



PATRICK TESTIN

STATE SENATOR

DATE: February 8th, 2022

RE: **Testimony on Senate Bill 861**

TO: The Senate Committee on Labor and Regulatory Reform

FROM: Senator Patrick Testin

Thank you Chairman Nass and members of the Senate Labor and Regulatory Reform Committee for allowing me to testify on behalf of Senate Bill 861 (SB 861).

The last two years have been a turbulent time for restaurants. They have had to be creative and accept new changes to the industry in order to survive. One way to continue to serve customers was delivery, but not every restaurant could offer delivery services. Third-party delivery services helped to remedy that situation.

Third-party food delivery services are a popular and convenient option for many; however, these companies can currently operate without bearing any responsibility to the restaurants whose food they transport. This can lead to the customer mistakenly blaming the restaurant for errors over which they have no control. Rep. Kuglitsch and I authored SB 861 because restaurants should have a right to know and determine when and if their food is delivered.

This bill outlines best practices and creates an environment of transparency that will enable both restaurants and delivery services to thrive. Some of the issues this legislation will address:

- Restaurants will receive transparency on fees (including commissions, delivery fees, and promotional fees) charged by third-party delivery companies.
- Third-party delivery companies must obtain consent or permission from a restaurant before using its name, menu, symbols, and images on its platform, or offering that restaurant's food to customers.
- Third-party food delivery services will ensure individuals delivering food know basic food safety principles.

Wisconsin is not alone in considering this sort of legislation; ten other states and Washington D.C. have already instituted similar requirements. This is an opportunity for Wisconsin to be one of the leaders in ensuring clarity and transparency for both restaurants and food delivery services.

MIKE KUGLITSCH

STATE REPRESENTATIVE • 84TH ASSEMBLY DISTRICT

DATE: February 8, 2022
RE: **Testimony for Senate Bill 861**
TO: Senate Committee on Labor & Regulatory Reform
FROM: Representative Mike Kuglitsch
SUBJECT: Senate Bill 861 -- Third-Party Food Delivery Services

Thank you Chairman Nass and Members of the Committee for your consideration of Senate Bill 861 (SB 861), which establishes principles for delivery of food by third-party delivery services.

Imagine owning a restaurant and receiving a call that your food was delivered late and cold. Your response is “but we don’t deliver...”

A growing issue in the restaurant industry has delivery and rideshare companies offering the public food and drink options without informing the restaurant. Third-party delivery services are known to list menus for local restaurants on their website and take orders for delivery without ensuring the food and drink arrive promptly on time. The result is often a bad review.

Delivery represents one of the most important segments of growth for the restaurant industry and third-party platforms play an important role in helping restaurants survive and grow their business, but restaurants have a right to know and determine when and if their food is being delivered.

In addition, customers should expect the same degree of food safety from delivery as they do when dining in a restaurant.

Senate Bill 861 is based on principles and guidelines the third-party delivery companies agreed to in cooperation with the Council of State Restaurant Associations and the National Restaurant Association, which has led to customization at the state level. SB 861 focuses on permission and transparency for delivery services and defines best practices for third-party food delivery.

The Bill requires third-party delivery companies offer access to minimal data sharing regarding orders from their restaurant originating on third-party delivery platforms. Minimal data sharing includes content of the order, time order was placed and ability for the restaurant to view and respond to consumer feedback.

In addition, SB 861, at the request of a restaurant, allows consumers while placing an order to elect to receive communications from the restaurant.

Senate Bill 861 also requires a 3rd-party food delivery services that violates the contract an action of not more than \$10,000 for each violation.

Senator Testin and I met with the third-party delivery platforms and the WRA last week and are considering ideas to amend the bill. We are reviewing bills passed in other states and should have an agreed upon amendment for the Committee to consider shortly.

Once we have an amendment, I ask the Senate Committee on Labor and Regulatory Reform to support SB 861 in Executive Session and allow the full Senate to debate the bill.

Thank you Mr. Chair, I ask for your support of this legislation and I am happy to take any questions.



