

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

AB 286 (Lorena Gonzalez)
Version: June 14, 2021
Hearing Date: June 22, 2021
Fiscal: No
Urgency: No
JT

SUBJECT

Food delivery: purchase prices and tips

DIGEST

This bill prohibits a food delivery platform from (1) marking up the price of the food and beverages it delivers, and (2) retaining tips or gratuities, as specified. The bill also requires food delivery platforms to provide itemized cost breakdowns.

EXECUTIVE SUMMARY

The COVID-19 pandemic has devastated the restaurant industry and made consumers and restaurants alike increasingly reliant on online food delivery options. While third party app-based food delivery companies, such as DoorDash, Uber Eats, and Grubhub, offer the promise of convenient and safe access to a variety of restaurants at the click of a button, these companies often impose hefty commissions and onerous terms that can add to the struggles of ailing restaurants. To protect restaurants and customers, the Legislature enacted the Fair Food Delivery Act of 2020 (AB 2149 (Gonzalez) Stats. 2020, Ch. 125) (Act), which prohibits food delivery platforms from arranging for the delivery of an order from a food facility without first obtaining an agreement authorizing the food delivery platform to take orders and deliver meals prepared by the food facility.

This bill seeks to expand the Act by (1) providing that it is unlawful for a food delivery platform to charge a customer a price for food or beverage that is higher than the price set by the food facility, (2) prohibiting the food delivery platform from retaining any portion of amounts designated as a tip or gratuity, and (3) requiring a food delivery platform to disclose to the customer and to the food facility an accurate, clearly identified, and itemized cost breakdown of each transaction, as prescribed. The bill is author-sponsored and is supported by a coalition of labor, consumer, and civil rights groups, as well as local governments. It is opposed by the California Taxpayers Association, the Civil Justice Association of California, the Internet Association, the Silicon Valley Leadership Group, and TechNet.

If the bill passes this Committee, it will be heard in the Senate Committee on Business, Professions and Economic Development.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Establishes the Act (Bus. & Prof Code § 22598 et seq.)¹, which prohibits food delivery platforms, as defined, from arranging for the delivery of an order from a food facility, as defined, without first obtaining an agreement with the food facility expressly authorizing the food delivery platform to take orders and deliver meals prepared by the food facility (§ 22599).
- 2) Defines:
 - a) "Food delivery platform" as an online business that acts as an intermediary between consumers and multiple food facilities to submit food orders from a consumer to a participating food facility and to arrange for the delivery of the order from the food facility to consumer. (§ 22598(a).)
 - b) "Food facility," via a cross reference to Health and Safety Code section 113789, which generally defines that term as an operation that stores, prepares, packages, serves, vends, or otherwise provides food for human consumption at the retail level, as specified. (§ 22598(b).)
- 3) Establishes the Unfair Competition Law, which provides a statutory cause of action for any unlawful, unfair, or fraudulent business act or practice and unfair, deceptive, untrue, or misleading advertising, including over the internet. (§ 17200 et seq.)

This bill:

- 1) Defines:
 - a. "Online order" as an order for food or beverage placed by a customer through, or with the assistance of, a food delivery platform, including a telephone order, for delivery.
 - b. "Purchase price" as the price, listed on the menu, for the items contained in an online order. This definition does not include taxes or gratuities that may make up the total amount charged to the customer of an online order.
- 2) Provides that it is unlawful for a food delivery platform to either:
 - a. Charge a customer a purchase price for food or beverage that is higher than the price set by the food facility.
 - b. Retain any portion of amounts designated as a tip or gratuity. Any tip or gratuity for a delivery order must be paid by a food delivery platform, in its

¹ All further section references are to the Business and Professions Code unless otherwise indicated.

entirety, to the person delivering the food or beverage. Any tip or gratuity for a pickup order must be paid by a food delivery platform, in its entirety, to the food facility.

- 3) Requires a food delivery platform to disclose to the customer and to the food facility an accurate, clearly identified, and itemized cost breakdown of each transaction, including, but not limited to, the following information:
 - a. The purchase price of the food and beverage.
 - b. The delivery fee charged to the food facility.
 - c. Each fee, commission, or cost charged to the food facility.
 - d. Each fee, commission, or cost charged to the customer by the food delivery platform.
 - e. Any tip or gratuity that will be paid to the person delivering the order.
- 4) Contains a severability clause.

