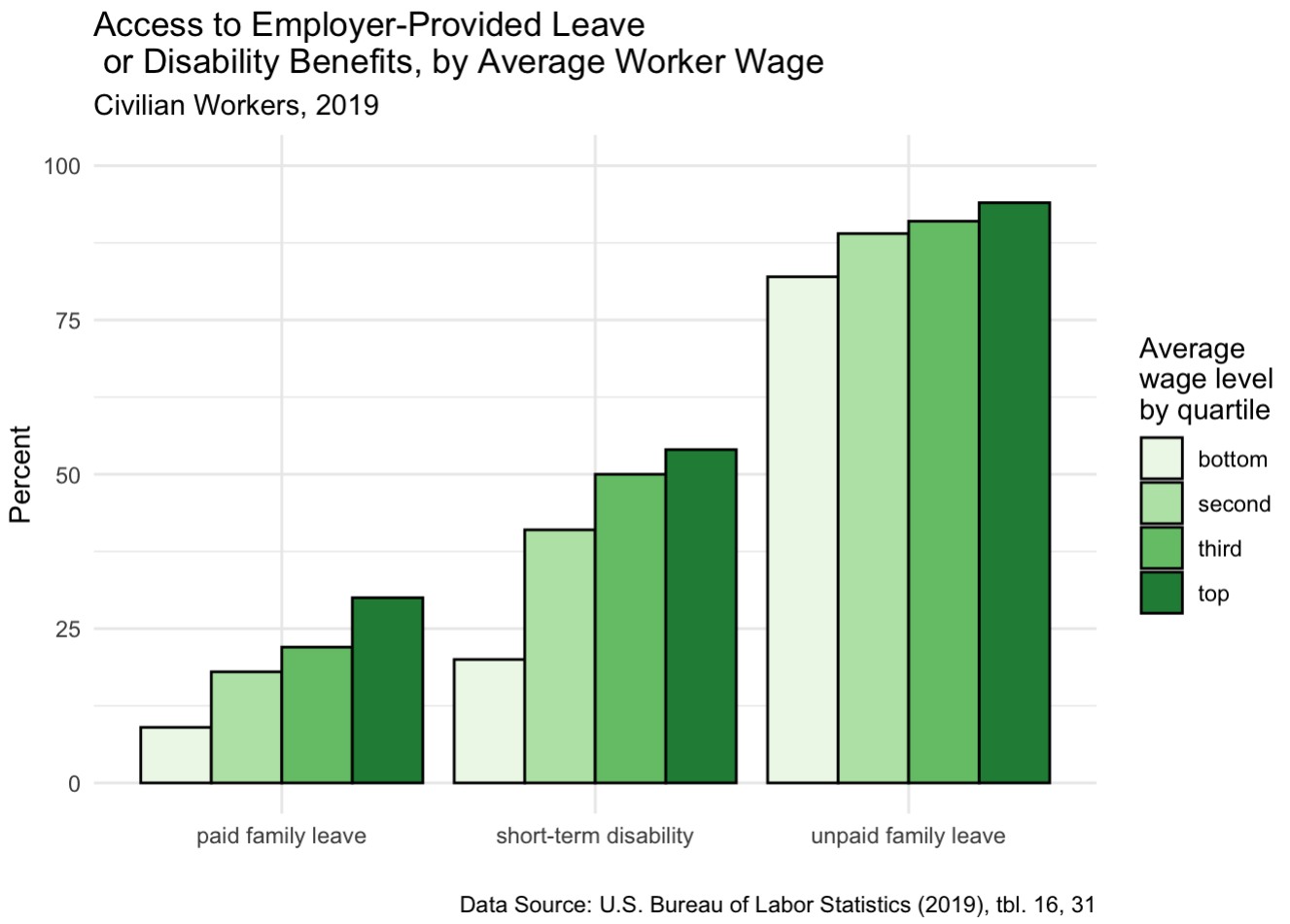
A growing number of state laws supplement the FMLA by providing paid leave for new parents, also as part of more general family and medical leave laws (A Better Balance 2020b). Most apply regardless of employer size, and they provide partial wage replacement, generally up to a cap set around the state's average wage. Most also cover part-time employees, and many permit independent contractors to opt into the program. The laws are typically funded by a small payroll tax.

