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The Collapse of the Turnover-Proof Business Model: Combatting a Labor Crisis

*Simran Thiara**

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INTRODUCTION

The restaurant industry is one of the largest and fastest growing sectors in the United States' economy.[1] In 2019 alone, it employed around 12.1 million individuals and was projected to grow exponentially by 2030.[2] However, despite its high employment rates and record growth, the industry was simultaneously facing a lesser-known epidemic: exponential turnover

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1. *Food and Beverage Serving and Related Workers*, U.S. BUREAU OF LAB. STAT., https://www.bls.gov/ooh/food-preparation-and-serving/food-and-beverage-serving-and-related-workers.htm#tab-6.

2. *Id*.

rates.[3] In fact, the epidemic was one that had been quietly, but quickly, progressing over the past two decades leading up to 2019. At that time, the Bureau of Labor Statistics calculated the turnover rate to be 81.9%.[4] But those in the industry estimated the actual turnover rate to be a whopping 150%.[5]

Up until the end of 2019, employers overlooked many of the issues that contributed to this turnover rate, which in large part, was because their business models allowed them to. Although employers and companies overlooked these issues, the industry was not spared by workers and advocacy groups who voiced significant criticisms and concerns of the industry's poor practices and overall poor treatment of its workers. These groups placed a large emphasis on the issue of low wages and poor labor protections and went so far as to referencing them as exploitative and violating fundamental human rights, particularly for women and people of color.[6]

It wasn't until the COVID-19 pandemic that employers truly felt the consequences of their poor employment practices. Once pandemic-shutdown regulations lifted and customer demand skyrocketed, workers refused to return to the industry, leaving millions of positions vacant. The COVID-19 pandemic was a unique phenomenon that exacerbated outstanding issues in the industry and brought workers to their breaking points. However, it simultaneously brought awareness to these issues and the extent of them—specifically, the extent to which restaurant employers will benefit themselves, at the expense of their workers.

More notably though, the issue of workers not returning has remained prevalent up until this day—more than a year after regulations lifted. Companies continue to struggle with retention rates and combating such high turnover rates in this new post-pandemic era. The issue has become so large that it is being referenced as a labor shortage. It is now said that the restaurant industry will never go back to its pre-pandemic norm.

This note ultimately discusses the underlying reasons for the labor crisis and the future of the industry—particularly the eventual response that will be required of employers or legislators to rectify and combat resulting long-term effects from the lack of labor. Some of the possible strategies that employers may implement include new recruitment targets, cost shifting, and automation. However, if these strategies fail to mitigate the anticipated long-term effects, the legislature will favor a solution of sectoral bargaining,

3. Eric Rosenbaum, *Panera Is Losing Nearly 100% of Its Workers Every Year as Fast-Food Turnover Crisis Worsens*, CNBC, https://www.cnbc.com/2019/08/29/fast-food-restaurants-in-america-are-losing-100percent-of-workers-every-year.html (last updated Aug. 29, 2019).

4. *Id.*

5. *Id.*

6. *Working Below the Line: How the Subminimum Wage for Tipped Restaurant Workers Violates the International Human Rights Standards*, FOOD LAB. RSCH. CTR. UC BERKELEY (Dec. 2015), https://www.law.berkeley.edu/wp-content/uploads/2015/04/WorkingBelowTheLine_FULL-LR-2.01PM-151207.pdf.

similar to California's newly proposed Fast Food Accountability and Standard ("FAST") Recovery Act.

SECTION I. THE INDUSTRY PRIOR TO THE PANDEMIC

In the years leading up to 2019, turnover rates in the restaurant industry were exponential. So much so, that some companies, like Panera Bread, faced a turnover rate of 100%.[7] When surveyed, workers listed the top reason for their departure as seeking higher compensation in other sectors.[8] For those familiar with the industry, this reason comes as no surprise. A simple comparison of the nation's living wage to the average restaurant workers' salary reveals how substantial the disparity between the two is.

To illustrate, in the United States, the living wage is approximately $31.90 per hour.[9] Or, in other words, workers must earn an hourly wage of $31.90 to meet the average cost of living, which encompasses basic living standards and necessities. However, on average, full-time restaurant workers typically work 42.9 hours per week and earn an average annual salary of $33,035, which is an hourly wage of approximately $15.90.[10] This means that restaurant workers earn only *half* the nation's living wage and thereby, cannot meet the basic standards of living on such low wage rates. More notably though, an astounding number are considered low-income or to be living in poverty. In fact, restaurant workers live in poverty at nearly three times the rate of the overall workforce.[11]

Although federal minimum wage is set at $7.25 per hour, the industry is governed by the Fair Labor Standards Act ("FLSA"), which allows employers to pay below the minimum wage and credit the remaining portion through workers' tips.[12] Over 60% of workers who are paid below the federal minimum wage work in the restaurant industry.[13] Workers in these establishments earn what is known as the tipped subminimum wage, which stands at a mere $2.13.[14] Currently, 43 states allow some form of this kind of

7. Rosenbaum, *supra* note 3.

8. *Weekly Restaurant Insights*, Blackbox Workforce Intelligence, https://blackboxintelligence.com/the-black-box-perspective-on-coronavirus/.

9. *State of the Rest. Workers*, REST. OPPORTUNITIES CTR. UNITED (2020), https://drive.google.com/file/d/19zGyWlVUH0cP0JEcniwwzBoAnUuJVWPn/view.

10. *Id*.

