

# Restaurant Delivery Services Carry Distinct Risks



It's the night of a big game and customers have been ordering your food for delivery for hours. Suddenly, your night takes a turn: A delivery driver is involved in a serious auto collision. Is the driver hurt? Is his car damaged — and is it adequately insured? Should you rush to the scene or let police handle it? What should you do about the customers expecting their food?

The food delivery and takeout industry is growing, with annual sales into the billions of dollars, according to the Restaurant Marketing & Delivery Association (RMDA). As more restaurants offer delivery options to meet consumer demands, it's important to understand and prepare for the accompanying risks, including employee classification, auto and bicycle collisions, theft, general worker safety, and even kidnap and ransom situations.

## GROWING INDUSTRY, GROWING RISKS

Consumers have food delivered to help make their busy lives less complicated. The RMDA estimates that delivery industry sales are 1% of the US gross domestic product. Enterprising businesses have tapped into this demand, but there can also be costs: A sampling of delivery restaurants in Marsh's *2015 Restaurant Loss Cost Benchmarking report* reveals that their cost per workers' compensation claim averaged \$5,300 annually over a five-year period, while the cost per auto liability claim averaged \$7,900.

The most common risks faced by delivery workers include:

**Driving:** Across all industries, transportation incidents accounted for almost half of on-the-job deaths, according to a recent Bureau of Labor Statistics (BLS) report.

**Slips and falls:** Falls were the second-most common cause of workplace death, accounting for 14% of fatalities across all industries, according to the BLS. For delivery services companies, slips and falls can represent a main cause of lost days from work. Consider that in one shift a delivery driver could walk up to multiple residences with a variety of risks, including:

- ▶ Uneven walkways.
- ▶ Damaged steps.
- ▶ Sprinkler heads in the grass.
- ▶ Loose pets.
- ▶ Poor or no lighting.

Delivery drivers also have their hands full with the product — which may be hot, heavy, or awkward to hold — and possibly a phone, a mobile point-of-sale attachment, and a change purse.

**Theft:** Delivery drivers can make tempting targets for thieves. Some restaurants have moved to electronic-only payment or require drivers to make frequent deposits at the restaurant to limit the amount of cash they carry. Other drivers carry decoy wallets in order to have something to hand over during a robbery. But when cash is not available, some thieves will take whatever they can — in one market, the scooters of two delivery people were stolen.

## RECIPES TO REDUCE RISKS

### EMPLOYEE OR INDEPENDENT CONTRACTOR?

For a business providing delivery service, the risks aren't all physical. One risk that has developed significantly over the past several years relates to how workers are classified: Are they employees or contractors?

Labeling workers as contractors is understandable — traditionally, they are less expensive for companies. Contractors are paid a salary, which is usually a predetermined amount, for a specific time. And traditionally, companies have not been required to provide contractors with workers' compensation coverage or other benefits that typically accompany the designation "employee."

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But categorizing your workers incorrectly could leave you exposed to significant wage and hour (W&H) liability risks. As the workplace has evolved over the last several years, the number of W&H lawsuits filed in federal courts has risen dramatically, including in the area of employee classification. Some W&H claims allege violations of the Fair Labor Standards Act (FLSA) and similar state laws for failing to pay overtime and not providing adequate rest breaks or even meals.

In calendar year 2015, 8,954 FLSA lawsuits were filed — an 11% increase from the previous year. And the top 10 settlements in 2015 — not including defense costs, state claims, or claims brought by the Department of Labor (DOL) — totaled \$463.6 million, more than double the total in 2014.

In July 2015, the Wage and Hour Division of the DOL issued an Administrator's Interpretation of the FLSA definition of "employ" that said "most workers are employees." This conclusion, while not legally binding, provided guidance for the DOL, which issued a warning that misclassification of employees as independent contractors will have serious repercussions. It writes on its [website](#): "The misclassification of employees as independent contractors presents one of the most serious problems facing affected workers, employers and the entire economy." The agency has singled out the misclassification of restaurant delivery drivers as independent contractors as a "common" violation.

Among the steps businesses involved in delivery services can take to help avoid misclassification issues:

- ▶ Err on the side of caution. Examine worker relationships to determine who really has the right of control. If the employer is making decisions about hours, location, schedule and performance, the worker most likely should not be considered an independent contractor.
- ▶ Have a centralized decision making system, if possible, to allow for the determination of who will be allowed to work as an independent contractor.
- ▶ Use independent contractor agreements — which specify the financial aspect and service details, providing clarification and direction to both parties.
- ▶ Ask independent contractors to carry and show proof of their insurance.

