

June 9, 2022

**The Fast Food Accountability and Standards Recovery Act (Assembly Bill 257):
Strengthening the Bill to Protect the Floor on Labor Standards and Establish Franchisor Liability**

Christina N. Chung¹

Executive Director, Center for Law and Work

Assembly Bill (A.B.) 257, the Fast Food Accountability and Standards Recovery (FAST Recovery) Act² is currently pending in the California Senate. A promising model to improve working conditions for low-wage workers, A.B. 257 creates a partnership between fast food restaurant workers, their advocates, businesses, and state agency officials through a Fast Food Sector Council empowered to set labor standards specific to the industry. A.B. 257 also aims to hold corporate fast food franchisors responsible when their franchisees fail to comply with labor laws. Recognizing that franchisors have little incentive to ensure that their franchisees have the resources necessary to continue their business operations while adhering to basic labor standards,³ the bill seeks to address the structural problems that cause endemic labor violations in the fast food sector.⁴

It remains to be seen whether the California Legislature will pass A.B. 257, either in its current form or after amendment – and if so, whether a bill of this scope and substance will be signed into law. On the one hand, the Newsom Administration has supported legislation that has advanced protections for low-wage workers and given them some agency, including a law establishing the collective bargaining rights of state-subsidized childcare providers for low-income families.⁵ At the same time, the Administration has shown an inclination toward more measured legislation that

¹ The author gratefully acknowledges comments helping to inform this Note from Catherine L. Fisk, the Barbara Nachtrieb Armstrong Professor of Law at the University of California, Berkeley.

² A.B. 257, 2021-2022 Cal. Assemb., Reg. Sess. (Cal. 2022) (as published on January 27, 2022). This Note examines the latest version of the bill as of June 9, 2022.

³ For a discussion of how the franchising structure in the fast food industry results in non-compliance with labor laws, see CATHERINE L. FISK & AMY W. REAVIS, PROTECTING FRANCHISEES AND WORKERS IN FAST FOOD WORK 4-5 (American Constitution Society, December 2021) (citing David Weil, THE FISSURED WORKPLACE 129-132 (2014)).

⁴ Studies have highlighted that non-compliance with labor laws is routine in the fast food sector. See, e.g., BRIAN JUSTIE, TIA KOONSE, MONICA MACIAS, JENNIFER RAY & SABA WAHEED, COVID-19 AND WORKING CONDITIONS IN THE LOS ANGELES FAST-FOOD SECTOR 21-33 (UCLA Labor Center, January 2022); KUOCHIH HUANG, KEN JACOBS, TIA KOONSE, IAN EVE PERRY, KEVIN RILEY, LAURA STOCK & SABA WAHEED, THE FAST-FOOD INDUSTRY AND COVID-19 IN LOS ANGELES 5-6 (UCLA Labor Center, UCLA Labor Occupational Safety and Health, UC Berkeley Labor Center & UC Berkeley Labor Occupational Health Program, February 2020); Farida Jhabvala Romero, *Most Fast Food Workers are the Victims of Wage Theft, Survey Finds*, KQED, May 10, 2022, at <https://www.kqed.org/news/11913643/most-fast-food-workers-are-victims-of-wage-theft-survey-finds>; Tiffany Hsu, *Nearly 90% of Fast-Food Workers Allege Wage Theft, Survey Finds*, L.A. TIMES, April 1, 2014, at <https://www.latimes.com/business/la-xpm-2014-apr-01-la-fi-mo-wage-theft-survey-fast-food-20140331-story.html>.

⁵ See A.B. 378, 2019-2020 Cal. Assemb., Reg. Sess. (Cal. 2019) (enacted).

does not immediately move the needle on labor standards but holds the potential to shape future policies, through worker participation in advisory councils that are tasked with issuing recommendations or studies on a particular issue.⁶

Regardless of its outcome during this legislative session, A.B. 257 will remain a consequential piece of legislation. At the very least, it has spurred necessary public discourse on the nature of contractual relationships in the fast food sector and how they result in pervasive non-compliance with labor laws, as well as fundamental questions about who should be held responsible for violations of workers' rights. Significantly, the bill is also a template for improving labor standards in the fast food sector and in other low-wage industries. As such, it is critical to gain insights into how A.B. 257 can be strengthened – not only for present purposes, but also for any future legislation contemplating a labor standards council in the mold of A.B. 257.

To this end, we focus on two core issues with the bill that should be addressed: (1) ensuring that existing rights and protections applicable to fast food workers operate as the floor on standards that can only be raised and not lowered, and that any new, greater protections can actually be enforced, and (2) establishing franchisor liability.⁷

PART 1

Protecting the Floor of Labor Standards Set by Existing Law, and Ensuring the Applicability of Statutory Enforcement Mechanisms

A.B. 257 seeks to enhance “existing enforcement and regulatory mechanisms” that have been “inadequate in ensuring fast food restaurant worker health, safety, and welfare” and to “improve[] job quality, wages, and working conditions” for fast food workers.⁸

The California Labor Code, quasi-legislative “Wage Orders” issued by the Industrial Welfare Commission, and Cal/OSHA health and safety regulations currently establish a floor of labor standards, and mechanisms to enforce them, for fast food workers in California. A.B. 257 should be amended to make clear that the labor standards fixed by the Fast Food Sector Council may only raise the floor of currently applicable labor standards and may not be less protective than existing law. Although this is the intent behind the bill, its provisions do not sufficiently safeguard that floor.

