



AMERICAN
CONSTITUTION
SOCIETY

Issue Brief

December

Protecting Franchisees and Workers in Fast Food Work

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Endemic wage theft, discrimination, harassment, and safety violations plague the fast food sector.¹ The COVID-19 pandemic has illuminated the tragic consequences of this legacy of worker maltreatment as fast food workers have found their employers unwilling and unable to comply with health and safety standards to prevent the spread of COVID. A study by medical researchers at the University of California, San Francisco found that California line cooks faced a 60 percent increase in mortality associated with the pandemic – the highest of any occupation – and Latino and Latina foodservice workers saw a 39 percent increase in mortality.² Physicians for Social Responsibility found that 89 percent of fast food restaurants failed to comply with over a third of public health guidelines for preventing workplace transmission.³ The public costs of COVID-19 transmission in fast food work have been estimated at \$1.2 billion in Los Angeles County alone.⁴

Deficiencies in existing mechanisms to enforce California’s public health and labor standards predate the pandemic, but the pandemic has surfaced the urgent need for change. Since April 2020, California fast food workers have filed over 250 complaints with state and local health

¹ A 2014 study surveyed 1,088 fast food employees nationwide, and 90 percent of the employees reported being forced to work off the clock, denied breaks, or refused overtime pay. Tiffany Hsu, *Nearly 90% of Fast-Food Workers Allege Wage Theft, Survey Finds*, L.A. TIMES (April 1, 2014). A 2016 study surveyed 1,217 women fast food employees nationwide and found that 30 percent of them had experienced unwanted sexual behaviors on the job. HART RESEARCH ASSOCS., *MEMORANDUM FROM HART RESEARCH ASSOCIATES REGARDING KEY FINDINGS FROM A SURVEY OF WOMEN FAST FOOD WORKERS 1–2* (2016). Finally, a 2015 study surveyed 1,426 fast food workers nationwide and found that 87 percent of them had experienced at least one injury in the last year (such as a burn, cut, fall, assault, or injury from lifting). HART RESEARCH ASSOCS., *NATIONAL COSH FAST FOOD SAFETY ONLINE SURVEY 3* (2015).

² Yea-Hung Chen et al., *Excess Mortality Associated with the COVID-19 Pandemic Among Californians 18-65 Years of Age, by Occupational Sector and Occupation: March Through October 2020*, PLOS ONE, (June 4, 2021).

³ PHYSICIANS FOR SOC. RESPONSIBILITY, *COVID-19 HAZARDS AMONG CALIFORNIA FAST-FOOD WORKERS 2* (2021).

⁴ KUOCHIH HUANG ET AL., *THE FAST FOOD INDUSTRY AND COVID-19 IN LOS ANGELES 2* (2021).

and labor agencies detailing restaurants' many safety failures.⁵ The California Division of Occupational Health and Safety (CalOSHA) and public health agencies, however, took few meaningful enforcement actions, relying mainly on the goodwill of employers to voluntarily comply with safety and health laws.⁶ Meanwhile, erratic scheduling, low wages, wage theft, harassment, denial of sick leave, and other labor violations have continued.⁷

Why have existing standards so spectacularly failed to protect this vulnerable but essential workforce? The structure of the fast food industry creates significant barriers for franchise fast food restaurants to observe minimum labor and safety standards while still making a profit. Corporate franchisors have little incentive to ensure that their franchisees have the resources they need to operate safely, responsibly, and in compliance with laws meant to protect employees.

California is considering a bill that would empower workers, franchisees, and franchisors to form a sector-wide Council to set industry-specific standards designed to protect fast food workers and address the problems prevalent in the industry.⁸ The bill would support a sustainable business model for franchisees and require and enable corporate franchisors to ensure that the food sold under their name is produced and sold under legal conditions. Assembly Bill 257 was first introduced in 2021 and will be re-considered by the California legislature in January 2022.

For this Issue Brief, we analyzed the proposed FAST Recovery Act and found that it offers a path to achieve a fairer and more effective regulatory system. It addresses the health, safety, and labor problems in fast food work by giving workers and franchisees a voice in setting labor standards, and it provides a mechanism to improve compliance in an industry structured to avoid accountability. The Fast Food Sector Council created by the legislation would strengthen opportunities for public input in rulemaking by bringing the expertise of public agencies, workers in the industry, franchisees, and franchisors into the regulatory process. And while the sectoral Council is an innovative solution in the fast food industry, it is based in well-settled principles of law. It is akin to existing appointed bodies, such as the California Energy Commission and California Coastal Commission, that are designed to tackle difficult issues and ensure input from stakeholders. By giving workers and franchise operators a voice in identifying workplace problems and developing standards to address them, the FAST Recovery Act promises a framework for common sense solutions to the problems of the industry.

