

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2023-2024 Regular Session

SB 1490 (Durazo)
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Fiscal: No
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CK

SUBJECT

Food delivery platforms

DIGEST

This bill strengthens the Fair Food Delivery Act. It requires food delivery platforms to disclose additional information in connection with their services, including the various costs charged to customers and food facilities as well as order information. The bill also requires platforms to create mechanisms for facilities to remove themselves or to choose which services they are interested in and prohibits platforms from placing certain restrictions on food facilities.

EXECUTIVE SUMMARY

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, Ch. 125, Stats. 2020) (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 bolster the protections of the Act by requiring platforms to disclose to consumers and restaurants the actual, itemized costs involved in online food order and delivery, including both the fees charged to restaurants and the fees directly paid by customers. The bill also ensures a balance of power between platforms and food facilities through various measures, including clear restrictions on limiting what facilities can dispute and preventing retaliatory responses.

The bill is sponsored by the Digital Restaurant Association and supported by the Independent Hospitality Coalition. It is opposed by various business and tech

organizations, including Technet. If the bill passes this Committee, it will next 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 the consumer;
 - 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;
 - c) “online order” as an order for food or beverage placed by a customer through or with the assistance of a food delivery platform, including, but not limited to, a telephone order, for delivery; and
 - d) “purchase price” as the price, as 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. (§ 22598.)
- 3) Makes it unlawful for a food delivery platform to do the following:
 - a) charge a customer any purchase price for food or beverage that is higher than the price posted on the food delivery platform’s website by the food facility at the time of the order;
 - b) retain any portion of amounts designated as a tip or gratuity. Any tip or gratuity for a delivery order shall be paid by a food delivery platform, in its entirety, to the person delivering the food or beverage. Any tip or gratuity for a pickup order shall be paid by a food delivery platform, in its entirety, to the food facility. (§ 22599.1(a).)

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

- 4) 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 the following information:
 - a) the purchase price of the food and beverage;
 - b) a notice, if applicable, that the food delivery platform charges a fee, commission, or cost to the food facility, unless the food facility directs that the food delivery platform disclose to customers the delivery fee charged to the food facility and each fee, commission, or cost charged to the food facility;
 - c) each fee, commission, or cost charged to the customer by the food delivery platform; and
 - d) any tip or gratuity. (§ 22599.1(b).)
- 5) Requires a listing website to clearly and conspicuously disclose if an order placed through a telephone number or other interface on their website or application may result in a fee, commission, or cost paid to a party other than the food facility, and shall identify that other party. (§ 22599.1(c)(2).)
- 6) 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) Requires a food delivery platform to provide to a food facility a mechanism to do both of the following:
 - a) Request removal of a listing or promotion of its services from the food delivery platform. Once the request is received, the platform shall remove the food facility from the platform within three business days and shall not list the food facility on its platform, offer the facility's food for delivery, or use their name, address, logo, or menu without consent.
 - b) Select services offered by the food delivery platform from a display that clearly discloses the fees charged for each selected service, including the specific rates for marketing, delivery, and order processing.
- 2) Prohibits a food delivery platform from the following:
 - a) Limiting the value or number of transactions that may be disputed by a food facility with respect to order, goods, or delivery errors for determination of responsibility and reconciliation with respect to those errors.
 - b) Penalizing a food facility for refusal to use a service offered by a food delivery platform.
 - c) Restricting a food facility from using consultants, accountants, or legal services to manage or review information provided by the platform.

