

Revisiting Price Gouging Compliance

Minding Your Business Blog on **March 21, 2022**

With the Biden administration ramping up scrutiny on supply chains and pricing practices, businesses should take a moment to revisit their COVID-19 price gouging compliance. As we've previously highlighted, risk management with ever-shifting price gouging restrictions requires careful consideration of documentation and oversight of pricing practices and decisions. 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, many businesses 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, manufacturers and suppliers should consider implementing procedures to assess whether they are required to comply with pricing restrictions, whether they are complying, and how to manage compliance. Below we outline some key considerations for businesses.

Who is subject to price gouging restrictions?

Price-gouging laws generally include high-level descriptions of covered entities. However, many statutes are silent as to whether non-retailers are within scope and, if so, how. States differ over whether 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." 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.

What products are subject to pricing restrictions?

Many states provide a blanket prohibition on price increases, while others provide a specifically enumerated list. Several states have recently become more nuanced in defining the products subject to pricing restrictions. For example, California recognized that only some products remain relevant to the COVID-19 pricing restrictions. Accordingly, as opposed to imposing pricing restrictions on all products, the current California restrictions apply only to COVID-19 rapid tests.

What are the pricing limitations?

Once you've identified which products may be subject to pricing restrictions, it's important to understand the limits on price increases. 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, 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 some level of price increases are permitted. Other states employing the 10 percent cap include New Jersey, Utah, and West Virginia, whereas several states permit higher thresholds—15% (Oregon and Wisconsin) and 20% (Pennsylvania).

How does that work in practice?

The precise amount of a permitted price increase will often depend on a baseline price. [Establishing the baseline price](#) for each covered product at issue is essential—and not always straightforward. The formulas for baseline prices also vary by state. For instance, in Oklahoma, the baseline price is the price charged “immediately prior to the state of emergency.” Any price increase above 10% of that baseline is presumptively illegal. These baseline prices lay the foundation for showing that the price increase was permitted. In contrast, Texas does not provide a specific baseline measurement, instead, it prohibits selling covered products at an “exorbitant or excessive price.” However, prices for these products just before the emergency would be relevant in determining whether a price increase is exorbitant or excessive. Additionally, businesses should consider that COVID-19 states of emergency may still be in effect, or lapsed only to be reinstated, adding an additional layer to consider when calculating a product’s baseline price.

To the extent price increases are put in place to reflect cost increases and maintain profit margin (potentially even increasing gross margins), they likely fall within the majority of the allowable exceptions. It becomes riskier, though, where profit margins are increased, as that component of the price increase may not get the full benefit of the exception. Defending any such pricing movements on the basis of the exception will necessarily require solid data on pricing and cost movements, and the relationship between them, along with evidence of a strong price gouging compliance program.

Defenses

Other defenses may be available. For example in Arkansas, the price gouging statute provides a specific exception for increased costs. A successful defense might establish that the alleged price increase was “directly attributable” to increased labor or materials costs, or to price increases by suppliers. Similarly, Oklahoma provides a specific exception for increased costs attributable to price increases on a petroleum commodity market or other non-emergency factors. Texas does not explicitly provide such an exception, though increased costs would arguably serve as defense to an allegation of “excessive” prices.

Additionally, the plaintiff in any suit must have the right to sue under the price gouging statute. Some states limit price gouging enforcement to the state's attorney general. Others provide a private right of action. However, for a private individual to bring such a suit, the plaintiff must have experienced a direct harm from the allegedly illegal conduct. A careful analysis of a private action may reveal that the complainant does not have sufficient grounds to bring a claim.

When facing a price gouging suit, companies should be wary of claims that a simple price increase imposes liability. With multiple factors at play in pricing calculations and the availability of defenses, many price increases remain permissible. Companies at risk of a price gouging claims should consider the extent to which their products or services may be covered by a state's pricing restrictions along with and the availability of potential justifications or defenses for price increases.

Price Gouging Compliance: guidelines for navigating 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 include states they are sold to. States often 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.
- Track the requirements, price caps, or other controls, and your products and services that may be covered for each.
- Identify the "baseline" price at the start of the relevant 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 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 restrictions.
- 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 even after the crisis subsides and the restrictions are lifted.

- 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.

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