These laws generally provide each new parent between eight and twelve weeks of leave, usually known as "bonding leave", to care for a new child. They are available to biological parents, and also generally to parents after an adoption or foster placement.

Additionally, in some states, a birth mother can receive benefits for the full allotment of "bonding" leave and separately receive benefits for a period of "medical" leave. This could include time during the pregnancy, delivery, or recovery period in which she is unable to work, or other medical needs that occur during the relevant year. In other words, this is different from the FMLA's structure, in that all leave rights under the FMLA are collectively subject to the 12-week annual cap.

Some of these laws provide income but do not technically reserve an employee's job. However, the employee may be able to combine the benefits under these laws with FMLA-protections or an employer's own leave policy. These laws are a very important step forward as compared to the prior baseline; however, since the leave rights are individual to each parent, single-parent families are eligible to receive only half as much leave (Widiss 2020).

Employers also sometimes choose to provide paid or unpaid leave to new parents as a matter of voluntary benefits. Although paid leave is quite rare, especially for lower-wage workers, unpaid leave is relatively standard. Moreover, some employers provide short-term disability benefits, which provide full or partial income replacements during a period of medical incapacity (Figure 1, Bureau of Labor Statistics 2019b, tbl. 16, 31). Birth mothers can usually access short-term disability benefits during the period of time that they are physically recovering from childbirth, typically a period of 6 to 8 weeks.



Data Source: U.S. Bureau of Labor Statistics (2019), tbl. 16, 31

8.3 Discrimination Against Pregnant Employees or New Parents

Pregnant employees or new parents may also face discrimination at work. A September 2020 review of COVID-19 workplace case filings identified lawsuits by pregnant employees as particularly prevalent. In all of the cases reviewed, the pregnant employee had allegedly asked for accommodations or a furlough to reduce her risk of COVID-19 exposure, after which the employer fired her (Camire, Meneghello, and Nesbit 2020).

The Pregnancy Discrimination Act makes clear that adverse actions against an employee because of pregnancy, breastfeeding, or related medical conditions are illegal. 42 U.S.C. § 2000e(k) (https://www.govinfo.gov/content/pkg/USCODE-2018-title42/html/USCODE-2018-title42-chap21-subchapVI-sec2000e.htm). It is also illegal to retaliate against employees for asking for accommodations under federal or state disability laws, under state pregnancy accommodation laws, or for seeking or using FMLA leave or state paid leave laws. However, in many such cases, the employer will argue that it fired the employee for other legitimate reasons, such as performance problems. In those cases, a plaintiff's odds of success depends on

marshaling enough evidence to undermine this justification. This could done, for example, by identifying other employees with similar performance records who were not terminated, or comments by decision-makers suggesting discriminatory bias or stereotypical assumptions, such as that pregnant employees are less competent or committed than other employees.

8.4 Unemployment Insurance

Pregnant employees may feel they have to quit work, particularly employees who have requested and been refused accommodations to mitigate risk of exposure. New parents likewise may feel they need to quit to provide care, especially because many childcare centers are closed or operating at a reduced capacity. In many states, during normal times, employees who quit a job for family-related care needs are not eligible for unemployment insurance (Ben-Ishai, McHugh, and Ujvari 2015). However, Congress and some States have provided temporary unemployment insurance eligibility for some workers in this situation. E.g. CARES Act § 2102(a)(3)(A)(ii)(I)(dd), 134 Stat. 313 (https://www.govinfo.gov/content/pkg/PLAW-116publ136/uslm/PLAW-116publ136.xml); Nevada, SB3 § 15(5) (Aug. 6, 2020) (https://www.leg.state.nv.us/Statutes/32ndSS2020/Stats2020SS3201.html#Stats2020SS3201_CH7).

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