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***The Importance of the Revival of California's Industrial Welfare Commission:  
The Promise and Future of Tripartite Sectoral Negotiated Rulemaking in California and Beyond***

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The old common-sense idea that representatives of business, labor, and the public should sit down together to negotiate over industry labor standards is new again. The California budget bill in July 2023 revived the Industrial Welfare Commission (IWC) from an almost 20-year quiescence due to funding cuts in the early 2000s. The IWC is a 110-year-old mechanism for setting standards for wages and working conditions through a collaborative process involving representatives of California workers, businesses, and the public.

In this Law & Policy Note, we explain how the IWC works, its importance as an exemplar of effective sectoral bargaining, the relationship between the IWC's renewed mandate and ongoing disputes over last year's Fast Food Accountability and Standards ("FAST") Recovery Act, and what the IWC's revival could mean for workers, business, and the public alike.

**PART 1****Background on the Industrial Welfare Commission**

As we explained in an earlier Law and Policy Note,<sup>1</sup> in 1913, the California Legislature created and delegated to the Industrial Welfare Commission (IWC) broad authority to regulate wages, hours and working conditions.<sup>2</sup> California voters amended the state Constitution to confirm the Legislature's authority to confer such power on the IWC.<sup>3</sup> The IWC was charged with regulating pay and working conditions for workers who experienced some of the lowest wages and most hazardous working

<sup>1</sup> See CLAW Law & Policy Note, *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* (June 2022), <https://www.law.berkeley.edu/research/claw/our-publications/>.

<sup>2</sup> *Martinez v. Combs*, 49 Cal.4th 35, 53-54 (Cal. 2010).

<sup>3</sup> 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).

conditions and were unable to get the benefits of collective negotiation through unions; at the time that was women and children.<sup>4</sup> Although the IWC's mandate was expanded to include all workers in the 1970s, the original focus remained: create a collaborative process for negotiating on a sectoral basis, sensitive to the different market conditions in different industries, particularly in low-wage sectors with the greatest risk of exploitation of vulnerable workers.<sup>5</sup>

The IWC issued industry- and occupation-wide Wage Orders fixing minimum wages, maximum hours of work, and conditions of labor for each sector or industry in California.<sup>6</sup> In addition to the IWC Wage Orders, minimum labor standards are enacted by the Legislature in statutes addressing the wages, hours, and working conditions of employees.<sup>7</sup> 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.”<sup>8</sup>

The IWC is composed of five members appointed by the governor, with the consent of the Senate, who serve four-year terms.<sup>9</sup> Two are “representatives of organized labor, who are members of recognized labor organizations.”<sup>10</sup> Two are “representatives of employers” and one is “representative of the general public.”<sup>11</sup> It is the duty of the IWC “to ascertain the wages paid to all employees in this state, to ascertain the hours and conditions of labor and employment in the various occupations, trades, and industries in which employees are employed in this state, and to investigate the health, safety, and welfare of those employees.”<sup>12</sup> If its investigation reveals “that in any occupation, trade, or industry, the wages paid to employees may be inadequate to supply the cost of proper living, or that the hours or conditions of labor may be prejudicial to the health, morals, or welfare of employees, the commission shall select a wage board to consider any of such matters and transmit to such wage board the information supporting its findings gathered in the investigation. Such investigation shall include at least one public hearing.”<sup>13</sup>

Wage Boards consist of “an equal number of representatives of employers and employees, and a nonvoting representative of the commission, designated by the commission, who shall act as chairperson.”<sup>14</sup> A Wage Board must consider the findings of the IWC and “any such other information it deems appropriate,” and then must report its recommendations as to what actions should be taken by the Commission.<sup>15</sup> Prior to amending any existing Wage Order or adopting a

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<sup>4</sup> See *Martinez*, 49 Cal.4th at 53-55.

<sup>5</sup> See *id.* at 55.

<sup>6</sup> 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).

<sup>7</sup> *Brinker Rest. Corp. v. Superior Court*, 53 Cal.4th 1004, 1027 (Cal. 2012).