- 3) Requires the itemized cost breakdown to be prominently disclosed and requires it to additionally include each fee, commission, surcharge, and cost charged to the food facility and the customer.
- 4) Clarifies that the breakdown shall include any tip or gratuity payable to the delivery driver, courier, or food facility.
- 5) Requires a food delivery platform to prominently and clearly disclose to the customer the specific amounts received by the food facility and the food delivery platform of the purchase price, commissions and fees, tips, and any other amounts charged by the food delivery platform to the customer.
- 6) Requires a food delivery platform to clearly and regularly disclose to the food facility and the customer the status of the order, including:
 - a) The method of delivery.
 - b) The anticipated date and time of the delivery of the order.
 - c) Confirmation that the order has been successfully delivered or that the delivery cannot be completed.
- 7) Requires the food delivery platform to provide the contact information of the food facility to the customer, including the primary telephone number or email address of the food facility.
- 8) Provides that, in addition to the exclusion of taxes and gratuities, the “purchase price” does not include fees, commissions, or surcharges.

COMMENTS

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

The COVID-19 pandemic decimated the restaurant industry. Millions of employees were laid off or furloughed and approximately four in 10 restaurants closed.² Meanwhile, sales through third-party online delivery services, already a major growth industry before the pandemic, surged dramatically, growing by 122 percent in 2020.³ Although these services can conveniently and safely connect restaurants with customers, they can be costly – commissions are often around 30 percent of the sale

² National Restaurant Association, Letter to Congress (Apr. 20, 2020), *see* <https://www.cnbc.com/2020/04/20/coronavirus-restaurants-describe-huge-shortfalls-with-government-aid.html>; 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/>. All internet citations are current as of April 10, 2024.

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>.

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 Postmates⁶), and 18 percent were through Grubhub.⁷ Despite rapid growth and skyrocketing valuations, the companies are not making money.⁸

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.⁹ The companies 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. While large corporate partners have the bargaining power to pay lower fees, many smaller restaurants that rely heavily on delivery services have reportedly operated at a loss because of fees from delivery services.¹⁰ This prompted several major cities to adopt temporary ordinances capping service fees.¹¹

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.¹² One type of predatory

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/>.)

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>.)

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-door-dash-postmates/>.)

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

⁹ *Id.*

¹⁰ 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>.

¹¹ *Id.*

¹² 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>.

practice involved listing restaurants on food delivery websites without their consent,¹³ 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.¹⁴

Last session, AB 286 (Gonzalez, Ch. 513, Stats. 2021) expanded the Act by prohibiting a food delivery platform from marking up the price of the food and beverages it delivers or retaining tips or gratuities it receives. AB 286 also requires food delivery platforms to provide itemized cost breakdowns to customers and food facilities that includes the purchase price of the food and beverage; a notice, if applicable, that the food delivery platform charges a fee, commission, or cost to the food facility, except as specified; each fee, commission, or cost charged to the customer by the food delivery platform; and any tip or gratuity.

Last year, AB 502 (Lee, Ch. 164, Stats. 2023) addressed issues with consumer communications intended for food facilities that are placed through a listing website. It prohibits such websites from associating methods of communication with a food facility where they know that use of that method will result in a “forwarded call,” as defined. AB 502 also requires certain disclosures with respect to fees, commissions, and other costs in connection with orders placed through such websites.

2. Strengthening the protections of the Fair Food Delivery Act

Despite these laws, concerns within the industry regarding anti-competitive practices, and opaque and manipulative fees continue to be expressed, and litigated. Recently, Los Angeles County brought an enforcement action against a leading food delivery platform, Grubhub, alleging false and deceptive advertising, misrepresentation and

¹³ 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>.

¹⁴ 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].)

unfair business practices that financially harm consumers, delivery drivers and restaurants. Specifically, the county alleges the following unlawful practices:

Harm to Consumers

- Deceptively advertises that consumers can place delivery orders online “for free” but then charges consumers fees on those orders at check-out.
- Uses bait-and-switch tactics to lure consumers with a flat, unqualified price for delivery upfront while adding deceptively labeled “service,” “small order” and “driver benefits” fees at checkout. In some cases, the costs of the fees exceed the cost of the food item ordered.
- Misrepresents restaurant search results on its apps and websites, telling consumers that the search results are based on relevance to the consumer’s query, when in fact, the results and rankings are based in part on how much restaurants have paid Grubhub for placement.

