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SAME OCEAN, DIFFERENT BOATS: THE PANDEMIC'S DISPROPORTIONATE IMPACT ON CERTAIN WORKERS, EMPLOYMENT LAW'S PROTECTIONS, AND ITS LIMITATIONS

By Ramit Mizrahi

Six months ago, the coronavirus pandemic led to one of the most extreme economic shocks in the history of our nation. Real gross domestic product shrank at an estimated annual rate of 32.9% in the second quarter of 2020, after dropping by 5% in the first quarter.[1] Nationally, employment rates were down by 20% at bottom in mid-April and are still nearly 7% below where they were in January 2020.[2] Here in California, as of July 27, employment rates remain nearly 10% below January rates.[3] Los Angeles County has been even harder hit, with an unemployment rate still at 17.5%.[4]

Looking at overall numbers, however, fails to reveal the disproportionate impact that the pandemic, and the governmental response to it, has had on certain groups of workers—those working in hard-hit industries, who are disproportionately low earners, women, and workers of color; those with disabilities; older workers; and parents with young children. Employment law offers protections to certain workers, but has its limitations. This article explores which workers are most affected by the pandemic, where employment law serves to protect them, and where we must look outside of employment law to support those most in need.

LOWER EARNERS, WOMEN, AND PEOPLE OF COLOR WORK DISPROPORTIONATELY IN THE HARDEST HIT INDUSTRIES

Some businesses and industries have emerged relatively unscathed (indeed, are thriving), while others screeched to a near standstill. For example, in mid-April, the leisure and hospitality industry nationwide had employment rates drop by 47.9% as compared to January 2020, and are still down 16.6% as of July 27.[5] Employment rates in education and health services decreased by 20.3% and remain down by 7.2%.[6] Retail and transportation rates decreased by 18.1%, and are still down 7.7%.[7] In contrast, employment rates for

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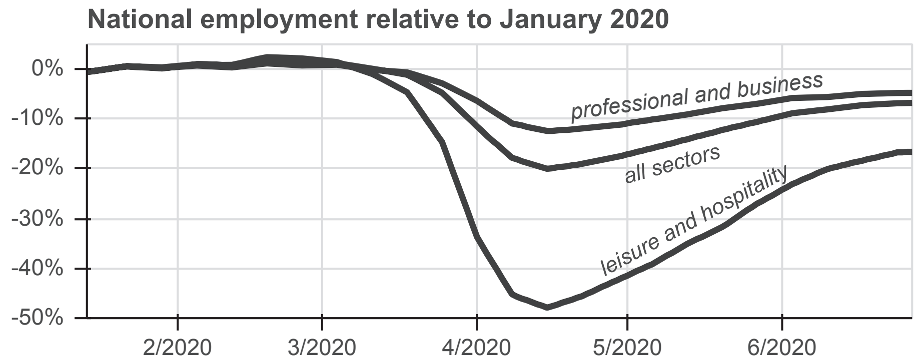