<sup>8</sup> *Id.* (citations omitted); see also *Troester v. Starbucks Corp.*, 5 Cal.5th 829, 839 (Cal. 2018).

<sup>9</sup> Cal. Lab. Code §§ 70-71.

<sup>10</sup> Cal. Lab. Code § 70.1.

<sup>11</sup> *Id.*

<sup>12</sup> Cal. Lab. Code § 1173.

<sup>13</sup> Cal. Lab. Code § 1178.

<sup>14</sup> Cal. Lab. Code § 1178.5.

<sup>15</sup> *Id.*

new one, the IWC must issue proposed regulations, and must ensure transparency and public involvement in the standard-setting process by publishing the proposed regulations and holding a hearing on it.<sup>16</sup> The IWC's proposed regulations must include any recommendation of the Wage Board that received at least two-thirds support of the Board; after the public hearing on the proposed regulations, the IWC can proceed on its own motion to amend or promulgate a Wage Order, which must incorporate the proposed regulations that were based on recommendations supported by at least two-thirds of the Wage Board, "unless [the IWC] finds there is no substantial evidence to support such recommendations."<sup>17</sup>

This is the process by which California's industry- or occupation-specific Wage Orders were adopted.<sup>18</sup> But from 2004 until 2023, the Legislature decided not to appropriate funds for the IWC, so it and the Wage Board process ceased to operate.<sup>19</sup>

In the 2023 Budget, the Legislature appropriated \$3 million to revive the IWC, which was directed "to convene industry-specific wage boards and adopt orders specific to wages, hours, and working conditions in such industries."<sup>20</sup> The IWC must convene by January 1, 2024, and must "prioritize for consideration industries in which more than ten percent of workers are at or below the federal poverty level."<sup>21</sup> The Legislature gave the IWC only until October 31, 2024 to issue new Wage Orders<sup>22</sup> which, combined with the prioritization of the working poor, means that the IWC will have to focus on only a few industries with the greatest need. Politics may ultimately play a role in the IWC's selection of industries to be prioritized, and it is unclear exactly how the IWC will apply the federal poverty level, which considers household size in determining which income level is below the poverty line. However, industries in which workers are paid the lowest wages include food service, especially at the low end of price, care work, and agriculture. The 2023 statute specifically states that any new Wage Order cannot include any standards that are less protective than existing state law,<sup>23</sup> which means that a Wage Order could increase but not lower the minimum wage, or could raise but not weaken the standards requiring premium pay for overtime work, and so on.

The IWC and the Wage Board(s) must determine what causes poverty-level pay and what law can do to address it. For example, should the minimum wage be raised? Or is the problem that irregular work schedules make it impossible for workers to get enough hours a week? Or is it that workers

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<sup>16</sup> Cal. Lab. Code §§ 1178.5(c), 1181. The public hearing must be held in at least three cities in the state. An exception exists when the proposed regulations "would affect only an occupation, trade, or industry which is not statewide in scope, in which case a public hearing shall be held in the locality in which the occupation, trade, or industry prevails." Cal. Lab. Code § 1178.5(c).

<sup>17</sup> Cal. Lab. Code § 1182(a).

<sup>18</sup> There are a total of 18 Wage Orders in effect today: 16 are industry- or occupation-specific; one covers all employees who are not covered by an industry- or occupation-specific Wage Order; and one general minimum wage order amends all other Wage Orders to conform them to the current minimum wage that is set by statute. See *Martinez*, 49 Cal.4th at 57.

<sup>19</sup> See *Murphy v. Kenneth Cole Prods., Inc.*, 40 Cal.4th 1094, 1102 n.4 (2007) (noting that the Legislature defunded the IWC in 2004, but its Wage Orders remain in effect).

<sup>20</sup> A.B. 102, 2023-2024 Cal. Assemb., Reg. Sess. Sec. 215 (Cal. 2023) (enacted).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

are not receiving the minimum wage, either because they are classified as independent contractors or because employers are flouting the law by paying less than the minimum wage or not paying for all hours worked? Whatever the cause, what new regulations can address while still allowing law-abiding businesses enough profit to keep operating?

