# How The NLRA May Slow Down The FAST Act

By **Riley Lagesen, Jonathan Sack and Anthony Guzman** (October 14, 2022)

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With substantial union backing, California's controversial Fast Food Accountability and Standards Recovery Act, A.B. 257 or the FAST Act, moved through California's Legislature with relative ease.

As the president of the Service Employees International Union, Mary Kay Henry, told Bloomberg News, the bill effectively offers "another form of collective bargaining" for fast food workers.

The day after being signed into law by California Gov. Gavin Newsom on Labor Day, opponents promptly launched a voter referendum to potentially overturn the FAST Act by putting it on the ballot for California voters, assuming a requisite number of voter signatures — over 600,000 — are collected by early December this year.

Given the potential impact of this legislation on the restaurant industry in California and beyond, in addition to other industries, many are asking what other legal challenges are available to stop the FAST Act if the referendum fails.

Interestingly, one of these challenges is found in the very law that the proponents of the FAST Act profess to mimic. By requiring another form of collective bargaining, the FAST Act may face challenges arguing that it interferes with or is preempted by federal law under the National Labor Relations Act.

The FAST Act creates a new Fast Food Council whose structure and activities resemble collective bargaining under the NLRA. The council consists of 10 state-appointed representatives of various stakeholder groups:

- Four representatives from fast food franchisors and franchisees;
- Two fast food employees;
- Two fast food employee advocates, who are widely expected to be union leaders; and
- Two state government officials.

Similar to collective bargaining, the labor and management representatives on the council propose, review and determine the minimum wages, maximum hours and other working conditions for the restaurants that meet the statute's coverage requirements.

Like the NLRA, the FAST Act also implements a strict enforcement regime. Employees are protected when complaining about certain terms and conditions of employment and in refusing to work in what an employee perceives as unsafe working conditions.

These and other instances of the FAST Act's NLRA overlap raise questions whether the new state law is federally preempted.

The U.S. Supreme Court has developed two doctrines under which the NLRA may preempt state or local laws. First, under Garmon preemption, named after the court's 1959 decision in San Diego Building Trades Council v. Garmon,[1] state and local governments may not regulate activities that the NLRA either protects or prohibits. State laws that overlap with NLRA-governed activities may be susceptible to Garmon preemption.

NRLA-governed activities include most private sector employees' rights to unionize, to bargain collectively through representatives that employees — not the government — select, to seek to improve terms and conditions of employment — with or without union representation — and to refrain from any such activities. State legislative and judicial actions that interfere with the National Labor Relations Board's exclusive responsibility to administer and interpret the NLRA may similarly fail under Garmon.

Second, under Machinists preemption, named after the court's 1976 decision in International Association of Machinists and Aerospace Workers v. Wisconsin Employment Relations Commission,[2] state and local governments may not tip the scales in favor of management or labor in areas Congress left subject to the free play of economic forces under the NLRA.

The doctrine prevents states from intruding upon the NLRA's process for employers and unions to determine employees' wages, hours, and other working conditions or with the NLRA's scheme allowing for strikes and lockouts.

For example, the Supreme Court previously invalidated under Machinists a California statute that prohibited certain employers from using state funds to promote or deter union organizing and a city of Los Angeles decision to condition a taxi company's franchise renewal on the company's resolution of an ongoing labor dispute among striking cab drivers. In the latter case, the court reasoned that the NLRA requires an employer and a union to bargain in good faith but does not require them to reach an agreement.

While NLRA preemption is broad, states remain generally able to enact minimum employment standards that apply to unionized and nonunionized employers and employees alike. The FAST Act's defenders will likely argue that, for preemption purposes, the wage rates, hours of work and other standards established under the FAST Act are no different from the minimum wage, overtime, meal and rest break, and other employment laws that state legislatures regularly enact.

This defense may be undercut by the inclusion of restaurant industry representatives on the Fast Food Council, which creates a key distinction from the traditional legislative process wherein publicly elected representatives propose, debate and pass laws. In contrast, the FAST Act's employment standards appear likely to arise as a result of bargaining-like activity between employer and employee representatives — similar to how the parties to collective bargaining determine terms and conditions of employment under the NLRA.

This and other FAST Act components may give rise to arguments that the new law is preempted, under Garmon or Machinists. Potential theories that the FAST Act unlawfully interferes with the NLRA might include the following.

**Interference With Selection of Bargaining Representatives**

One of the NLRA's stated purposes is "protecting the exercise by workers of full freedom of association, self- organization, and designation of representatives of their own choosing." Employees under the NLRA choose their representatives through a highly regulated process

intended to safeguard employees' freedom of choice.

Yet the FAST Act's employee and employee advocate representatives are government-appointed, and serve at the will of the appointing authority.

**Bargaining Without Majority Support**

The NLRA makes it unlawful for an employer and a union to engage in collective bargaining where the union has not established majority support among the employees at issue. The FAST Act arguably requires such bargaining between the council's management, employee and employee advocate representatives. Yet the FAST Act requires only 10,000 covered restaurant employees to sign a petition approving the council's creation and empowering these representatives — not a majority of all covered workers throughout the state.

**Interference With the Free Play of Economic Forces in Collective Bargaining**

The NLRA requires employers and unions to bargain in good faith but does not require either party to agree to the other's proposals. Under the FAST Act, the council "shall promulgate minimum fast food restaurant employment standards" annually by Jan. 15.

**Interference With the Free Play of Economic Forces in Strikes**

Unions' and employees' ultimate leverage against employers is the NLRA-protected and regulated right to strike. Exercise of this right carries risks, as an employer may exercise its rights to lock out or replace striking workers temporarily or permanently.

The FAST Act arguably interferes with this NLRA framework by establishing a rebuttable presumption of unlawful discrimination or retaliation where an employer takes any adverse action against an employee who refuses to work in protest of certain workplace safety conditions.

**Interference With the Right to Seek to Improve Working Conditions**

Under Section 7 of the NLRA, employees have the right to "engage in … concerted activities for the purpose of … mutual aid and protection." Activity is generally protected when two or more employees join together to try to improve wages, benefits, hours of work or other working conditions and can take many forms, including appeals to management, a union, the press or a government agency, among others.

The FAST Act interferes with the NLRA by creating different standards by which employees who "made a complaint or disclosed information" to management, to the media, to the government, "or to a watchdog or community based organization" — like a labor union — are protected.

**Conclusion**

These and other FAST Act provisions arguably interfere with the federal labor relations scheme that Congress created under the NLRA. Preemption and other potential legal challenges may allow California restaurants to avoid the FAST Act's burdens while preserving employees', employers' and unions' rights under federal law.

How these issues may be addressed in the courts may play out in the forthcoming months, especially if the referendum efforts are not successful.

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[1] San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959).

[2] International Association of Machinists and Aerospace Workers v. Wisconsin Employment Relations Commission, 427 U.S. 132 (1976).