

SENATE JUDICIARY COMMITTEE
Senator Hannah-Beth Jackson, Chair
2019-2020 Regular Session

AB 2149 (Gonzalez)
Version: August 14, 2020
Hearing Date: August 18, 2020
Fiscal: No
Urgency: No
JT

SUBJECT

Food delivery platforms

DIGEST

This bill prohibits a food delivery platform from arranging for delivery of an order from a food facility without the food facility's consent.

EXECUTIVE SUMMARY

The COVID-19 pandemic has decimated the restaurant industry. Approximately four in 10 restaurants have closed, and it is estimated that anywhere from 20 to 80 percent will close permanently.¹ Although third party app-based food delivery companies such as DoorDash, PostMates, Uber Eats, and Grubhub can conveniently connect restaurants with customers who shelter at home, they can be costly and a poor fit for some restaurants. But some restaurants that have refused to enter into agreements with food delivery companies have discovered that they are listed regardless, overwhelming their operations, creating quality and safety problems, and eroding their customer bases.

This bill would prohibit a food delivery platform 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. The author argues that this will level the playing field for mom-and-pop restaurants that risk losing their customers if they do not agree to the conditions of large tech companies. The bill is author-sponsored and supported by California Labor Federation, California Restaurant Association, California Travel

¹ 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 Aug. 14, 2020); 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 Aug. 2, 2020).

Association, and Small Business Majority. It is opposed by Electronic Frontier Foundation, the Internet Association, and TechNet.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Establishes the Unfair Competition Law (UCL), 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. (Bus. & Prof. Code § 17200 et seq.)
- 2) Establishes the California Retail Food Code (Health & Saf. Code § 113700 et seq.) to safeguard public health and provide to consumers food that is safe, unadulterated, and honestly presented through adoption of science-based standards. (*Id.* at § 113703.)

This bill:

- 1) Establishes the Fair Food Delivery Act of 2020.
- 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 the consumer.
- 3) Incorporates the existing definition of “food facility” in Health and Safety Code section 113789, which generally defines that term as an operation that stores, prepares, serves, vends, or otherwise provides food for human consumption at the retail level, including (1) an operation where food is consumed on or off the premises, regardless of whether there is a charge for the food, and (2) a place used in conjunction with the operations described in the subdivision, including storage facilities for food-related utensils, equipment, and materials.
- 4) Prohibits a food delivery platform 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.

COMMENTS

1. Food delivery services

Shelter-in-place orders and social distancing practices in response to the COVID-19 pandemic have devastated the restaurant industry and made consumers increasingly reliant on food delivery options. The California Restaurant Association, which supports the bill, writes:

Restaurants are facing an unprecedented crisis. According a recent survey, the National Restaurant Association estimates that more than 1 million restaurant employees in California have been laid off or furloughed since the beginning of the coronavirus outbreak in March. In the month of April, estimated revenue losses for the food service industry is over \$6 billion. At the same time food delivery platforms are experiencing unprecedented growth as consumers are required to stay at home as a matter of public health.

Third party app-based food delivery companies, such as DoorDash, PostMates, Uber Eats, and Grubhub, offer the promise of convenient access to a variety of restaurants through a single service. This service can help restaurants by increasing sales, notoriety, and customer bases.

However, many restaurateurs, particularly proprietors of small independent restaurants, claim that food delivery companies have added to their struggles. Food delivery services typically charge restaurants a hefty commission – often up to 30 percent of the sales price – and may also charge the customer service fees.² In an industry known for its thin profit margins, this impact to revenues can be a formidable barrier to sustained financial viability. 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.

In some cases, food delivery services have included menus on their apps without the restaurant's consent or knowledge.³ “[I]n those situations the company tasks the driver

² 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*, TechCrunch (Mar. 16, 2020) <https://techcrunch.com/2020/03/16/the-hidden-cost-of-food-delivery/> (as of Aug. 14, 2020).)

³ 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 Aug. 2, 2020).

with ordering food ahead of time or at the restaurant before delivery.”⁴ The California Travel Association, in support, writes that if a restaurant is not aware that their food is being offered for delivery via a third-party app, it “can lead to an array of problems – long delivery times, diminished food quality, and potential food safety impacts – that all reflect back on the restaurant.”