2801 Fish Hatchery Road | Madison, WI 53713 | (608) 270-9950 | (800) 589-3211 | FAX (608) 270-9960 | www.wirestaurant.org

February 8, 2022

TO: Senate Committee on Labor and Regulatory Reform
Senator Stephen Nass, Chair

FR: Susan Quam, Executive Vice President

RE: SB 861 – Third Party Delivery Consent

Thank you Chair Nass and members of the committee for hearing our story this morning. We appreciate your time today.

The Wisconsin Restaurant Association (WRA) represents over 7,000 restaurant locations statewide. Our organization represents all segments of the restaurant and hospitality industry; our membership includes food establishments of all types and sizes, such as seasonal drive-ins, supper clubs, diners, bars, locally owned franchisees, fine-dining and hotels/resorts. Over 75 percent of our membership are independent restaurants. Regardless of ownership type, all restaurants are the cornerstones of their neighborhoods and communities. Restaurants not only provide great food, drink and hospitality, they support schools, teams, charities and churches with fundraising and donations. They provide meeting places to celebrate, mourn and organize, or just provide a safe, tasty meal for a busy family.

This committee and many others in the Capitol have heard us explain the economic toll the pandemic has taken on restaurants and the entire tourism industry. I will not dive into those statistics at this time, but have attached our most recent survey information for you to this testimony.

As restaurants were forced to close to indoor dining in March of 2020, some restaurants were able to remain open with skeleton crews for carryout and delivery sales. For restaurants where carry out and delivery was not part of their business model, these “new” sales provided some cash flow and allowed them to keep a few people employed. Even prior to the pandemic, we saw increasing demand for restaurant delivery and third party delivery companies provided opportunities for restaurants to expand their customer base. We know that many restaurant companies continue to have thriving relationships with third party companies. However, as any industry grows, especially at a rate that is artificially accelerated due to forces like a pandemic, there are issues and business practice that do emerge that are not beneficial to all restaurants. That is why we are here today regarding putting some parameters in place to level the playing field for restaurants, especially as they try to hang on to their businesses.

SB 861 is based on a set of agreed upon principles developed by the Council of State Restaurant Associations, our partner the National Restaurant Association, and some of the larger, national third party companies. We will admit the bill contains a large number of requirements for third party companies and it is very ambitious. If enacted, it would be the most restrictive bill of its kind in the country. We realize now that some of the requirements in the bill, such as much of the data sharing requirements, really should be contract negotiations between the restaurants and the third party companies and we are definitely willing to work with the bill’s authors and third party companies to pare those types of requirements down.

However, there are still some very important core components of regulation that we believe need to be enacted to protect restaurants businesses and I will give you an overview of those.

- **Definition of what food establishments that are covered by this bill. Wisconsin statute already has these two. The first one is more broad:**
 - Ch. 97.30 (1)(c) "Retail food establishment" means a permanent or mobile food processing facility where food processing is conducted primarily for direct retail sale to consumers at the facility, a mobile facility from which potentially hazardous food is sold to consumers at retail or a permanent facility from which food is sold to consumers at retail, whether or not that facility sells potentially hazardous food or is engaged in food processing. "Retail food establishment" includes a restaurant or temporary restaurant. "Retail food establishment" does not include an establishment holding a license under s. 97.605, to the extent that the activities of the establishment are covered by that license, or a stand operated by a minor, as defined in s. 66.0416 (1) (b).
 - Ch. 125.035 (18) "Restaurant" means **any building, room, or place where meals are prepared or served or sold to transients or the general public**, including all places used in connection with it and including any public or private school lunchroom for which food service is provided by contract.
 - Either one of these would cover any establishment that sells a meal, so that does include places like a convenience or grocery store that makes individual sandwiches in the deli or provides other restaurant like activities
- **Definition of who is authorized to enter into a documented agreement or documented permission/consent with the third party company**
 - For a single unit establishment, it would need to be the owner or manager
 - For a multi-unit company, it would need to be by the parent company (restaurant group) or franchisor, unless the franchisor has given express permission to franchisees via their franchise agreement that allows them to enter into agreements
- **Definition of documented agreement or permission/consent**
 - Documentation of permission or an agreement does not need to be a contract
 - An email or other type of documentation that can be produced upon demand is what is intended
- **Base requirements**
 - A third party company cannot list* a restaurant in any manner without documented consent by an authorized representative of the restaurant or company.
 - *This includes the restaurant's name, address, logo, menu or any other intellectual property owned by the restaurant. Listing a restaurant's name on a platform, even with some kind of disclaimer, can imply there is some kind of relationship with the platform. Or, it can portray the restaurant in some negative way, depending how the listing is given.
 - Delivery drivers must be informed of, and the driver must acknowledge they understand, the following food safety responsibilities
 - Proper handwashing: when, how and why

