

KEY TAKEAWAYS FROM CALIF.'S SWEEPING FAST-FOOD WAGE BILL

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Pooja Nair, Chair of ECJ's Food, Beverage and Hospitality Department, recently published an article for Law360 on the Key Takeaways From Calif.'s Sweeping Fast-Food Wage Bill.

This article discusses California Gov. Gavin Newsom signing A.B. 257, a controversial and far-reaching law that will have a major impact on California fast-food employers and is likely to shape the way the state regulates other industries in the future. The Fast Food Accountability and Standards, or FAST, Recovery Act, regulates nearly all fast-food restaurants in the state and is poised to dramatically shake up regulation of the industry and impose standards far beyond the already high standards set for minimum wages and working conditions as enshrined by California state law and local ordinances.

The bill defines "fast food restaurants" as those that are part of a chain consisting of 100 more establishments that "share a common brand, or that are characterized by standardized options for decor, marketing, packaging, products, and services." Restaurants located within grocery stores and bakeries are not considered fast-food restaurants and are exempted. A.B. 257 establishes, until Jan. 1, 2029, an unelected Fast Food Council, consisting of 10 members, to exist within the California Department of Industrial Relations, or DIR. The Fast Food Council is to be composed of:

One representative from the DIR;

- Two representatives of fast-food restaurant franchisors;
- Two representatives of fast-food franchisees;
- Two representatives of fast-food restaurant employees;
- Two representatives of advocates for fast-food restaurant employees; and
- One representative from the Governor's Office of Business and Economic Development.

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The governor has the power to appoint the representatives of the state agencies, fast-food restaurant employees, fast-food restaurant franchisees and fast-food restaurant franchisors, while the speaker of the California Assembly and the state Senate Rules Committee will each appoint one representative of an advocate for fast-food restaurant employees. Members of the Fast Food Council serve a term of four years. However, before the Fast Food Council has the power to issue new standards or rules, at least 10,000 California fast-food restaurant employees must sign a petition supporting its creation. The bill sets out a comprehensive petition review process. Once the petition process is completed, the Fast Food Council will have broad powers to establish sector-wide minimum standards on wages, working hours, and other working conditions adequate to ensure and maintain the health, safety, and welfare of, and to supply the necessary cost of proper living to, fast food restaurant workers and to ensure and effect interagency coordination and prompt agency responses regarding issues affecting the health, safety, and employment of fast food restaurant workers.

This includes the power to raise the minimum wage for fast-food workers up to \$22 per hour in 2023. Beginning Jan. 1, 2024 and annually thereafter, the Fast Food Council may increase minimum wage by no more than the lesser of 3.5% or the rate of change in the averages of the most recent July 1 to June 30 period over the preceding July 1 to June 30 period for the U.S. Bureau of Labor Statistics nonseasonally adjusted U.S. Consumer Price Index for Urban Wage Earners and Clerical Workers. In addition to the Fast Food Council, any county or city with a population of at least 200,000 people may establish a local fast-food council, which may provide written recommendations to the Fast Food Council regarding minimum state health, safety, and employment standards. It is unclear what powers these local fast-food councils may have beyond an advisory role. The FAST Recovery Act provides that it is unlawful for any fast-food restaurant to employ a worker for lower wages or for longer hours than those fixed by the minimum standards set by the Fast Food Council. The state's labor commissioner and the Division of Labor Standards Enforcement are required to enforce the standards established by the council, and have the power to investigate violations and issue citations against employers. However, neither the Occupational Safety and Health Standards Board nor local health departments are required to enforce standards promulgated by the Fast Food Council, but the council may petition the board for changes in safety and health standards. Fast-food restaurant employers are prohibited from discharging or retaliating against employees for:

- Making a complaint to the media, the California Legislature, government agency or community-based organization about working conditions;
- Participating in a Fast Food Council or local fast-food council proceeding; and
- Refusing to perform work in a fast-food restaurant because they believe that the practices or premises of the restaurant would violate worker or public health and safety laws.

In this regard, the bill creates a rebuttable presumption of unlawful discrimination or retaliation if a fast-food restaurant operator takes any adverse action against one of its employees within 90 days following the date when the operator learned of the employee's actions.

Delegating such significant regulatory power over the fast-food industry from state agencies to an unelected state council is unprecedented, and has the potential to create regulatory confusion for fast-food restaurants. Fast-food restaurants are already required to follow safety standards from the California Division of Occupational

Safety and Health, minimum wage and overtime standards from the DIR, and public health and other wage regulations issued by local authorities.

A.B. 257 will further complicate employment law compliance for individual fast-food restaurants, particularly for smaller franchisees of fast-food brands, by making the regulatory web to follow even more difficult to navigate.

Different agencies and the Fast Food Council will have overlapping power to issue minimum wage and working conditions standards, which fast-food restaurants must follow in order to be compliant with the law.

The minimum wage implications of A.B. 257 are significant. As the state minimum wage is currently \$15 per hour, a \$22 minimum wage would represent almost a 50% increase above the highest state minimum wage in the nation.

One potential implication of this bill is that fast-food restaurants may invest even more in automation to try to reduce the number of staff needed to service a restaurant. In addition, increased prices for fast-food consumers is a virtual certainty.

More importantly, A.B. 257 represents a radical step toward sectoral bargaining. Sectoral bargaining, which is common in Europe, allows workers to negotiate compensation and working conditions on an industrywide basis.

This stands in contrast to the American method of enterprise bargaining in which workers negotiate with individual companies at individual locations. It should therefore be no surprise that the FAST Recovery Act is the result of substantial union lobbying, and was co-sponsored by the Service Employees International Union of California.

In addition to quasi-sectoral bargaining, the law contains additional pro-union provisions, such as exempting fast-food employees who are unionized as long as those employees receive 30% more than the state minimum wage pursuant to a collective bargaining agreement that expressly provides for the wages, hours of work and working conditions of the employees.

Although the Fast Food Council is something new from the California Legislature, hyperfocused legislation targeting particular industries has gained popularity among California lawmakers.

For example, the Garment Worker Protection Act, which was passed in 2021 and will become effective Jan. 1, 2023, makes California the first state to ban piece rate pay for garment workers and makes retailers and fashion brands jointly and severally liable as "brand guarantors."

Similarly, multiple California cities, including West Hollywood, Santa Monica, Oakland, Long Beach and most recently Los Angeles, have passed local ordinances targeting the hotel industry and setting pay rates based upon a maximum square footage that hotel room attendants can clean in one shift.

Notably, the FAST Recovery Act was defeated in the state Assembly in June 2021 after falling three votes short. Passage of the bill this year was secured through a number of concessions, such as eliminating a provision that would have imposed liability on franchisors for employment violations by franchisees. Other concessions included preventing the council from creating paid sick or vacation benefits, or issuing regulations regarding predictable scheduling.

Partners Pooja S. Nair and Kelly Scott at Ervin Cohen & Jessup contributed to this article. The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

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