

## Insights

# PROACTIVELY SAFEGUARDING YOUR BUSINESS FROM POTENTIAL ALLEGATIONS OF PRICE GOUGING IN THE U.S.

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## SUMMARY

As shelter-in-place orders began to sweep across the United States, many store shelves emptied and, in some instances, prices for certain products skyrocketed, including products that are essential to everyday living and staying safe during the COVID-19 crisis.

As a result, one of the many hot-button business, and corresponding legal, issues to arise out of the COVID-19 crisis is price gouging. Price gouging occurs when sellers raise their prices for goods and services to take advantage of the consequent increased demand for those items, often during emergencies. Price gouging has ensued following large scale natural disasters such as hurricanes or wildfires, where sellers have drastically elevated prices for basic necessities, safety equipment and medical supplies that were in high demand following those catastrophic events. As many consumers, businesses and state attorneys general are aware, allegations of price gouging for those same items have been prevalent in the midst of the COVID-19 crisis.

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Any business that sells products or services must be mindful of the current concerns and legal parameters surrounding price gouging, particularly where the business sells directly to the general public. Businesses selling basic necessities, safety equipment and medical supplies are largely permitted to operate, and generate profits, during the COVID-19 crisis, but should also be careful to adhere to any applicable state laws regarding price gouging.

### **Who enforces price gouging?**

State attorneys general are the primary enforcers of price gouging. The majority of states, including the District of Columbia, have price gouging laws. Individuals and businesses can, and are often encouraged, to file price gouging complaints with their respective state attorneys general. It is up to those attorneys general to then investigate and enforce their individual states' price gouging laws via legal action, civil or criminal penalties and other similar measures.

### **How can a business determine whether it is susceptible to allegations of price gouging?**

If your business sells any basic necessities, safety equipment, medical supplies or other comparable products, it should be particularly aware of the price gouging laws for each state in which it operates. Price gouging laws are enacted at the state level, and while many state price gouging laws are similar, they are not identical. Moreover, most price gouging laws are only implemented when a state of emergency, or other analogous measure, has been declared by that state's governor. The timing of each state's official emergency declaration, or related response, has been different in the rapidly evolving COVID-19 crisis. This differentiated timing has correspondingly impacted the implementation of price gouging laws across the country.

Many state's price gouging laws define price gouging as selling certain products during a state of emergency for more than a set percentage above the price for those same products during a timeframe leading up to the state of emergency. For example, California defines price gouging as selling consumer items including food, emergency supplies, medical supplies, home heating oil, building materials, or gasoline for more than 10% greater than the price charged for those goods or services immediately prior to the declaration of emergency. Cal. Penal Code § 396.

Other state's price gouging laws apply a reasonableness standard in determining whether sellers are price gouging during a state of emergency. In one such state, New York, "no party within the chain of distribution of such consumer goods or services or both shall sell or offer to sell any such goods or services or both for an amount which represents an unconscionably excessive price." N.Y. Gen. Bus. Law § 396-r. The law goes on to state that "[w]hether a price is unconscionably excessive is a question of law for the court." *Id.*

The penalties for the violation of price gouging laws also vary by state. Those penalties, such as the price gouging laws in New Jersey, include civil penalties of up to \$10,000 for a first violation, and up to \$20,000 for each subsequent violation. N.J. Stat. Ann. § 56:8-109. Importantly, under New Jersey law each sale of a product is deemed to be a separate and distinct violation. *Id.*

Although each state institutes their own respective price gouging laws, it will be beneficial for businesses that sell products throughout the country to adhere to those state laws with the most restrictive price gouging measures in order to ensure overall compliance. Connecticut poses one of the most stringent price gouging laws, where a product that is deemed by the Governor to be in short supply during a state of emergency is not to be sold “at a price which exceeds the price at which such product or service was sold or offered for sale ... in the usual course of business immediately prior to the declaration of the emergency.” Conn. Gen. Stat. Ann. § 42-232; *see also* Georgia Code Ann. § 10-1-393.4; Louisiana Stat. Ann. § 29:732; Mississippi Code. Ann. § 75-24-25.

Notably, as the COVID-19 crisis continues, states that do not currently have price gouging laws in place, such as Maryland, are actively working towards enacting such legislation. Other states, such as Delaware, have included price gouging measures in their state of emergency declarations. Because each state law is different, any business engaged in selling products, and particularly those businesses selling products in more than one state, should carefully evaluate its sales practices with respect to those price gouging laws.

### **Price gouging also impacts third-party marketplaces.**

In addition to price gouging laws applied to sellers and others in the stream of commerce, many state attorneys general have also requested that large scale third-party marketplaces, primarily those that operate online in multiple states, proactively monitor and enforce their own measures to prevent price gouging. These suggested measures include creating price gouging policies and providing consumers with resources to lodge price gouging complaints against sellers. These additional parameters pose another level of regulations for which any business selling products on a third-party website, or operating such marketplaces, should be aware.

With varying price gouging laws across the country currently in place, and new laws being put into action by more states as the COVID-19 crisis carries on, businesses selling products subject to such laws must be vigilant in refraining from any practices that may be deemed to be price gouging. Doing so may protect your business from potential penalties enforced by state attorneys general and provide your business with the chance to endure during this otherwise difficult time.

Accordingly, we will continue to monitor any developments related to price gouging laws and regulations throughout the COVID-19 crisis and update you accordingly. We also invite you to review the other COVID-19 posts on this blog, many of which are aimed directly at answering other questions and concerns for businesses operating during the COVID-19 crisis. If you have any questions related to price gouging, or any other concerns for your business’ operations during the COVID-19 crisis, please contact Susan Brice ([susan.brice@bclplaw.com](mailto:susan.brice@bclplaw.com)), Tom Lee ([tom.lee@bclplaw.com](mailto:tom.lee@bclplaw.com)) or Zeke Katz ([zeke.katz@bclplaw.com](mailto:zeke.katz@bclplaw.com)).

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