- Proper time and temperature control as it relates to transporting food from the restaurant to the customer
- Cannot deliver food while ill with diarrhea or vomiting
- Basic knowledge of cross contamination as it relates to transporting food from the restaurant to the customer
- Minimal data sharing
 - Content of the order
 - Time order was placed
 - Ability for restaurant to view and respond to consumer feedback
- Removal of restaurant listing
 - If a restaurant is listed without documented consent the third party has 72 business hours to remove the restaurant after being contacted
 - If a restaurant wishes to be removed from the platform after giving documented consent, the third party has 10 business days to remove the restaurant after being contacted
 - **\$10K fine if restaurant is posted without documented consent or not removed within 10 days after documented consent has been revoked**
- Bill goes into effect 120 days after it is published

As I mentioned earlier, the WRA team is very willing to continue to work with Rep. Kuglitsch, Senator Testin and representatives of the third party companies to further discuss what are the measures Wisconsin should have in place for third party platforms. We look forward to further conversations.



FOR IMMEDIATE RELEASE

January 24, 2022

Contact: Tracy Kosbau

Vice President of Marketing and Public Relations

Office: 608-216-2960

Mobile: 608-698-5853

Omicron Variant Hit Restaurant Industry Hard Replenishing the RRF Forecast to Save more than 30,000 Jobs

*New survey from National Restaurant Association shows 18,000 jobs
in Wisconsin saved with first round of RRF Funding*

Today, the Wisconsin Restaurant Association released new survey data highlighting the devastating impact the omicron variant has had so far. The survey also reveals the positive impact the Restaurant Revitalization Fund (RRF) had on the restaurant industry in Wisconsin. According to National Restaurant Association analysis, the first round of RRF funding saved more than 18,000 Wisconsin jobs and helped 95% of recipients of a grant stay in business.

In addition, the survey found:

- Nearly 40% of restaurant operators who did not receive RRF grants feel it's unlikely that they will stay in business beyond the pandemic without a grant.
- 87% of restaurant operators who applied for an RRF grant, but did not receive funding, said a future grant would enable them to retain or hire back employees.

"This highlights how impactful RRF replenishment would be. The National Restaurant Association estimates indicate that full replenishment of the RRF will save an additional 30,000 restaurant jobs in Wisconsin," said Kristine Hillmer, President & CEO of the Wisconsin Restaurant Association. "The RRF was a critical lifeline to many, but far more remain on the sidelines, desperately looking for support amidst continued economic uncertainty. The decisions Congress could make in the coming weeks will be critical toward the future of the restaurants that are so proud to serve our communities."

The restaurant industry was hit hard by the latest surge of COVID-19 cases caused by the omicron variant. Forced to adapt to deteriorating consumer confidence, restaurants reduced hours/days of operation, cut seating capacity, and shutdown, pivoting to off-premises dining with the end result being lower sales volumes in 2021 than in 2019.

Omicron variant negatively impacted business conditions in Wisconsin

- The omicron variant led to a rapid deterioration in business conditions for restaurants in Wisconsin. 81% of restaurants experienced a decline in customer demand for indoor on-premises dining in recent weeks, as a result of the increase in coronavirus cases due to the omicron variant.
- Wisconsin restaurants took a number of actions in recent weeks, as a result of the increase in coronavirus cases due to the omicron variant:
 - 46% reduced hours of operation on days that it is open
 - 39% closed on days that it would normally be open
 - 17% reduced seating capacity
 - 7% changed to only offering off-premises for a period of time
- As a result, 68% of operators say business conditions for their restaurant are worse now than they were 3 months ago. Only 4% say business conditions improved during the last 3 months.
- This was on top of the cumulative effects of nearly 2 years of pandemic-induced challenges:
 - 59% of operators say their restaurant accumulated additional debt since the beginning of the COVID-19 outbreak in March 2020.
 - 49% of operators say their restaurant fell behind on expenses since the beginning of the COVID-19 outbreak in March 2020.
 - 72% of operators say their restaurant is less profitable now than it was before the beginning of the COVID-19 outbreak in March 2020.

