



Not So FAST...Blocking California's New Fast Food Industry Union Giveaway

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With the ink barely dry on the [new California FAST Act](#), and the law not set to take effect until January 1, 2023, there are already reports of challenges percolating in the news.

Veto Referendum

One of the first challenges getting attention – and the one that may ultimately be necessary – is an electoral veto referendum [to repeal the law](#). Such an initiative would require nearly 625,000 valid signatures to qualify for the ballot and then would have to go to the voters. Such a vote has happened just 48 times in California's history and only 28 laws have been repealed this way.

However, with millions of Happy Meals at risk of becoming less happy for working parents, it is possible that the FAST Act could be the next law to be struck down.

Court Challenge

Less discussed in the media, at least so far, is the possibility of legal challenge.

There are several possible routes this could take. One is a challenge to the

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authority delegated to the unelected Fast Food Council established under the FAST Act. Under federal law, there is a growing body of law that relates to the amount of authority that permissibly can be delegated to an executive agency. The U.S. Supreme Court dealt with a claim that an agency overstepped its authority in *West Virginia v. Environmental Protection Agency*, 597 U. S. ____ (2022).

However, a more powerful challenge to the FAST Act could be based on a less obvious approach — federal labor law preemption. There is a significant line of authority that Congress intended to occupy the field with respect to labor relations and the regulation of labor organizations and their dealings with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work. Indeed, Section 2(5) of the National Labor Relations Act (NLRA) defines the term "labor organization" as "any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."

The FAST Act provides that two of the 10 members of the Fast Food Council be are to be representatives of fast food restaurant employees and an additional two are to be representatives of advocates for fast food restaurant employees. Thus, it would appear that the FAST Act may have created a labor organization and given it responsibilities and powers that conflict with the statutory scheme of the NLRA.

There are other provisions of the FAST Act that similarly intrude upon the legal regime created by the NLRA. So a challenge to the FAST Act on that basis may provide a fertile ground to prevent the new law from burdening the California fast food industry.