

Report on Supply Chain Compliance Volume 3, Number 10. May 14, 2020

Keeping food deliveries safe

By Karen Kroll

As much of the U.S. shelters in place to help slow the spread of COVID-19, more consumers are using delivery services to get grocery and restaurant orders. Meal delivery services grew by 24% for the year ending March 2020, according to Second Measure, a technology company that analyzes consumer behavior.^[1]

The services' popularity highlights questions about the responsibilities of all parties—restaurant or grocer and delivery company—to ensure orders are safely transported. However, no easy answer exists. One reason is that guidance and regulations continue to change. An example is the recent addition of several provisions to the Los Angeles Municipal Code, including one requiring food delivery platforms to offer their workers the option of a “no-contact” delivery method.^[2]

In addition, many drivers are considered independent contractors rather than employees.^[3] The companies that engage them generally exert less control than would be the case if they were employees. For example, Uber Eats advertises that drivers have “no boss.”^[4]

Complicating things further, even delivery drivers who otherwise are independent contractors can be considered employees in specific cases. Take the recent ordinance change in Los Angeles. It considers delivery drivers employees for several specific purposes, including the right to predictable schedules and to a contact-free delivery method, said Bruce Sarchet, a shareholder with employment law firm Littler. “If you’re doing business in Los Angeles, you should be aware of this,” he added.

While these issues have always been “below the surface” of the food delivery business, they hadn’t emerged as major concerns until the pandemic, said Shawn Stevens, food industry attorney with Food Industry Counsel LLC. Although there’s currently no evidence of COVID-19 being transmitted through food, it can sometimes be transferred between infected people and on objects such as delivery bags. “We’re in the infancy of this new market, and the rules are still being made,” he said.

Assigning responsibility

In considering which party has a duty to ensure a delivery driver is acting to safely deliver orders, some might say the delivery companies do. After all, they’re creating the economic opportunity for the driver, Stevens said.

Others could argue that delivery companies are in the transportation or software business, not the food safety business, Stevens noted. Instead, the delivery person essentially functions as extension of the “back of house” or the restaurant kitchen, he said. Hence, the restaurant would be responsible for ensuring the person and car taking the food are clean and sanitary.

This tends to be easier when a restaurant or retailer uses its own employees to make deliveries, as it gains greater control and can provide training and establish safety policies. “It’s a much better scenario,” Stevens said. At the same time, it’s often less efficient for retailers and restaurant operators to dedicate their own employees to deliveries, he added.

Given that many delivery workers are independent contractors, it becomes difficult for the restaurant or retailer

to ensure, for instance, the drivers aren't working while sick and that they're practicing adequate personal hygiene. Ron Leibman, head of the transportation, logistics and supply chain management practice with McCarter & English, indicated this is a weak point in the supply chain.

OSHA guidance

Several Occupational Health and Safety Administration standards are relevant to employers' efforts to keep workers from being exposed to COVID-19.^[5] "The General Duty Clause requires employers to provide a safe, healthy workplace free from known hazards," said Tiffany Hubbard, associate with McCarter & English.

OSHA's multiemployer policy focuses on worksites in which employees from multiple companies are present, such as suppliers' employees stocking shelves within grocery stores, said Manesh Rath, partner with experience in occupational health and safety with Keller and Heckman LLP.

When multiple employers have workers at a common worksite, several of the employers may have a duty to comply with OSHA standards, Rath said. This includes the employer with power to control the hazard or worksite, the employer whose workers may be exposed to a hazard, and/or the employer who has the power to correct a hazard.

Businesses can set policies to be followed by visitors to their premises to ensure the safety of both workers and all visitors. For instance, a business can ask a vendor to ensure any of the vendor's workers located on the business's premises comply with safety requirements, Rath said. So, a grocer could require a delivery company to provide its drivers with personal protective equipment. This would be true even if the delivery company engages independent contractors, he added.

