

VIOLATING PRICE-GOUGING LAWS MAY SUBJECT BUSINESSES TO CIVIL AND CRIMINAL PENALTIES

Hodgson Russ Business Litigation Alert
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In the wake of the COVID-19 pandemic, there have been several stories in the news and on social media about individuals and businesses capitalizing on “panic buying” and attempting to charge excessive prices for everyday products. Rudimentary economics tells us that prices will increase in response to increased demand. But when does that increase cross the line into illegal “price gouging,” and how can you stay on the right side of the law?

What is price-gouging?

Price-gouging is considered the practice of increasing product prices so they are exorbitant, unconscionable, or in grossly excess of the normal selling price. That definition certainly comes with some subjectivity—but some recent examples clearly cross the line. A third-party seller on Walmart.com tried selling an 8-ounce bottle of Purell for nearly \$50. Sellers on Amazon tried selling a pack of toilet paper for \$99, and a two-pack of 1 liter sanitizer bottles for \$199. For context, toilet paper usually sells for \$1 per roll, and hand sanitizer for \$7-\$8 per liter. Even medical supplies are being sold at unconscionable prices. New York Governor Andrew Cuomo described his experience bidding against other states for face masks. Masks that normally cost under \$1.00 are now sold for \$7.50. Other items like thermometers and gloves are selling at twice or triple their normal price.

Which states have price-gouging laws?

Many jurisdictions have anti price-gouging laws to combat businesses and individuals from selling essential products at a premium during crisis. In New York, goods and services which are necessary for a consumer’s health, safety and welfare, cannot be sold at “an unconscionably excessive price.” If a business or individual does sell products at an unconscionable price, the New York Attorney General may seek a civil fine up to \$25,000 and require the offender to make restitution. In New York City, the Attorney General has already sought at least \$275,000 in fines for price-gouging. One business was a hardware store selling 1200 ml bottles of Purell for \$79.

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New York is not the only state with protections for consumers. In Florida, not only are there laws against price-gouging, but consumers are allowed to file class actions. And a class action has already been filed against Amazon accusing the company of raising prices on toilet paper and hand sanitizer during the pandemic. In California, if businesses increase prices for certain essential products by more than 10%, they may be subject to penalties as well. Consumers in California may also file class actions against businesses who commit price-gouging.

How are price-gouging laws being enforced?

Businesses and individuals who sell products online should be aware that their practices are monitored. This is especially true if products are sold through websites like Amazon, Walmart or eBay. Amazon is currently working with Attorneys General in states like Florida and Missouri to combat price-gouging. Amazon is removing posts selling products at inflated prices, suspending seller accounts, and using technology to identify and remove inappropriate listings related to the coronavirus. The company is also cooperating with Attorneys General to provide any information that will further investigations. On top of working with web retailers, Attorneys General are responding to online complaints, phone calls and anonymous tips regarding businesses selling products at a premium.

In an attempt to stop price-gouging, Attorneys General in 34 states have issued letters to online retailers asking them to thoroughly monitor price-gouging online. These letters provide recommendations on how to prevent price-gouging. First, businesses should create policies and enforce restrictions on price-gouging during an emergency. Second, businesses should start enforcing restrictions on price-gouging before an emergency is declared. And third, businesses should create a complaint portal online for consumers to report price-gouging. The Attorneys General believe these measures will impact the marketplace and allow consumers to obtain products at reasonable prices.

Businesses are not completely precluded from increasing the prices of products and services. Most of the price-gouging laws allow businesses to defend against allegations by proving the increased price was directly attributable to increases in material and labor. If the cost of products is increasing for businesses, they should keep a detailed record of all transactions and price changes, as well as any receipts. Additionally, if businesses operate in more than one state, they should identify the differences in each state's price-gouging statute to ensure compliance.

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In order to comply with the various price-gouging statutes across the country, many businesses must take extra steps in assessing their compliance and vulnerability. An internal assessment should be a business's first step in understanding whether they are susceptible to price-gouging violations. If a business is at risk, there are many precautions that can be taken, which vary depending on the type of business. Businesses may want to train employees on price gouging laws so product prices and supply levels can be closely monitored. If businesses allow third parties to sell online, issuing guidelines to sellers may prevent future price-gouging. Finally, creating a program which allows employees or consumers to report price gouging will assist businesses in keeping up to date on potential violations.

The coronavirus pandemic created an unpredictable market, which makes understanding how to comply with various statutes difficult. Compliance with price gouging statutes alone will vary depending on the type of business, industry, and product being sold. If you have questions about how price-gouging laws impact your business, please contact Reena Dutta (716.848.1626), Patrick Hines (716.848.1679), or Michael Maxwell (716.848.1495) in our Litigation Practice.

Please check our Coronavirus Resource Center and our CARES Act page to access information related to both of these rapidly evolving topics.

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