To convey the full scope of this issue, we first provide a brief summary of the existing statutory and regulatory framework that presently sets labor standards for fast food workers. Next, we pinpoint

⁶ See, e.g., S.B. 321, 2021-2022 Cal. S., Reg. Sess. (Cal. 2021) (convening an advisory committee to make recommendations to the Department of Industrial Relations and the Legislature on policies the state may adopt to protect the health and safety of privately funded household domestic service employees) (enacted).

⁷ It is not within the scope of this Note to assess other aspects of the bill, such as the composition of the Fast Food Sector Council, the council's interplay with local fast food sector councils, or the administrative rulemaking procedures set out in the Government Code to which the council is subject and which include the time-intensive requirement to develop a Standard Regulatory Impact Analysis for all major regulations. Neither does this Note address the council's constitutionality – a point of opposition to the bill that has been evaluated in scholarly analysis. See FISK & REAVIS, *supra* note 3, at 6-8.

⁸ See A.B. 257, 2021-2022 Cal. Assemb., Reg. Sess. Sec. 2 (h)-(j) (Cal. 2022) (as published on January 27, 2022).

why and where A.B. 257 should be amended to clearly preserve these standards as a minimum baseline, and recommend model language.

A. Framework of labor standards currently applicable to fast food workers

1. California Labor Code and the Industrial Welfare Commission Wage Orders

In 1913, the California Legislature created the Industrial Welfare Commission (IWC), and delegated to the IWC broad authority to regulate wages, hours and working conditions.⁹ California voters amended the state Constitution to confirm the Legislature’s authority to confer such power on the IWC.¹⁰ Pursuant to its quasi-legislative authority, the IWC issued industry and occupation-wide wage orders fixing minimum wages, maximum hours of work, and conditions of labor for each industry.¹¹ Courts, in turn, have noted that the IWC wage orders “are to be accorded the same dignity as statutes,”¹² and have viewed them with “extraordinary deference, both in upholding their validity and in enforcing their specific terms.”¹³

In addition to the IWC wage orders that establish labor standards, the Legislature has enacted various statutes addressing the wages, hours, and working conditions of employees.¹⁴ Thus, as the California Supreme Court has explained, in California “wage and hour claims are today governed by two complementary and occasionally overlapping sources of authority: the provisions of the Labor Code, enacted by the Legislature, and a series of 18 wage orders, adopted by the IWC.”¹⁵

Currently, IWC Wage Order No. 5-2001, which covers the “public housekeeping industry,” applies to fast food workers, as one sector of the restaurant industry.¹⁶ While various wage order provisions (for example, regarding overtime and meal periods) find their analog in the Labor Code, Wage Order No. 5-2001, like other IWC wage orders, also sets forth certain standards that are not separately specified in the Labor Code. These standards include requirements for providing rest

⁹ See *Martinez v. Combs*, 49 Cal.4th 35, 53-54 (Cal. 2010).

¹⁰ See CAL. CONST., art. XIV, § 1 (declaring that “[t]he Legislature may provide for minimum wages and for the general welfare of employees and for those purposes may confer on a commission legislative, executive, and judicial powers”), *added by* Assemb. Const. Amend. No. 40, 1975–1976 Reg. Sess., *as approved by voters* (Prop. 14), Prim. Elec. (June 8, 1976).

¹¹ See CAL. CODE REGS. tit. 8, §§ 11010-11170 (codifying the industry and occupation orders of the IWC); *Indus. Welfare Comm’n v. Superior Court*, 27 Cal.3d 690, 700-702 (Cal. 1980) (discussing history of the IWC and its promulgation of wage orders).

¹² *Brinker Rest. Corp. v. Superior Court*, 53 Cal.4th 1004, 1027 (Cal. 2012).

¹³ *Martinez*, 49 Cal. 4th at 61.

¹⁴ See *Brinker Rest. Corp.*, 53 Cal.4th at 1026.

¹⁵ *Id.* (citations omitted); see also *Troester v. Starbucks Corp.*, 5 Cal.5th 829, 839 (Cal. 2018) (quoting *Brinker Rest. Corp.*).

¹⁶ IWC Wage Order No. 5-2001 defines “public housekeeping” as “any industry, business, or establishment which provides meals... and includes, but is not limited to...[r]estaurants, night clubs, taverns, bars, cocktail lounges, lunch counters, cafeterias, boarding houses, clubs, and all similar establishments where food in either solid or liquid form is prepared and served to be consumed on the premises....” CAL. CODE REGS. tit. 8, § 11050, subdiv. 2(P)(1).

periods,¹⁷ split shift premiums,¹⁸ reporting time pay,¹⁹ and uniforms and equipment,²⁰ as well as certain recordkeeping obligations.²¹

At the same time, standards set by the IWC wage orders are enforceable through Labor Code provisions.²² Indeed, the California Supreme Court has noted that certain Labor Code claims rest on obligations imposed by the applicable wage order.²³ The integrated nature of the Labor Code and IWC wage orders is clear on the face of several Labor Code provisions which expressly incorporate the wage orders. Some examples include the following:

- Section 558 provides for civil penalties when an employer or other person acting on behalf of an employer violates, or causes to be violated, provisions regulating hours and days of work in the Labor Code or “in any order of the Industrial Welfare Commission.”
- Section 1194.2 provides for the recovery of liquidated damages when minimum wages “fixed by an order of the [IWC] or by statute” are not paid.
- Section 226.7 provides for an additional hour of pay at the employee’s regular rate of pay for each workday that a meal, rest, or recovery period is not provided as mandated by an applicable statute or order of the IWC (among other entities).
- Section 1193.6 enables the Labor Commissioner’s Office to file a civil action for unpaid minimum and overtime wages owed to an employee under certain provisions of the Labor Code “or the orders of the [IWC].”
- Section 1199 makes it a misdemeanor for an employer or other person acting either individually or as an officer, agent, or employee of another person to, *inter alia*, require or cause any employee to work for longer hours than those fixed or under conditions of labor prohibited by “an order of the [IWC]” or to pay or cause to be paid to any employee a wage less than the minimum “fixed by an order of the [IWC].”

