

SUBJECT: Regulating third-party food delivery services, agreements with restaurants

COMMITTEE: Licensing and Administrative Procedures — favorable, without amendment

VOTE: 8 ayes — S. Thompson, Kuempel, Darby, Fierro, Geren, Goldman, Hernandez, Pacheco

0 nays

3 absent — Ellzey, Guillen, Huberty

SENATE VOTE: On final passage, April 9 — 31-0, on Local and Uncontested Calendar

WITNESSES: No public hearing.

DIGEST: SB 911 would impose regulations on third-party food delivery services relating to agreements with restaurants, consumer complaints, fees, and the use of a restaurant’s mark or trade name, among other provisions.

Restaurants. The bill would define a “restaurant” as a business that operated its own permanent food service facility with commercial cooking equipment on its premises and prepared and offered to sell multiple entrees for consumption on or off the premises.

The Texas Alcoholic Beverage Commission could issue a food and beverage certificate to restaurants that held a wine and malt beverage retailer’s permit, mixed beverage permit, private club registration permit, or retail dealer’s on-premise license.

Third-party food delivery services. The bill would define a “third-party food delivery service” as a website, mobile application, or other service that acted as an intermediary between consumers and multiple restaurants not owned or operated by the service to arrange for the delivery or pickup of food or beverages from those restaurants.

Agreements with restaurants. An agreement between a third-party food delivery service and a restaurant would have to be in writing, expressly authorize the service to arrange for the delivery or pickup of food or beverages from that restaurant, and clearly state each fee that the restaurant would have to pay to the service or absorb in connection with an order arranged through the service.

An agreement could not include any provision that required the restaurant to indemnify the third-party food delivery service, including an employee or independent contractor of the service, for claims or liabilities resulting from acts or omissions of the service or of an employee or independent contractor of the service. An agreement violating these provisions would be void and unenforceable.

These provisions would apply only to an agreement entered into or renewed on or after the bill's effective date.

Requirements. A third-party food delivery service would have to provide a consumer a clearly identified mechanism to express concerns or complaints directly to the service regarding an order arranged through the service. A third-party service also would have to remove a restaurant from the service by 10 days after receiving a request for the removal if the service did not have a valid agreement with the restaurant.

Prohibitions. A third-party food delivery service could not:

- arrange for the delivery or pickup of food or beverages from a restaurant in Texas unless the service had filed a certificate of formation or registration with the secretary of state;
- use a restaurant's mark or trade name in connection with the service in a misleading way that suggested the restaurant sponsored or endorsed the service;
- add a restaurant removed from the service to the service unless written consent from the restaurant was received; or
- charge a restaurant a fee or require the restaurant to absorb a fee in connection with the service's arrangement of an order from that

restaurant unless the restaurant had agreed to pay or absorb the fee under a valid agreement with the service.

Private cause of action. If a third-party food delivery service violated the bill's provisions, a restaurant aggrieved by the violation could bring an action against the service for injunctive relief and damages equaling the restaurant's actual damages or the service's profits arising from the violation. If a court found that the defendant committed the violation knowingly or in bad faith, the court could award the plaintiff:

- exemplary damages in an amount up to three times the sum of the plaintiff's actual damages and the defendant's profits arising from the violation; and
- the plaintiff's reasonable attorney's fees.

Local ordinances, regulations. A municipality or county could not adopt or enforce an ordinance or regulation to the extent that the ordinance or regulation affected the terms of valid agreements between third-party delivery services and restaurants.

The bill would take effect January 1, 2022.

**SUPPORTERS
SAY:**

SB 911 would aid in the recovery of restaurants affected by the COVID-19 pandemic by creating clear requirements for third-party services that facilitated deliveries from restaurants. The popularity of food delivery through third-party platforms grew substantially in the wake of restaurant dine-in shut downs and capacity limitations due to the pandemic. However, some delivery services have improperly implied a sponsorship or connection between restaurants and the delivery service by using a restaurant's mark or trade name, thereby misleading consumers and precluding the ability of restaurants to resolve customer complaints.

The bill would remedy this problem and others arising from the misleading business practices of some delivery services by prohibiting the unauthorized use of a restaurant's mark or trade name and requiring the removal of restaurants from a service within 10 days of a request. The bill

also would create clear guidelines for restaurant-delivery service agreements, avenues for injunctive relief and recovery of damages, and complaint processes to protect consumers.

Because the bill would create several additional avenues through which an entity could acquire a food and beverage permit, it would not negatively impact bars or food trucks or remove any ability these entities have to conduct business under current law. The bill is not intended to limit competition, but rather to regulate third-party food delivery services.

CRITICS
SAY:

SB 911 could limit competition in the food delivery space by precluding bars and food trucks from taking advantage of the bill's provisions. The bill would do this by narrowly defining a restaurant to mean a permanent food service facility with commercial cooking equipment. The pandemic waiver issued by the Texas Alcoholic Beverage Commission that allowed bars to more easily qualify for a food and beverage certificate helped keep these businesses afloat and Texans employed. Excluding bars and food trucks from the bill's provisions would provide an unfair advantage to certain participants in the food industry at the expense of healthy market competition and consumer choice.

NOTES:

The House companion bill, HB 2119 by Burrows, was considered by the House Committee on Licensing and Administrative Procedures in a public hearing on March 24, reported favorably on March 29, and sent to the Calendars Committee.