

Professional Perspective

**Price Gouging Laws
and Covid-19:
What Supply Chain
Businesses Should Know**

*Christopher Ondeck, John Ingrassia, Owen Masters,
and Nicollette Moser, Proskauer*

Reproduced with permission. Published April 2020. Copyright © 2020 The Bureau of National Affairs, Inc.
800.372.1033. For further use, please visit: <http://bna.com/copyright-permission-request/>



Price Gouging Laws and Covid-19: What Supply Chain Businesses Should Know

Contributed by [Christopher Ondeck](#), [John Ingrassia](#), [Owen Masters](#), and [Nicollette Moser](#), Proskauer

Price gouging laws are now being applied to supply chains. Even though these laws typically focus solely or primarily on the point of sale to consumers for an emergency of short duration, the length of the current emergency is shifting the scrutiny of enforcers to the supply chain. This enforcement is uncharted territory for most supply chain participants, and they will need to understand and manage these new requirements.

Price gouging laws in most states limit price increases for food, medical products, and services, and other covered essential products and services, during an emergency such as the Covid-19 pandemic. These laws vary from state to state in how they are written, how and what they cover, and how they are being applied by state attorneys general.

Price gouging laws always apply at the point of sale to consumers. In concept, these laws anticipate an emergency of short duration—days or weeks—and they cap consumer price increases. However, the pandemic state of emergency will last far longer than days or weeks. For many manufacturers and service providers, as well as brokers, wholesalers, and other business-to-business sellers in the supply chain that are upstream from the point-of-sale to the consumer, this is a new occurrence and creates a substantial risk that most supply chain businesses do not have existing systems or procedures in place to manage.

For reputable companies up and down the national supply chain, compliance with the array of state price gouging laws requires more than intuition and a moral compass. Even with the best intentions and the desire to help during an emergency, many supply chain businesses may inadvertently run afoul of price gouging laws. Because price gouging statutes can cover more than obvious bad conduct and point-of-sale pricing to consumers, supply chain businesses should consider implementing procedures to assess whether they are required to comply with these laws, whether they are complying, and how to manage compliance going forward.

Price Gouging Basics

There is presently no national price gouging law, but most states do have laws in place against the practice. While the rules differ from state to state, they typically are triggered by municipal or state level declarations of a state of emergency. [California's](#) price gouging law is triggered once the governor declares a state of emergency, and lasts for 30 days thereafter. However, due to the anticipated lasting effects of Covid-19, California recently extended the 30-day period for some counties through September.

New York, by contrast, does not require a declaration of emergency. In [New York](#) and [Maine](#), price gouging restrictions can be triggered by abnormal market events (“periods of abnormal disruption of the market”). At present, almost all the states’ price gouging laws have been activated. However, the situation is in flux and the triggers or dates for specific state rules likely will be changing over the coming months, so continued attention to developments is advised.

Pricing Caps

Most state price gouging laws do not specify a precise price increase that qualifies as price gouging. [Alabama](#), [Florida](#), and [Maine](#), for instance, bar selling at “unconscionable” prices, but maintain a rebuttable presumption of price gouging for price increases over a certain percentage. Others, like [Idaho](#) and [Texas](#), bar “exorbitant or excessive prices.” [Georgia](#) and [Mississippi](#), simply bar any price increases after a declared state of emergency.

[California's](#) bar on price increases over 10% of the price charged for the good immediately prior to the declaration of emergency is a useful benchmark for national sellers—at least for states where price increases are permitted at all. Other states employing the 10 percent cap include New Jersey, Utah, and West Virginia, whereas other states list higher thresholds—15% (Oregon and Wisconsin) and 20% (Pennsylvania).