⁵ Fight for \$15 has been tracking complaints filed by fast food workers in California since the beginning of the pandemic. Since April 2020, workers have filed 268 reports with county public health departments, CalOSHA, and the California Department of Industrial Relations. Catherine Fisk & Amy Reavis, *Unpublished Database* (Nov. 14, 2021).

⁶ Farida Jhabvala Romera, *'Minimal to Non-Existent': Safety Inspector Shortage Worsened in Pandemic, Leaving California Workers Vulnerable*, KQED (June 3, 2021).

⁷ HUANG ET AL., *supra* note 4, at 5–6.

⁸ A.B. 257, 2021 Cal. Assemb., Reg. Sess. (Cal. 2021).

I. The FAST Recovery Act Should Become California Law

On June 3, 2021, California State Assemblywoman Lorena Gonzalez’s Assembly Bill 257, known as the Fast Food Accountability and Standards Recovery (FAST Recovery) Act,⁹ fell only three votes shy of passage. The bill has support from the Fight for \$15 movement, the Service Employees International Union, and thousands of fast food workers who protested their poor working conditions and demanded change.¹⁰ The bill may return to the legislature as early as January 2022. It could dramatically improve the lives of fast food workers and franchise restaurant operators, and it is a model for sectoral-based labor standards nationwide.

The FAST Recovery Act reflects a two-pronged approach to reform in the fast food sector, which is defined as fast food restaurants that are part of a set of thirty or more establishments nationally that share a common brand, or that are characterized by standardized options for décor, marketing, packaging, products, and services. In other words, this bill would create changes among large fast food restaurant chains, such as McDonalds and Burger King. Each prong is discussed below.

A. A Fast Food Sector Council Could Improve the Lives of Fast Food Workers

The FAST Recovery Act would establish a Fast Food Sector Council tasked with establishing industrywide minimum standards on minimum wages, maximum working hours, and other health and safety conditions for fast food restaurant workers. Specifically, the Council is tasked with (1) issuing standards on wages, working conditions, and training that are adequate to ensure and maintain the welfare of fast food restaurant employees, see Section 2(c) of the draft bill; and (2) recommending fast food restaurant health and safety standards, as may be necessary to protect the health and safety of fast food restaurant workers, to the California Occupational Safety and Health Standards Board, see Section 2(e) of the draft bill. The bill also provides for the Council to perform a triennial review of its fast food restaurant standards, to investigate, amend and issue new standards as appropriate, and to hold public meetings to engage stakeholders.¹¹

Like other state commissions, such as the California Coastal Commission and the California Energy Commission, that seek to develop policy through engagement of diverse stakeholders, the Council’s membership would be drawn from the business and labor communities and public officials. The Council would consist of eleven members: one representative from the State Department of Public Health; one representative from CalOSHA; one representative from the Division of Labor Standards and Enforcement; two representatives from the Department of Industrial Relations; one representative of fast food restaurant franchisors; one representative of fast food restaurant franchisees; two representatives of fast food restaurant employees; and two representatives of advocates of fast food restaurant employees. Under the Act, the Governor appoints the representatives of the state agencies; the Speaker of the Assembly appoints the

⁹ *Id.*

¹⁰ Gabrielle Canon, *California Fast-Food Workers Rally Behind Labor Bill with Major Protests*, GUARDIAN (Apr. 16, 2021).

¹¹ A.B. 257, §§ 2(c), 2(e), 1471(f)(1), 2021 Cal. Assemb., Reg. Sess. (Cal. 2021).

franchisor representative, one of the employee representatives, and one of the advocate representatives. The Senate Rules Committee appoints the franchisee representative, the other employee representative, and the other advocate representative.

The Act also includes other opportunities for local and stakeholder input. The Act authorizes cities with populations greater than 200,000 to establish local fast food sector councils. These local councils would provide recommendations to the state-wide Council.

B. Sharing Responsibility Between Franchisors and Franchisees for Employment and Labor Law Compliance Protects Workers from Unsafe Working Conditions

The FAST Recovery Act would also create three primary mechanisms to ensure shared responsibility between franchisors and franchisees for employment and labor law compliance. First, the Act would make franchisors jointly and severally liable for franchisees' violations of the Council's standards and other employment, worker, and public health and safety laws. Second, the Act would allow a franchisee to sue their franchisor for monetary or injunctive relief if the franchisor impeded compliance with the Council's minimum standards. Barriers to compliance would include changes in a franchise's terms that put the cost of compliance on the franchisee.