11. *The Impact of COVID-19 on Restaurant Workers Across America*, REST. OPPORTUNITIES CTR. UNITED (JAN. 2022), https://rocunited.org/wp-content/uploads/sites/7/2022/06/ROC_COVID_Impact_2.pdf.

12. *See* Ashley Weis, *Tip Jars in Need of Change: The Case for Reforming Employee Tip Regulations in the Fair Labor Standards Act*, UNIV. OF TOLEDO REV. (2019).

13. *It's a Wage Shortage, Not a Worker Shortage*, ONE FAIR WAGE & UC BERKELEY FOOD LAB. RSCH. CTR. (MAY 2021), https://onefairwage.site/wp-content/uploads/2021/05/OFW_WageShortage_F.pdf.

14. REST. OPPORTUNITIES CTR. UNITED, *supra* note 9.

wage.[15] Workers' rights groups have come to label the subminimum wage as another form of slavery.[16]

What is even more devastating is that regardless of whether workers earn federal minimum wage or tipped subminimum wage, both groups are unable to afford their basic housing, health care, and transportation needs.[17] To bridge the gap between paychecks and subsistence, most restaurant workers must turn to, and rely on, public assistance programs to meet their basic needs.[18] The restaurant industry has the highest public program participation rate of any industry at 44%.[19] These public programs include earned income tax credits, publicly subsidized health insurance, income support, and food subsidies.[20] The participation of restaurant workers in these programs can be directly attributed to three major factors: the industry's low wages, low work hours, and low benefits.

While poverty wages clearly present themselves to be a challenge, they are not the only ones that restaurant workers face. Other substantial challenges and injustices often include unpredictable schedules, wage theft, unsafe working conditions, and failure to be provided with: paid sick leave, paid time off, retirement benefits, paid parental leave, and access to affordable healthcare.[21] Studies have shown that these challenges are reinforcers of race and gender inequality as they disproportionately impact disadvantaged and historically discriminated groups the most.[22] For example, in terms of gender, women comprise 54% of all restaurant workers and represent more than 66% of tipped restaurant workers. Furthermore, of those 54% of women, more than one third are mothers, and well over half are single mothers.[23] Similarly, in terms of race, workers of color comprise nearly half of the restaurant industry—40% of which, work in states that allow tipped subminimum wage.[24]

As a result, these groups suffer the long-term effect of economic immobility. Whether these wages are the cause of this historic economic immobility, or whether they are just one of many influential factors, one thing is clear: there is a strong correlation between the low-wage, economic immobility theory and exponentially high turnover rates. A closer look at the turnover crisis reveals how restaurant workers' economic immobility is a product of flawed labor ideologies, which are the foundation for most of the

15. ONE FAIR WAGE & UC BERKELEY FOOD LAB. RSCH. CTR., *supra* note 12.

16. *Id*.

17. Sylvia Allegretto, et al., *Fast Food, Poverty Wages*, UC BERKELEY LAB. CTR., 2 (Oct. 15, 2013), https://laborcenter.berkeley.edu/pdf/2013/fast_food_poverty_wages.pdf.

18. *Id*.

19. *Id*.

20. *Id*.

21. Sekou Siby, *Restaurant Workers Need a Bill of Rights*, INEQUALITY.ORG (Mar. 4, 2022), https://inequality.org/research/restaurant-workers-bill-of-rights/.

22. REST. OPPORTUNITIES CTR. UNITED, *supra* note 11, at 4.

23. *Id.* at 5.

24. *Id*.

business models in the industry.[25] Although employers also experience losses related to high turnover rates, employers do not suffer even a fraction of the cost that workers do.

The National Restaurant Association estimated the cost of hiring to be approximately $2,000 per employee.[26] However, this number varies by restaurant type, like fast-food workers, who are less expensive to turn over than those in upscale dining establishments.[27] Additionally, employee replacement costs range from $2,100 to $2,800.[28] Considering that some establishments can face turnover rates of up to nearly 100%, these losses may seem costly for employers. But by industry standards, they are considered relatively good.[29]

Surprisingly enough, companies intentionally create jobs that are standardized and routine, and that ultimately require little to no skills.[30] By doing so, they offset tremendous costs associated with maintaining workers by simply trading them off with replacement costs, which are significantly lower. This strategy derives from the theory of worker fungibility and has been the foundation of the "turnover-proof" business model. This turnover-proof model has been what the industry has thrived on for decades as it maximizes profits, while keeping costs as low as possible.

In the years leading up to 2019, other external variables, such as increased minimum wage, worker retaliation, and calls for better employee practices, put greater pressures and costs on companies.[31] As a result, the turnover-proof business model began to stretch thin as the turnover rates grew larger than what they had anticipated for.[32] However, although worsening, the turnover crisis was still manageable and companies were able to overlook these external variables. But in March 2020, the evolution of the COVID-19 pandemic caused the turnover-proof model to officially collapse from unbearable pandemic-related impacts, forever changing the industry.[33]

SECTION II. THE EFFECTS OF THE PANDEMIC

March 2020 marked a turning point for many as the COVID-19 virus swept through the nation. Although all industries and sectors were affected, the restaurant industry was one of the hardest-hit in the entire nation.[34] Of those employers and workers, workers were the greatest to suffer from the pandemic-related impacts. Nearly six million restaurant workers were left