¹⁷ *Id.* subdiv. 12. Although the Labor Code requires premium pay for the failure to comply with rest period obligations (see CAL. LAB. CODE § 226.7), the specific rules setting forth such obligations appear only in the wage orders themselves.

¹⁸ CAL. CODE REGS. tit. 8, § 11050, subdiv. 4(C).

¹⁹ *Id.* subdiv. 5.

²⁰ *Id.* subdiv. 9.

²¹ *Id.* subdiv. 7. For example, the IWC wage orders require employers to keep time records showing when the employee begins and ends each work period, as well as split shift intervals. This more specific requirement is not expressly set forth in the Labor Code.

²² The 1913 act that created the IWC also included criminal, administrative, and civil enforcement provisions in order to “ensure the IWC’s wage orders would be obeyed[.]” *Martinez*, 49 Cal.4th at 56. The current Labor Code contains versions of these enforcement provisions. See *id.*

²³ See *Dynamex Operations West, Inc. v. Superior Court*, 4 Cal.5th 903, 942 (Cal. 2018) (noting as examples plaintiffs’ Labor Code claims for failure to pay overtime and to provide accurate wage statements). See also *Martinez*, 49 Cal.4th at 56-57, 64 (holding that an employee who sues under the Labor Code to recover unpaid minimum wages actually and necessarily sues to enforce the applicable wage order); *Brinker Rest. Corp.*, 53 Cal.4th at 1026-27 (generally explaining the complementary and overlapping nature of Labor Code provisions and IWC wage orders).

2. Cal/OSHA health and safety regulations

Under existing law, rulemaking authority on workplace health and safety standards is bifurcated between the Division of Occupational Safety and Health (DOSH, also known as Cal/OSHA) and the Occupational Safety and Health Standards Board (OSHSB). Cal/OSHA develops proposed occupational health and safety standards of general application²⁴ and presents them to OSHSB, whose members are appointed by the Governor. OSHSB, in turn, is charged with adopting, amending, or repealing occupational safety and health standards and orders²⁵ (hereinafter, “Cal/OSHA regulations”).

Currently, in addition to Cal/OSHA’s COVID-19 Prevention Emergency Temporary Standards (which remain in effect until December 31, 2022),²⁶ various Cal/OSHA regulations address health and safety requirements for restaurant work,²⁷ including but not limited to regulations on the following:

- Injury and Illness Prevention Program (requiring employers to develop and implement an effective Injury and Illness Prevention Program)²⁸
- Hazard Communication (requiring employers whose employees may be exposed to hazardous substances to have a written hazard communication program that addresses various requirements)²⁹
- Repetitive Motion Injuries (requiring certain employers to establish and implement a program designed to minimize repetitive motion injuries)³⁰
- Cold Storage (requiring specified safety measures for cold storage, processing, and manufacturing rooms)³¹
- Hand Protection (requiring employers to select, provide and require employees to use appropriate hand protection when an employee's hands are exposed to hazards such as cuts or lacerations, abrasions, punctures, chemical burns, thermal burns, and harmful temperature extremes)³²
- Eyewashes (requiring plumbed or self-contained eyewash or eye/facewash equipment which meets certain requirements to be provided at all work areas where, during routine operations or foreseeable emergencies, the eyes of an employee may come into contact with a substance which can cause corrosion, severe irritation or permanent tissue damage or which is toxic by absorption)³³

²⁴ See CAL. LAB. CODE § 147.1.

²⁵ *Id.* § 142.3.

²⁶ See CAL. CODE REGS. tit. 8, §§ 3205-3205.2.

²⁷ As one study reported, health and safety issues typically experienced by fast food workers include, *inter alia*, exposure to harmful chemicals, hot grease, slippery floors, broken or damaged kitchen equipment, missing or damaged PPE, insufficient training to do the job safely, and cuts and wounds from lifting or carrying heavy items. See JUSTIE, ET AL., *supra* note 4, at 26-27.

²⁸ CAL. CODE REGS. tit. 8, § 3203.

²⁹ *Id.* § 5194

³⁰ *Id.* § 5110

³¹ *Id.* § 3249

³² *Id.* § 3384

³³ *Id.* § 5162

- Working Area (requiring, *inter alia*, permanent floors and platforms in work areas to be free of dangerous projections or obstructions, maintained in good repair, and reasonably free of oil, grease, or water)³⁴

Cal/OSHA may also issue a “special order” applicable to an individual place of employment when it “determines that an unsafe condition, device, or place of employment poses a threat to the health and safety of an employee which cannot be made safe under existing standards or orders.”³⁵

B. Amendments to A.B. 257 that ensure labor standards are not diminished and higher standards can actually be enforced

The existing labor standards under the California Labor Code, IWC wage orders, and Cal/OSHA regulations create a baseline of protections for fast food workers. We identify two loopholes in the bill’s provisions that should be closed to ensure such existing protections are not weakened.

First, A.B. 257 should expressly provide that the floor set by existing labor standards applicable to fast food workers may only be raised, not lowered.