FIGURE 1

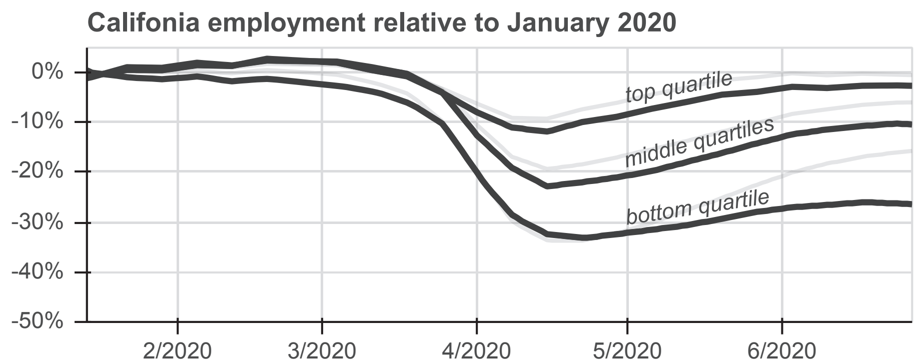

FIGURE 2

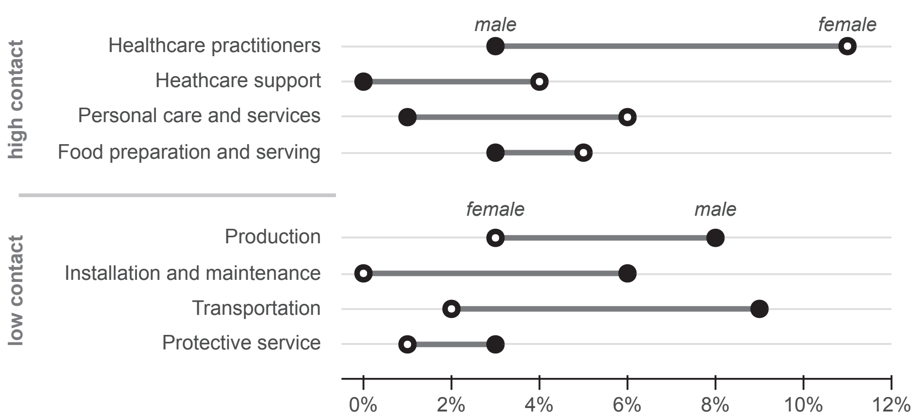

FIGURE 3

professional and business services only decreased by 12.4% at worst, and are now down only 4.8%.[8] (See Figure 1.[9])

The loss of jobs was borne disproportionately by those workers in the bottom wage quartile (earning less than $27,000 a year). (See Figure 2—reflecting declines in California employment rates, with national rates in light grey.[10]) In California, they saw a drop in employment rates of 33.1% in April 2020.[11] Those in the middle two quartiles (earning between $27,000 and $60,000 a year) saw a decrease of 22.8%.[12] Those earners in the top wage quartile (earning more than $60,000 a year) saw a decrease of only 11.8%.[13] As a result, fifty-two percent of lower-income workers surveyed in April responded that they or someone in their household had lost a job or lost wages, as compared to 42% of middle-income workers, and 32% of upper-income workers.[14]

Women and workers of color have taken a particularly large hit, as they work disproportionately in the industries and occupations that have been hardest hit. Before the pandemic, men and women both had unemployment rates of around 3.5%, but in April, the rate for women rose to 16.2%, compared to 13.5% for men.[15] This is largely explained by the fact that women comprise about 77% of workers in jobs involving close personal contact and that cannot be done remotely. For example, 11% of all female workers are healthcare practitioners (but only 3% of male workers), 4% of female workers are in healthcare support (0% of male workers), 6% of female workers work in personal care and services (but only 1% of male workers), and 5% of female workers work in food preparation and serving (but only 3% of male workers).[16] In contrast, men are more likely to work in jobs that are considered "low" contact—e.g., transportation and material moving (9% of all male workers vs. 2% of female workers); installation and maintenance (6% of male workers vs. 0% of female workers); production (8% of male workers vs. 3% of female workers); and protective services (3% of male workers vs. 1% of female workers).[17] (See Figure 3.[18])

The pandemic has affected people of color disproportionately: 41% of Latino workers surveyed in April reported that they or someone in their households were laid off or lost their jobs, as compared to 32% of Black workers, and 24% of white workers.[19] And just as Latina and Black women suffer the widest pay gaps (Latinas earn 54 cents for every dollar paid to white, non-Latino men, Black women 62 cents, and white women 79 cents),[20] they have fared the worst, as about 30% held service-sector jobs.[21] At bottom, their national unemployment rates were 20.2% and 16.4%, respectively, as compared to 15% for white women.[22] Undocumented workers, who comprise about 1 in 10 California workers, have also been hit hard, as nearly half live at or below 150% of the poverty line, and do not have access to federal unemployment benefits when they lose their jobs.[23]

The recovery, too, is favoring some industries and occupations. Indeed, while people have heard of economists debating whether we would have "V" or "W" shaped recoveries, Christopher Mims of the Wall Street Journal describes what is happening now as a "K" shaped recovery "in which there are now two Americas: professionals who are largely back to work, with stock portfolios approaching new highs, and everyone else."[24] (Here, the idea is that professional workers are riding the upper leg of the "K" onward and upward, working remotely, adjusting habits, and saving money as the pandemic limits their dining out, entertainment, and personal services. In contrast, others types of workers are sliding down the bottom leg of the "K," as some jobs lost to the pandemic may not return and automation threatens others.) California regained less than one third of the 2.6 million jobs lost during the first two months of the pandemic.[25] Workers in the bottom quartile are still down 26.4% from January employment rates, while those in the middle two quartiles have recovered to 10.4% below January numbers, and the top quartile is down only 2.6%.[26] The recovery is now slowing dramatically.[27]

Unfortunately, employment law offers few protections to workers in hard-hit industries and occupations who have lost their jobs or wages due to closures, layoffs, or reductions in hours. Generally, protections are limited to situations in which layoffs, furloughs, or other job actions are conducted in a discriminatory manner or in which selection criteria lead to disparate impacts on workers in protected categories. Under those circumstances, an employer must be able to explain why the plaintiff was selected for layoff or other adverse action instead of others.[28]

In April, the City of Los Angeles enacted two ordinances seeking to help workers in hard-hit industries and who work for large employers. Those ordinances require defined employers (airport, commercial property, event center, and hotel employers) to give rehiring preferences to qualified laid-off workers, with criteria and priorities laid out in the ordinances.[29] The California Legislature followed suit, passing a similar bill on August 31. Assembly Bill 3216 would provide recall and retention rights to laid-off employees of hotels, private clubs, event centers, airports, and building services.[30] Those employers would be required to offer available positions to laid-off employees based on a preference system. The impact of the laws and ordinances remains to be seen, though the hope is that when the recovery happens, those workers will be able to resume their employment.