25. *Id*.
26. Rosenbaum, *supra* note 3.
27. *Id*.
28. *Id*.
29. *Id*.
30. *Id*.
31. *Id*.
32. *Id*.
33. *Id*.
34. REST. OPPORTUNITIES CTR. UNITED, *supra* note 11, at 4.

unemployed, either temporarily or permanently.[35] Additionally, about 85% also experienced wage loss during the pandemic.[36] During this time, most workers who had been laid-off, or whose hours had been significantly reduced, were eligible to apply for unemployment insurance. The government also introduced pandemic-related assistance, which enhanced unemployment benefits by an additional $300 per week for those who qualified for the program.[37] Despite being one of the most affected groups, many restaurant workers did not qualify for these benefits. At that time, restaurant workers could be placed into one of three groups: (1) employed; (2) unemployed and receiving pandemic unemployment assistance; or (3) unemployed but did not qualify for unemployment assistance. Workers across all three groups quickly recognized that those receiving unemployment assistance were earning substantially more than they did while working.[38] As a result, this situation showcased on a broader scale, many of the already-existing issues and inequalities restaurant workers face.

For instance, those in the first group, who were still employed and working during the pandemic, found it unfair and atypical that those who had been laid off were, oddly enough, better suited in terms of pay, than those who were able to keep their jobs. Moreover though, during this time, employed workers were earning even less than before, since customer tips had drastically decreased.[39] Similarly, this situation was particularly devastating and difficult to grapple with for those in the third group. Most of those workers were subminimum wage workers, whose low earnings disqualified them from receiving unemployment insurance in general.[40]

In addition to low wages, those in the first group, with an "employed" status, faced a number of other issues in the workplace as well. A study taken between October 2020 and May 2021, when the virus was still at its peak, found that employed restaurant workers faced the following issues at the following rates: low wages and tips (76%); concerns about COVID-19 safety (55%); hostility and harassment from customers (39%); transitioning to a different industry (31%); hostility and harassment from coworkers and employers (26%).[41] Moreover, these issues prompted many to consider leaving the industry altogether.[42]

35. *Id*.
36. Siby, *supra* note 21.
37. Emily Barone, *This Should Be a Boom Time for Restaurants. But Owners—and the Few Workers Remaining—Are Struggling*, TIME (June 29, 2021, 4:41 PM), https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwiB2J3Btej3AhXSLM0KHRSPB8IQFnoECAsQAQ&url=https%3A%2F%2Ftime.com%2F6076710%2Frestaurants-labor-shortage%2F&usg=AOvVaw0Mwqcbexa0oapjd3ipARIX.
38. *Id*.
39. *Id*.
40. Barone, *supra* note 37.
41. *Id*.
42. *Id*.

As evidenced by the study, workers found employers' management of pandemic health and safety protocols to be especially poor.[43] Because restaurant jobs involve extensive face-to-face interaction with others, workers at that time were at an inherently higher risk of contracting COVID-19.[44] Similarly, restaurant worker mortality rates also increased to 39%, making the industry one of the two highest increases among all.[45] For comparison, the mortality rate for line cooks increased by 60%, whereas, nurses, for instance, only had an increase of 35%.[46] Although expected to work, 91% of these workers did not receive additional compensation for working in hazardous conditions.[47] Similarly, 34% did not have access to personal protective equipment and 10% of workers were even forced to work while COVID-positive due to a fear of employer retaliation, need for wages, and a lack of paid sick leave.[48]

Lastly, other issues such as, staffing shortages and harassment, also played a role in workers' employment-related hardships.[49] Staffing shortages caused restaurant workers to work harder and in higher-stress environments due to the lack of additional help.[50] In turn, shortages also led to slower service and less table turnover, which decreased worker wages and tips even further.[51] Additionally, workers were often harassed while mandating and enforcing COVID-19 protocols to patrons.[52] In particular this health and safety element aspect, exemplified the extent to which employers would benefit themselves, despite being at the expense of their workers, which mirrored decades of similar treatment.

Although the COVID-19 pandemic exacerbated much of the already-prevalent issues for workers, the pandemic did not spare employers from the consequences of their own practices. In June 2021, pandemic mandates quickly lifted nationwide, and diners were eager to get back to their pre-pandemic ways.[53] However, paired with the skyrocketed customer demand, restaurants had little to no time to accommodate for the influx of restaurant-goers.[54] The lag between the labor supply and customer demand made returning to pre-pandemic, day-to-day operations overwhelming. Despite the

43. *Id*.

44. *Study: California Food Industry Workers Face Highest Risk of Dying from COVID-19*, CRAMER AND MARTINEZ LLP: WORKERS' COMP. (Sept. 27, 2021), https://www.cramerandmartinez.com/workers-compensation-law-ca/study-california-food-industry-workers-face-highest-risk-of-dying-from-covid-19.

45. *Id*.

46. *Id*.

47. Siby, *supra* note 21.

48. *Id*.

49. Mark Remillard, *COVID-19 Pandemic Exposes New Challenges for Restaurant Industry*, ABC NEWS (Sept. 6, 2021, 5:00 AM), https://abcnews.go.com/US/covid-19-pandemic-exposes-challenges-restaurant-industry/story?id=79852137.

50. *Id*.

51. *Id*.

52. *See* REST. OPPORTUNITIES CTR. UNITED, *supra* note 11, at 16, 24.

53. *See* Barone, *supra* note 37.

