SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2021-2022 Regular Session

AB 257 (Holden)
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TSG

SUBJECT

Food facilities and employment

DIGEST

This bill establishes a council to develop workplace standards specific to the fast food industry and increases fast food franchisors' legal accountability for their franchisees' compliance with labor standards through, among other things, imposition of joint and several liability on the franchisor for labor violations committed by the franchisee.

EXECUTIVE SUMMARY

There is evidence that workplace pay and safety violations are prevalent in the fast food industry. In an attempt to improve working conditions and compensation in this sector, this bill proposes a series of measures designed to develop new, industry-specific labor standards and to heighten the accountability of fast food franchisors for workplace violations committed by their franchisees. Specifically, key provisions of the bill: (1) establish a Fast Food Sector Council charged with promulgating labor standards for the fast food industry; (2) make fast food franchisors jointly and severally liable for labor violations committed by their franchisees; (3) empower fast food franchisees to sue their franchisor if the franchise terms make it impossible for the franchisee to comply with labor laws; (4) make fast food franchisors liable for any franchisee liability to which the terms of the franchise agreement substantially contributed; and (5) create a rebuttable presumption of unlawful retaliation for adverse employment actions taken in the 90 days after a worker engages in protected activity.

The bill is sponsored by Fight for $15 and the Service Employees International Union (SEIU) California. Support comes from organized labor and workers' rights advocates. Opposition comes from franchisors, fast food operators, and business associations who assert that the bill is unwarranted, will increase labor costs inside and outside the fast food sector, and undermines the franchise business model. The bill passed out of the Senate Labor, Public Employment and Retirement Committee by a vote of 3-2. If the bill passes out of this Committee, it will next be heard in the Senate Appropriations Committee.

PROPOSED CHANGES TO THE LAW

Existing law:

1) Establishes, within the Department of Industrial Relations (DIR), the Division of Labor Standards and Enforcement (DLSE) under the direction of the Labor Commissioner (LC) and authorizes them to investigate employee complaints, conduct administrative law hearings, and enforce labor laws. (Lab. Code §§ 79 *et seq*.)

2) Establishes the Division of Occupational Safety and Health of California (Cal/OSHA) within the DIR to protect and improve the health and safety of workers by setting and enforcing standards, providing outreach, education, and assistance, and issuing permits, licenses and registrations. (Lab. Code §§ 140 *et seq*.)

3) Creates the California Retail Food Code (CRFC) which establishes uniform health and sanitation standards for retail food facilities, as defined. Requires a local health officer or a local law enforcement agency to notify the person in charge of the food facility, investigate conditions, and take appropriate action when a health officer is notified of an illness that can be transmitted by food or an employee in a food facility. (Health & Saf. Code §§ 113949.1 and 113949.2.)

4) Provides, pursuant to the California Franchise Relations Act, for a set of rules governing the termination, nonrenewal, and transfer of franchises between a franchisor, a subfranchisor (if any), and a franchisee. (Bus. & Prof. Code §§ 20000 *et seq*.)

5) Requires, under the California Franchise Investment Law, registration with the state, the disclosure of specified information, and the provisions of specified documentation as part of the offer or sale of franchise opportunities in California. (Corps. Code §§ 31000 *et seq*.)

This bill:

1) Makes findings and declarations highlighting the low wages and poor working conditions in the fast food industry and stressing the inadequacy of existing enforcement and regulatory mechanisms to address these problems.

2) Defines a "fast food restaurant" as any establishment in the state that is part of a chain, consisting of at least 30 members, and that provides food or beverages in the following manner:
   a) in disposable containers;
   b) for immediate consumption, either on or off the premises;
   c) with limited or no table service; and

d) to customers who order or select items and pay before eating.

3) Defines fast food restaurant "franchisee" as a person to whom a fast food restaurant franchise is granted, and defines fast food restaurant "franchisor" as a person who grants or has granted a fast food restaurant franchise.

4) Establishes a Fast Food Sector Council (the Council) composed of 13 members representing relevant state agencies, fast food franchisors and franchisees, fast food employees, and advocates for fast food restaurant employees. Provides that the members shall be appointed by the Governor, the Speaker of the Assembly, and the Senate Rules Committee, as specified.

5) Specifies that the Secretary of Labor and Workforce Development shall be the chairperson of the Council, responsible for convening the Council and facilitating its work.

6) Declares that the Council's purpose is to establish industry-wide minimum standards on wages, working hours, and other working conditions adequate to ensure and maintain the health, safety, and welfare of fast food workers and to ensure interagency coordination and prompt agency responses regarding issues affecting the health, safety, and employment of fast food workers.

7) Directs the Council to issue, amend, or repeal rules or regulations as necessary to carry out its duties and purpose, as specified. Provides that if there is a conflict between standards, rules, or regulations issued by the council and any other rules or regulations issued by another state agency (except Cal/OSHA, as described below) that the Council's rules, standards and regulations shall apply to fast food restaurant workers, franchisees, and franchisors.