Harm to Drivers

Grubhub misrepresents the qualities, characteristics and scope of the “Driver Benefits Fee,” which Grubhub charges consumers in connection with Proposition 22. Grubhub deceptively implies that the fee provides healthcare benefits to drivers and that consumers no longer need to tip their drivers because “they don’t have to depend on tips.”

Harm to Restaurants

Grubhub deceptively and unilaterally charges restaurants for customer refunds, which Grubhub issues without restaurants’ consent, and without verifying whether the customer or the restaurant was responsible.¹⁵

This bill bolsters the protections of the Act in order to provide more transparency for both consumers and the restaurants. It also ensures that restaurants have more control over the services being provided and their ability to hold platforms accountable.

Currently, food delivery platforms are required to disclose to the customer and to the food facility an accurate, clearly identified, and itemized cost breakdown of each transaction. This must include a notice, if applicable, that the platform charges a fee, commission, or cost to the food facility, unless the food facility directs that the platform disclose to customers the delivery fee charged to the food facility and each fee,

¹⁵ *LA County Sues Grubhub Alleging Unfair and Deceptive Business Practices*, Office of the County Counsel, Los Angeles, <https://counsel.lacounty.gov/la-county-sues-grubhub-alleging-unfair-and-deceptive-business-practices/>.

commission, or cost charged to the facility. This bill instead requires the breakdown to include each fee, commission, surcharge, and cost charged to the facility, including delivery fees. The bill also requires the itemized breakdown to be prominently disclosed to the customer and food facility, clarifies what tips and gratuities must be disclosed, and includes surcharges charged to the customer.

To ensure greater transparency for the customer, the bill requires the platform to prominently and clearly disclose to the customer the specific amounts received by the food facility and the amounts received by the platform of the purchase price, commissions and fees, tips, and any other amounts charged by the food delivery platform to the customer.

To also ensure transparency and accountability with respect to individual orders, the bill requires a food delivery platform to clearly and regularly disclose to the food facility and the customer the status of the order, including how it will be delivered, the expected time of delivery, and confirmation of successful delivery or the inability to complete it. A platform must also provide the facility's contact information to the customer. Platforms are prohibited from limiting the value or number of transactions that may be disputed with respect to order, goods, or delivery errors for determination of responsibility and reconciliation with respect to those errors.

To ensure greater control for the restaurants, the bill requires the platforms to provide a mechanism for a food facility to request removal of a listing or promotion of their services. If such a request is made, the platform must remove the facility within three days and refrain from listing it or offering its food for delivery.

To deter anticompetitive practices, the platform must also establish a method for facilities to select the services of the platform that it wishes to engage from a display of these services that clearly discloses the fees charged for each selected service, including the specific rates for marketing, delivery, and order processing. A platform is prohibited from penalizing a food facility for refusal to use any specific service offered. A food delivery platform cannot restrict a food facility from using consultants, accountants, or legal services to manage or review information provided by the food delivery platform.

According to the author:

Customers and restaurants are paying high, and often hidden fees when ordering through the big third-party delivery platforms. SB 1490 requires platforms to disclose to consumers the actual costs involved in online food order and delivery, including both the fees charged to restaurants and the fees directly paid by customers. By providing transparent information, consumers will not be deceived by misleading cost information and can make informed decisions when ordering food from their favorite restaurants.

The Digital Restaurant Association, the sponsor of the bill, writes:

The restaurant industry currently faces many challenges. With online orders now averaging 40% of restaurant revenue, and the big three delivery companies have 99% market share, these third-party delivery platforms have substantial power in the restaurant industry. Our aim is to protect consumers and restaurants from unfair and harmful business practices by advocating for best practices including fee transparency and improving restaurant's control over the customer experience.

SB1490 aligns with our goals of fee disclosures to customers and restaurants including an itemized breakdown of purchase price, fees, commissions, and tips, so the customer understands the true costs and the restaurant can understand the specific fees for marketing, ordering and delivery. The legislation also bans delivery platforms from limiting the value or number of transactions disputed by a restaurant as evidenced by operators having to bear the brunt of delivery chargebacks. We also support the ability to increase order information sharing by requiring the disclosure of order status including delivery method, anticipated date and time and confirmation of successful delivery to assist with the customer experience and reduce miscommunication.