54. Barone, *supra* note 37.

vast number of vacant positions, the industry continued to face a shortage of cooks, washers, and wait staff.[55] As a result, most restaurants began suffering from a major labor supply and demand gap.[56] The sector that was once on track to be the fastest growing became the farthest from recovery as 2.2 million positions remained unfilled.[57] To this day, this issue remains prevalent as workers simply will not return to the industry.

SECTION III. THE LABOR CRISIS

The National Restaurant Association reports that the spectrum of restaurants—from white-tablecloths to fast food—are facing similar challenges as one another.[58] Their findings reveal that 72% of operators rated recruitment and retention of workforce as their top challenge, which was up from 8% in January.[59] Employers are in fierce competition with one another to staff up and accommodate customers.[60] In response to the crisis and the competitive demand for workers, restaurants began offering significantly increased wages.[61] As a result, such unique circumstances have created a never-before-seen dynamic between restaurant employers and workers. In normal times, such fierce competition for labor would indeed drive down the unemployment rate as those looking for work would typically be enticed by higher wages and other perks.[62] Based on this, the industry is referring to this situation as a labor shortage. But is it really?

A labor shortage refers to a lack of workers; however, there is no actual shortage of workers.[63] To the contrary, there is a surplus of unemployed individuals available and looking for work.[64] In fact, many of these unemployed workers are ones with prior experience, who possess the knowledge and familiarity of these jobs. Naturally then, the question arises: Why are workers refusing to return to the industry, despite the incentive of higher wages?

The discrepancy between wage increases and lack of workers indicates that while wages are a large part of the issue, they are not the sole reason for why workers will not join the industry.[65] Economic theory suggests that had

55. *Id*.
56. *See id*.
57. Nicole Bateman & Martha Ross, *The Pandemic Hurt Low-Wage Workers the Most— and So Far, the Recovery Has Helped Them the Least*, BROOKINGS (July 28, 2021), https://www.brookings.edu/research/the-pandemic-hurt-low-wage-workers-the-most-and-so-far-the-recovery-has-helped-them-the-least/.
58. Barone, *supra* note 37.
59. *Id*.
60. *Id*.
61. *Id*.
62. *Id*.
63. ONE FAIR WAGE, *supra* note 12, at 1.
64. *Id*.
65. Priscilla Totiyapungprasert and Felicia Campbel, *5 Reasons the Restaurant Labor Shortage Is More Complicated Than You Think*, AZ CENT. (Sept. 28, 2021),

wages been the sole, influencing factor, there would not be a crisis. This assertion is further supported by the fact that, once pandemic unemployment assistance benefits ended, workers still did not return, whereas they typically should have.[66]

Instead, the current crisis is driven by a recognition of the industry's flawed practices, specifically those that come at the expense of workers and result in long-term economic immobility.[67] Therefore, this is not a labor shortage—rather, it is a labor crisis. While wage rates have been an important consideration, several other factors also have formed the basis for workers' decisions to steer clear of the industry.

SECTION IV. WHY WORKERS ARE REFUSING TO RETURN

First, economic trends demonstrate that increased wages are not enough to lure prospective workers. Recently, there have been promising signs that wages are increasing, and even more so among some low-wage occupations. However, inflation is also rising, thereby, reducing the buying power that rising wages offer. Therefore, not only do wage trends matter, but wage levels matter too. An uptick in wages does not compensate for decades of stagnation. In February 2020, prior to the pandemic, the labor market was already in a condition where low-wage work became normalized, and the labor market became desensitized, leaving millions struggling to support themselves and their families. Then, factoring in the pandemics' economic impact, that struggle was only further exacerbated. Thus, it is evident that wage increases alone will not drive workers back to the industry, instead wages are only a starting point.

Second, there is a lack of security in the restaurant job market, which is clear from worker fungibility being the driving force of the industry's business models. Rather than maintain workers through wage increases and benefits, employers are willing to, and preferred to, replace them. Employers' little disregard for their livelihoods has left a grave impression on workers, especially during the pandemic. For these reasons, once pandemic-shutdown regulations lifted, workers opted for jobs in other sectors where they were more valued.

Taken together, these factors result in economic immobility and are the basis for the labor crisis. One thing is clear for employers: worker fungibility can no longer be the basis for which business models rest. As demonstrated by the millions of positions that remain unfilled, workers now hold the most bargaining power.[68] And they will not return without substantive, permanent

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https://www.azcentral.com/story/entertainment/dining/2021/09/28/why-does-arizona-have-restaurant-hospitality-labor-shortage/5899185001/.

66. *See* Bateman, *supra* note 54.

67. *Id.*

68. *See* Amelia Lucas & Melissa Repko, *Labor Shortage Gives Retail and Restaurant Workers The Upper Hand— For Now*, CNBC (Aug. 11, 2021, 3:37 PM), https://www.cnbc.com/2021/08/11/labor-shortage-gives-retail-and-restaurant-workers-the-upper-hand.html.

change. Under this new, post-pandemic dynamic, restaurants now have a greater stake at risk with labor than they once did. A failure to adapt to the labor crisis could be detrimental in the long run, as restaurants will be challenged with higher costs and lose substantial revenue. Because the industry is expected to never return to its pre-pandemic norms, restaurants should be motivated and driven towards finding a solution, now more than ever.[69]

SECTION V. POSSIBLE SOLUTIONS TO THE LABOR CRISIS

As illustrated, it is a crucial time for both restaurant workers and employers. The gap between supply and demand elicits an immediate response as the industry continues to fall behind in its recovery. The failure to act timely will result in higher business costs and become strikingly burdensome due to a substantial increase in food prices, services, and inflation.[70] While it is in the best interest of companies to create a personalized solution that takes into account its own best interests, doing so is certainly not the only option; rather, Congress may also take legislative action. If this is the case, companies will be at a disadvantage since the legislative measures will be unable to account for those personalized company needs and will ultimately, benefit workers. And unlike in the past, employers will **not** be able to successfully lobby against such legislation.