A.B. 257 states that “minimum wages, maximum hours of work, and other working conditions fixed by the council... shall be the minimum wage, maximum hours of work, and the standard conditions of labor for fast food restaurant employees...”³⁶ The bill, however, does not clearly prohibit the council from issuing standards that are *less protective than current law*.³⁷ While the intent of A.B. 257 is to authorize the council to set standards only if they exceed existing ones,³⁸ the actual provisions of A.B. 257 are sufficiently ambiguous on this point and could invite future litigation if the council were intentionally or inadvertently to set a lower standard. That ambiguity should be eliminated.

Proposed section 1471 (d)(3) states that the bill does not provide the council with authority to create or amend *statutes*. This does not necessarily prevent the council from issuing or recommending standards that are lower than existing provisions of IWC Wage Order No. 5-2001 or the Cal/OSHA regulations. Indeed, A.B. 257 provides that if there is a conflict between the standards promulgated by the council and those of another state agency, the council’s standards prevail.³⁹ Furthermore, the bill does not appear to contemplate local minimum wage orders (which are not specific to fast food workers but would cover such workers within the local jurisdiction) which may mandate a higher wage even if the council were to issue, for example, a minimum wage order specific to fast food workers that raises the *state* minimum wage.

³⁴ *Id.* § 3273

³⁵ *Id.* § 332.2

³⁶ A.B. 257, 2021-2022 Cal. Assemb., Reg. Sess. § 1471 (j)(1) (Cal. 2022) (as published on January 27, 2022).

³⁷ A.B. 257 makes a distinction between standards on wages, working conditions, and training, which the council is authorized under the bill to promulgate, and health and safety standards that fall within the jurisdiction of OSHSB. With respect to the latter, the bill provides that the council shall not promulgate standards and shall only recommend them to OSHSB, which in turn, must adopt the council’s recommended standard according to the procedures specified unless it finds the standard is outside of OSHSB’s statutory authority or is otherwise unlawful. *See id.* § 1471 (e). We do not address the merits of this framework.

³⁸ *See id.* Sec. 2 (h)-(j).

³⁹ *Id.* § 1471 (d)(1).

Neither does proposed section 1471 (f) of the bill address these potential vulnerabilities. This subdivision states,

“The council shall conduct a full review of the adequacy of the minimum fast food restaurant health, safety, and employment standards at least once every three years. Upon that review, the council shall issue, amend, or repeal, or make recommendations to issue, amend, or repeal, any fast food employment, health or safety standard, or a portion of any such standard, as appropriate to meet the purposes of this section. With the exception of emergency standards, any individual new standard, or an amendment or repeal of an existing standard, shall not be less protective of or less beneficial to health, safety, or fast food restaurant worker employment conditions, including wages, than the immediately preceding standard.”

The opening sentence of proposed section 1471 (f) refers to “*the minimum fast food restaurant health, safety, and employment standards.*” This reads as a reference to preceding subdivision (d), which sets forth the council’s authority to issue “minimum fast food restaurant employment standards.” Indeed, there are currently no labor standards *specific* to fast food restaurant workers, and the council’s purpose is to develop and promulgate such standards (repeatedly termed in the bill as “minimum fast food restaurant employment standards”). Therefore, as drafted, the terms “existing standard” and “immediately preceding standard” in subdivision (f) appear to refer to the minimum fast food restaurant standards that the *council* has issued or recommended (and which the council is charged with reviewing on a triennial basis) – and not to encompass the existing standards under IWC Wage Order No. 5-2001 and Cal/OSHA regulations.⁴⁰ At best, the terms “existing standard” and “immediately preceding standard” are ambiguous.

While the underlying assumption may be that the council would not (even inadvertently) create lesser standards than those currently established by the applicable IWC wage order and Cal/OSHA regulations, the bill’s provisions do not expressly foreclose that possibility. We recommend clearing up any ambiguity on this issue that leaves the bill susceptible to different interpretations. Thus, proposed section 1471 (d), which sets forth the scope of the council’s rulemaking authority, should be amended, in line with the bill’s intent, to make clear that the council may not lower existing labor standards. In addition, the exception in subdivision (f) that on its face allows for less protective “emergency standards” – regardless of the policy rationale for that exception – creates too much of a loophole that could be exploited. Accordingly, we suggest the following amendments to subdivisions (d)⁴¹ and (f):

*(d) (1) The council shall promulgate minimum fast food restaurant employment standards, including, as appropriate, standards on wages, **hours**, working conditions, and training, as are reasonably necessary or appropriate to protect and ensure the welfare, including the physical well-being and security, of fast food restaurant workers or to otherwise meet the purposes of*

⁴⁰ When compared to the broader language in the bill discussing local fast food sector councils, the narrower construction of subdivision (f) is even more apparent. The bill provides that local fast food sector council “recommendations shall not be less protective of, or less beneficial to, health, safety, or fast food restaurant worker employment conditions than *other applicable state or local standards.*” See *id.* § 1471 (i) (emphasis added).