The possibility that the IWC will find that some businesses are reaping handsome profits in industries where workers are living in poverty and devise effective legal rules to transfer some of that profit to labor has led a number of business groups to attack the revival of the IWC. The attacks have come even though the members of the IWC have yet to be appointed and the industries it will investigate are not yet known. Spokespersons for businesses that operate on a franchise model (as in fast food and many chain restaurants) lambasted the revival of the IWC.<sup>24</sup> Apart from the usual business arguments that new wage orders will increase the costs of regulatory compliance, or increase labor costs in ways that cannot be passed on to consumers, business groups have specific concerns. Some are substantive, but one relates to a referendum that will be on the ballot in November 2024. We first examine that, and then we consider the substantive issues that may be animating business opposition.

**PART 2****The IWC and the Fast Food Council**

In 2022, California enacted Assembly Bill 257,<sup>25</sup> an innovative law patterned on the IWC but slightly different that creates a new way to regulate wages and working conditions in fast food, a low-wage industry that employs more than half a million workers statewide. Dubbed the Fast Food Accountability and Standards (“FAST”) Recovery Act, AB 257 would create a ten-member Fast Food Council, composed of representatives of workers, employers, and the public, empowered to set standards for fast food workers’ wages, health, and safety, and a few other enumerated working conditions. Like the IWC, the FAST Recovery Act required tripartite negotiation to set minimum labor standards. This feature especially alarmed franchisors such as McDonalds Corp. To the behemoth global corporations that operate on a franchise model, the legal obligation to sit down with representatives of franchisees, workers, worker organizations, and the public to address wages and working conditions is anathema because they disclaim any connection between their profits and the dismal working conditions in the restaurants that operate under their aegis.<sup>26</sup>

<sup>24</sup> Jeanne Kuang, *Is California Using an Old Labor Board to Get Around a Fast Food Industry Referendum?* CAL MATTERS (June 27, 2023).

<sup>25</sup> A.B. 257, 2021-2022 Cal. Assemb., Reg. Sess. (Cal. 2022).

<sup>26</sup> A quick Google search reveals McDonald’s Corporation reported steady or even dramatic increases in profits year-over-year; according to one source, gross profit for the corporation was almost \$14 billion in 2023, up 6.55% since 2022, and consistent or even dramatic increases since 2020. See [https://www.macrotrends.net/stocks/charts/MCD/mcdonalds/gross-profit#:~:text=McDonald's%20gross%20profit%20for%20the%20twelve%20months%20ending%20June%202030,a%2029%25%20increase%20from%202020](https://www.macrotrends.net/stocks/charts/MCD/mcdonalds/gross-profit#:~:text=McDonald's%20gross%20profit%20for%20the%20twelve%20months%20ending%20June%202030,a%2029%25%20increase%20from%202020;); <https://corporate.mcdonalds.com/corpmcd/our-stories/article/Q4-2022-results.html>.

The day after the FAST Recovery Act was signed, the franchise and restaurant industry trade groups launched a campaign to repeal it by referendum. Spending a reported \$4 million, the International Franchise Association and the National Restaurant Association quickly gathered the requisite number of signatures to put the referendum on the ballot, which automatically caused AB 257 to be put on hold until the 2024 general election. That gives the industry a two-year delay in implementation.<sup>27</sup> (Another industry-backed ballot referendum also qualified; it challenges—and therefore puts on hold—a law restricting or regulating the safety of oil and gas wells near schools, housing, parks, and other public places.) Critics of both referenda point out that the paid signature-gatherers made deceptive statements to prospective signers, in some instances saying that the referendum would do exactly the opposite of what it will do.<sup>28</sup>