8) Emphasizes that meetings of the Council are subject to the laws governing open meetings conducted under the auspices of state government.

9) Specifies that any standard issued, amended, or repealed by the Council shall not take effect unless all of the following are satisfied:
   a) the Council submits a report regarding the proposed standard to the state Assembly and Senate policy committees on labor by January 15;
   b) the Legislature does not, by October 15, enact legislation modifying the standard or preventing it from taking effect; and
   c) the Secretary of Labor and Workforce Development voted in favor of the standard.

10) Subjects all standards promulgated by the Council to suspension of increases in the statewide minimum wage if ordered by the Governor in specified circumstances.

11) Prohibits the Council from promulgating standards that alter or amend requirements in state law regarding retail food safety.

12) Provides that to the extent that any minimum standards are found by the Council to be reasonably necessary to protect fast food restaurant worker health and safety and fall within the jurisdiction of Cal/OSHA, the council shall recommend standards to Cal/OSHA. Specifies that Cal/OSHA shall prepare a written opinion, as specified, and adopt the Council's recommendation, unless it finds that the recommended standard is outside of its statutory authority or otherwise unlawful.

13) Requires that all standards, rules, and regulations adopted, amended, or repealed by the Council comply with the rule-making requirements of the California Administrative Procedures Act.

14) Requires the Council to conduct a review of its standards every three years and requires it to hold public hearings every six months, as specified.

15) Authorizes a county or city with a population greater than 200,000 to establish a Local Fast Food Sector Council, as provided.

16) Emphasizes that meetings of any local council are subject to the laws governing open meetings conducted under the auspices of local government.

17) Provides that standards set by the Council do not supersede standards contained in a valid collective bargaining agreement if the agreement expressly provides for better wages, hours, and working conditions than the minimum requirements established by the Council.

18) Does not require local health departments to enforce standards established by the Council.

19) Provides that a fast food franchisor shall be responsible for ensuring that its franchisee complies with specified labor laws, including standards established by the Council.

20) Provides that if a fast food restaurant franchisee is liable for a labor law violation, as specified, the franchisor shall be jointly and severally liable for any associated penalties or fines. Provides that the laws and orders, as specified, and any rules and regulations implementing these laws and orders, 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. Provides that this provision cannot be waived or circumvented by an agreement, nor shall the franchisee indemnify the franchisor for liability under this provision.

21) Provides that if a fast food restaurant franchisee shows by a preponderance of the evidence that the terms of its franchise agreement were a substantial factor in causing any liability the franchisee has actually incurred under federal, state, or local law, the franchisor shall be jointly and severally liable for the portion of the liability to which the terms of the franchise agreement contributed.

22) Prohibits a fast food restaurant franchisee or fast food restaurant franchisor from discriminating or retaliating against an employee who exercises certain rights under this bill; and creates a rebuttable presumption of unlawful discrimination or retaliation for any adverse action taken against the employee within 90 days of the franchisor or franchisee having knowledge of the employee's exercise of those rights. Provides that an employee subject to discrimination and retaliation shall have a cause of action, as specified.

COMMENTS

1. Evidence of low wages, poor conditions, and labor violations in the fast food sector

The author states that California's fast food industry employs over 556,000 Californians, the majority of whom are over 23 years old and nearly 70 percent are people of color.

There is evidence that wages are generally low and working conditions are often poor in the fast food industry. The COVID-19 pandemic exacerbated these problems. As explained by the Senate Labor, Public Employment and Retirement Committee in its analysis of this bill:

> A University of California Los Angeles Labor Center report, "The Fast-Food Industry and COVID-19 in Los Angeles," reveals alarming data about fast-food workers in particular. According to the report, "A growing body of research reveals workplaces, and food service in particular, to be a common vector of COVID-19 transmission. Research published early in 2021 found that cooks had the highest increase in mortality—up by 39% from 2019—of any occupation during the pandemic. Occupations with frequent interactions with the public and close proximity among workers increase the likelihood of transmission. This is the case for food preparation workers and servers, dominated by Latinx and Black workers, who are particularly vulnerable to workplace exposure. Further, an analysis of fast-food worker complaints found that those worksites had multiple elements of noncompliance such as lack of adequate PPE, physical distancing, screening, and exposure notification."

> Additionally, the report finds that "fast-food workers were more than twice as likely as other workers to fall below the federal poverty line, and more than one-and-one-half times more likely to be uninsured. Low wages caused two-thirds to enroll in a safety net program—at a public cost of $1.2 billion. Nearly seven in ten fast-food workers were women vulnerable to sexual harassment in the industry. Further, we reviewed studies that showed that even before COVID-19, fast-food workers in Los Angeles County faced disproportionately high rates of injury, workplace violence, harassment, retaliation, and wage theft."