Ultimately, however, until our economy makes a full recovery, vulnerable workers in hard-hit industries must rely on federal, state, and local governments to create and maintain social safety nets to support them.[31]

WORKERS WITH DISABILITIES MAY NOT BE ABLE TO SAFELY RETURN TO WORKPLACES

For workers with certain medical conditions, returning to workplaces where they interact with others is particularly risky. To give just a few examples, those with cancer, lung conditions such as chronic obstructive pulmonary disease, cystic fibrosis, moderate or severe asthma, heart disease, type 2 diabetes, obesity, and those who are immunocompromised face an increased risk of severe illness and serious complications from COVID-19.[32] They may be unable to safely return to their workplaces, or may require reasonable accommodations to be able to do so, such as personal protective equipment (PPE), modifications of work schedules to minimize interactions, changes to the work environment (such as being moved from a cubicle to a private office or adding physical barriers), or temporary restructuring of marginal job duties.[33]

Anecdotally, this author has seen cases involving employers who have preemptively forced workers with disabilities on leaves because they are at higher risk for COVID-19 complications. However, as the EEOC made clear in its technical guidance related to COVID-19:

> [T]he ADA does not allow the employer to exclude the employee—or take any other adverse action—solely because the employee has a disability that the CDC identifies as potentially placing him at "higher risk for severe illness" if he gets COVID-19. Under the ADA, such action is not allowed unless the employee's disability poses a "direct threat" to his health that cannot be eliminated or reduced by reasonable accommodation.[34]

Remote work is often the best accommodation option, but it is often not possible. Economists from the University of Chicago estimate that 37% of jobs can be performed entirely at home, while 63% of jobs require onsite presence.[35] In April, about 31% of workers were working remotely.[36] So, those with jobs that could be performed remotely were able to keep working during the stay-at-home orders; many with disabilities that place them at greater risk of COVID-19 complications sought to maintain this arrangement as workplaces opened up. Unfortunately, as discussed above, low-income workers, women, and workers of color may be the least likely to benefit from the ability to continue working remotely.[37]

Employees with disabilities or serious medical conditions who cannot return to work have multiple leave laws potentially available to them, including the California Family Rights Act[38] (12 weeks), the Family & Medical Leave Act of 1993[39] (concurrently, 12 weeks), and the Families First Coronavirus Response Act[40] (2 weeks). Indeed, California just expanded CFRA to apply to all employers with 5 or more employees (down from 50), and to cover additional familial relationships, including domestic partners, grandparents, grandchildren, siblings, parents-in-law, and adult children.[41] But, given that SARS-CoV-2 and its associated risks will be with us for an extended period of time, workers with disabilities will inevitably see their job-protected leave time under these laws run out if it has not done so already. Those workers may also have leave available as a reasonable accommodation under the Fair Employment and Housing Act (FEHA)[42] and Americans with Disabilities Act (ADA),[43] with cases finding leaves over one year could be reasonable accommodations.[44] However, leave as a reasonable accommodation is very fact specific; these laws do not require employers to provide open-ended indefinite leaves, and at some point employers may assert that keeping positions held for extended periods create an undue hardship.[45]

OLDER WORKERS WHO ARE LAID OFF MAY BE FORCED INTO EARLY RETIREMENT

Older people are particularly susceptible to COVID-19 complications. Indeed, COVID-19 fatality rates increase exponentially with each decade of life. (See Figure 4.[46]) Compared to 18-29-year-olds, death rates are 30 times higher among 50-64 year-olds, 90 times higher among 65-74-year-olds, 220 times higher among 75-84-year-olds, and 630 times higher among those 85 and older.[47] While the FEHA and the Age Discrimination in Employment Act of 1967 (ADEA)[48] do not provide accommodation obligations based solely on age, older workers who have pre-existing medical conditions that leave them susceptible can seek disability accommodations under the FEHA and ADA. Further, employers are prohibited by both laws from taking adverse actions against older workers because they are at greater risk from COVID-19.[49]