⁴¹ Our recommended amendments add a new subparagraph (2) to subdivision (d). Existing subparagraphs (2) and (3) of subdivision (d) would therefore need to be renumbered as subparagraphs (3) and (4).

this section, subject to the limitations of subparagraph (2) of this subdivision and subdivision (e). The council may also issue, amend, or repeal any other rules and regulations as necessary to carry out its duties under this section or meet the purposes of this section, subject to the limitations of subparagraph (2) of this subdivision and subdivision (e). ~~To the extent there is a conflict between standards, rules, or regulations issued by the council and the rules or regulations issued by another state agency, the standards, rules, or regulations issued by the council shall apply to fast food restaurant workers and fast food restaurant franchisees and franchisors, and the conflicting rules or regulations of the other state agency shall not have force or effect with respect to fast food restaurant workers, franchisees, or franchisors.~~ Decisions by the council regarding standards, rules, and regulations shall be made by an affirmative vote of at least six of the council members. All standards, rules, and regulations by the council shall be issued, amended, or repealed, as applicable, in the manner prescribed in Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code.

(2) (A) Notwithstanding any other provision of this section, the council may only issue or recommend standards, orders, rules, or regulations that are more protective of or more beneficial to the wages, hours, working conditions, or health and safety of fast food restaurant workers than existing state standards, orders, rules, or regulations applicable to fast food restaurant workers, including but not limited to applicable orders of the Industrial Welfare Commission and regulations set forth under Chapter 4 of Division 1 of Title 8 of the California Code of Regulations. Any standard, order, rule, or regulation, or a portion thereof, issued or recommended by the council shall not have any force or effect if it is less protective of or less beneficial to the wages, hours, working conditions, or health and safety of fast food restaurant workers than an existing state standard, order, rule, or regulation, or a portion thereof. To the extent there is a conflict between a more protective or more beneficial standard, order, rule, or regulation, or a portion thereof, issued by the council and a standard, order, rule, or regulation, or a portion thereof, issued by another state agency, board, or commission, the more protective or more beneficial standard, order, rule, or regulation, or a portion thereof, issued by the council shall, with respect to fast food restaurant workers, franchisees, or franchisors, supersede the conflicting standard, order, rule, or regulation, or a portion thereof, of the other state agency, board, or commission.

(B) The council may only amend or repeal, or make recommendations to amend or repeal, an existing state standard, order, rule, or regulation, or a portion thereof, as it applies to fast food restaurant workers, that has been issued by another state agency, board, or commission, if doing so would be more protective of or more beneficial to the wages, hours, working conditions, or health and safety of fast food restaurant workers. Any action by the council in contravention of this subparagraph shall not have any force or effect.

(C) Nothing in this section limits the applicability of local orders or standards on wages, hours, working conditions, or health and safety, including but not limited to local minimum wage or overtime laws, to fast food restaurant workers, unless the council issues a standard, order, rule, or regulation on the same subject which is more protective of or more beneficial to fast food restaurant workers than the local order or standard, in which case such standard, order, rule, or regulation issued by the council shall supersede the local order or standard.

(D) Nothing in this section limits the authority of the Division of Occupational Safety and Health to issue a special order applicable to a fast food restaurant operator pursuant to Section 332.2 of Article 3 of Subchapter 1 of Chapter 3.2 of Division 1 of Title 8 of the California Code of Regulations.

...

*(f) The council shall conduct a full review of the adequacy of the minimum fast food restaurant health, safety, and employment standards at least once every three years. Upon that review, the council shall issue, amend, or repeal, or make recommendations to issue, amend, or repeal, any fast food employment, health or safety standard, or a portion of any such standard, as appropriate to meet the purposes of this section. ~~With the exception of emergency standards, any~~ **Any** individual new standard, or an amendment or repeal of an existing standard, shall not be less protective of or less beneficial to **the wages, hours, working conditions, or health, and safety of fast food restaurant workers,** ~~or fast food restaurant worker employment conditions, including wages,~~ than the immediately preceding standard.*

Second, A.B. 257 should include a provision that draws any higher standards issued by the council into the enforcement provisions of the Labor Code which currently incorporate IWC wage order standards, and that ensures the council’s higher standards are enforceable.

A.B. 257 is silent about existing Labor Code sections that enable administrative, civil, or criminal enforcement of labor standards and that expressly incorporate the IWC wage orders, including provisions authorizing damages, civil penalties, or criminal penalties for non-compliance with those standards.⁴² As a result, any higher standards issued by the council may not be enforceable under these code sections.

To take one example, liquidated damages under Labor Code Section 1194.2 are only available to a worker in an administrative or civil action when minimum wages “fixed by an order of the [IWC] or by statute” are not paid. Under A.B. 257, even if the council were to set a new, higher minimum wage, fast food workers would arguably not be entitled to liquidated damages for a minimum wage violation. This is because the higher minimum wage fixed by the council is not a wage “fixed by an order of the [IWC] or by statute.”⁴³ As a result, any wage gains would not be backed by existing

⁴² See Part 1, A.1. of this Note, *supra* (discussing the integrated nature of the Labor Code and IWC wage orders).

⁴³ A.B. 257 declares that “[t]he minimum wages, maximum hours of work, and other working conditions fixed by the council in standards promulgated pursuant to subdivision (d) shall be the minimum wage, maximum hours of work, and the standard conditions of labor for fast food restaurant employees or a relevant subgroup of fast food restaurant employees.” See A.B. 257, 2021-2022 Cal. Assemb., Reg. Sess. § 1471 (j)(1) (Cal. 2022) (as published on January 27, 2022). It may be possible to argue that this subdivision is a statutory provision that “fixes” the minimum wage (insofar as it states the minimum wage is the wage that is fixed by the council), for purposes of liquidated damages in this example. However, it is also possible to counter this somewhat circular argument. There is no good public policy reason to leave this open to interpretation and possible litigation – especially when catchall bill language could be crafted to ensure the enforceability of council standards under not only the liquidated damages provision but also other Labor Code sections providing for administrative, civil, or criminal enforcement of labor standards.