There is also evidence that labor violations are rampant in the fast food industry. In a survey of over a thousand fast food employees across the nation in 2014, 90 percent of those workers reported being forced to work off the clock, denied breaks, or refused overtime pay.[1] A 2015 survey of well over a thousand fast food workers nationwide revealed that 87 percent had experienced at least one workplace injury over the course of the last year.[2] And a 2016 survey of over a thousand female fast food workers showed that 60 percent had endured sexual harassment on the job.[3]

The opponents of this measure disagree with these findings. Though there may be some labor violations in their industry, they say, evidence suggests that it is not especially out of line in comparison with other industries. As argued by the California Restaurant Association:

> The counter service restaurant industry does not flout existing law and does not have disproportional violations compared to other industries that necessitate the creation of a sectoral council.
> Workplace violations in the restaurant industry do not happen at a higher rate than other sectors. California's Department of Industrial Relations (DIR) 2020 annual report cites investigating 474 cases, out of which only 46 had merit. This data is across all industries and consistent with other years. Limited Service Restaurants (NAICS 722513) have a total of 36 violations from August 2020 through February 2022. During the year 2021, there were only 16 citations given out for Limited Service Restaurants, which given the

[1] Tiffany Hsu, *Nearly 90% of Fast-Food Workers Allege Wage Theft, Survey Finds* (Apr. 1, 2014) Los Angeles Times https://www.latimes.com/business/la-fi-mo-wage-theft-survey-fast-food-20140331-story.html (as of Jun. 24, 2022).
[2] *Memorandum Regarding Key Findings from a Survey on Fast Food Worker Safety* (Mar. 16, 2015) Hart Research Associates https://www.coshnetwork.org/sites/default/files/FastFood_Workplace_Safety_Poll_Memo.pdf (as of Jun. 24, 2022).
[3] *Memorandum Regarding Key Findings from a Survey of Women Fast Food Workers* (Oct. 5, 2016) Hart Research Associates https://hartresearch.com/wp-content/uploads/2016/10/Fast-Food-Worker-Survey-Memo-10-5-16.pdf (as of Jun. 24, 2022).

> thousands of restaurants in this NAICS code is below 1% of the industry. However, there are other industries (some of which are unionized) that have double or triple the number of citations during this time period and sector councils are not being proposed for those industries. [Internal footnotes omitted.]

2. The components of this bill

This bill can be broken down into five components. Under the banner of the Fast Food Accountability and Standards (FAST) Recovery Act, these components are intended to work together to improve wages and conditions for fast food workers. Each of the components are described in turn, below. Included with each discussion are some of the primary concerns raised by opponents.

a. Establishment of a Fast Food Sector Council

The bill's first major proposal is the establishment of a state Fast Food Sector Council.

The Council would be composed of 13 members. Five of the members would come from the relevant state agencies. The Secretary of the Labor and Workforce Development Agency would serve as the permanent chairperson. One member would be a representative from the Division of Labor Standards Enforcement, which oversees administrative enforcement of wage and hour laws. One member would be a representative who would come from the Division of Occupational Health and Safety Administration (Cal/OSHA), which, as the name suggests, oversees administrative enforcement of workplace health and safety laws. Two members would be representatives from the Department of Industrial Relations, which oversees the development and enforcement of California labor policy more generally. The remaining eight members of the Council would come, two each, from fast food restaurant franchisors; fast food restaurant franchisees; fast food restaurant employees; and advocates for fast food restaurant employees.

The Council's job would be to establish industry-wide minimum standards on wages, working hours, and other working conditions adequate to ensure and maintain the health, safety, and welfare of fast food workers. These standards would have, within the context of the fast food industry, a preemptive effect over all other regulations, including those developed by other state agencies. The lone exception would be workplace safety standards, where any standards developed by the Council would be treated as proposals for possible adoption by Cal/OSHA. The Council would also be tasked with ensuring interagency coordination and prompt agency responses regarding issues affecting the health, safety, and employment of fast food workers.

The Council could dramatically improve the lives of the thousands of Californians working in the fast food industry. The Council would presumably mandate higher

wages across the fast food sector. It would likely lead to the adoption of heightened health and safety regulations to address dangers that are unique or especially prevalent in the fast food context. For example, the Council would probably propose rules around security during late night operations and at drive-through windows to better protect workers against the risks of theft or assault. The Council might also develop standards around what benefits must be made available to fast food workers. Because they would be developed by and for the fast food industry, these standards could all be customized to respond to the unique aspects of the sector and could be updated as specific issues arise. Perhaps most critically, by adopting these standards across the industry, the Council would allow the various fast food restaurants to make these changes together, thus greatly mitigating competitive pressures that might prevent any individual restaurant or chain from undertaking these reforms on their own.