And third, the Act would prohibit fast food restaurant operators from firing or retaliating against any employee for filing complaints or disclosing information regarding employee or public health or safety, participating in statewide or local councils, or refusing to work in a restaurant that the employee had reason to believe was violating worker or public health and safety laws. The bill creates a right of action for employees to sue the restaurant operator in these cases for reinstatement, treble lost wages, and attorney's fees.

II. Sectoral Councils Protect Franchisees and Workers by Sharing Information and Responsibility Among the Three Partners—Franchisor, Franchisee, and Workers

Powerful global corporations like McDonalds use the franchise model to ensure they extract profits from the business. They control the prices and much of the power over quality, hours, and other operations, and the franchisee or restaurant operator has no way to increase its profits other than by cutting labor costs. Little wonder, then, that operators fail to pay wages to which workers are entitled, deny sick leave, ignore harassment, safety hazards, or disease transmission – they are so squeezed by their franchisors that there is little incentive to comply with the law.

Franchisees typically pay the franchisor a royalty that is linked to revenues (not profits). The franchisor has an incentive to maximize the number of restaurants and the size of each royalty up to the point where franchisees can no longer earn enough revenue to cover the royalty and the cost of operation plus enough profit to continue in business. Because the franchisor dictates the royalty plus requirements about sourcing and quality control, the only cost franchisees can control is labor. Thus, they have an incentive to aggressively reduce labor

costs. Studies have shown that major fast food franchisors (Burger King, Pizza Hut, KFC, Taco Bell) had returns on assets in the range of 16 to 20 percent during the same years when their major franchisees had returns on assets of 1 percent.¹² In those same years, studies estimate 18 percent of fast food workers experienced minimum wage violations, 70 percent were not properly paid for overtime work, and 74 percent were forced to work off the clock.¹³

Studies have also shown through sophisticated statistical analysis that it is the franchising relationship—not the nature of restaurant work generally or fast food work in particular—that accounts for the noncompliance with labor standards. The probability of noncompliance with wage law is about 24 percent higher among franchisee-run outlets than among otherwise similar company-run fast food outlets.¹⁴ Of those instances in which an investigation revealed wage and hour violations, total back wages owed workers were on average 50 percent higher for franchisees than for company-owned restaurants, and overall back wages found per investigation were nearly 60 percent higher.¹⁵ Finally, it is noteworthy that most brands operate their national chains through a mix of company-owned and operated and franchised restaurants, and “one-half of the top twenty brands had *no* violations and owed no back wages at *any* of their company-owned outlets even though the franchisees in those same companies often owed substantial back wages to employees.”¹⁶

Workers at fast food restaurants operated by the corporation are significantly more likely than workers at franchised operations of the same brand to be paid according to what the law requires. This is because at company-operated restaurants the information and incentives are aligned: the company that can set the costs of operation through pricing, quality control, and other consumer experience measures also controls labor costs. The company can use the information it has about labor costs to set other operational costs that affect the value of the brand.

These economic analyses suggest that the solution to aligning information and incentives in franchise operations is to give workers and franchisees the power and voice to demand corporate responsibility for safe workplaces that comply with all labor standards.

The FAST Recovery Act’s two-pronged approach addresses the squeeze that franchisors put on franchisees and workers. First, the Fast Food Sector Council empowers franchisees and workers to meet on equal terms with the global brands, along with representatives of relevant government agencies, to discuss and establish the terms under which restaurants operate—wages, costs, safety measures—so that the restaurant operators and the workers can ensure that the economic model is sustainable for all three stakeholders. The membership of the Council is evenly weighted between corporate representatives, franchisee representatives, government representatives, and employee representatives.¹⁷ Employees are protected from

¹² DAVID WEIL, *THE FISSURED WORKPLACE* 129 (2014).

¹³ *Id.* at 130.

¹⁴ *Id.* at 131.

¹⁵ *Id.*

¹⁶ *Id.* at 132.

¹⁷ A.B. 257, §§ 1471(a)(1)(A)–(H), 2021 Cal. Assemb., Reg. Sess. (Cal. 2021).

retaliation for participating on the Council and for sharing information about working conditions they face. Thus, the standards that the Council sets and recommends will be meaningfully informed by concerns from all three partners in the franchise relationship.