COMMENTS

1. Author's statement

The author writes:

In recent years, food delivery companies like GrubHub, Postmates, and UberEats have aggressively entered the food service space and made claims that they will help small businesses grow their customer base and increase their total revenues. However, restaurants have increasingly reported unauthorized listing of their businesses on platforms, the lack of an ability to connect with their customers, difficulty with ensuring quality of service, and a lack of clarity around the various fees charged to both the restaurant and consumer.

Assembly Bill 286 would provide much needed transparency to both customers and restaurant owners about the true cost of the service provided by third-party delivery companies. Specifically, this bill requires food delivery companies to provide clear itemized costs breakdowns of each transaction to both restaurants and customers alike. Furthermore, this bill ensures that any tips or gratuity by a customer reaches the drivers and restaurants involved in the delivery of an order, and ensure that the purchase price of an item on the platforms are set by the food facility.

2. Food delivery platforms and the Fair Food Delivery Act of 2020

The COVID-19 pandemic has decimated the restaurant industry. Millions of employees have been laid off or furloughed, approximately four in 10 restaurants have closed, and

it has been estimated that anywhere from 20 to 80 percent will close permanently.² Meanwhile, sales through third-party online delivery services, already a major growth industry before the pandemic, surged dramatically last year, growing by 122 percent.³ Although these services can conveniently and safely connect restaurants with homebound customers, they can be costly – commissions are often around 30 percent of the sale price, and there may be additional fees⁴ – and a poor fit for some restaurants.⁵ In an industry known for thin profit margins, this impact to revenues can be a formidable barrier to sustained financial viability. Yet for many restaurants, partnering with a third-party delivery service has been the only way to continue operating in the midst of the pandemic.

Three major companies control the online food delivery industry. In April of 2021, 56 percent of meal delivery sales were through DoorDash and its subsidiaries, 26 percent were through Uber Eats and its subsidiaries (including Drizly and the recently acquired Postmates⁶), and 18 percent were through Grubhub.⁷ Despite rapid growth and skyrocketing valuations, the companies are not making money.⁸ As more consumers get vaccinated and restrictions ease, the industry stands to lose business from customers eager to resume dining on-premises.⁹

These companies have strongholds in different metro areas: for instance, whereas DoorDash had 74 percent of sales in San Francisco, it had just 41 percent of sales in Los Angeles where Uber Eats and Postmates collectively had 44 percent.¹⁰ The companies

² National Restaurant Association, Letter to Congress (Apr. 20, 2020), available at <https://restaurant.org/downloads/pdfs/business/covid19-letter-to-house-senate-leaders.pdf> (as of May 30, 2021); Matt Goulding, *An Extinction Event for America's Restaurants* (June 19, 2020) *The Atlantic*, available at <https://www.theatlantic.com/culture/archive/2020/06/what-will-happen-restaurants/613141/> (as of May 30, 2021).

³ Chris Crowley, *5 Big Reasons the Delivery 'Boom' May Soon Go Bust* (May 5, 2021) *New York Magazine*, available at <https://www.grubstreet.com/2021/05/5-reasons-the-food-delivery-boom-may-soon-go-bust.html> (as of May 31, 2021).

⁴ For the top five food delivery platforms, total markups range from 17 percent to 40.5 percent of the restaurant's list price. (Noah Lichtenstein, *The hidden cost of food delivery*, (Mar. 16, 2020) *TechCrunch*, available at <https://techcrunch.com/2020/03/16/the-hidden-cost-of-food-delivery/> (as of May 30, 2021).)

⁵ Many restaurants use their own online ordering and delivery systems to ensure quality control and cost-effectiveness. Boutique restaurants may lack the capacity to absorb extra orders and may be unwilling to risk entrusting an unknown, unregulated third party to handle an order properly and deliver it promptly.

⁶ Before Uber acquired Postmates, Uber and Grubhub discussed a possible merger. (Ed Hammond, *Uber Approaches Grubhub With Takeover Offer*, (May 12, 2020) *Bloomberg*, available at <https://www.bloomberg.com/news/articles/2020-05-12/uber-is-said-to-approach-grubhub-with-takeover-offer> (as of May 30, 2021).)

⁷ Liyin Yeo, *Which company is winning the restaurant food delivery war?* (May 14, 2021) *Bloomberg Second Measure*, available at <https://secondmeasure.com/datapoints/food-delivery-services-grubhub-uber-eats-doorDash-postmates/> (as of May 30, 2021).