BUSINESSES' COURSE OF ACTION

As noted, restaurants have been reluctant for decades to change poor practices, simply because they keep business costs as low as possible. A complete change in those practices will not be the first course of action that they will pursue to resolve the labor crisis. This section discusses a list of possible strategies they may default to, instead of increasing worker benefits permanently, as well as the likelihood of success, pursuant to each strategy. Namely, these strategies include new recruitment tactics, cost shifting, and automation.

A. New Demographics

The first strategy that restaurants may take to combat the labor crisis is to target and recruit a new demographic of workers. For instance, restaurants could change the baseline requirements for education and skills. Post-pandemic, one of the first restaurants to explore this was Chipotle, who no longer requires workers to have high school diplomas.[71] Since then, other chain restaurants have also followed suit on this approach.

69. Bateman, *supra* note 54.
70. *Id.*
71. *How Chipotle is Addressing the Industry's Turnover Crisis*, QSR MAG., https://www.qsrmagazine.com/fast-casual/how-chipotle-addressing-industrys-turnover-crisis.

However, it is unclear whether this will resolve the labor crisis since younger workers, and workers with lower education levels, are already the primary demographic that make up the industry. Even if restaurants lower requirements, like age and education levels, higher amounts of training may be required, which could become too costly, or result in higher production time and slow down business.

B. Cost-Shifting

The second strategy is to cost-shift onto the customer. Cost shifting is when businesses strategically offset higher costs by passing them along to others, generally in the form of additional fees and higher food prices.[72] Most employers have already implemented this strategy and will likely continue to do so until demand is negatively affected. However, a mere glance at the state of the economy indicates how unrealistic this strategy is, particularly when taking inflation into account. While it has temporarily alleviated higher costs, it will not be the permanent solution to the labor crisis.

For instance, Bloomberg found that, until recently, U.S. households have mostly absorbed higher prices on everything from coffee to chicken to clothes, helping companies maintain huge profit margins despite higher input.[73] But customers have not been happy about the increased costs of these goods.[74] And with the latest surge of inflation rates, stemming in part from Russia's invasion of Ukraine, many households have reached their breaking points.[75] As political tensions escalate and unprecedented global events, like the COVID-19 pandemic, become more common-place, household expenditures will continue to rise. Therefore, shifting costs onto customers and relying on them to burden the cost of higher business expenses would be detrimental and far too risky. Restaurant dining, whether fast-food or high-end, is a luxury. If price shifting continues, restaurant dining will come to a screeching halt, as Americans are already struggling to keep up with rising household costs.

C. Automation

A third strategy that businesses may pursue is to incorporate more workplace technologies that eliminate the need for workers. Many establishments have already began taking this approach in the form of automated ordering and kiosk stands.[76] However, it's unclear how much of the need for workers can truly be eliminated by technology—at least before doing so comes at the expense of customer satisfaction and company values.

72. Lisa Abramowicz, *American Consumers Are Starting to Hit Their Breaking Point*, BLOOMBERG (Mar. 28, 2022), https://www.bloomberg.com/opinion/articles/2022-03-28/wall-street-should-start-worrying-about-u-s-consumers.

73. *See id*.

74. *Id*.

75. *Id*.

76. Rosenbaum, *supra* note 3.

For instance, in shifting to an almost entirely automated workplace, certain restaurants would not only likely lose some basic functions, but more importantly, jeopardize unique features and characteristics for which they are known. And similarly, food is only one part of the dining experience.[77] Statistics show that customers value the social experience that comes along with restaurant dining, as well as being waited on.[78] 64% of customers that dine-in said they'd choose traditional table service, where servers take orders and bring the bill at the end of a meal, as opposed to using a table or smartphone app.[79]

A primary example that illustrates these principles is the chain franchise, Hooters. Introducing technology that would eliminate the need for its waitresses would jeopardize who the company itself refers to as "the very essence of Hooters," as their waitresses "provide the energy, charisma and engaging conversation that keep guests coming back."[80] Therefore, while technology is yet another strategy that may help with the supply and demand issue—and unlike cost shifting, can do so more permanently—it cannot resolve it, at least not without negatively affecting customer demand.

Although these three strategies are the most realistic and feasible avenues for companies to pursue, they are only temporary solutions. In and of themselves, they will not resolve the labor crisis or alleviate its consequential, long-term costs. Rather the most promising solution is to permanently improve workplace practices and policies. Because the industry has relied on the turnover-proof model for so long for its success, such a permanent change will not come about so easily, despite the advantage to tailor policies to specific company interests. If companies fail to resolve the crisis, Congress will be called upon to do so.

LEGISLATIVE COURSE OF ACTION

Like restaurant employers, Congress should also see this as a pressing concern, requiring immediate attention. The failure to act swiftly could result in another economic disaster, which the country simply cannot afford in this post-pandemic era. To explain, restaurant workers are essential to the country's economic growth, both in the work capacity and individual capacity, as they make up 10% of the United States' workforce.[81] In their individual capacities, their combined spending and contributions are necessary for economic stimulation in our new post-pandemic and highly inflated economy. In their worker capacities, they are the backbone of the restaurant industry and make up the wait staff, cooks, cashiers, food

77. *State of the Restaurant Industry*, NAT'L REST. ASS'N (2021), https://go.restaurant.org/rs/078-ZLA-461/images/2021-State-of-the-Restaurant-Industry.pdf

78. *Id*.