The Wisconsin restaurant industry's recovery is incomplete

- A majority of restaurants have not experienced a complete sales recovery to pre-pandemic levels. 68% of operators say their sales volume in 2021 was lower than it was in 2019. Only 26% of operators reported a same-store sales increase between 2019 and 2021.
 - Much of the sales growth in 2021 was driven by higher menu prices, as restaurant operators were forced to offset sharply rising costs throughout their restaurant. 88% of operators say their restaurant's total costs (as a percent of sales) were higher in December 2021 than they were in December 2020. Only 4% of operators reported lower costs.
- Customer traffic levels also remained below 2019 levels for most restaurants. 75% of operators say their customer traffic in 2021 was lower than it was in 2019. Only 21% of operators reported an increase in customer traffic between 2019 and 2021.

The Restaurant Revitalization Fund saved many businesses and jobs in Wisconsin

- 95% of RRF recipients said the grant made it more likely that they would be able to stay in business during the pandemic.
- 82% of RRF recipients said the grant helped them retain or hire back employees that would otherwise have been temporarily or permanently laid off.

- The National Restaurant Association estimates that over 18,000 restaurant jobs in Wisconsin were saved as a result of the initial round of Restaurant Revitalization Fund grants.
- 90% of RRF recipients said the grant helped them pay expenses or debt that had accumulated since the beginning of the COVID-19 outbreak in March 2020.
- 82% of RRF recipients said the grant was not sufficient to cover all of their lost sales since the beginning of the COVID-19 outbreak in March 2020.

A replenished Restaurant Revitalization Fund would save more businesses and jobs in Wisconsin

- 40% of restaurant operators that applied for an RRF grant but did not receive funding said it is unlikely that they will be able to stay in business beyond the pandemic, if they do not receive a grant through the Restaurant Revitalization Fund.
- 87% of restaurant operators that applied for an RRF grant but did not receive funding said a future grant would enable them to retain or hire back employees that would otherwise have been temporarily or permanently laid off.
 - The National Restaurant Association estimates that future grants awarded after a full replenishment of the Restaurant Revitalization Fund will potentially save more than 30,000 restaurant jobs in Wisconsin that are currently at risk.

Source: National Restaurant Association, national survey of 4,200 restaurant operators conducted January 6-18, 2022

The Wisconsin Restaurant Association is one of the largest trade associations in the state with over 7,000 member locations throughout Wisconsin. The mission of the Wisconsin Restaurant Association is dedicated to the success of the Foodservice and Hospitality Industry. The Association advocates on behalf of the restaurant industry, provides a voice for the restaurant industry to consumers and the media and provides access to information and services to help members better run their businesses. WRA represents the entire foodservice industry which includes over 15,000 licensed food service establishments.

WRA membership includes a wide range of foodservice businesses representing virtually every size and style of restaurant in the state. Members include fine dining establishments, mom-and-pop supper clubs, small cafes, quick service restaurants, corporate chain restaurants, institutional food service operations, catering businesses and hotel and motel foodservice among others.

- END -



Chairman Nass and Member of the Committee,

I am Scott Divine, VP of Sales for EatStreet, We're a proud Wisconsin company founded and based right here in Madison. I've been with EatStreet for 8 years and watched the company grow from a small student project with a few dozen employees to a substantial employer and contributor to Wisconsin's economy, with:

- *139 employees in our headquarters in Madison*
- *121 full time W-2 drivers*
- *1982 part time W-2 Drivers right here in Wisconsin.*
- *All in all, over 2,000 W-2 jobs created in this state over the past 12 years.*

Over the years EatStreet has partnered with the National Restaurant Association and is a current member of the Wisconsin Restaurant Association.