⁸ *5 Big Reasons the Delivery 'Boom' May Soon Go Bust*, *supra*, fn. 3.

⁹ *Which company is winning the restaurant food delivery war?*, *supra*, fn. 7.

¹⁰ *Id.*

also vie for partnerships with the nation's top chain restaurants. Uber Eats has a contract with Starbucks, Postmates with Popeye's, Grubhub with Taco Bell and KFC.¹¹ While large corporate partners have the bargaining power to pay lower fees,¹² many smaller restaurants that rely heavily on delivery services have reportedly operated at a loss because of fees from delivery services.¹³ This has prompted several major cities to adopt temporary ordinances capping service fees, set at 20 percent of the total sale price in New York and Berkeley, 15 percent in San Francisco, and 10 percent in Seattle and Los Angeles.¹⁴

Several lawsuits against food delivery platforms have been filed across the country alleging, among other unscrupulous behaviors, unfair business practices, labor violations, and the misuse of restaurants' names and logos.¹⁵ One type of predatory practice involved listing restaurants on food delivery websites without their consent,¹⁶ which risks overwhelming restaurant operations, creating quality and safety problems, and eroding customer bases. In response, the Legislature adopted the Fair Food Delivery Act of 2020. The Act prohibits food delivery platforms from arranging for the delivery of an order from a food facility without first obtaining an agreement with the food facility expressly authorizing the food delivery platform to take orders and deliver meals prepared by the food facility. (§ 22599.) A violation of the Act constitutes an unfair business practice under the Unfair Competition Law.¹⁷

¹¹ *Id.*

¹² *Id.*

¹³ Supriya Yelimeli, *Berkeley limits service fees for third-party food delivery apps* (July 13, 2020) Berkeleyside, <https://www.berkeleyside.org/2020/07/13/food-delivery-berkeley> (as of May 30, 2021).

¹⁴ *Id.*

¹⁵ See Jaya Saxena *Who's Paying for the Great Delivery Wars?* (Jan. 21, 2021) Eater.com, available at <https://www.eater.com/22224695/uber-eats-postmates-grubhub-delivery-wars-2021> (as of Jun. 12, 2021).

¹⁶ Janelle Bitker & Shwanika Narayan, *Grubhub, DoorDash rush to add restaurants. Customers and drivers pay the price* (Feb. 2, 2020) San Francisco Chronicle, available at <https://www.sfchronicle.com/business/article/Grubhub-DoorDash-rush-to-add-restaurants-15023372.php> (as of May 31, 2021).

¹⁷ Business and Professions Code section 17200 prohibits unfair competition, including unlawful, unfair, and fraudulent business acts. The UCL covers a wide range of conduct, making any business practice prohibited by law independently actionable as an unfair competitive practice. (*Medical Marijuana, Inc. v. ProjectCBD.com* (2020) 46 Cal.App.5th 869, 896, citing *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1143.) However, "a practice may violate the UCL even if it is not prohibited by another statute. Unfair and fraudulent practices are alternate grounds for relief." (*Medical Marijuana, Inc. v. ProjectCBD.com, supra*, 46 Cal.App.5th at 896, quoting *Zhang v. Superior Court* (2013) 57 Cal.4th 364, 370 [citations and nested quotation marks omitted].) The UCL provides that a court "may make such orders or judgments . . . as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition." (§ 17203.) The law also permits courts to award injunctive relief and, in certain cases, to assess civil penalties against the violator. (§§ 17203, 17206.) Pursuant to Proposition 64 (2004), the UCL provides that a person may bring an action for an injunction or restitution if the person "has suffered injury in fact and has lost money or property as a result of the unfair competition." (§ 17204.)

3. Prohibits mark-ups and tip-skimming; requires costs transparency

This bill provides that it is unlawful for a food delivery platform to charge a customer a price for food or beverage that is higher than the price set by the food facility. “Purchase price” is defined as the price, listed on the menu, for the items contained in an online order.¹⁸ The term is defined to exclude taxes or gratuities that may make up the total amount charged to the customer of an online order. This does not prevent the food delivery platform from charging a commission or fees for service.