Opponents contend that the creation of the Council raises a legal question regarding delegation of legislative authority. The Legislature does not enact laws covering all of the minutia of managing a state and an economy the size of California. As a result, it is necessary for the Legislature to be able to delegate the authority to formulate regulations and procedures to operationalize the details of more general statutory mandates. There is a limit on how far the Legislature can go with this however, since only the Legislature has the power to make the laws in our system of government. After all, the hallmark of democratic governance is that the laws emanate from elected leaders.

With all of this in mind, the Supreme Court of California has formulated the following doctrine on permissible delegation of legislative authority:

> The essentials of the legislative function are the determination and formulation of the legislative policy. Generally speaking, attainment of the ends, including how and by what means they are to be achieved, may constitutionally be left in the hands of others. The Legislature may, after declaring a policy and fixing a primary standard, confer upon executive or administrative officers the power to fill up the details by prescribing administrative rules and regulations to promote the purposes of the legislation and to carry it into effect. Similarly, the cases establish that while the legislative body cannot delegate its power to make a law, it can make a law to delegate a power to determine some fact or state of things upon which the law makes or intends to make its own action depend. We have said that the purpose of the doctrine that legislative power cannot be delegated is to assure that truly fundamental issues will be resolved by the Legislature and that a grant of authority is accompanied by safeguards adequate to prevent its abuse. This doctrine rests upon the premise that the legislative body must itself effectively resolve the truly fundamental issues. It cannot escape

> responsibility by explicitly delegating that function to others or by failing to establish an effective mechanism to assure the proper implementation of its policy decisions. (*Kugler v. Yocum* (1968) 69 Cal.2d 371, 375-7.)

Opponents argue that the structure of the bill hands over sweeping power to set labor policy in the fast food industry to the new Council. On the other hand, the bill does include significant safeguards against abuse of that power. All Council standards would be required to proceed through the Administrative Procedures Act, meaning, among other things, that the Office of Administrative Law would review the standards to ensure that they do not go beyond the statutory authority granted. In addition, because of amendments taken in the Senate Labor, Public Employment and Retirement Committee, Council standards would have to be proposed by January 15 and would not go into effect until October 15 of the same year, thus giving the Legislature an opportunity to pass alternative, superseding legislation in the interim. Although these safeguards would seem sufficient to hold the Council to its statutory mandate, opponents may still bring a legal challenge if the bill is enacted and argue that it is an improper delegation of legislative authority.

b. Joint and several liability between franchisor and franchisee for labor violations

The second major component of this bill is a proposal to make franchisors jointly and severally liable for labor violations committed by their franchisees. In other words, if a franchisee engages in wage theft of their employee then the franchisor is also on the hook for the wage theft. The idea is that the franchisor bears the burden of the wage theft instead of the worker and their family.

Liability refers to the legal responsibility to compensate someone for harm that happens to them, to pay a penalty for breaking the law, or both. In most scenarios, the law assigns liability to the person or entity who caused the harm or who violated the law. Joint and several liability refers to scenarios in which the law assigns full responsibility to compensate someone or to pay for a violation to more than one person or entity.

In the context of businesses operating under the franchise model, the current default rule in California is that only the franchisee is responsible for any labor violations that take place at franchise locations. However, where the franchisor exerts sufficient control over the working conditions at a franchise, the California courts have held that the franchisor can be held joint and severally liable for labor violations that occur at that franchise. (*Patterson v. Domino's Pizza* (2014) 60 Cal. 4th 474.)

Opponents argue that this dynamic encourages franchisors to stay out of the franchisee's way, at least with respect to labor practices. They contend that this space provides franchisees with a feeling of entrepreneurial freedom. In this sense, opponents

note that franchisees are not merely managers carrying out orders from the franchisor, but independent proprietors.

By contrast, the proponents emphasize that the current rule about joint and several liability for labor violations creates a financial incentive for franchisors to avoid exercising control over the labor practices taking place at their franchises. Proponents note that the less the franchisor can claim to know or do anything about working conditions at their franchises, the safer the franchisor is from sharing liability. Indeed, when it comes to the possibility that there are labor violations taking place among their franchisees, the current legal dynamic rewards franchisors for burying their head in the sand.

This bill proposes, instead, that franchisors would always be jointly and severally liable for their franchisees' labor law violations, including any new standards established by the proposed new Council discussed above, regardless of the degree of control that the franchisor exercises over day-to-day working conditions at their franchise locations.

Almost certainly, this move would increase compliance with labor laws in the fast food sector. The imposition of joint and several liability would strongly incentivize franchisors to monitor their franchisees closely for labor violations because the franchisors would now have skin in that game. Proponents note that monitoring pay and working conditions at the franchises should not be especially difficult for franchisors to manage; after all, in many cases they already monitor and audit an extraordinary number of details about how their franchises operate, from menu options down to the type of lightbulbs used.[4] And, if that increased vigilance fails to prevent the labor violations from occurring in the first place, making the franchisor jointly and severally liable for these violations makes it more likely that the workers actually receive their unpaid wages or penalties, since collection would no longer depend on the financial responsibility and solvency of the franchisee alone.