Thwarted by the referendum, proponents of sectoral negotiation over wages and working conditions went back to the Legislature. Seeing the broader benefits of sectoral negotiation over wages and working conditions, the Legislature decided to invest state funds in reviving the IWC, in order to focus on all sectors, not just fast food, where poverty among the labor force is high. Reviving the IWC in the budget is not subject to referendum. Moreover, the IWC will do its work regardless of whether the referendum to repeal AB 257 passes. However, because the 2023 budget bill directed it to complete its work before the November 2024 election, if the referendum fails, AB 257 could go into effect and the Fast Food Council could then get to work. And even if the IWC issues a Wage Order affecting the fast food industry, if AB 257 survives the referendum the Fast Food Council could pick up where the IWC left off if there are other standards that should be raised. Moreover, the Fast Food Council created by AB 257 has workers as members, whereas a Wage Board has representatives of organizations representing workers, so the Fast Food Council has a role to play in promoting democratic participation beyond its role in raising standards.

**PART 3****Issues Facing the IWC**

The issues that made AB 257 a tough legislative fight (it passed by the narrowest of margins) may bedevil the work of the IWC and the wage board(s) it may create.

An overarching issue is why, in a state with a statewide minimum wage of \$15.50 per hour (40 cities have higher minima, ranging from about \$19 in West Hollywood and about \$18 in Mountain View and San Francisco, to just above \$16 in Oakland) are there industries where more than ten percent of the workforce lives in poverty? The federal poverty level is \$14,580 for a single person, \$24,860 for a family of three, up to \$50,460 for a family of eight. In theory, full-time work at the state minimum wage for 50 weeks a year would keep a single person, or even a single parent of two above the federal poverty level (with a pre-tax gross income of \$31,000). So it stands to reason that workers are not getting the minimum wage or are not working full time.

<sup>27</sup> Ben Christopher & Jeanne Kuang, *Ballot Blockade: California Industries Rely on Referenda to Stop Laws* CALMATTERS (June 2, 2023).

<sup>28</sup> Lynn La, *Labor hits back on business-led California ballot measures*, CAL MATTERS (Mar. 21, 2023).

Yet, even if they were, living on the minimum wage in most places in California is impossible, given the high cost of living. Just recently, the United Ways of California released its estimates of poverty in the state finding that 3.7 million (34%) households do not earn sufficient income to meet basic needs and 97% of those have at least one working adult.<sup>29</sup> Over half of households in California with children under the age of six live in poverty. At least a wage board and the IWC will have the opportunity to debate, in a public and participatory forum, what the minimum wage should be. But there are more issues, some of which have been politically fraught for the Legislature.

One is the issue of which employers should be responsible for ensuring that their operations comply with law. In fast food, but also in many other low-wage occupations ranging from manufacturing to agriculture, businesses (sometimes called client employers or lead employers) that use labor contract with other entities to provide the labor on terms that seek to prevent the client employer from having any legal responsibility for the contractor's labor practices. As Andrew Elmore and Kati Griffith documented, some contracts all but encourage the contractor to violate wage and other minimum standards laws in order to maximize the contractor's profit (or even to make a profit at all).<sup>30</sup> Although workers in franchise fast food found that efforts to get their franchisee-employer (often an undercapitalized small business) to raise wages failed because the franchisee could not improve conditions and stay in business, many courts have resisted the conclusion that the franchisor is a joint employer.<sup>31</sup> An early version of AB 257 would have made franchisors jointly liable with franchisees for certain minimum labor standards violations in the fast food industry, but the joint employer provision was removed in the legislative process. Another bill to create joint employer liability is pending in the legislature, but has not passed out of committee.<sup>32</sup>

A second major issue the IWC may consider concerns working hours. Are Californians living in poverty only because the minimum wage is too low or they are not paid the wages they are owed, or is part of the problem that they cannot get full time work? If they can't get enough paid hours in the week, is it because the employer does not offer them, or because the schedule changes erratically and the employee cannot schedule child care or already has another part-time job which also has an erratic schedule? Some municipalities have enacted fair scheduling ordinances to address this problem, requiring large employers in some industries to notify employees at the time of hire what the likely work schedule will be and to post schedules ten days in advance and not deviate from it, or else provide premium pay (usually 1.5 times the regular rate of pay) for deviations.<sup>33</sup>

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<sup>29</sup> *The Real Cost Measure in California 2023*, UNITED WAYS OF CALIFORNIA, <https://unitedwaysca.org/realcost/> (visited Aug. 25, 2023).