statutory enforcement mechanisms that incentivize the actual payment of minimum wage.⁴⁴

Thus, A.B. 257 should be amended so that enforcement provisions under the Labor Code – administrative, civil, and criminal – are not inadvertently rendered inapplicable to fast food workers after promulgation of new standards by the council. We recommend amending subdivision (j) of proposed section 1471 as follows:

(j) (1) The minimum wages, maximum hours of work, and other working conditions fixed by the council in standards promulgated pursuant to subdivision (d) shall be the minimum wage, maximum hours of work, and the standard conditions of labor for fast food restaurant employees or a relevant subgroup of fast food restaurant employees as defined by the council. The employment of a fast food restaurant employee for lower wages or for longer hours than those fixed by the minimum standards promulgated by the council, or under any other working conditions prohibited by the minimum standards promulgated by the council, is unlawful.

(A) Any provision of this code that incorporates the standards or orders of the Industrial Welfare Commission, or arises out of or enforces those standards or orders, shall be construed, with respect to fast food restaurant employees or a relevant subgroup of fast food restaurant employees as defined by the council, to also incorporate, arise out of, or enforce the standards on minimum wages, maximum hours of work, and other working conditions fixed by the council pursuant to subdivision (d) of this section, which shall supersede any applicable standard or order of the Industrial Welfare Commission, or portion thereof, that is less protective of or less beneficial to the wages, hours, or working conditions of such employees.

(B) Compliance with the ~~minimum fast food restaurant employment~~ standards on minimum wages, maximum hours of work, and other working conditions promulgated by the council pursuant to subdivision (d) shall be enforced ~~by the commissioner and the Division of Labor Standards Enforcement pursuant~~ according to the administrative, civil, and criminal enforcement procedures and provisions set forth in Chapter 4 (commencing with Section 79) of Division 1, Division 2 (commencing with Section 200), and Division 3 (commencing with Section 2700) of this code, and according to any additional enforcement procedures and provisions that are set forth in standards, orders, rules, or regulations promulgated by the council.

⁴⁴ A.B. 257 does provide that the council's standards shall not take effect until after the council submits a report to the Legislature that contains a copy of the standard and the reasons for adopting it, and 60 days (from the date of receipt by the Legislature) have passed during which the Legislature is in session. See *id.* § 1471 (d)(2). Although in any given instance, the Legislature may determine it is necessary or desirable to act after receiving such notice from the council, it would defeat the overall purpose of the bill to essentially require codification on the back end of the council's actions in order to make certain standards enforceable.

PART 2

Establishing Fast Food Franchisor Liability

Whether or not franchisors are liable for violations of fast food workers' rights, including failure to comply with wage and hour laws, is a contentious legal issue.⁴⁵ A.B. 257 seeks to resolve this issue by expressly holding fast food franchisors responsible with their franchisees for such violations. We examine joint and several liability provisions that have been enacted by the California Legislature in other low-wage industries, as a model for recommending amendments to strengthen the franchisor liability provisions of A.B. 257.

A. Joint and several liability statutes in other low-wage industries

Opponents of A.B. 257 claim that the bill is rooted in a "common misconception" that fast food franchisors "actually own and operate the [franchisee] stores and make employment decisions for them."⁴⁶ This claim glosses over the Legislature's more sophisticated understanding of contractual schemes that result in non-compliance with labor laws – as evidenced not only in this bill but also in past enactments concerning other low-wage industries – and the Legislature's consistent approach in addressing such schemes.

A.B. 257 essentially recognizes that the fast food industry utilizes a contractual arrangement that attempts to shield the corporate franchisor (typically a global corporation) at the top of the contracting chain from responsibility for labor law violations of its franchisees at the bottom of the chain – even though the franchising relationship creates tremendous downward pressure that all but forces franchisees into non-compliance with labor standards.⁴⁷ Indeed, A.B. 257 has been cut from the same cloth as previous California legislation addressing rampant violations of labor standards in low-wage industries such as garment, port trucking, and janitorial – in which businesses that have used contracts to distance themselves from direct control over workers can nonetheless be held jointly and severally liable with the subcontractor for unpaid wages, unreimbursed business expenses, damages, and penalties due to workers.

1. Joint and several liability in the garment industry

Under a bill passed and signed into law last year,⁴⁸ apparel companies throughout the contracting chain⁴⁹ can be held jointly and severally liable in administrative wage claims for labor law violations of subcontractors. Significantly, the Legislature declared its intention to reach garment companies

⁴⁵ See, e.g., *Salazar v. McDonald's Corp.*, 944 F.3d 1024 (9th Cir. 2019).

⁴⁶ See Cal. Assemb. Lab. & Emp't. Comm. Analysis, A.B. 257, at 6 (April 22, 2021).

⁴⁷ See FISK & REAVIS, *supra* note 3.

⁴⁸ See S.B. 62, 2021-2022 Cal. S., Reg. Sess. (Cal. 2021) (enacted). S.B. 62 expanded on existing liabilities codified by the Legislature in 1999, in a groundbreaking bill aimed at addressing labor violations in the state's garment industry. See A.B. 633, 1999-2000 Cal. Assemb., Reg. Sess. (Cal. 1999) (enacted).