79. *Id*.

80. HOOTERS, https://www.hooters.com/franchising/why-hooters/index.php#hooters-girl.

81. *See* REST. OPPORTUNITIES CTR. UNITED, *supra* note 9; *2020 State of the Restaurant Worker*, at 5.

preparers, and food managers.[82] Their work contributions are why the industry is expected to reign in $898 billion in 2022 sales, which is up from the $864 billion in 2019.[83] Such substantial revenue and industry growth, in turn, also contributes to the overall economic growth and the nation's GDP. Without their return, it is unclear how the industry's future growth trajectory will be met.

Nonetheless, even if restaurants can meet those trajectories without the need for workers, Congress should be wary of doing so. Eliminating those worker positions would also eliminate workers spending in their individual capacities, due to their lack of employment and earnings. As restaurant workers make up 10% of the workforce, there would be a massive subsequent impact on the country's economic recovery as well, causing a considerable loss of economic revenue. Additionally, it would also increase the reliance and need for assistance programs, as seen during the pandemic. Taken together, each of these would be additional strains to the already fragile and uncertain economic state of the nation.

For these reasons, the government also has a high stake in the labor crisis—arguably, an even greater one. Unless serious change happens, workers will not return. Simply bridging the supply and demand gap by eliminating worker positions through automation, poses a significant issue for the government, who will be motivated to keep the industry humanized for economic purposes. Thus, unlike previous decades, legislative action will benefit workers, even if done so at the cost of employers. As further discussed in this section, there are a few options Congress may take that would bring about the long-awaited change workers seek, while also speeding up the industry's economic recovery. To tackle the issue, Congress must take into account several of the circumstances that are prevalent in today's job market for low-wage workers.

One of these circumstances is that there are simply not enough jobs paying decent wages for Americans without college degrees, which

82. *Id*.

83. These trajectories may signal that the industry can function without its workers. However, that contention would be misplaced. Much of this increase is expected to come from price surges. The following considerations illustrate why this is the case: (1) Restaurants have been forced to come up with creative solutions to adapt to the worker crisis, but the implemented strategies were intended only to be temporary. Critics anticipate that restaurants may be able to get by with these temporary measures for another year, but after that, a permanent solution will be needed. Restaurants will find that the opportunity cost of potential sales, amidst the labor crisis, too great to bear. (2) Even if restaurants are willing to accept these opportunity costs, Congress will still take action in support of workers. While the industry creates a substantial amount of revenue that factors into the nation's gross domestic product ("GDP"), so do millions of restaurant workers as well. A stimulated economy stems from spending. If millions of workers are left displaced and unemployed, spending will decrease significantly. In turn, this decrease will result in great economic repercussions to the already fragile pandemic economy. The government will not, and likely cannot, accept this economic opportunity cost. Alicia Kelso, *Restaurant Industry Sales Expected To Hit $898 Billion This Year, Up From $864 Billion In 2019*, FORBES (Feb. 1 2022, 8:30AM), https://www.forbes.com/sites/aliciakelso/2022/02/01/restaurant-industry-sales-expected-to-hit-898-billion-this-yearup-from-864-billion-in-2019/.

significantly hinders the economic mobility of low-wage workers.[84] Without more inclusivity in higher paying positions, or permanent benefits for low-wage workers, workers cannot be coaxed back into the labor force.[85] Therefore, legislators must be mindful to the kinds of jobs that are generated, whether they pay enough to live on, and to whom they are available.[86]

One way to increase economic mobility is through the "Raising Floors and Building Ladders" theory.[87] This theory was developed on the correlation between low wage workers, job insecurity, and poor industry practices throughout the industry.[88] It calls for policies that encourage career mobility (ladders) and basic economic stability (the floor), stating that both must be done to increase economic mobility overall for low-wage workers.[89] It states that this can be achieved in two parts. The first part is by enhancing workplace education and through training workforce systems, which would help workers adapt to changing skill needs. Whereas, the second part entails strengthening worker protections and improving job quality, specifically with a focus on pay, stable and predictable hours, and health and safety standards.[90] It would be advantageous for Congress to apply this theory to the restaurant sector because it would resolve the labor crisis and avoid future economic consequences. It would also economically stimulate the industry to achieve a quicker post-pandemic recovery, while ensuring that it meet its growth trajectory in the coming years.

However, the difficulty with this regulation is creating it in a way that not only achieves these results, but does so without overstepping economic principles of the free-market approach. Increasing the economic mobility correlated with these jobs will require that companies reevaluate their high profit, low-cost business models. These difficulties will require that Congress create incentives that ensure companies will follow suit and that regulation be successful.