Exceptions

Many state statutes provide exceptions for increases directly attributable to increases in the cost of labor or materials, or for increases specifically authorized by a state agency. In [California](#), for instance, price increases over 10% are not unlawful:

. . .if [the seller] can prove that the increase in price was directly attributable to additional costs imposed on it by the supplier of the goods, directly attributable to additional costs for labor or materials used to provide the services, during the state of emergency, and the price is no more than 10 percent greater than the total of the cost to the seller plus the markup customarily applied by the seller for that good or service in the usual course of business immediately prior to the onset of the state of emergency or local emergency.

Because California enforces a specific benchmark, the law requires what seems to be a straightforward calculation. However, these calculations can grow complicated quickly. Some states that bar any price increases, like Georgia for instance, include an exception for increased costs. In [Georgia](#), prices can be increased “only in an amount which accurately reflects an increase in cost of the goods or services to the person selling the goods or services or an increase in the cost of transporting the goods or services into the area.” [Florida's](#) law includes an exception for additional costs and additional costs incurred in connection with “regional, national, or international market trends.”

Notably, these exceptions may not exempt increases for products tied to an index price. Sellers that tie their prices to a given index are not specifically exempted from price gouging rules. As a result, parties should monitor whether their products are included in the basket of goods and services for which price increases could trigger price gouging laws.

Covered Products and Services

Typically, the rules address a defined scope of goods and services, and sometimes levels of the supply chain. The most common prohibitions limit price increases for categories like food, fuel, batteries, or medicine. Some states, such as [Louisiana](#) and [Hawaii](#), take a broader approach and apply price increase restrictions to almost any good or service. Still other [states](#) limit the restrictions to products specified by governor.

Application to Supply Chains

There is an increasing amount of enforcement up the supply chain. Retailers are responding to public outcry about price increases saying that their supply chain costs have increased. State enforcers have followed this trail and begun scrutinizing supply chain companies. State attorneys general have issued dozens of subpoena to suppliers of covered goods and services up and down the supply chain. This is uncharted territory—both for the enforcers and for supply chains.

Price-gouging laws generally include high-level descriptions of covered entities. However, many statutes are silent as to whether supply chains are covered and, if so, how. States also differ substantially over whether their price-gouging laws apply to suppliers. Maine's law, for example, applies to all necessities regardless of to whom they are sold (and regardless of where the seller sits in the supply chain) —this may include, for example, national wholesaler or consumer goods producers selling to supermarkets in Maine.

Similarly, [New York's](#) law applies to “all parties within the chain of distribution, including any manufacturer, supplier, wholesaler, distributor or retail seller of consumer goods or services or both.” Similarly, [North Carolina's](#) law applies to “all parties in the chain of distribution.” By contrast, [Idaho's](#) law only applies for sales to the ultimate consumer.

In addition, governors are expanding the scope and application of price gouging laws to supply-chains in real time. Minnesota does not have a price-gouging law, but this didn't stop Governor Tim Walz from taking action. On March 20, 2020, Walz issued [Executive Order 20-10](#), creating a price gouging restriction in Minnesota. The order limits “all persons...from selling, offering to sell, or causing to sell in this state any essential consumer goods or services,” for an “unconscionably excessive price.” On its face this restriction includes sellers at every level of the supply chain. Minnesota's example illustrates how important it is for sellers to monitor ongoing developments, even in states without price gouging laws.

Private Rights of Action

Private rights of action may be available to plaintiffs that allege they are injured by price gouging. For example, [California's](#) law provides that “a violation of this section shall constitute an unlawful business practice and an act of unfair competition” under [California Bus. & Prof. Code § 17200, et seq.](#) [California unfair competition laws](#) provide that victims of price gouging can seek injunctions for price gouging. The attorney general, district attorneys, county counsel, or cities can also [seek civil penalties](#) of up to \$5,000 per violation, in addition to additional penalties for harm to senior citizens or violations of an injunction. By contrast in [New York](#), plaintiffs do not have a private right of action under the law, despite the legislature's [repeated attempts](#) to add one. Penalties under New York's law are limited to \$25,000 in fines and restitution, plus injunction relief.