Some jurisdictions have taken action to regulate food delivery companies. Seattle, Washington D.C., and New York limit the commissions that food delivery platforms may charge.⁵ Rhode Island’s legislature introduced a bill that would provide a private right of action for a merchant whose likeness, registered trademark, or intellectual property is used by a third-party delivery service without express written consent of the merchant. The House Corporations Committee has held that bill for further study. In California, AB 1360 (Ting, 2019) and AB 3336 (Carrillo, 2020) would establish food-handling requirements for people who provide food delivery services. AB 1360 is on the Senate inactive file; AB 3336 is pending in the Senate Appropriations Committee.

2. Unlawful business practice

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.” (Bus. & Prof. Code § 17203.) The law also permits courts to award injunctive relief and, in certain cases, to assess civil penalties against the violator. (Bus. & Prof. Code §§ 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.” (Bus. & Prof. Code § 17204.)

⁴ Garrett Snyder, *Grubhub and other delivery apps face backlash over unauthorized restaurant listings* (March 11, 2020) Los Angeles Times, available at <https://www.latimes.com/food/story/2020-03-11/grubhub-delivery-app-backlash> (as of Aug. 14, 2020).

⁵ Bobby Allyn, *Restaurants Are Desperate – But You May Not Be Helping When You Use Delivery Apps* (May 14, 2020) NPR website, available at <https://www.npr.org/2020/05/14/856444431/cities-crack-down-on-food-delivery-app-fees-as-restaurants-struggle-to-survive> (as of Aug. 2, 2020).

This bill would require that food delivery platforms – defined as online businesses that act as intermediaries between consumers and food facilities to submit food orders and arrange for their delivery – obtain the express written consent of a restaurant before arranging for the delivery of an order from a food facility. A violation of the bill’s requirements would constitute an unlawful business practice for purposes of the UCL.

The author argues that the bill will level the playing field for mom-and-pop restaurants that risk losing their customers if they do not agree to the conditions of large tech companies. In support, the Small Business Majority writes:

AB 2149 will benefit California small business owners during this difficult time by requiring food delivery companies to enter into an agreement with the restaurant owner that clearly and transparently outlines the terms and fees associated with being listed on the platform without the owner’s consent. This bill will protect California’s restauranteurs from the “race to the bottom” approach typically associated with agreements not made in good faith.

3. Support

The California Restaurant Association writes:

In some cases, restaurants already have a delivery system in place operated by their own employees. If their menu is listed on an unauthorized food delivery platform, then it creates massive confusion for both the restaurant and the delivery driver who shows up. The customer, driver, and restaurant end up losing because the customer does not get their food, the driver does not get paid, and the restaurant’s reputation is damaged.

They continue:

[...] Not all food delivery platforms are taking such aggressive tactics to grow their business. Some food delivery platforms are true partners with restaurants. We believe all food delivery platforms should commit to partnerships that are mutually beneficial. ... This bill will help restore equity back into the relationship.

The California Labor Federation writes that “[m]ost third party delivery companies are large, well-capitalized and national, which forces small local restaurants to agree to their conditions.” They continue:

While restaurants employ staff directly, providing benefits and protections such as workers’ compensation, paid sick days, unemployment insurance, minimum wage, and many more, many third-party delivery platforms misclassify their workers as independent contractors, further rigging the playing field in their

favor. Delivery companies shirk their responsibilities, increasing profits and market share, while shifting the cost of benefits onto employers and taxpayers. This is just one of the many tools they use to take advantage of restaurants, who provide jobs with actual protections to their workers.

This imbalance creates problems for restaurants. Restaurants lose contact with their customers and the opportunity to market to them, solicit feedback, or address issues. Some restaurants do not even know they are listed on a delivery platform and have no way to connect with customers or track their business. In the event a restaurant objects to commission increases, or stops doing business with a delivery company, these food delivery platforms can undercut restaurants by re-directing customers to a competing business or “ghost kitchen.”