## DELIVERING SAFELY

Beyond employee classification, there are other risks faced by companies that provide delivery services. One of the first steps to mitigating these risks comes in the hiring process — by running criminal background checks and reviewing driving records, restaurants and food delivery companies can better understand the risks that come with a candidate.

Across industries, transportation is where most on-the-job fatal incidents occur. Among the steps to consider when sending drivers on deliveries:

- ▶ Emphasize safety over speed.
- ▶ Underscore the dangers of distracted driving. This doesn't just mean use of a cell phone while driving, although that should be

prohibited. Distracted driving refers to anything that takes the driver's hands off the wheel, eyes off the road, and mind away from the task at hand.

- ▶ Define the delivery radius and boundaries.
- ▶ Use technology such as cellular mapping to help prevent drivers from getting lost.
- ▶ Invest in or otherwise require employees — including workers in the restaurant and those making deliveries — to wear no-slip shoes.
- ▶ Train drivers on simple safety procedures, including:
  - ▷ Parking under streetlights when possible.
  - ▷ Shining car headlights toward customers' front doors.
  - ▷ Carrying flashlights.
  - ▷ Locking car doors.
  - ▷ Verifying orders via cell phone to ensure delivery addresses are valid.
  - ▷ Requesting that customers' porch or outdoor lights be turned on.
- ▶ Reduce robbery risk by limiting the amount of cash drivers carry and reiterating with customers that denominations over a certain amount won't be accepted. Caller ID software that verifies customer identities can also help reduce the chance of a robbery.

Above all, restaurants and others should ensure that drivers have a point person with whom to stay in constant communication.



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## RISK TRANSFER SOLUTIONS

Despite the best-laid plans, insurance claims can nevertheless crop up. Delivery services companies should work with their insurance advisors to ensure they have the right insurance coverage to protect against their key risks. Among other forms of coverage, businesses should consider purchasing:

- ▶ **Employment practices liability insurance (EPLI)**, which is designed to cover claims by current employees, former employees, and applicants for employment practices wrongful acts. EPLI policies typically cover discrimination, harassment, and wrongful termination, but exclude coverage for wage and hour claims.
- ▶ **Wage and hour solutions**, which are intended to provide coverage for actual or alleged violations of the FLSA or similar state laws. These include claims brought by the DOL, employees, and independent contractors; claims for failure to pay overtime and provide meal breaks; and collective and class-action claims. Wage and hour policies typically cover defense costs, settlements, and judgments.
- ▶ **Workers' compensation**, which provides coverage for on-the-job injuries. Although policies can vary from state to state, workers' compensation policies generally provide coverage for necessary medical treatment and lost wages if an injured employee is unable to work.
- ▶ **Auto liability**, which is a critical area of concern for many companies that provide delivery services. Generally, drivers are required to carry their own insurance and disclose to their insurers that their vehicle will be used for delivery service work. However, there may be a financial incentive for a driver to not disclose to insurers that a vehicle is being used for business, as this could cause the policy to be rewritten and carry a higher deductible, or other costs. If that uninsured or underinsured motorist is then involved in a collision, the resulting gaps in coverage could leave the hiring company exposed and on the hook for some or all of the costs.
- ▶ **Commercial general liability (CGL)**. A CGL policy protects businesses against claims for injury and property damage that occurs on the insured's premises, while conducting operations, or when the insured's products are being used.
- ▶ **Kidnap and ransom (K&R) coverage**, which is particularly important for larger organizations. A K&R policy could be triggered if a delivery person was taken and a ransom demand is made, or in the event of an "express kidnapping," where the delivery person is abducted, forced to withdraw money from an ATM, and then released.

## CONCLUSION

Delivery services appear poised to extend their reach and meet growing consumer demands. As they do, the risks will no doubt continue to grow along with the opportunity. By recognizing the need to properly classify workers, striving for safety, and building an effective risk transfer program, you can help ensure that the pizza, wings, and other fine food arrive on time, your employees remain safe, and your bottom line is protected.

For more information, please visit [marsh.com](http://marsh.com) or contact:

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