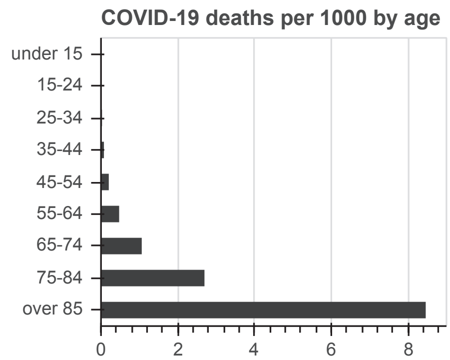

FIGURE 4

Even without the added layer of their increased vulnerabilities to COVID-19, older workers have historically been hit harder by layoffs as companies cut costs and let go of higher earners. Then, age discrimination prevents their rehire when there is a recovery. This is a pattern that was seen in the Great Recession and may well play out again here.

Among workers over the age of 25, there has not been a sizeable difference in unemployment rates based on age.[50] However, these data do not tell the full story: in that older workers are less likely to work in the industries disproportionately impacted by COVID-19, the data do not parse out whether older workers are being laid off or terminated in greater numbers as compared to their younger peers *in the same jobs*. There is evidence that they are: research by economists at the University of California, San Diego and University of Georgia found that, "for each one percentage point increase in a state-industry's monthly unemployment rate, the volume of age discrimination firing and hiring charges [with the EEOC] increases by 4.8% and 3.4%, respectively," and that "the fraction of meritorious claims increases significantly when labor market conditions deteriorate."[51] They further found that during the Great Recession, *each* percentage point increase in local unemployment rates reduced relative callback rates for older women by 14%.[52]

Further, while for younger workers, unemployment may be temporary, for many older workers, their job losses may lead to an unplanned, unwanted early retirement. We saw this during the Great Recession: only 22.5% of long-tenured employees aged 65 and over who lost their jobs between 2011 and 2013 were reemployed by January 2014.[53] In stark contrast, 68.2% of workers ages 25 to 54 and 53.2% of workers ages 55 to 64 found employment in that period.[54] It appears that the same is happening again: according to a recent economic report, participation in the labor force has declined by 7%, and is almost fully explained by early retirement among those ages 50 and up.[55]

Older workers who have been laid off for reasons related to their age *do* have protections. As discussed above, if layoffs are disproportionately affecting older workers, they may have claims under the FEHA and ADEA—even if employers are using criteria that may be facially neutral, such as salary. In fact, the FEHA explicitly provides as much:

> The Legislature declares its intent that the use of salary as the basis for differentiating between employees when terminating employment may be found to constitute age discrimination if use of that criterion adversely impacts older workers as a group, and further declares its intent that the disparate impact theory of proof may be used in claims of age discrimination. The Legislature further reaffirms and declares its intent that the courts interpret the state's statutes prohibiting age discrimination in employment broadly and vigorously, in a manner comparable to prohibitions against sex and race discrimination, and with the goal of not only protecting older workers

as individuals, but also of protecting older workers as a group, since they face unique obstacles in the later phases of their careers.[56]

Older employees who have not been hired for jobs because of their age also have protections under FEHA and the ADEA. However, as the EEOC's Memphis district director Katherine Kores explained, "hiring cases can be extraordinarily difficult to identify and investigate," given applicants' lack of access to information, including whom the company hired or the composition of its workforce.[57]

PARENTS WITH YOUNG CHILDREN FACE A CHILD-CARE CRISIS—AND WOMEN DISPROPORTIONATELY BEAR THIS BURDEN

Nearly one in three workers has a child under the age of 14.[58] According to survey results released by the University of California at Berkeley Center for the Study of Child Care Employment, 35% of child care centers and nearly 20% of home-based child care providers closed as a result of the pandemic.[59] Those that remain open are struggling with decreased capacity and increased cost, and the report warned that "without more public funding, the California child care industry will continue to collapse."[60] Nationally, as many as 450,000 child-care slots may have been lost.[61] Further, with school closures and remote learning, parents of school-aged children cannot rely on school as a safe place for their children to be during the day.

Those whose jobs cannot be done remotely face difficult choices as their normal child-care options may be unavailable; two-thirds of parents who need child care to work reported having difficulty finding it in the first couple of months of the pandemic.[62] Similarly, with school closures and remote learning, parents have limited options. Remote learning often requires active parental involvement, particularly at the younger grades. Thus, even parents who are lucky enough to have jobs that can be performed remotely have significant challenges.