The bill also prohibits a food delivery company from retaining any portions of amounts designated as a tip or gratuity.¹⁹ The bill would require a food delivery platform to pay any tip or gratuity for a delivery order, in its entirety, to the person delivering the food or beverage, and to pay any tip or gratuity for a pickup order, in its entirety, to the food facility.²⁰

Finally, the bill requires a food delivery platform to disclose to the customer and to the food facility an accurate, clearly identified, and itemized cost breakdown of each transaction, including, but not limited to, the following information:

- The purchase price of the food and beverage.
- The delivery fee charged to the food facility.
- Each fee, commission, or cost charged to the food facility.
- Each fee, commission, or cost charged to the customer by the food delivery platform.
- Any tip or gratuity that will be paid to the person delivering the order.²¹

¹⁸ “Online order” is defined as an order for food or beverage placed by a customer through or with the assistance of a food delivery platform, including a telephone order, for delivery.

¹⁹ DoorDash recently settled a lawsuit alleging the company used tips to offset base wages of delivery drivers. (Dana Kerr, *DoorDash settles lawsuit for \$2.5M over 'deceptive' tipping practices* (Nov. 25, 2020) Cnet, available at <https://www.cnet.com/news/door-dash-settles-lawsuit-for-2-5m-over-deceptive-tipping-practices/> (as of May 31, 2021).)

²⁰ With respect to tips to drivers, section 7453(c), which was added by Proposition 22 (2020) provides:

(c) No network company or agent shall take, receive, or retain any gratuity or a part thereof that is paid, given to, or left for an app-based driver by a customer or deduct any amount from the earnings due to an app-based driver for a ride or delivery on account of a gratuity paid in connection with the ride or delivery. A network company that permits customers to pay gratuities by credit card shall pay the app-based driver the full amount of the gratuity that the customer indicated on the credit card receipt, without any deductions for any credit card payment processing fees or costs that may be charged to the network company by the credit card company.

As described below, the opposition argues section 7453(c) renders this protection unnecessary. The provision does not apply to tips intended for the food facility.

²¹ In the context of the regulation of commercial speech, compelled disclosure of “purely factual and uncontroversial information about the terms under which . . . services will be available” need only be reasonably related to the State’s interest in preventing deception of consumers. (*Nat’l Inst. of Family & Life Advocates v. Becerra* (2018) 138 S.Ct. 2361, 2372; *Zauderer v. Office of Disciplinary Counsel of Supreme Court* (1985) 471 U.S. 626, 651.)

Writing in support, the Consumer Attorneys of California describe the problem these provisions seek to address:

...consumers are often blind to the relationships between food delivery platforms and restaurants, obscuring how much of their money is actually supporting the local restaurant, and how much is going to the platform. For consumers who hope to “vote with their wallet” by supporting platforms providing fairer contractual terms to restaurants, this lack of transparency makes informed choice difficult.

These provisions are similar to a temporary regulation adopted in Los Angeles, which includes a 15 percent cap on the delivery fees that a food delivery platform may charge. An earlier version of this bill contained a 15 percent cap as well; however, this was removed in the Assembly Committee on Privacy and Consumer Protection.

4. Support

The bill is supported by a coalition of labor, consumer, and civil rights groups, as well as local governments. They describe the hardships faced by restaurants during the pandemic, the hefty commissions and fees charged by food delivery platforms, and the lack of bargaining power that small businesses have to enter into mutually beneficial arrangements. The organizations uniformly write in support of the bill’s transparency provisions. United Food and Commercial Workers – Western States Council states:

This is why transparency on fees charged by third-party food delivery companies to customers and business owners are essential. Chicago and Washington D.C have implemented measures to increase transparency for consumers of pricing for third-party food delivery services. Food delivery app companies have been employing design practices that obfuscate fees that ultimately impact restaurant profits and worker pay. A Medium article [Citation] states, “Transparency is helpful to empower users to make clear decisions about what their money is going toward and how it’s impacting their local economy and the contract delivery people who lack full-time worker protections and benefits. It is one of many mechanisms in an ecosystem of change we need to further hold companies accountable to the many stakeholders who rely on their services. At a minimum, consumers deserve to know what they’re paying for – be it a service fee, a tip, or a meal – and who they’re paying for it – so that they can make informed choices about whether and how to utilize these services, with an understanding of how these services can affect their local community. Consumers deserve more transparency into how these businesses operate to hold themselves accountable as consumers, to hold the companies accountable for their practices, and to hold their representatives accountable for the effectiveness of their policies.

