



# COMPLIANCE ALERT

June 28, 2022



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- **The New Retail Delivery Fee is here**

In June 2021, Colorado enacted a new law pertaining to the collection of a Retail Delivery Fee (“RDF”) from retailers offering product delivery to their in-state customers, which is set to take effect on July 1, 2022. Though many have argued that this fee may really be a tax in disguise, restaurants and similar retailers should be prepared to calculate, collect, and remit the RDF for their delivery orders starting July 1, 2022, which this article breaks down into a more digestible format.

Please note that this article focuses on the RDF’s application to restaurants and similar retailers despite its application to several other retailers offering non-consumable products to their in-state customers. For further questions on whether the RDF applies to you, please contact us so that we can help you navigate this law based on your personal circumstances.

- **What is the new Retail Delivery Fee?**

According to the new law, Colorado has noticed a large increase in retail deliveries, “including restaurant food,” in the state, likely due to the introduction of third-party delivery applications and the new delivery trends created by the COVID-19 pandemic.<sup>1</sup> Colorado expects that the increase in retail deliveries will result in accelerated deterioration of its transportation infrastructure, which it is using to justify the RDF’s implementation.

Accordingly, starting on July 1, 2022, restaurants and similar retailers are required to collect a \$0.27 fee from their customers on nearly all of their delivery transactions made by motor vehicle within the state, regardless of whether the delivery is made by an employee or a third party (as further described in the next section). For restaurants and similar retailers, a delivery transaction can be translated into a single delivery order of food or beverage items. For example, the RDF only applies once to a single delivery order regardless of the amount of food and beverage items contained within the order, i.e., the equivalent of a customer ordering

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<sup>1</sup>C.R.S. § 43-4-218(1).



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and paying for an appetizer, entrée, dessert, and beverage in a single transaction. Conversely, if customers have multiple delivery orders from the same retailer, then the RDF applies to each of those orders even if the same delivery driver is delivering these items to the customers at the same location, i.e., if two individuals at the same residence order and pay for food and beverage items in two separate transactions from the same retailer at the same time.

Please also note that the RDF is subject to increases each year depending on the state's review of future inflationary data. Be on the lookout for any increases from the Department of Revenue by mid-April of each year.

- **Who does the Retail Delivery Fee apply to?**

Most restaurants and similar retailers will be subject to the RDF, regardless of whether they are in-state or out-of-state (with the caveat below), given that the RDF applies to all products subject to state taxation, which includes food and beverage items. A few notable exceptions to the RDF's requirements are out-of-state deliveries, wholesale product deliveries, i.e., alcohol purchases from a wholesaler, and deliveries to purchasers who are exempt from state taxation requirements, i.e., government offices, public schools, or charitable organizations. Out-of-state retailers who generate less than \$100,000 in sales within the state per year are also exempt from the RDF's requirements given that these types of retailers generally are not required to remit sales tax to the state.

The type of delivery vehicle a restaurant or similar retailer uses for its delivery orders may further exempt it from the RDF's requirements. Restaurants and similar retailers that use motor vehicles, even through third-party delivery vendors (as explained below), for their delivery orders are subject to the RDF's requirements. Colorado law broadly defines a motor vehicle as any "self-propelled vehicle," which includes low-speed electric vehicles.<sup>2</sup> However, the definition excludes electrical-assisted bicycles (including normal bicycles) and electric scooters. The new law also excludes a new type of vehicle, entitled "personal delivery devices."<sup>3</sup>

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<sup>2</sup>C.R.S. § 42-1-102(58).

<sup>3</sup>C.R.S. § 42-40-218(c).



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These are defined as autonomously operated robots that weigh no more than 550 lbs. and travel under 10 m.p.h., which are starting to become more common on college campuses.