Testing concerns

In their efforts to maintain a safe workplace, some employers are considering testing workers for signs of COVID-19. Because the distinction between employee and independent contractor depends largely on the degree of control a company exerts over the worker, testing could prompt questions if applied to most delivery drivers, Sarchet said. "If every day you give them a health screening, is that too much control? Are you converting them to employees?" he asked.

While Sarchet noted that a health test wouldn't control the manner or mean by which a worker completes their tasks, potentially blurring the line between independent contractor and employee, "this hasn't yet faced a legal test." It's also possible the answers will vary by state, he added.

Given how much guidance on maintaining the safety of drivers and the orders they're transporting is evolving, "there's not a clear answer and not likely to be a clear answer to the question of which party is responsible for ensuring delivery orders are safely handled," said Hugh Murray, partner with McCarter & English. Instead, responsibility is shared between the retailer, restaurant and delivery company, all of whom have an interest in ensuring the safety of the deliveries. "I think [they] will be driven more by the market than by legal considerations," he added.

Steps to take

Even without clear answers to questions of who's responsible for the safety of food delivery orders, restaurants and retailers can act to make their deliveries as safe as possible. Larger chains can negotiate with their delivery company partners, asking them to meet certain requirements, such as the use of face masks, or risk terminating their contracts, Stevens said. "It's the responsibility of the larger chains to create standards and best practices, as they're in the best position to do so," he added.

All companies should monitor local and national regulations and guidance or work with a partner that does. Both the Centers for Disease Control and Prevention^[6] and the Food and Drug Administration^[7] have issued COVID-

19-related guidance geared to restaurants, grocers and delivery drivers, as have state agencies. “It’s really up to the individual entity to keep up, as there’s no clearinghouse that tells how the law in New York City differs from the law in Dubuque,” Leibman said.

Another step is to develop a written infection control plan and document the steps taken each day to comply with appropriate safety measures, Rath said. This can include routine disinfecting as well as regular checks of employees and contractors about potential symptoms. “This acts as a record of compliance,” he added.

The rules and guidance around sanitation and food safety practices likely will continue to evolve as online food shopping appears poised to make up a significant portion of the future grocery market. “COVID is the beginning and not the end,” Leibman said.

Takeaways

- The guidance around food safety and sanitation practices to protect against COVID-19 continues to evolve. Restaurants, retailers and delivery companies should regularly monitor information coming from national agencies like the Centers for Disease Control and Prevention, as well as local government entities.
- All involved in food delivery—the restaurant or retailer, the delivery platform and the delivery person—have a responsibility and incentive to ensure safety.

1 Kathryn Roethel Rieck, “Which company is winning the food delivery war?” Second Measure, April 21, 2020, <https://bit.ly/3fpSEC1>.

2 Los Angeles Municipal Code, Ordinance No. 186591, adding Article 3-72MM “Grocery, Drug Retail and Food Delivery Worker Protection” to § XX, Sec. 200.14. Additional Requirement for Food Deliveries, April 10, 2020, <https://bit.ly/2YHZbBP>.

3 “FAQ: Why should I be a DoorDash driver?” DoorDash, last accessed May 7, 2020, <https://bit.ly/3beYoep>.

4 “Deliver with Uber Eats - Become an Uber Delivery Partner,” Uber, last accessed May 7, 2020, <https://ubr.to/35E2JGI>.

5 Occupational Safety and Health Administration, “COVID-19,” Safety and Health Topics, U.S. Department of Labor, last accessed May 7, 2020, <https://bit.ly/3cpoY5K>.

6 “What Food and Grocery Pick-up and Delivery Drivers Need to Know about COVID-19,” Coronavirus Disease 2019 (COVID-19), Centers for Disease Control and Prevention, last reviewed April 17, 2020, <https://bit.ly/2YPpWUW>.

7 “Best Practices for Retail Food Stores, Restaurants, and Food Pick-Up/Delivery Services During the COVID-19 Pandemic,” Food Safety During Emergencies, U.S. Food and Drug Administration, April 21, 2020, <https://bit.ly/2WcZjb9>.

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