This legislation would enhance existing laws enacted by AB 286 (Gonzalez), AB 2149 (Gonzalez), and SB 478 (Dodd). SB 1490 expands consumer and restaurant protections by including mechanisms for restaurants to exercise their rights already allowed in previous legislation such as codifying a mechanism, process and timeline for the removal of restaurants from a food delivery platform if the restaurant puts in a request, and the process for restaurants to disclose the fees charged to them by the food delivery platform.

Writing in opposition, the California Chamber of Commerce and Technet argues the bill "introduces vague and [nonsensical] provisions into existing law, with no clear benefit for consumers or restaurants." They highlight concerns with various provisions of the bill specifically, including the following:

Section 22599.1(c) would require every food delivery platform to disclose to the public their pricing arrangements with contracting restaurants – which provides no apparent benefit to the consumer or the restaurant. An analogy helps explain how bizarre this requirement is: when we go to a musical concert, we buy a ticket. That ticket doesn't mean that the venue needs to publish the details of their contract with the musical artist, or the security guards, or the rental costs for the set pieces. That isn't relevant to a consumer, and is part of their business model.

To briefly re-iterate existing law: the restaurant is already aware of the pricing of their agreement with the food delivery platform – as they negotiated their pricing before the food was posted pursuant to existing law. Similarly, the customer is already required to be made aware of any fees that they pay to the food delivery service under existing law.

The only one to benefit from compelling disclosure of such information would be competitors. Here, we similarly see no benefit for this information for consumers or restaurants – raising the question: why should food service platforms be compelled to publicize their contract terms with their business partners?

Similarly, the Chamber of Progress writes in opposition:

Specifically, the bill would require food delivery apps to disclose to customers “each fee, commission, or surcharge, and cost charged” to the restaurants they order from. Large restaurant chains often negotiate with individual delivery platforms for exclusive partnerships, preferential placement in searches, marketing services, or better commission fees. These negotiations are confidential and take place in a competitive market—both for food delivery services and restaurants.

If these fees were disclosed to customers, large restaurant chains stand to gain an anti-competitive advantage in their negotiations by getting access to the private contractual information of their competitors.

In response to these concerns, the author has agreed to amendments that remove from the bill Section 22599.1(c), the provision calling for disclosure of the specific amounts received by both the platform and food facility. In addition, the author has agreed to revert Section 22599.1(b)(2) back to existing law, but to require platforms to provide a mechanism for food facilities to exercise that right to direct the platforms.

A number of food delivery platforms argued in opposition to the bill that the provisions requiring a mechanism for food facilities to remove their listings on these sites and to select the specific services they wanted were problematic as they could interfere with already established contractual obligations.

In response to these concerns, the author has agreed to amendments that specifically state these provisions shall not interfere with any preexisting contractual obligations between a platform and a food facility.

SUPPORT

Digital Restaurant Association (sponsor)
Independent Hospitality Coalition

OPPOSITION

California Chamber of Commerce
Chamber of Progress
East Los Angeles Chamber of Commerce
Friends Liquor
Plant Cafe
Starbird Cafe
Technet

RELATED LEGISLATION

Pending Legislation: AB 375 (Davies, 2023) requires a food delivery platform to provide specified information to a consumer about their delivery driver. This bill is currently pending referral in the Senate Rules Committee.

Prior Legislation:

AB 502 (Lee, Ch. 164, Stats. 2023) *See Comment 2.*

AB 286 (Gonzalez, Ch. 513, Stats. 2021) *See Comment 2.*

AB 2149 (Gonzalez, Ch. 125, Stats. 2020) *See Executive Summary.*

AB 3336 (Carrillo, Ch. 105, Stats. 2020) required 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.
