

Insights

MARYLAND GETS CRABBY WITH SURVEILLANCE PRICING

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SUMMARY

Maryland recently passed the Protection from Predatory Pricing Act, becoming the first state to ban “surveillance pricing,” or the use of personal data to set consumer-specific prices, in the food sector. The Act, following recent actions by New York and California, reflects a broader state trend of regulating surveillance pricing across the U.S. Whether the Act’s provisions effectively “ban” surveillance pricing in practice remains to be seen, but it may pave the way for other states to create their own robust surveillance pricing restrictions.

Maryland has become the first state to ban the practice of surveillance pricing in a business sector—here, food sales—through its recently passed Protection from Predatory Pricing Act. Set to take effect on October 1, the Act prohibits grocery stores and food delivery services from using “dynamic pricing” or “personal data” to set higher prices for specific consumers. As such, food retailers and delivery services can no longer set personalized prices for consumers based on information “that is linked or can be reasonably linked to an identified or identifiable customer.”

WHAT IS SURVEILLANCE PRICING?

“Surveillance” or “personal” pricing practices can create both optical and substantive risks for clients. State and federal enforcers argue that surveillance pricing poses risks of eroding the consumer surplus and inhibits comparison shopping, because consumers cannot reliably assess competing prices or understand the truth of discounts that may be illusory. Enforcers have also raised fairness concerns about prices that may change based on vague data metrics (e.g., opening a new browser window). Consumer privacy is another major concern for regulators, as personal health information, web browsing history, mobile app usage, location, and other demographic information may be used by algorithms to set individualized prices.

The growing use of algorithms and personal data to establish individualized prices has become a trending focus for enforcers, regulators, and consumer advocacy groups alike. Bills targeting surveillance pricing have been introduced throughout the U.S., and state Attorneys General have

also launched targeted investigations into the practice. While Maryland is the first state to outright “ban” personal pricing, other states—like [New York](#), which already has a law requiring conspicuous disclosure of surveillance pricing—are considering bans of their own.

WHAT DOES MARYLAND’S NEW LAW COVER?

In Maryland, the true impact of the law remains to be seen, as Maryland’s new law contains numerous exceptions. For example, the ban excludes promotional pricing and loyalty benefits, loyalty membership pricing, subscription-based price agreements, price offerings based on a consumer’s consent to provide personal data, and certain geographic and supply-based price differences.

The question is thus what practical impact the new law will have. For example, if consumers create an account to shop online at a given grocery store or to use a food delivery service, and the account process involves consenting to provide their personal data in exchange for certain prices, the consent exception may preserve these routine and widely accepted commercial interactions. Similarly, the Act’s exceptions for promotional pricing and loyalty programs recognize that such practices can result in lower prices and greater savings for consumers. Because these programs are a standard feature of modern retail—one that consumers expect—the Act’s practical reach may be more limited than its broad prohibition might initially suggest.

Further, the Act notably does not provide a private right of action, which may suggest that its contours and limits are unlikely to be tested in court. The Act is solely enforceable by the Consumer Protection Division of the Maryland Attorney General’s office, which must provide notice of any alleged violation and a forty-five-day opportunity to cure. If the company cures within the window, the Division cannot bring an enforcement action. Given that potential violators have over a month to cure before being at risk for enforcement, and that violators cannot be subject to consumer actions for violations, it is unlikely that there will be immediate extensive legal challenges under the Act, though initial waves of warning letters are more likely.

WHAT COMES NEXT?

Though the effects of the Protection from Predatory Pricing Act are uncertain, Maryland’s ban may serve as an influential test case for other jurisdictions considering their own surveillance pricing legislation. For example, New Jersey’s [SB 3732](#) similarly seeks to ban retail food stores from using “dynamic,” “surveillance,” or “personalized algorithmic pricing,” when selling groceries, but excepts discounts, promotional pricing, and loyalty program benefits. In California, [AB 2564](#) has been under consideration for several years and would impose a broader prohibition on surveillance pricing for goods, backed by significant civil penalties and a private right of action. The bill has drawn opposition from industry groups which contend that its expansive definition of “surveillance pricing” risks sweeping in routine, consumer-friendly practices—including loyalty rewards, targeted promotions, and personalized discounts—that generally result in lower prices for consumers.

Depending on the success of Maryland's ban once in force, states like New Jersey and California may opt to amend their existing proposed provisions. The Maryland Act may also influence states to take a firmer stance on prohibiting the practice, rather than imposing "softer" restrictions like disclosure requirements.

Ultimately, Maryland's legislation illustrates that surveillance pricing will continue to face scrutiny, regulation, and potential enforcement actions. Clients, especially those that sell food products in Maryland, should audit their current pricing practices to ensure compliance with the new Maryland law and other states' laws. This should include a thorough review of data inputs used in any algorithms or pricing models, which form the basis of most surveillance pricing criticisms. When in doubt, companies should consult outside counsel for specific questions.

For a comprehensive overview of state legislation addressing algorithmic pricing and other AI-related regulatory developments, visit BCLP's [AI Legislation Map](#).

--BCLP Associate Grace Driskell contributed to this client alert.

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