

The Pink Tax: Discrimination or Actual Differentiation?

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At the end of 2019, Governor Andrew M. Cuomo released the [10th proposal of his 2020 State of the State Agenda](#), which aims to eliminate the so-called “pink tax,” a gender-based pricing phenomenon that allegedly results in higher prices for goods and services marketed towards women as compared to substantially similar alternatives marketed towards men.

The proposal was prompted by a study conducted by the New York City Department of Consumer Affairs, which analyzed prices of toys, clothing, personal care products, and home health products and concluded that, 42 percent of the time, products marketed towards women are 7 percent more expensive than those targeted towards men. Consumer products fared even worse in the study results, which reflected a 13 percent price difference for products marketed towards women.

Governor Cuomo’s proposal is another step in a series of actions taken to reduce the gender wage gap. In 2016, he signed legislation prohibiting a tax on menstrual products, making New York one of the first states to ban the “tampon tax,” and in 2019, he signed legislation mandating equal pay for substantially similar work.

New York is not the first (or the only) state to engage on this issue. For example, California law prohibits businesses from gender-based pricing discrimination for services such as [haircuts, alterations, and dry cleaning](#). A bill that sought to extend that law to pricing of goods was withdrawn after opposition from retail and manufacturing companies.

There are, of course, various gender-neutral considerations that factor into pricing decisions, such as cost of materials, cost of manufacturing, packaging, tariffs, and advertising expenses. Moreover, as the NYC study acknowledged, men’s and women’s products are rarely identical, making exact comparisons difficult and, in many instances, misleading. But it remains to be seen how (and if) these differences will be factored in to the scope of the bill.

The plaintiffs’ bar has already identified the “pink tax” as a theory of liability under state consumer protection laws. For example, in Missouri, putative class actions have been filed against dry cleaning services and various consumer product manufacturers and retailers alleging gender-based pricing discrimination. There has also been litigation in multiple jurisdictions claiming that the “tampon tax” violates the equal protection clause of the U.S. and state constitutions. With growing media coverage over the pink tax generally, as well as Governor’s Cuomo’s recent attention to the issue, we expect to see more class actions being filed in this space.