Many parents find that they cannot devote themselves fully to both work and caregiving/homeschooling. Mothers are often the ones who have to sacrifice their jobs. One survey found that one in four women who reported becoming unemployed during the pandemic said it was because of a lack of child care—double the rate among men.[63] Another survey of working parents conducted in May and June 2020 found that 13.3% of working parents lost a job or reduced their hours due to a lack of child care.[64] Working parents lost eight hours per week on average to care for their children; those with two working parents lost 14.6 hours per week on average.[65] These losses of hours were disproportionately suffered by women of color, women without a college degree, and women in low-income households.[666]

Parental status and caregiving responsibilities are not protected categories under the FEHA or federal law. While employers are prohibited from holding men and women to different standards, such as hiring fathers but not mothers (referred to as "sex plus" discrimination), there is no restriction on demanding availability from workers even-handedly. Given that caregiving is borne disproportionately by women, and that the pandemic has compounded the shortage of safe, affordable, available childcare, the lack of protections leave caregivers in the lurch. While the federal FFCRA provides up to 12 weeks per year of paid leave for those caring for a child whose school or child-care provider is closed, its protections will expire on December 31,[67] and 12 weeks will quickly run out for parents relying on it if it has not already.

CONCLUSION

While the pandemic has taken a toll on everyone, it has hit certain groups of workers particularly hard. Employment law's protections are limited. The CFRA, FFCRA, and other leave laws may protect workers unable to work for health-related reasons or because they need to care for others, but these laws are of limited duration—and this pandemic is not going away. When workers are targeted because of a protected characteristic, they have legal recourse. However, there are few remedies for those workers who happen to work within the hardest-hit occupations and industries—workers who are disproportionately low-income, women, and people of color. Here is where employment law reaches its limits, and we must instead ensure that the deep structural inequalities in our labor market are addressed through a robust safety net that reflects the reality that it may take some time for us to reach a post-COVID-19 world where our economy and practices return to normal.

ENDNOTES

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8. *Id.*
9. Data from Opportunity Insights EconomicTracker, available at https://github.com/OpportunityInsights/EconomicTracker. The author thanks Dr. Justin S. Bois of the California Institute of Technology for creating Figures 1 to 4 in this article.
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12. *Id.*
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19. Parker, *et al.*, *supra* at n.14.
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21. *Id.*
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23. Jacqueline Garcia and Erica Hellerstein, *Undocumented workers face obstacles qualifying for benefits during the pandemic*, CalMatters (Apr. 14, 2020), https://calmatters.org/california-divide/2020/04/undocumented-workers-benefits-coronavirus/.
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25. Roosevelt, *supra* at n.4.
26. Opportunity Insights, *supra* at n.2.
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34. EEOC COVID-19 Guidance, *supra* at n.32, G.4.
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39. 29 U.S.C. § 2601 et seq.
40. H.R. 6201, 116th Cong. §§ 5102, 3102.
41. Sen. B. 1383, 2019-2020 Leg., Reg. Sess. (Cal. 2020). For claims against employers with 5 to 19 employees, employees would be required to submit their claims to mediation with the Department of Fair Employment and Housing before filing a civil action. *Id*.
42. Cal. Gov't Code § 12940.
43. 42 U.S.C. § 12101.
44. *See, e.g.*, Nunes v. Wal-Mart Stores, Inc., 164 F.3d 1243 (9th Cir. 1999) (genuine issue of material fact as to whether employee was entitled to additional leave beyond the one year already provided); Garcia-Ayala v. Lederle Parenterals, Inc., 212 F.3d 638, 650 (1st Cir. 2000) (stating that "[t]hese are difficult, fact intensive, case-by-case analyses, ill-served by per se rules or stereotypes" and holding that plaintiff's request for an additional two-month leave after fifteen months of leave did not constitute undue hardship).
45. There is, however, a difference between an "indefinite leave"—which is generally deemed an "undue hardship," and one where the doctor provides only an approximate date, a range of dates, or a moving target, all of which do not necessarily result in an undue hardship but must be reviewed on a case-by-case basis. See EEOC, *Employer-Provided Leave and the Americans with Disabilities Act* (May 9, 2016), https://www.eeoc.gov/laws/guidance/employer-provided-leave-and-americans-disabilities-act.
46. Figure 4 was created by using two data sources: (1) CDC data on deaths involving COVID-19, pneumonia, and influenza through August 15 reported to NCHS by sex and age group and state, available at https://data.cdc.gov/NCHS/Provisional-COVID-19-Death-Counts-by-Sex-Age-and-S/9bhg-hcku/data, and (2) 2019 Census Bureau population data estimates, available at https://www.census.gov/data/tables/2019/demo/age-and-sex/2019-age-sex-composition.html.
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