A. Broadening Skillsets

To recall, the industry's efforts to standardize and "routinize" jobs ultimately, resulted in high turnover-proof jobs.[91] However, it also created low-quality jobs and its poor reputation, consisting of: low wages; lack of career choices; an overwhelming belief that fast-food jobs should only ever be temporary; and that they are low-end jobs because of their hours and little responsibility.[92] Another reason why workers have not returned to the restaurant industry is because they entered other industries that offered

84. Bateman, *supra* note 54.
85. *Id*.
86. *Id*.
87. *Id*.
88. *Id*.
89. *Id.*
90. *Id.*
91. Rosenbaum, *supra* note 3.
92. *Id*.

higher pay and allowed them to broaden their skillset. Together, these became an additional reason for why workers sought jobs in other industries, where they'd receive higher pay and develop a broader skillset. Based on this, new legislation must incentivize companies to allow workers to have great responsibilities and potential for more growth within their restaurants—essentially, no longer allowing them to treat workers as fungible. Studies and restaurants that do not operate on a worker-fungibility business model both have demonstrated the successes of doing so. When restaurant workers are taken care of, they stay longer, are more productive, and provide better quality service.[93] Even greater results can then be achieved by incorporating promotions and opportunities, a sense of purpose, achievable goals, and job stability.[94]

One highly popular restaurant chain that demonstrates the success in doing so is In-N-Out. In-N-Out has a high rapport for employee satisfaction, with 94% of employees recommending working there.[95] In fact, the company has a 4.4 rating on Glassdoor and 4.5 rating on Indeed, making it the highest ranked fast-food company to work for in the entire United States.[96] In-N-Out's Vice President of Operations, Denny Warwick contributes the company's success and employee satisfaction to their sustainable business model, referencing the incorporation of crucial factors like benefits, flexibility, and opportunity.[97] Moreover, In-N-Out highlights a distinction from most of the industry, who is struggling from recruitment and worker retention issues.[98]

B. Greater Protections

The second part of the "Raising Floors and Building Ladders" theory calls for greater protections and improved job quality. One avenue to achieve this would be through a proposal like that of California's newly introduced, "Fast Food Accountability and Standards ("FAST") Recovery Act. The FAST act was designed to address and regulate controversial employer practices, including those related to low wages, poor working conditions, and training.[99] The act aims to rectify the inequality of power workers have to negotiate with employers.[100] In other industries, negotiations typically take place through unions, however, in the food industry, this is uncommon. For

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93. ONE FAIR WAGE, *supra* note 12.
94. BLACK BOX INTELL., *supra* note 8.
95. *How In-N-Out Burger Created a Culture of Engagement*, INSTANT, https://www.instant.co/wp-content/uploads/2018/11/Instant_In-N-Out_Culture_of_Engagement.pdf (last visited Oct. 23, 2022).
96. *Id*.
97. *Id*.
98. *Id*.
99. Benjamin Sachs, *California's FAST Act: A Promising Move Toward Sectoral Regulation*, ONLABOR (Apr. 30, 2021), https://onlabor.org/californias-fast-act-a-promising-move-toward-sectoral-regulation/ (quoting David Madland, *Raising Standards for Fast-Food Workers in California*, CAP (Apr. 20, 2021), https://www.americanprogress.org/article/raising-standards-fast-food-workers-california/.).
100. *Id.*; *see also* A.B. 257, 2021 Cal. Assemb., Reg. Sess. (Cal. 2021).

instance, of total fast-food and counter workers, only 3% belong to unions nationwide.[101] The fast-food sector mirrors what the industry as a whole struggles with: frequent turnovers and the fact that, inexperience and intimidation make it too difficult for workers to organize.[102] Instead of unionization, negotiations would take place through sectoral bargaining.[103] Under the sectoral bargaining approach of the FAST Act, a statewide "Fast-Food Sector Council," made up of workers, government agents, and industry representatives, would set minimum health, safety and employment standards across California's food industry.[104] The State would have the power to negotiate salaries and work conditions for an entire industry, as well as any other rules and regulations necessary to carry out additional duties.[105] More importantly though, unlike before, the act holds the companies who create and mandate poor employment practices responsible, in addition to franchise owners. [106]

If Congress were to implement this type of sectoral bargaining throughout the nation, restaurant workers would undoubtably feel safe to return to the industry and also feel empowered knowing they would no longer endure poor employment practices. However, enacting such a resolution will be met with opposition. A few key opposing arguments that critics have cited include: (1) restaurant franchisors may reconsider doing business in California, or instead seek ways to mitigate the new costs, like through automation; (2) The passage of the FAST Recovery Act may impact food prices because operators will need to adjust to the increased costs and potential risks created by the legislation. And in turn, these increased restaurant food prices may become challenging for many customers.[107]

However, in the context of federal regulations, and considering the current state of the industry and economy, many of these arguments do not stand ground. Regarding the first argument, if a proposal like the FAST Act is uniformly required of all states, franchisors will not reconsider doing business in only one state. Similarly, they will not rethink whether to do business entirely either; it is highly unlikely that restaurants will forego a

101. Sachs*, supra* note 99.

102. Jackie Botts & Jesse Bedayn, *Worker Empowerment or Government Overreach? California's Fas Food Bill Tests Labor Laws*, S.F. CHRON. (Jan. 16, 2022), https://www.sfchronicle.com/bayarea/article/Empower-workers-or-government-overreach-16777494.php.

103. Sachs, *supra* note 99.

104. Catherine L. Fisk & Amy W. Reavis, *Protecting Franchisees and Workers in Fast Food Work*, AM. CONST. SOC'Y, https://www.acslaw.org/wp-content/uploads/2021/12/Fisk-Reavis-IB-Final5662.pdf.