<sup>30</sup> Andrew Elmore & Kati L. Griffith, *Franchisor Power as Employment Control*, 109 CAL. L. REV. 1317, 1339-1355 (2021). See also Kati L. Griffith, *An Empirical Study of Fast-Food Franchising Contracts: Towards a new "Intermediary" Theory of Joint Employment*, 94 WASH. L. REV. 171 (2019);

<sup>31</sup> *Id.* at 1325-1332 (collecting cases). Relevant cases in California include *Salazar v. McDonald's Corp.*, 944 F.3d 1024 (9<sup>th</sup> Cir. 2019), and *Patterson v. Domino's Pizza, LLC*, 60 Cal.4<sup>th</sup> 474 (2014).

<sup>32</sup> See [https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill\\_id=202320240AB1228](https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202320240AB1228).

<sup>33</sup> See, e.g., Los Angeles Fair Work Week Ordinance, Chap. 18, Los Angeles Admin. Code, Art. 5, §185.00 et seq. (effective 4/1/2023). Other cities with such ordinances include Berkeley, Emeryville, and San Francisco.

PART 4

Conclusion

The idea that a diversity of people with shared and antagonistic interests should discuss a matter and attempt to arrive at a negotiated solution hardly seems novel or controversial. Indeed, scholars and Congress have embraced negotiated rulemaking for decades to improve both the substance of legal standards and compliance with them.<sup>34</sup> Although there is no scholarly consensus about whether negotiated rulemaking reduces litigation, improves compliance, or speeds up the rulemaking process, even scholars who are skeptical of its instrumental benefits find that it enables participation of many interested parties in the process.<sup>35</sup>

In the context of non-union low-wage labor, the promise of the IWC is that it enables workers to organize around speaking out about wages and working conditions. And the public process shines a light on the existence, scope, and causes of low wages and dangerous or difficult working conditions. It is the potential for mobilization and organization that have led scholars to embrace boards or commissions like the IWC.<sup>36</sup> And the reason why it matters to have representatives of the businesses throughout the network of interconnected entities that operate under the names of major brands—whether it is franchise fast food or hotel chains or agriculture—is so that we can understand where the wealth produced by low-wage labor goes and whether or how it could be shared more equitably.

As California often has in the past, the state is once again innovating in developing new approaches to national problems. The creation of the IWC in 1913 led the way in improving labor standards for the most vulnerable workers in the economy. Its revival today can be a model for how workers, public representatives, and business can tackle the very serious problem of terrible poverty in the industries that provide goods and services nationwide. As other states, including New York, are experimenting with developing sectoral negotiation to improve labor standards, our experience with the IWC will provide valuable lessons.

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<sup>34</sup> See, e.g., Philip J. Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1 (1982); John T. Dunlop, *The Limits of Legal Compulsion*, 27 LAB. L.J. 67 (1976); Maeve P. Carey, *Negotiated Rulemaking: In Brief* (Congressional Research Service Report R46756, Apr. 12, 2021), <https://crsreports.congress.gov/product/pdf/R/R46756/2>. Negotiated rulemaking is specifically authorized by the federal Administrative Procedure Act, 5 U.S.C. §§ 561-570, and has been used by a wide array of administrative agencies on topics ranging from labor, education, housing, and the environment.

<sup>35</sup> Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L.J. 1255 (1997).

<sup>36</sup> See Kate Andrias, *Social Bargaining in States and Cities: Toward a More Egalitarian and Democratic Workplace Law*, HARV. L. & POL'Y J. ONLINE (2018), <https://journals.law.harvard.edu/lpr/wp-content/uploads/sites/89/2018/01/Andrias-Social.pdf>; Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2 (2016).