Second, the FAST Recovery Act aligns the power of the franchisor with its legal responsibility for ensuring compliance. The second prong of the Act's solution to the impossible situation faced by workers and franchisees is to align legal responsibility with the power to ensure compliance with law. The Act makes a fast food franchisor jointly and severally liable with its franchisee for the franchisee's violations of certain enumerated employment, health, and safety laws and regulations or for violations of other laws that the franchise agreement was a substantial factor in causing. To ensure that franchisors do not rewrite the franchise agreement to evade liability under the law, the FAST Act prohibits a franchisor from requiring a franchisee to indemnify it for liability under the law. And, to address concerns that franchisees' existing franchise agreements present a substantial barrier to legal compliance by making profitable operation in tension with workplace labor and safety compliance, the FAST Recovery Act provides a cause of action for a franchisee to obtain relief from the franchisor necessary to enable compliance with the specified employment and safety laws.¹⁸

III. Sectoral Councils Such as the Food Sector Council Are Well Established and Legally Permissible

The FAST Recovery Act represents an innovative solution to the imbalance of power in the fast food industry and its rampant labor violations. But the Council it proposes would not be a unique or suspect administrative body in state government. In California, as in other states, the legislature may, and often does, delegate "quasi-legislative or rulemaking authority" to an administrative body.¹⁹

For example, the Occupational Safety and Health Standards (OSHS) Board promulgates standards necessary for the protection of employees²⁰ and consists of appointed members from management, labor, occupational health, occupational safety, and the general public.²¹ Courts have regularly upheld the OSHS Board's standards.²² Similarly, the Industrial Welfare Commission (IWC) was established by legislation in 1913 and was delegated "the power to fix minimum wages, maximum hours of work, and standard conditions of labor" for California

¹⁸ *Id.* §§ 1472(b), (e)(1).

¹⁹ *Gerawan Farming, Inc. v. Agric. Lab. Rel. Bd.*, 3 Cal. 5th 1118, 1146–47 (Cal. 2017) (internal quotation marks omitted) (quoting *Carmel Valley Fire Protection Dist. v. State of California*, 25 Cal. 4th 287, 299 (Cal. 2001)); *see also* *Wilke & Holzheiser, Inc. v. Dep't of Alcoholic Beverage Control*, 65 Cal. 2d 349, 369 (Cal. 1966) (stating that while "truly fundamental issues should be resolved by the Legislature," the legislature can delegate legislative functions when the grant of authority is "accompanied by safeguards adequate to prevent its abuse.").

²⁰ CAL. LAB. CODE §§ 142.3(a), 142.3(c) (2002).

²¹ CAL. LAB. CODE § 140(a) (1973).

²² *See, e.g., Pulaski v. Cal. Occupational Safety & Health Standards Bd.*, 75 Cal. App. 4th 1315, 1323 (Cal. Ct. App. 1999).

workers.²³ Composed of employee representatives, employer representatives, and a representative from the general public, the IWC issued numerous standards that the California Supreme Court upheld and that remain in force.²⁴ Several other state boards function this way as well.²⁵

Courts have long recognized the practical necessity of entrusting quasi-legislative and quasi-judicial functions to departments, boards, commissions, and agencies with expertise.²⁶ This delegation of authority is permissible so long as “suitable safeguards are established to guide the power’s use and to protect against misuse.”²⁷ Opponents of the FAST Recovery Act argue that to allow the Fast Food Sector Council to meet, negotiate, and adopt binding labor standards would put the terms of the labor relationship into the hands of an unelected body²⁸ in a way that impermissibly delegates legislative authority.²⁹ However, the FAST Recovery Act imposes

²³ *Martinez v. Combs*, 49 Cal.4th 35, 50, 52 (Cal. 2010).

²⁴ CAL. LAB. CODE §§ 70 (1980), 70.1 (1990); *Indus. Welfare Comm. v. Superior Court*, 27 Cal. 3d 690, 701 (Cal. 1980).

²⁵ *See, e.g.*, CAL. PUB. RES. CODE § 30300 *et seq.* (1976) (describing the California Coastal Commission which has quasi-judicial control of land and public access along the state’s coastline and is comprised of members of the general public and elected officials); CAL. PUB. UTIL. CODE § 301 *et seq.* (1974) (describing the California Public Utilities Commission which regulates privately owned public utilities and uses a collaborative stakeholder process to design and implement energy-efficiency programs); CAL. PUB. RES. CODE § 26235 (2017) (describing the California Energy Commission which establishes guidelines and standards for state energy projects and allows for the public to propose energy efficiency measures for consideration); CAL. WATER CODE § 175 (2011) (describing the State Water Resources Control Board which oversees allocation of the state’s water resources, safeguards the cleanliness of Californians’ water, and has an Office of Public Participation designed to include the public and stakeholders in the Board’s decision-making processes).