To the opponents of this bill, however, imposition of joint and several liability for labor law violations strikes at a core aspect of the franchise business model. It would, the opponents assert, completely undermine the entrepreneurial independence that characterizes the franchise business model for both franchisees and franchisors. If this component of the bill is enacted, the opponents say, one of two things would happen: either franchisors would swoop in and begin to micromanage their franchisees' labor practices or the franchisors would abandon the franchise model altogether and simply own and manage each of their outlets themselves.

Whether these things would indeed come to pass is hard to say. Staff notes that the bill does not require or even incentivize franchisors to take responsibility for *every* aspect of

[4] Hsu and Abrams. *Subway Got Too Big. Franchisees Paid a Price.* (Jun. 28, 2019) New York Times https://www.nytimes.com/2019/06/28/business/subway-franchisees.html (as of May 31, 2022).

their franchisees' business operations. The bill only makes franchisors legally responsible for ensuring that the franchisees are obeying labor laws – something franchisees are *already* obligated to do.

c. Cause of action by franchisee against franchisor for franchise terms that render compliance with labor laws impossible

The third major component of the bill is the creation of a new civil cause of action that a franchisee could bring against a franchisor for imposition of franchise terms that either create a substantial barrier or make it impossible for the franchisee to comply with labor laws, including any of the standards created by the new Council described above. Prevailing franchisees could get monetary or injunctive relief sufficient to enable the franchisees to return to compliance with the law.

According to the proponents of the bill, this component of the bill is intended to get at franchisor practices that effectively push franchisees to ignore the law. For example, the proponents report that at least one fast food franchisor requires its franchisees to use employee monitoring software that will not track meal and rest breaks, thus complicating the franchisees' ability to comply with state law that mandates such breaks.

Up to this point, this aspect of the bill might be seen as essentially reiterating, in the fast food franchise context, the general contract law principle that contractual terms which violate public policy are void and unenforceable. (Civ. Code § 1667.) Thus, a term within a franchise agreement that genuinely forced a franchisee to disobey the laws presumably could not be enforced, since it would violate the public policy expressed through the law. The challenge in such cases is not the legal standard, but convincing a court that the franchise terms truly left the franchisee with no reasonable alternative other than to break labor laws.

Perhaps because of that challenge, the bill pairs this new cause of action with a related rebuttable presumption: any change in the terms of the franchise agreement that increases the costs of the franchise to the franchisee is *presumed* to force the franchisee out of compliance with labor laws. Now, rather than the franchisee having to convince the court that it had no reasonable alternative for complying with the franchise agreement other than to violate the law, the onus would be on the franchisor to convince the court that the franchisee did have other options. This switch would likely cause franchisors to be far more careful when altering the terms of their franchise agreements.

In reaction to this component of this bill, the opponents raise concerns that franchisees could easily allege that franchise fees or other franchise agreement terms caused workplace violations, when in fact the franchisee's own performance shortcomings or financial management are to blame. While such a scenario seems plausible, it also seems

to be addressed within the statutory framework: the franchisor could rebut the presumption by showing that the real source of the problem is the franchisee, not the terms of the franchisee agreement. Still, the opponents argue that the existence of the rebuttable presumption and cause of action would "chill" the franchisor from ever making adjustments to the franchise agreement terms, even when those chance might be to the franchisee's benefit.

d. Joint and several liability for <u>all</u> forms of liability incurred on account of the franchise agreement terms

In addition to imposing joint and several liability on franchisors for all of their franchisees' *labor violations*, the fourth component of this bill proposes to extend joint and several liability on franchisors for *other forms of liability* as well, but in a more limited way. Specifically, the bill states that as to all other liability that a franchisee might incur under local, state or federal law, the franchisor would be jointly and severally liable for that part of the liability to which the terms of the franchise agreement are a substantial contributor.

The proponents of this bill intend this provision to strike at what they contend are abusive practices in which franchisors push their franchisees to cut corners in search of ever-improving financial margins. Certainly the potential of exposure to liability might cause the franchisor to think more carefully about the downstream consequences of their franchise terms.