Here at EatStreet, we're proud of the strong partnerships we've nurtured with restaurants all over the state of Wisconsin. We understand that the relationship between a restaurant and 3rd party delivery company needs to be a "win-win" agreement, and we work towards that goal every day. We're also proud of the value we bring to our restaurant partners. 3rd party delivery companies such as EatStreet not only provide valuable last mile fulfillment services for our restaurant partners, but also generate significant new revenue for restaurants. Almost 7 in 10 orders from a 3rd party delivery platforms are brand new orders to the restaurant.

Our CEO, Matt Howard along with our competitors sat down with the authors of this bill, Representative Mike Kuglitsch and Senator Pat Testin to discuss ways in which S861 can be modified to be able to work for both the restaurants and companies such as Eatstreet.

EatStreet has two primary concerns with the bill as it stands.

First off, EatStreet would like to raise an important issue regarding consumer privacy and data protection provisions which are in this bill.

- *We have an obligation to our customers to maintain data privacy and to conform with laws and regulations surrounding data security. Sharing customer data with restaurants, without requiring proper safeguards can create risks for the restaurants themselves, diners, whose data is being shared, as well as EatStreet.*
- *We do also have concerns that this legislation may violate state and federal law. There is currently litigation in NY regarding similar laws by DoorDash, GrubHub and UberEats. The suit claims that the law is unconstitutional and violates state and federal laws.*

- *In an era of heightened concerns about data privacy and identity theft, We worry that compelled disclosure of information is an invasive intrusion of consumer's privacy.*

Our second area of concern regards written contracts. The current language of this bill disadvantages both local 3rd party companies such as EatStreet, as well as local independent restaurants.

- *Eatstreet has regular communication with our partners to update menus, send payments and provide software upgrades and tablets. This communication and service acknowledges that our restaurant partners do want our services even though there may not be a written contract in place.*
- *By legislating details and specifics of how local companies like ours can engage in agreements with restaurants, we lose the flexibility to create unique partnerships with both locally owned favorites, as well as national chain restaurants.*
- *Secondly, the requirement of a written contract would negatively impact small, local restaurants who do not have large in-house legal departments and bargaining power to negotiate contracts on their behalf. This would favor national chains and in the end hurt the family owned restaurants that are already struggling.*
- *I do believe that most of us in this room are looking for the same result: A restaurant is on the 3rd party platforms it chooses to be on, and is removed from the platforms they choose not to work with. We feel that by putting a legal mechanism in place for a restaurant to be removed from a platform, we can achieve the same end, while still maintaining the flexibility for local companies to do business together and compete with the big national players.*

In many respects, this is a bill that is looking to solve a problem that existed a few years ago, but not today. There is one company not represented in this room that continues the practice of adding restaurants to their platform without the restaurants permission. Yesterday in fact there was a story on Madison.com talking about our issue. I'll read a small portion of the story to highlight Eatstreet.

Matt Van Nest, co-owner of Brasserie V on Monroe Street, said he's had trouble with Grubhub ordering his food, and more than half the time it was food the restaurant was no longer serving.

Van Nest said he's had a good experience with EatStreet, the Madison-based food delivery company, and it's the only delivery service he uses. He likes EatStreet because it has its own employees, instead of private contractors.

His restaurant doesn't see a lot of delivery business, maybe two or three orders a night, and having EatStreet handle delivery is preferable to him coordinating that service and having to worry about insurance and liability.

"That's not what our model is. We're not a delivery place," Van Nest said.

Kristine Hillmer, president and CEO of the Wisconsin Restaurant Association, said EatStreet is a valued partner to a lot of restaurants and not one of the big three: Uber Eats, Grubhub and DoorDash. "They are also at the table," she said about EatStreet.

"A restaurant needs to be able to have control over their product and what's happening with it and not have companies insert themselves into that relationship," she said.

"We just want the restaurant to be, pun intended, in the driver's seat to say who can and who cannot deliver their food," Hillmer said.

Mr. Chairman and Committee members, I ask that you allow us to work with the Wisconsin Restaurant Association and the authors of this bill, to make this a bill where all parties can thrive.

Thank you for your time and I'm happy to answer any questions. Behind me is Michelle Dama also from Eatstreet to help answer your questions.