The California Hawaii State Conference National Association for the Advancement of Colored People argues:

By requiring clear disclosure of the cost breakdown, including specific fees, commissions, and costs charged to the food facility and to the customer, as well as the purchase price of the food and beverage, this bill would provide transparency to both customers and food facilities with respect to the business practices, and relative values, of food delivery platforms. By requiring the cost breakdown to be provided to both the customer and the food facility, such transparency can also help food facilities determine whether platforms with whom they contract are complying with the law, and how their assignment of costs and fees to customers may affect the customer's perception of the restaurant's relative value.

5. Opposition

As noted above, the prior version of this bill would have imposed a cap on commissions charged by food delivery platforms. This provision was stricken from the bill. Numerous organizations registered opposition in previous committees based on concerns with the now-omitted provision.

Of these organizations, only the Civil Justice Association of California, Internet Association, Silicon Valley Leadership Group, and TechNet have affirmed their continued opposition. With respect to the bill's disclosure requirements, this group argues:

Section 22599.1. 2(b)(3) continues to require a food delivery platform to disclose to the *customer* the commission charged to a *food facility* by a food delivery platform. All of the fees a food facility pays to a food delivery platform are voluntary and confidential. When food facilities choose to partner with a food delivery platform, they agree to pay fees not just for delivery and pick up service, but for a wide range of optional services, such as advertising and marketing. Disclosing the specific commission will mislead customers because the commissions paid are not for delivery alone.

Additionally, this information is highly competitive between food delivery platform companies and between food facilities, specifically restaurants. Some restaurants choose to offer delivery using their own staff, while others choose to partner with delivery platforms or a similar service. Those that do choose to partner with a delivery platform have a wide variety of platforms to choose from, and each platform offers products that are tailor-made to meet the needs of restaurants and other

food facilities, from the largest chains to the local mom-and-pops. These private business-to-business contracts should remain private between the parties who voluntarily negotiate and agree to these contracts.

To meet the transparency goals of the bill, we suggest that the language be amended so that food delivery platforms are required to disclose to customers what the customer is required to pay and to food facilities what the food facility is required to pay.

Additionally, those organizations oppose the provision in the bill that prohibits a food delivery platform from retaining tips or gratuities. They write:

[...] This provision is unnecessary since it is already the law. Our member companies voluntarily wrote this into Proposition 22, Business and Professions code Section 7453(c): “No network company or agent shall take, receive, or retain any gratuity or a portion thereof that is paid, given to, or left for an app-based driver by a customer, or deduct any amount from the earnings due to an app-based driver for a ride or delivery on account of a gratuity paid in connection with the ride or delivery.” Proposition 22 became effective on January 1, 2021, thus this provision is unnecessary and should be stricken.

The bill was recently amended to additionally apply to tips or gratuities designated for the food facility, which are not covered by Proposition 22.

SUPPORT

California Employment Lawyers Association
California Hawaii State Conference NAACP
California Labor Federation, AFL-CIO
California State Council of Service Employees International Union
City of Berkeley
City of San Diego
Consumer Attorneys of California
Raise High Road Restaurants
San Ysidro Improvement Corporation
Small Business Majority
United Food and Commercial Workers – Western States Council

OPPOSITION

California Taxpayers Association
Civil Justice Association of California
Internet Association

Silicon Valley Leadership Group
TechNet

RELATED LEGISLATION

Pending Legislation: AB 1444 (Lee, 2021) would also expand the Act by regulating the practice in which consumer communications intended for food facilities placed through a listing website are re-routed to a food delivery platform. The bill is set to be heard in this Committee on June 29, 2021.

Prior Legislation: *See* Comment 2.

AB 3336 (Carrillo, Ch. 105, Stats. 2020) requires ready-to-eat food delivered by third-party food delivery services to be transported in a manner that protects the food from contamination and spoilage, including by requiring the interior floor, sides, and top of the food holding area to be clean, requiring the food to be maintained at a holding temperature necessary to prevent spoilage, and by requiring bags or containers to be closed with a tamper-evident method prior to the food deliverer taking possession of the ready-to-eat food.

AB 1360 (Ting, 2019) would have established requirements on food delivery platforms that deliver food to consumers from a grocery establishment, a retail store with a grocery department, or a grocery warehouse, including requiring that a food delivery driver has specified training, and that the food delivery platform maintains liability insurance. The bill died on the Senate floor.

PRIOR VOTES:

Assembly Floor (Ayes 56, Noes 8)

Assembly Privacy and Consumer Protection Committee (Ayes 9, Noes 1)