The basic concept underlying this provision is already part of the law, at least as to torts. "Under general negligence principles a person ordinarily is obligated to exercise due care in his or her own actions so as not to create an unreasonable risk of injury to others. It is well established that one's general duty to exercise due care includes the duty not to place another person in a situation in which the other person is exposed to an unreasonable risk of harm through the reasonably foreseeable conduct of a third person." (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112. Internal quotations and citations omitted.) Thus, if the terms of a franchise agreement say the coffee has to be scalding hot, for example, the franchisor would almost certainly be found liable when customers get burnt by it, since the harm is a foreseeable consequence of the franchise term. If that is so, then it may be worth asking exactly what additional work this provision does.

e. Rebuttable presumption of retaliation with 90 days of protected activity

As a practical matter, no workplace right of any kind is of much use if everyone knows workers can be fired or otherwise punished for exercising it. Therefore, strong protections against retaliation have been essential to labor law. (And, unless they are combined with swift and readily available injunctive enforcement, even strong legal protections against retaliation are not worth much as a practical public policy matter,

because a legal claim for retaliation does not put food on the table for the worker's family the way that keeping a job does.)

Retaliation for the exercise of workplace rights is generally unlawful already. (Lab. Code §§ 98.6, 1102.5, and 6310; Gov. Code § 12940(h). But whether existing California law is strong enough to offer workers genuine confidence in exercising their workplace rights is debatable at best. Surveys of workers often indicate that most fear retaliation for exercising workplace rights and many have experienced it.[5]

Accordingly, this bill proposes to modestly strengthen workplace protections against retaliation in the fast food industry by establishing a 90-day window after a worker exercises workplace rights in which any adverse action taken by the employer against the worker will be presumed to be retaliatory, putting the onus on the employer to show otherwise. By putting the onus on the employer to show a valid reason for adverse actions for a period, addition of a rebuttable presumption gives workers a more meaningful opportunity to exercise workplace rights.

Although similar rebuttable presumptions exist in a variety of employment law contexts (*see, e.g.,* Lab. Code §§ 2105 (90 days); 246.5 (30 days); and 1019 (90 days), employers often view them as problematic. Employers frequently assert that rebuttable presumptions of retaliation essentially grant workers impunity from having to follow workplace rules.

But it is precisely for that reason that the presumption is rebuttable. An employer acting in good faith and with consistent enforcement need not hesitate to take disciplinary action against employees for flaunting workplace rules, performing poorly, or engaging in inappropriate behavior, even when operating under a rebuttable presumption of retaliation, because the rebuttable presumption can be refuted in such cases. The rebuttable presumption is not intended to protect workers who have done something to warrant adverse employment action; the purpose behind the rebuttable presumption is to make it more difficult to *invent* something as a pretext to fire a worker who has just exercised a workplace right, thereby getting rid of the worker, the problem, and any associated potential for liability. Put another way, temporarily shifting the burden of proof to the employer does not prevent firing workers who misbehave; it just requires that the employer demonstrate that the misbehavior is the genuine reason for the firing.

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[5] *See, e.g. Few Options, Many Risks: Low-Wage Asian and Latinx Workers in the COVID-19 Pandemic* (Apr. 2021) ., Advancing Justice - Asian Law Caucus and University of California, Berkeley Labor and Occupational Health Program https://www.advancingjustice-alc.org/news_and_media/covid-workers-report (as of Jun. 24, 2022).

3. Proponents arguments in support of the bill

In summary, proponents of the bill assert that:

- industry-specific standards will lift wages and improve conditions for workers across the fast food sector;
- joint and several liability will obligate franchisors to use their resources and power to prevent labor violations;
- labor protections will not be exercised unless there are strong protections against retaliation; and
- onerous franchise terms make it difficult for fast food franchisees to do right by their workers.

According to the author:

> California's fast food workers face overlapping crises of wage theft, sexual harassment, unsafe workplace conditions, and some of the lowest wages of any occupation group in the state. The COVID-19 pandemic has further exposed the unacceptable working conditions that have gone unchecked for years in the fast food industry. While multi-billion dollar fast-food corporations are collecting record profits during the pandemic, their workers are paid dismally low wages, put their health on the line to serve customers, are denied paid sick leave, and have been forced to compromise their safety at work. To address the failures of this industry to create secure, good quality jobs, fast food workers need the authority in state law to shape their own workplace standards and hold their employers accountable without facing retaliation. AB 257 will give fast food workers at large fast-food establishments the ability to shape industry-wide workplace standards through the establishment of the Fast Food Sector Council, and will empower workers to hold companies accountable for providing safe working conditions.

As sponsors of the bill, Service Employees International Union – California and Fight for $15 jointly write:

> California is in urgent need for legislation like AB 257. Low wages and lack of protections in fast food don't just affect the state's half million fast food workers - they impact California taxpayers as well. According to a joint UC Berkeley and UCLA study, two-thirds of California's half million fast-food workers rely on safety net programs despite working for highly profitable global corporations like McDonald's, costing taxpayers $4 billion annually. […] We have the opportunity to emerge from the current crises facing the

> state by building a stronger and more inclusive economy than we had before. We must look to innovative solutions like AB 257 to transform the low-wage jobs in the fast food industry into safe, well-paying, and secure jobs.

