

California Adopts the FAST Recovery Act: What Fast-Food Chains Need to Know

The Act has the potential to significantly increase wages for restaurant employees and to impose work scheduling limitations on restaurant companies.

Key Points:

- Restaurant companies that are part of a chain with 100 or more establishments nationally should analyze whether their establishments in California meet the test for “fast food restaurants” under the Act, which is broad and covers a number of restaurant concepts that are not typically considered fast food.
- The Act establishes a Fast Food Council, which is authorized to adopt working standards for “fast food restaurants” in California, but whose authority is contingent upon 10,000 California fast food restaurant employees signing a petition approving its creation.
- The anti-retaliation provisions of the Act will require employers to carefully consider disciplinary decisions regarding employees who have a history of raising complaints concerning labor code, employee or public health and safety compliance.
- For now, the Act does not extend liability to franchisors for actions by franchisees.

On August 29, 2022, the California State Senate passed the Fast Food Accountability and Standards Recovery Act, or the FAST Recovery Act (the Act), which aims to improve working conditions for the more than 550,000 fast food restaurant workers in the state. According to the Act, such workers have been subject to low pay, few benefits, and minimal job security, as well as high rates of wage theft, sexual harassment, discrimination, and health and safety risks. If California Governor Gavin Newsom signs the Act into law, it would become effective on January 1, 2023. The Act would establish a Fast Food Council, which is authorized to adopt minimum standards for fast food restaurant employees (subject to obtaining 10,000 signatures from fast food restaurant employees).

Assuming it is signed into law, this Client Alert summarizes key provisions of the Act and its anticipated impact on restaurant companies that operate in California.

Restaurants Covered by the Act

The Act generally applies to “fast food restaurants” in California that are part of a “fast food chain” consisting of 100 or more establishments nationally that share a common brand (or that are characterized by standardized options for decor, marketing, packaging, products, and services). A “fast food restaurant” is an establishment that, in its regular business operations, primarily provides food or beverages in the following manner:

- For immediate consumption either on or off the premises
- To customers who order or select items and pay before eating
- With items prepared in advance, including items that may be prepared in bulk and kept hot, or with items prepared or heated quickly
- With limited or no table service (table service does not include orders placed by a customer on an electronic device)

The Act excludes an establishment that, on September 1, 2022, operates as a bakery and produces bread for sale on-site (and not as part of another menu item), so long as the establishment continues to operate as a bakery. As a result, restaurants that might otherwise qualify as “fast food restaurants” are excluded if they produce bread on-site and sell it as a stand-alone item. The Act also excludes restaurants operating within grocery stores that are the employer at those restaurants.

Restaurant companies with 100 or more establishments under the same brand (or operating under standardized options) nationally should consider whether their restaurants in California constitute “fast food restaurants” under the Act. For many companies, the determination will not be clear. Fast-casual restaurants, buffets, cafés, coffee shops, ice cream parlors, pubs, food kiosks, diners, and other food establishments may or may not be a “fast food restaurant” under the Act depending on the degree to which they collect payment before customers eat, prepare items in advance, and provide table service. Companies that are in a gray area should consult with counsel on whether they meet the test. Ultimately, the decision of whether a restaurant is a “fast food restaurant” will be determined by the Labor Commissioner (who has enforcement authority for the Act) and the courts (since workers will have a private right of action to enforce the Act, as discussed below).

The Fast Food Council

The Fast Food Council (the Council) is authorized to establish minimum standards on wages, maximum working hours, and other working conditions, and to supply the necessary cost of proper living to fast food restaurant workers. However, the Council cannot establish these standards until the Director of Industrial Relations receives a petition approving the creation of the Council signed by at least 10,000 California fast food restaurant employees. Under the Act, the Council will exist until January 1, 2029, and, on that date, the Council will cease operations and various provisions of the Act will become inoperative.

Composition and Term

The Council will consist of the following 10 members:

- One representative from the Department of Industrial Relations
- Two representatives of fast food restaurant franchisors

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

The Governor will appoint each of the members of the Council, other than one representative of advocates for fast food restaurant employees (which will be appointed by the Speaker of the Assembly and the Senate Rules Committee).

Each member of the Council will serve a term of four years (ending January 1 or, if sooner, when the Council ceases operations). Vacancies occurring prior to the expiration of the term of a member will be filled by appointment for the unexpired term. A member of the Council cannot serve more than two consecutive terms. The Governor will designate the chairperson of the Council.

Operation

Decisions by the Council will be made by an affirmative vote of at least six members. As a result, the Council could adopt standards even if all four representatives of fast food restaurant franchisors and franchisees vote against them.

To establish a standard, the Council must first submit the standard to the appropriate labor committees of each house of the Legislature by January 15 of a particular year. The standard will not take effect until October 15 of that year. However, during that interim period, the Legislature may enact legislation that prevents the standard from taking effect. Given the legislative process, this provision may have limited impact as an effective check on standards proposed by the Council.

Limitations on Minimum Wage Increases

Under the Act, the Council may not increase the minimum wage in California to more than \$22 per hour for 2023. For 2024 and after, the Act limits any increase in the minimum wage (whether by the Council or otherwise) to a percentage based on the consumer price index (not to exceed 3.5%), rounded to the nearest 10 cents.

Limitations on Authority

Under the Act, the Council may not create new paid time off benefits, such as paid sick leave or paid vacation, or promulgate regulations regarding predictable scheduling. In addition, the Council cannot override collective bargaining agreements in certain, limited circumstances.

To the extent that any standards of the Council fall within the jurisdiction of the Occupational Safety and Health Standards Board (OSHS Board), the Council must petition the OSHS Board to adopt the standards. The OSHS Board must respond to the petition within six months following receipt of the petition (or three months in the case of an emergency order). The OSHS Board must not adopt a standard recommended by the Council if it reduces occupational safety and health protections for employees.

Local Fast Food Councils

A county, or a city with a population of more than 200,000, may establish a Local Fast Food Council (a Local Council), which would be composed of at least one representative who is either a fast food restaurant franchisor or a fast food restaurant franchisee and at least one representative who is a fast food restaurant employee, and a majority of representatives from local employment, health, and safety agencies. A Local Council may provide written recommendations to the Council regarding minimum local health, safety, and employment standards that the Local Council finds are reasonably necessary to protect the health, safety, and welfare of fast food restaurant workers.

Anti-Retaliation

The Act prohibits a fast food restaurant operator from discharging, or in any manner discriminating or retaliating against, a fast food restaurant employee for (a) specified protected actions, including internal complaints and complaints to a franchisor, the media, the Legislature, a watchdog or community-based organization, or a governmental agency regarding employee or public health or safety, or (b) the refusal to perform work if the employee reasonably believes there is a health or safety violation.

If the operator violates these provisions, the employee has a private right of action for reinstatement, treble damages (lost wages), and work benefits, plus attorney's fees and costs. The Act creates a rebuttable presumption of unlawful retaliation if the operator discharges or takes any other adverse action against an employee within 90 days of the date when the operator had knowledge of the protected action.

No Franchisor-Franchisee Joint Liability

Prior to the Act's adoption, there was one important change for franchisors. The Act was amended to delete the provisions making fast food restaurant franchisors responsible for ensuring that their franchisees comply with various employment and worker and public health and safety laws.

Conclusion

The Act has the potential to significantly increase wages for fast food restaurant employees and to impose work scheduling limitations on "fast food restaurant" companies. Restaurant companies in California should analyze whether their establishments are "fast food restaurants" under the Act, and therefore potentially subject to the jurisdiction of the Council and the Act's anti-retaliation provisions.

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