²⁶ *Gaylord v. City of Pasadena*, 175 Cal. 433, 436 (Cal. 1917) (“Even a casual observer of governmental growth and development must have observed the ever-increasing multiplicity and complexity of administrative affairs -- national, state, and municipal--and even the occasional reader of the law must have perceived that from necessity, if for no better grounded reason, it has become increasingly imperative that many quasi-legislative and quasi-judicial functions, which in smaller communities and under more primitive conditions were performed directly by the legislative or judicial branches of the government, are intrusted [*sic*] to departments, boards, commissions, and agents. No sound objection can longer be successfully advanced to this growing method of transacting public business. These things must be done in this way or they cannot be done[.]”).

²⁷ *Gerawan Farming, Inc. v. Agric. Lab. Rel. Bd.*, 3 Cal. 5th 1118, 1146 (Cal. 2017); *see also* *People’s Fed. Sav. & Loan Ass’n v. State Franchise Tax Bd.*, 110 Cal. App. 2d 696, 700 (Cal. App. Ct. 1952) (requiring the legislature to establish discernible standards for a board to apply in administering and enforcing the regime in practice).

²⁸ Letter from the International Franchising Association, California Restaurant Association, and the California Chamber of Commerce, in Opposition to AB 257 to the Cal. Assemb. Lab. & Emp. Comm. (April 14, 2021) (on file with the authors).

²⁹ The California Constitution states that, “[t]he Legislature may not delegate to a private person or body power to make, control, appropriate, supervise, or interfere with county or municipal corporation improvements, money, or property, or to levy taxes or assessments, or perform municipal functions.” CAL. CONST. art. XI, § 11(a).

sufficient direction and constraints upon the Fast Food Sector Council to meet any objection about the delegation of rulemaking authority.

A delegation of authority is unconstitutional “only when a legislative body (1) leaves the resolution of fundamental policy issues to others or (2) fails to provide adequate direction for the implementation of that policy.”³⁰ The FAST Recovery Act’s delegation of rulemaking authority to the Council satisfies both requirements and is thus a constitutional delegation of power.

First, to the extent the bill is adopted by the legislature, its legislative findings would reflect a fundamental policy decision—that a Council with subject-matter expertise tasked with identifying industry-wide standards would provide better protection for fast food workers than the current enforcement and regulatory mechanisms in place. In adopting the bill, the legislature would be finding that existing mechanisms had failed to ensure compliance with labor and health and safety laws, and recognizing that it is the disconnect in information and power that leads to franchise-operated restaurants having significantly worse labor standards across the sector. The legislature cannot delegate this “fundamental policy determination,”³¹ and it would not be delegating it. Moreover, it would be making the fundamental policy decision that an expert body with subject matter expertise and experience in the fast food industry, and with institutionalized representation of franchisor, franchisees, and workers, is best suited to develop the rules necessary to protect the health, safety, and welfare of fast food restaurant employees.

Second, the Act provides adequate direction to the Council for implementing its policy by identifying a specific purpose for the standards to be promulgated by the Council—namely, ensuring the health and safety of fast food workers and sharing accountability between franchisees and franchisors, and requiring that the standards be “reasonably necessary or appropriate” to advancing that purpose.³²

The legislature’s creation of and delegation of authority to the Fast Food Sector Council is thus permissible.

IV. Conclusion

The California Legislature should enact the proposed FAST Recovery Act when it comes up for a vote in 2022. It addresses the endemic health, safety, and labor problems in fast food work by giving workers and franchisees a voice, along with the brand-name fast food franchisors, in setting labor standards. It provides a mechanism to improve compliance in an industry structured to avoid accountability. The Fast Food Sector Council created by the legislation would strengthen opportunities for public input in rulemaking by bringing the expertise of public agencies, workers in the industry, franchisees, and franchisors into the regulatory process. And while the sectoral Council is an innovative solution to grievous problems in the

³⁰ *Gerawan*, 3 Cal. 5th at 1146.

³¹ *Id.* at 1147 (internal quotation marks omitted) (quoting *Agric. Lab. Rel. Bd. v. Superior Court*, 16 Cal. 3d 392, 419 (Cal. 1976)).

³² A.B. 257, § 1471(d), 2021 Cal. Assemb., Reg. Sess. (Cal. 2021).

fast food industry, it is based on the well-established participatory model that California and many other states have long used to regulate energy, water resources, and public utilities.

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