⁴⁹ For a discussion of how the garment industry is structured, see CHRISTINA CHUNG & JUDY MARBLESTONE, REINFORCING THE SEAMS: GUARANTEEING THE PROMISE OF CALIFORNIA'S LANDMARK ANTI-SWEATSHOP LAW 10-11 (Asian Law Caucus, Asian Pacific American Legal Center, Garment Worker Center, Sweatshop Watch, Women's Employment Rights Clinic, September 2005).

that “have attempted to avoid liability [for unpaid wages] by adding layers of contracting between themselves and the employees manufacturing the garments.”⁵⁰ The Legislature determined that liability was appropriate “regardless of how many layers of contracting that person may use.”⁵¹ Thus, liability attaches to garment companies that license a brand or name, regardless of whether the person with whom they contract performs the manufacturing operations or hires contractors or subcontractors to perform the manufacturing operations. Under the law, such companies are jointly and severally liable with the manufacturer and contractor for unpaid wages, unreimbursed business expenses, and other compensation, including interest, due to workers, as well as reasonable attorneys’ fees and costs and civil penalties for the failure to secure valid workers’ compensation insurance.⁵²

2. Joint and several liability in the port trucking industry

As part of a bill that was enacted in 2018,⁵³ the Legislature similarly announced its intention to hold upstream retailers and manufacturers that benefit from the labor of commercial truck drivers accountable for labor law violations in the port drayage industry.⁵⁴ The Legislature described the industry as one built on the common use of sublease agreements between port trucking companies and drivers,⁵⁵ in which drivers are “routinely misclassified as independent contractors” and deprived of meaningful remedies because port trucking companies “that commit violations go out of business and are replaced by others that repeat the pattern.”⁵⁶ Finding that “some of the world’s largest retail and manufacturing companies” utilizing port trucking companies “have the market power to exert meaningful change in the port drayage industry that has eluded California drivers for more than a decade,”⁵⁷ the Legislature declared in the bill that upstream liability “will exert pressure across the supply chain to protect...drivers from further exploitation.”⁵⁸ Thus, under the law, business entities including retailers and manufacturers may be jointly and severally liable in an administrative or private enforcement action for the full amount of any unpaid wages, unreimbursed expenses, damages, and penalties, including interest, that are found due for labor violations when the business receives notice of but uses a port trucking company that has an unsatisfied final court judgment for such violations.⁵⁹

⁵⁰ CAL. LAB. CODE § 2670 (a).

⁵¹ *Id.*

⁵² *Id.* §§ 2671 (d), 2673.1 (a)(1).

⁵³ S.B. 1402, 2017-2018 Cal. S., Reg. Sess. (Cal. 2018).

⁵⁴ *See id.* Sec. 1 (o) (stating that “[c]ustomers of port drayage are some of the world’s largest retail and manufacturing companies” and that “[a]fter more than a decade of rulings, media stories, and independent reports, they should be aware of the widespread labor violations in the drayage industry”).

⁵⁵ *Id.* Sec. 1 (d).

⁵⁶ *Id.* Sec. 1 (f), (h), (i).

⁵⁷ *Id.* Sec. 1 (o), (r).

⁵⁸ *Id.* Sec. 1 (q).

⁵⁹ CAL. LAB. CODE § 2810.4 (b)-(c).

3. Joint and several liability in the property services and long-term care industries

Enacted in 2015, Labor Code Section 238.5⁶⁰ provides that “[a]ny individual or business entity, regardless of its form, that, as part of its business, contracts for services in the property services or long-term care industries shall be jointly and severally liable for any unpaid wages, including interest, where the individual or business entity has been provided notice, by any party, of any proceeding or investigation by the Labor Commissioner in which the employer is found liable for those unpaid wages, to the extent the amounts are for services performed under that contract.”⁶¹

Covering workers who perform long-term care, janitorial, security guard, valet parking, landscaping, and gardening services,⁶² Section 238.5 provides the Labor Commissioner’s Office with a potent mechanism to recover wages for low-wage workers. Wage liability under the law is based only on the existence of a contract (including any subcontract) for services. Once it is established that a contract for long-term care or property services was entered into, the individual or entity at the top of the contracting chain can be held jointly and severally liable with the contractor for wages due for services performed under that contract.⁶³

4. Joint and several liability in low-wage industries providing subcontracted labor to a “client employer”

In 2014, California passed A.B. 1897, which codified Labor Code Section 2810.3, a powerful corporate accountability statute directed at low-wage subcontracted industries. Under this law, an up-the-chain “client employer” is jointly and severally liable, along with the contractor that provides labor to the client employer, for the unpaid wages of all workers supplied by the contractor, all sums payable to the workers or the state based upon the failure to pay wages (including damages and penalties), and civil penalties for the contractor’s failure to secure workers’ compensation insurance.⁶⁴ As long as the section’s definitional terms are met,⁶⁵ such liability attaches; the statute does not require any proof that the client employer exercised control over the work performed by the worker who is owed wages, or that the client employer was aware of the contractor’s labor violations. It also does not matter how many layers of subcontracting exist between the client employer and the contractor providing labor. By statutorily extending responsibility for unpaid wages, damages, and penalties to client employers, the law helps to ensure that workers are able to recover what they are owed, particularly if the labor contractor absconds or becomes insolvent.

⁶⁰ This code section was added as part of a larger bill addressing nonpayment of wages. See S.B. 588, 2015-2016 Cal. S., Reg. Sess. (Cal. 2015) (enacted).

⁶¹ CAL. LAB. CODE § 238.5 (a)(1).

⁶² See *id.* § 238.5 (e). The law does not apply to an individual or owner of a home-based business, to the extent that property services are rendered at the individual or home-based business owner’s primary residence, and provided that the primary residence does not have multiple housing units. *Id.* § 238.5 (f).