4. Opponents arguments against the bill

In summary, the opponents of this bill contend that:

- unique standards for the fast food industry are not necessary because there is insufficient evidence to prove that labor violations are more prevalent in this industry than in others;
- the bill's imposition of joint and several liability on franchisors will constrain the entrepreneurial independence of franchisees and result in a corporatization or closure of franchises in California;
- to the degree there are labor violations in the fast food sector, improved government agency enforcement is the better solution.

For example, in opposition to the bill, a coalition of 47 business and employer trade associations led by the California Restaurant Association writes:

> This legislation, and this sector council, applies to a large and incredibly diverse industry. The language in the bill details inclusion of all counter service restaurants with 30 or more locations nationwide. Tens of thousands of restaurants, including coffee shops, ice cream parlors, salad bars, taquerias, delis, pizzerias, bakeries, burger houses and other fast food and quick service restaurants, which employ hundreds of thousands of workers and serve millions of California customers daily, will be impacted. To be clear, many of the aforementioned restaurants are franchises. The franchise business model allows individuals to be in business for themselves but not by themselves through leveraging a known brand. Women, minorities, and veterans are increasingly building their own small businesses through franchising and are often single-unit owners. This is especially the case in California's restaurant industry, where franchisees own and operate establishments in the neighborhoods where they live. Franchisees are small business owners, local job creators and valued members of their communities. They maintain all control in determining the day-to-day operations of the establishment, including hiring, wages, and employment practices in accordance with state law.
>
> And yet, AB 257 singles out the restaurant industry for the creation of a sectoral council that will raise the cost to operate a counter service restaurant in California. The state maintains the strongest labor laws and highest minimum wage in the country, all of which

> the restaurant industry must follow. The counter service restaurant industry does not flout existing law and does not have disproportional violations compared to other industries that necessitate the creation of a sectoral council. […] Simply put, AB 257 is a response to a false narrative and is an indictment on California's robust and appropriately aggressive enforcement entities. Funding these enforcement entities adequately and maintaining the legislature's existing-and full- authority to legislate in this area of law is the solution

SUPPORT

Fight for $15 (sponsor)
Service Employees International Union - California (sponsor)
American Civil Liberties Union - California Action
Alameda Labor Council
Alliance of Californians for Community Empowerment Action
American Federation of State, County and Municipal Employees
Amigos de Guadalupe Center for Justice and Empowerment
Asian Americans Advancing Justice - Asian Law Caucus
Asian Law Alliance
Asian Pacific American Labor Alliance Alameda
Asian Pacific American Labor Alliance Sacramento
Asian Pacific American Labor Alliance San Francisco Chapter
Asian Pacific Environmental Network
Bend The Arc: Jewish Action, Bay Area Chapter
Bluegreen Alliance
California Alliance for Retired Americans
California Coalition for Worker Power
California Conference Board of the Amalgamated Transit Union
California Conference of Machinists
California Employment Lawyers Association
California Environmental Voters
California Faculty Association
California Immigrant Policy Center
California Labor Federation, AFL-CIO
California Rural Legal Assistance Foundation
California School Employees Association
California Teamsters Public Affairs Council
California Teachers Association
Center for American Progress Action Fund
Center for Integrated Facility Engineering, Stanford University
Center on Policy Initiatives
Central Coast Alliance United for a Sustainable Economy

Centro Legal de la Raza
Chinese Progressive Association San Francisco
City of Los Angeles
CLEAN Carwash LA
Clergy and Laity United for Economic Justice
Coalition for Humane Immigrant Rights
Consumer Attorneys of California
County of San Diego
County of Santa Clara
Courage California
Democratic Socialists of America, Long Beach Chapter
Democratic Socialists of America, Sacramento Chapter
Democratic Socialists of America, San Diego Chapter
East Bay Alliance for a Sustainable Economy
Elk Grove Education Association, CTA
Engineers and Scientists of California, IFPTE Local 20
Equal Rights Advocates
Friends Committee on Legislation of California
Food Empowerment Project
Gamaliel of California
Garment Worker Center
Gig Workers Rising
Housing Now! CA
Human Impact Partners
IBEW Local 1245
ILWU Northern California District Council
Indivisible CA: StateStrong
Jobs with Justice
Jobs with Justice, San Francisco
Koreatown Immigrant Workers Alliance
La Raza Centro Legal
Legal Aid at Work
Legal Aid of Marin
Lift Up Contra Costa Action
Los Angeles Alliance for a New Economy
Los Angeles County Democratic Party
Los Angeles County Federation of Labor
MAIZ San Jose
Napa/Solano Central Labor Council
National Council of Jewish Women, California
National Domestic Workers Alliance
National Employment Law Project
Natural Resources Defense Council
North Bay Jobs with Justice