105. Botts, *supra* note 102.

106. Taylor Hall et al., *California's 'FAST Recovery Act': The Anticipated Impact on the Restaurant Industry, Franchise Industry, Jobs, and Food Prices*, NAT'L L. REV., 292 (2022), https://www.natlawreview.com/article/california-s-fast-recovery-act-anticipated-impact-restaurant-industry-franchise.

107*. Id.*; *see also* Gary M. Galles, *Not So Fast on the Fast Act*, THE AM. INST. FOR ECON. RSCH., https://www.aier.org/article/not-so-fast-on-the-fast-act/.

business venture solely based on unfavorable regulations, especially when high profit margins would still be achievable. Instead, what would most certainly deter business ventures is the missing labor force necessary to start the business. Workers are paramount to the foundations of new restaurants. Without a guarantee of these workers, companies would be far more reluctant to consider doing business than they would in the case of high-cost regulations ensuring less labor risk. Next, relating to this argument, opponents argue that employers may mitigate costs by eliminating workers through automation. However, as discussed previously, technology may certainly help to curb the additional costs, but only to a certain extent as the traditional, non-automated dining experience is largely preferred by customers. Some restaurants are also branded by the unique experience they deliver to customers, which cannot be provided to the same degree through technology.

Furthermore, the second argument opponents raise is the problem of increased food prices and the resulting effect on customer demand. This argument is also weak for several reasons. First, rising prices are a result of the nation's inflation issue; they would not be attributable to the proposed legislative act. Second, as discussed earlier, restaurants imposing even higher costs on customers will not bode well. The price increases are not necessary, rather they are cost-shifting techniques that allow companies to avoid bearing unwanted costs. Simply stated, profit-maximizing industries, like the restaurant industry, can easily bare these costs. The reason they are heavily disputed and unwanted is because they come at the expense of greater profit.

Instead, the benefits of the FAST Act far outweigh any costs companies face as a result. If Congress adopts a similar act and requires it of all states, there will be a greater and broader impact. The impact would be one that extends beyond the worker crisis and to the long-awaited victory for workers in the form of protections and social mobility. Moreover, legislation like this would be an innovative way to push for reform. Its construct would reach the source of countless worker issues and hold those corporations accountable, who create poor practices, bad reputation, and economic immobility. Although the title suggests that the act only applies to fast-food restaurants, a closer look reveals that it is far more reaching. The Act covers any restaurant concept with "30 or more establishments nationally that share a common brand" if it has the following four characteristics: 1) in its regular course of business provides food or beverages in disposable containers; 2) food is served for immediate consumption on or of premises; 3) operates with limited or no table service; and 4) customers pay before eating.[108] Additionally, it includes both company-owned and franchised restaurant concepts, not just franchised brands.[109]

108. NAT'L L. REV., *supra* note 106.
109. *Id.*

Moreover, it is one that would create real change for workers. Not only would workers' voices be heard, but they would become an integral component of decision making, which is crucial to combatting the labor crisis. Enacting this kind of legislation would gain workers' trust and allow them to feel safe to return to the industry. Additionally, it would also benefit smaller restaurants who feel uneasy about having to pay higher costs of fair wages, proper training, and safe conditions, while big corporations do not have to.[110]

In conclusion, when taking together each of these circumstances, applying the "Raising Floors and Building Ladders" approach seems to be the most promising solution for Congress to address the labor crisis. Weaving its framework into legislation will ultimately come in the form of sectoral bargaining, like that of California's FAST Recovery Act. But to successfully do so, Congress will have to incentivize companies and encourage them to adopt certain workplace policies and practices. Prior to the pandemic, such regulations seemed impossible. However, based on the current state of the industry and the nation's economy, support for this legislative regulation is more likely than ever.

CONCLUSION

For decades, workers in the restaurant industry have faced poor practices, including poverty wages, lack of benefits, harassment, and unsafe working conditions. Studies have shown these practices are reinforcers of race and gender inequality and leave workers susceptible to long-term economic immobility. Up until recently, past efforts to create reform were largely unsuccessful as doing so would have resulted in changes to the turnover-proof business model. Those changes would have resulted in higher business costs and lower profits, and ultimately, defeated the driving force behind the model: the theory of worker fungibility.

However, the aftermath of the COVID-19 pandemic caused employers to feel the consequences of their own practices, as workers failed to return to the industry when customer demand skyrocketed. To this day, restaurant establishments struggle to attract and retain workers, despite increased pay wages. In short, the resulting labor crisis is a product of years of poor treatment and practices, especially during the time of the pandemic, when workers suffered industry-related hardships at an exacerbated rate.

As the industry is expected to never go back to its pre-pandemic norms and dynamic, employers are faced with finding a solution to bridge the gap between labor supply and customer demand. As discussed, many of the solutions companies default to will not successfully resolve this issue. Although it would be advantageous for companies to put forth their own policies, and thereby, take into account their own best interests, the likelihood of them doing so is low. For this reason, Congress will be required

110. *Id.*

to take legislative action. This legislative action must take into consideration several circumstances that have played a role in the overall labor crisis. As a result, the most promising course of action will be a framework that follows the "Raising Floors and Building Ladders" theory. This theory will largely focus on the rights and protections of workers, which can be accomplished through a form of sectoral bargaining similar to California's FAST Recovery Act.

While it is unknown which course of action will prevail, one thing is certain: failure to address the labor crisis will result in grave consequences—for both employers and the nation's economy. Unlike ever before, workers are now the ones who hold the most bargaining power. More notably though, they are the closest they have ever been to achieving a long-awaited victory for change.

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