Of note, the RDF's requirements will still apply to restaurants and similar retailers that use a third-party delivery vendor, i.e., DoorDash, GrubHub, Postmates, Uber Eats, etc., for their delivery orders. This is because third-party delivery vendors are generally not responsible for collecting and remitting sales taxes for their clients' delivery transactions. Please ensure to double-check your vendor agreements with your third-party delivery vendors to verify the same. Furthermore, as explained below, the Department of Revenue is expected to make a rule that does not exempt refunds from the RDF's requirements. Hence, if a customer receives a partial or full refund on a delivery order from a restaurant or similar retailer, the restaurant or similar retailer is still expected to remit the RDF from the refunded delivery order to the state.

- **When does the Retail Delivery Fee take effect?**

As noted above, restaurants and similar retailers are required to start collecting the RDF on July 1, 2022 for all of their delivery orders. RDFs are due on the 20th business day following the state sales and use tax reporting period for the restaurant or similar retailer. For example, if the restaurant or similar retailer is required to file its sales and use tax returns on a monthly basis, then the RDF will be due on the 20th business day of each month. Conversely, if the restaurant or similar retailer is required to file its sales and use tax returns on a quarterly basis, then the RDF will be due on the 20th business day of the first month of the quarter. An RDF return is due each filing period, even if the restaurant or similar retailer does not have any fees to report (with the caveat in the next section). The Department of Revenue could impose penalties and interest for late filings, so please ensure to create new calendar events for your RDF filings. The RDF return form (DR 1786) can be found [here](#), and only a single return form is required per restaurant or similar retailer, even if it has multiple locations in the state.



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- **What do I have to do if the Retail Delivery Fee applies to me or my business?**

First, the restaurant or similar retailer should ensure that its point-of-sale and accounting systems are modified or programmed to track and log the RDF on each applicable delivery order. The RDF should be displayed as a separate labeled item on the customer's electronic or physical receipt. For best practices, this may require restaurants and similar retailers to confer with their third-party delivery vendors to ensure that their electronic receipts for the customer include the RDF. To make matters more difficult, if restaurants and similar retailers are using a third-party delivery vendor, they need to verify the vendor's method of transportation for each delivery order to ensure the RDF applies to a customer's order. Otherwise, they could accidentally overcharge the customer. For example, in downtown Denver, third-party delivery vendors have been observed using bicycles or even scooters for their delivery orders, which will exempt the orders from the RDF (as described above). If restaurants or similar retailers are not aware of their third-party delivery vendors' use of these exempt methods of transportation, then they may accidentally charge their customers the RDF when it is not applicable.

Second, the RDF has a separate account under the Department of Revenue's return system. If restaurants or similar retailers have been operating an active sales tax account or retailer license since January 1, 2021, or have reported any sales tax liability after January 1, 2021, then the Department of Revenue will automatically register the restaurant or similar retailer for an RDF account by July 1, 2022. Out-of-state restaurants or similar retailers will also be automatically registered if they have an out-of-state retailer's use account. Importantly, the RDF account is not considered a license, nor is a registration fee required. If the restaurant or similar retailer does not engage in retail deliveries as part of its operations, then the Department of Revenue has instructed the restaurant or similar retailer to not file any RDF returns. The Department of Revenue will then close the account by February 28, 2023.

If you are a restaurant or similar retailer that does not fit into the above criteria, i.e., a brand new business, then visit the Department of Revenue's website [here](#) and scroll to the "Additional Ways to Create an Account After July 1, 2022" tab to learn how to create an RDF return account.



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- **Parting Notes**

As an additional clarification, please note that the RDF is a state-imposed fee. The city or county in which you or your business are located may have separate and distinct taxes and fees that are not affected by this new law. Moreover, the Department of Revenue is currently engaged in rulemaking for the new law, which may clarify or even modify the above information. For the most up-to-date developments on the rulemaking process, please visit the Department of Revenue's website [here](#) for proposed and approved regulations for the new law.

Overall, the RDF's requirements may be coming as a surprise to most restaurants and similar retailers. If you or your business fall into this category, you are not alone. Please contact us with any questions so that we can help you navigate this new law based on your personal circumstances.