4. Opposition

The Internet Association and TechNet jointly write:

AB 2149 will harm restaurants, consumers, and food delivery platforms at a time when more customers and restaurants need these platforms to safely weather the COVID-19 global pandemic. As currently drafted, AB 2149 would require restaurants to enter into a contract with a food delivery platform before they can offer delivery through the platform. But today, many restaurants prefer to have options when it comes to food delivery platforms; AB 2149 would limit those choices.

The requirements of AB 2149 could cut many struggling family-operated restaurants off from delivery as restaurants will be removed from platforms until an affirmative contract can be signed. This lapse could be disastrous for restaurants simply trying to keep the doors open by offering take-out as frustrated customers may permanently turn to competitors while contract details get negotiated.

Furthermore, as restaurants across California closed their doors to dine-in customers, many turned to food delivery platforms to offer delivery service, maintain operations, and make payroll. Some restaurants prefer the flexibility of their current arrangements with food delivery platforms as the advertising exposure and the increased business the platforms provide is highly valuable without having to be locked into a contract. Our platforms have provided critical lifelines, connecting customers with their restaurant of choice.

The requirement that the restaurant’s consent be granted in writing is not a requirement that an actual binding contract be executed. It is simply a requirement that the platform, before profiting off a restaurant’s business, get its consent and document it. This is a common requirement that is generally not viewed as onerous. A one-line email could suffice. And while a mass removal of restaurants from food delivery platforms is

technically possible, the bill, should it become law, would likely be signed in September but would not become effective until January 1, 2021. This provides three months for delivery platforms, as well as restaurants that want to continue using their services, to proactively address the issue. In fact, nothing prevents the platforms from seeking consent now; some platforms already do this. Furthermore, given their penchant for dynamic and creative use of technology, the delivery platforms may be especially well suited to the task. That said, going forward the author may wish to consider expressly addressing what happens when a restaurant wishes to revoke its consent; if they can do so at any time, then a reasonable grace period for compliance may be appropriate.

The Internet Association and TechNet additionally write that the bill's incorporation of the definition of "food facility" in Health and Safety Code section 113789 will cause it to apply to a broader array of entities than intended. That provision generally defines that term as an operation that stores, prepares, serves, vends, or otherwise provides food for human consumption at the retail level, including (1) an operation where food is consumed on or off the premises, regardless of whether there is a charge for the food, and (2) a place used in conjunction with the operations described in the subdivision, including storage facilities for food-related utensils, equipment, and materials. Going forward, the author may wish to ensure this definition fits the bill's aims.

Finally, the Electronic Frontier Foundation, writing about the prior version of the bill, raises concerns relating to trademark, copyright, and freedom of speech. The prior version of the bill would have prohibited a food delivery platform from posting a menu of, or otherwise using the likeness, registered trademark, or intellectual property belonging to, a food facility without the express written consent of the food facility. However, the author recently amended the bill to omit aspects relating to intellectual property and instead directly prohibit platforms from arranging for the delivery of orders from a restaurant without its consent. Thus the bill is now a straightforward regulation of an abusive business practice and no longer implicates the issues raised by Electronic Frontier Foundation.

SUPPORT

California Labor Federation
California Restaurant Association
California Travel Association
Small Business Majority

OPPOSITION

Electronic Frontier Foundation
Internet Association
TechNet

RELATED LEGISLATION

Pending Legislation:

AB 3336 (Carrillo, 2020) revises the California Retail Food Code to require a person who delivers food for a third-party delivery system to obtain a food handler card and to comply with specific requirements when delivering ready-to-eat food from a food facility to a consumer. The bill is pending in the Senate Appropriations Committee.

Prior Legislation:

AB 1360 (Ting, 2019) would have required food delivery platforms to ensure that their drivers had training relating to maintaining potentially hazardous foods at required temperatures and maintained liability insurance covering liabilities arising from the use of a vehicle in connection with providing food delivery services. This bill is currently on the inactive file on the Senate Floor.

PRIOR VOTES:

Assembly Floor (Ayes 68, Noes 5)

Assembly Privacy and Consumer Protection Committee (Ayes 9, Noes 2)