North Bay Labor Council
The Oakland Institute
One Fair Wage
Organize Sacramento
Partnership for Working Families
Pilipino Association of Workers & Immigrants
Power Switch Action
Restaurant Opportunities Centers of California, Bay Area and Los Angeles Chapters
Richmond Progressive Alliance
Sacramento Central Labor Council
San Francisco Board of Supervisors
San Francisco Rising
Santa Clara County Wage Theft Coalition
SEIU-United Service Workers West
SEIU Local 721
SEIU Local 2015
Silicon Valley Democratic Socialists of America
Silicon Valley Rising
Southern California Coalition for Occupational Safety & Health
Stanford Solidarity Network
Sunrise Bay Area
Sunrise Sacramento
Teachers Empowering Youth Activists
The RowLA: The Church Without Walls
Together We Will - San Jose
UCLA Labor Center
Union de Vecinos
UNITE-HERE, AFL-CIO
United Farm Workers
United for Respect
United Food and Commercial Workers, Local 770
United Food and Commercial Workers, Western States Council
Utility Workers Union of America, AFL-CIO
Voices for Progress
Warehouse Worker Resource Center
Western Center on Law & Poverty
Women's March National
Working Partnerships USA
Workplace Fairness
Worksafe
Yolo Democratic Socialists of America

OPPOSITION

7 Eleven
American Petroleum and Convenience Store Association
Anago Cleaning Systems
Beverly Hills Chamber of Commerce
Brea Chamber
CalAsian Chamber of Commerce
California African American Chamber of Commerce
California Attractions and Parks Association
California Chamber of Commerce
California Hispanic Chamber of Commerce
California Hotel & Lodging Association
California Restaurant Association
California Retail Food Safety Coalition
California Retailers Association
Carlsbad Chamber of Commerce
Chino Valley Chamber of Commerce
Church's Chicken/Texas Chicken
Civil Justice Association of California
Commerce San Jose
Corona Chamber of Commerce
Family Business Association of California
FISH Window Cleaning
Fresno Chamber of Commerce
Garden Grove Chamber of Commerce
Gilroy Chamber of Commerce
Greater Bakersfield Chamber of Commerce
Greater Conejo Valley Chamber of Commerce
Greater High Desert Chamber of Commerce
Greater Riverside Chamber of Commerce
HOA Brands
Hollywood Chamber of Commerce
International Franchise Association
InExpress
Laguna Nigel Chamber of Commerce
Lake Elsinore Chamber of Commerce
Lodging Industry Association
Long Beach Area Chamber of Commerce
Menifee Valley Chamber of Commerce
Murrieta/Wildomar Chamber of Commerce
National Federation of Independent Business
North Orange County Chamber
Oceanside Chamber of Commerce

Orange County Business Council
Oxnard Chamber of Commerce
Pleasanton Chamber of Commerce
Rancho Cordova Chamber of Commerce
Redondo Beach Chamber of Commerce
Sacramento Metropolitan Chamber of Commerce
San Jose Chamber of Commerce
San Gabriel Valley Economic Partnership
San Pedro Chamber of Commerce
Santa Maria Valley Chamber
SAVE LOCAL JOBS Stop AB 257
Simi Valley Chamber
South Bay Association of Chambers of Commerce
Southwest California Legislative Council
Temecula Valley Chamber of Commerce
Torrance Area Chamber of Commerce
Tulare Chamber of Commerce
United States Chamber of Commerce
46-individuals

RELATED LEGISLATION

Pending Legislation: AB 676 (Holden, 2021) makes a series of revisions to the laws governing the business relationship between franchisors and franchisees to better protect franchisees from abusive or fraudulent practices. AB 676 is currently pending consideration before the Senate Appropriations Committee.

Prior Legislation:

SB 62 (Durazo, Ch. 329, Stats. 2021) required a garment manufacturer who contracts with another person for the performance of garment manufacturing to jointly and individually share all civil legal responsibility and civil liability for all workers in that other person's employ. Also prohibited the practice of piece-rate compensation for garment manufacturing, except in the case of worksites covered by a valid collective bargaining agreement.

AB 1701 (Thurmond, Ch. 804, Stats. 2017) held general contractors and subcontractors in the construction industry jointly liable for unpaid wages, including fringe benefits, and authorized civil actions to enforce the joint liability.

AB 1897 (R. Hernández, Ch. 728, Stats. 2014) established joint liability between employers and labor contractors for unpaid wages and failure to secure worker's compensation insurance.

PRIOR VOTES:

Senate Labor, Public Employment and Retirement Committee (Ayes 3, Noes 2)
Assembly Floor (Ayes 41, Noes 21)
Assembly Floor (Ayes 38, Noes 27)
Assembly Appropriations Committee (Ayes 12, Noes 4)
Assembly Judiciary Committee (Ayes 7, Noes 3)
Assembly Labor and Employment Committee (Ayes 5, Noes 2)

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