Strong Enforcement

Even in states without price gouging laws, like Minnesota, state attorneys general and governors are taking action, including criminal and civil enforcement. While criminal enforcement likely will be limited to the most egregious cases, civil enforcement may be used as a broader tool to highlight the need to ensure diligent compliance efforts. Enforcers in Washington, which does not have a price gouging law, have argued that price increases in the middle of a public health crisis could violate the state's Consumer Protection Act, which prohibits unfair business practices.

The Washington state attorney general has initiated investigations into price gouging and the state's legislature is considering a price gouging law. The governor of Michigan recently issued an [executive order](#) that prohibits people who purchased goods from a retailer from reselling those goods at an excessively higher price than that which they paid.

Local and national sellers in all levels of the supply chain need to understand how they can quickly put a compliance program in place that ensures their organizations and employees are not inadvertently running afoul of the emergency state rules.

Federal Enforcement

In addition to state enforcers, some have argued the Federal Trade Commission's broad Section 5 authority could cover price gouging. Section 5 of the Federal Trade Commission Act prohibits “unfair methods of competition” and “unfair or deceptive acts or practices.” The FTC rarely relies on its Section 5 authority for pricing conduct alone, but it has already been active against unethical salesmen hocking untested “cures” and natural remedies. It remains to be seen whether the agency will consider using Section 5 against price gouging conduct, but some member of Congress are urging the agency to do just that.

On March 27, 2020, President Donald Trump issued [Executive Order 13910](#), invoking presidential authority under the Defense Production Act to limit the hoarding of specified medical supplies like face masks. Under this order, the Department of Health and Human Services has issued [regulations](#) designating face masks, respirators, sterilization services, disinfectant devices, and other medical supplies as “scarce materials.” This [restriction](#) means people cannot hoard these goods or the components used to make these goods for the purpose of reselling them in “excess of prevailing market prices.”

Worldwide Issue

Outside of the U.S., price gouging potentially raises significant issues under applicable antitrust regimes and applicable fair-trading laws. Leaving aside civic duty and reputational risks, manufacturers and resellers in the EU and [U.K.](#), for example, need to be careful when putting in place price rises as international regulators are responding to opportunistic price gouging conduct.

The European Competition Network issued a [joint statement](#) on the application of competition law in the EU during the crisis in which it made clear that all EU antitrust/competition regulators “will...not hesitate” to take action against opportunistic companies taking advantage of the crisis by abusing their dominant position or otherwise engaging in nefarious practices.

Price Gouging Compliance Ideas

Below are some guidelines and ideas to help companies navigate compliance with state price gouging rules.

- Identify every state in which a business sells. Be over-inclusive, consider states into which products or services are sold from, and also states they are sold to. States may assert expansive jurisdiction, even for product sold free on board to a receiving party outside the state, if the impact in downstream prices occurs inside the state.
- Create a tracking chart that lists the requirements, the price caps, or other controls, and your products or services that may be covered.
- Identify the “baseline” price at the start of the declaration of the emergency. Maintain a record of price increases and fluctuations and the basis for any pricing movements.
- Develop a strategy to respond to any inquiries or accusations from a customer about possible price gouging.
- Monitor the continuing and evolving requirements from state governors; executive orders continue to be issued that change and add to the coverage and requirements of state price gouging laws on a daily basis.
- Goods that are priced based on an index may not be specifically exempted from price gouging rules, so sellers should be cognizant of price increases not directly attributable to increased costs.
- Any inquiry from a state attorney general's office is a serious matter that can have extensive risk, including expense to respond, reputational risk, and penalties, as well as possible subsequent civil suits by parties at all levels in the supply chain that may potentially allege overcharges now or after the crisis subsides.
- Consider conducting a “price gouging assessment” using internal or external legal and sales functions working as a unified team, and providing a deliverable that can be used across the relevant business functions to address price gouging risk.