⁶³ See *id.* § 238.5 (a).

⁶⁴ See *id.* § 2810.3 (a)(4), (b).

⁶⁵ See *id.* § 2810.3 (a).

B. Amendments to strengthen fast food franchisor liability under A.B. 257

The widespread lack of compliance with labor laws at fast food restaurants is well-documented.⁶⁶ However, fast food workers are left with no meaningful remedy when, due to the very structure of the franchise relationship, a franchisee is unable to comply with labor standards and pay what is owed for such non-compliance. In order to address this dynamic, A.B. 257 attempts to put fast food workers on equal footing with other low-wage workers by expressly providing for up-the-chain liability of the corporate franchisor when workers experience labor violations. Ultimately, the bill is driven by the same public policy goals previously expressed by the Legislature for extending joint and several liability to upstream businesses in subcontracted low-wage industries: namely, to ensure that workers whose rights are violated can be made whole and labor standards are not rendered illusory, and to ensure that corporations utilizing contractual arrangements to profit from the labor of workers can be held responsible for labor violations stemming from those arrangements.

To fully realize their potential, however, the bill's franchisor liability provisions should be strengthened.

In proposed section 1472 (b), A.B. 257 provides for joint and several liability of franchisees and franchisors for violations of various enumerated employment and public health and safety laws and regulations, but limits joint and several liability to "penalties or fines" for their violation. The bill then states, in proposed section 1472 (c), that the enumerated laws and regulations "may be enforced against a fast food restaurant franchisor to the same extent that they may be enforced against the fast food restaurant franchisor's franchisee." As a matter of statutory interpretation, it is unclear how these two subdivisions would be harmonized with each other. In one respect, subdivision (c) is broader because it appears to establish shared liability of the franchisor for *all* of the section's enumerated laws, which could provide for remedies in addition to "penalties and fines" (for which the franchisor is jointly and severally liable under subdivision (b)). At the same time, subdivision (c) is arguably narrower, however, in that it does not specify that liability of the franchisor is joint and several with the franchisee.

A subsequent provision of the bill, proposed section 1472 (f), is also both broader and narrower in its reach than subdivisions (b) and (c) – broader because it generally addresses "any liability" of the franchisee under "federal, state, or local law" (and not limited to employment or public health and safety laws), and narrower because it requires the franchisee to show by a preponderance of evidence that the terms of a franchise were a "substantial factor in causing" any such liability of the franchisee. Section 1472 (f) then proceeds to hold the franchisor jointly and severally liable "for the portion of the liability to which the terms of the franchise contributed," and therefore calls for some apportionment of franchisor liability based on causation.

Altogether, the bill's franchisor liability provisions seem difficult to square with one another; at best, they create a maze of different forms and degrees of franchisor liability. Instead, we recommend clearly establishing joint and several liability of the franchisor and franchisee for the full

⁶⁶ See note 4, *supra*.

amount of wages, damages, and penalties due to fast food workers, and to the state, for violations of employment standards. To this end, A.B. 257 could be modeled after the Legislature’s previous enactments establishing joint and several liability of upstream businesses in other low-wage industries.

Specifically, subdivisions (b) and (c) of proposed section 1472 of the bill should be deleted and replaced by the following subdivision:⁶⁷

A fast food restaurant franchisor shall be jointly and severally liable with its fast food restaurant franchisee for the full amount of wages, unreimbursed business expenses, any other compensation, damages, and penalties, including applicable interest, as well as reasonable attorney’s fees and costs, that are owed to any and all fast food restaurant workers who performed labor for the franchisee, due to a violation of any of their rights under this code, Article 1 (commencing with Section 12940) of Chapter 6 of Part 2.8 of Division 3 of Title 2 of the Government Code, or Chapter 5 (commencing with Section 17200) of Part 2 of Division 7 of the Business & Professions Code, or that are owed to the state based upon any such violation.

Furthermore, we also recommend deleting subdivision (f) of proposed section 1472. To the extent subdivision (f) requires apportioning franchisor liability based on some proof of causation, it would be inconsistent with the stronger joint and several liability provision suggested above.

| | |
|--------|------------|
| PART 3 | Conclusion |
|--------|------------|

The FAST Recovery Act is at once ambitious and novel in its scope and focus on the fast food industry, yet also firmly rooted in established precedent. The bill draws upon the historic role of California’s Industrial Welfare Commission, and follows in the footsteps of previous up-the-chain liability statutes in low-wage industries with high rates of labor violations. The model language we propose conforms the bill’s provisions with its intent to address pervasive labor abuses in the fast food industry by bringing together workers, their advocates, franchisees, franchisors, and state officials empowered to elevate labor standards in the fast food sector. First, our recommendations will ensure that labor standards developed by the council cannot fall below existing state standards applicable to fast food workers. Second, our amendments will also ensure the council’s higher standards are fully enforceable under the Labor Code, including under provisions authorizing damages or penalties for non-compliance with those standards. Finally, our recommendations clarify and strengthen the franchisor liability provisions of the bill so that fast food workers whose rights are violated are not left without meaningful remedies. No matter the bill’s ultimate fate, these amendments should be made in order to enhance A.B. 257 as a model for building worker power and lifting labor standards in an array of low-wage industries.

⁶⁷ Our recommendation encompasses the Legislature’s policy decision in subdivisions (a) and (c) of proposed section 1472 to include shared responsibility of franchisors for unlawful employment practices under the Government Code, as well as violations of the Unfair Competition Law in the Business & Professions Code.