

# Price Gouging During an Emergency: Coronavirus Edition

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The COVID-19 pandemic has made commodities such as hand sanitizer, disinfectant, and toilet paper in high demand. The shortages, however temporary, have left shelves empty, orders unfulfilled, and items on back order. As a result, some consumers are willing to pay a premium.

But if businesses raise their prices too much during and after the coronavirus health emergency, such a practice may be considered price gouging, which is both a crime in California and conduct that could subject businesses to any number of civil lawsuits, including class action lawsuits.

Under California law, if the government declares a state of emergency or a local emergency, businesses cannot increase the price of food, repairs, construction, housing, emergency and medical supplies, and gasoline more than 10% in the disaster area. Landlords cannot raise their month-to-month rent by more than 10% in an emergency. These restrictions are in place for 30 days from the day the emergency is declared, but state and local officials may extend the effective period of the statute beyond such time if they deem it necessary to protect the lives, property, or welfare of citizens. Local ordinances may also prohibit price gouging on their own terms.

On March 4, 2020, Gov. Gavin Newsom declared an emergency in the state of California. Therefore, anti-price gouging laws are in full effect for all of California. Indeed, various enforcement agencies and task forces have mobilized to investigate and prosecute these and other claims related to COVID-19.

Similar restrictions are in place in many other jurisdictions across the nation. Just as the pandemic is widely felt, so too is the issue of price gouging. U.S. Sen. Edward Markey, in open letters to Amazon

and the Federal Trade Commission, highlighted this very issue as having national import, citing by way of example a 2000% markup for certain items as a result of the COVID-19 pandemic.

Businesses may not be without relief, however, given that prices do not fluctuate in a vacuum. If businesses can prove that the increased price is directly attributable to increases in the cost of labor or materials needed to provide the good or service, they may not be liable, at least in California. Thus, business owners who believe a price increase is justified should consider both whether they can raise prices and whether they should raise prices. Regardless, all businesses should monitor prices closely and keep complete records of all transactions as proof, e.g., estimates, invoices, receipts, or bills. When comparing products, businesses should note as much information as possible, including the product name, size or quantity, manufacturer, item number, and unit price.

Businesses have been forced to act quickly by the ongoing health crisis, but they should also be reminded to act wisely and act proactively, when possible. While we all hope the pandemic itself subsides in short order, the legal implications of actions taken during this sensitive time will be litigated for years to come. For instance, on March 10, 2020, a class action lawsuit was filed in Miami-Dade County, Florida, against Amazon alleging that Amazon was “preying upon the public’s fear of a surging epidemic and using COVID-19 as an opportunity to pad profits by way of unlawful price increases.” The consumer class is alleged to be: “All consumers in the State of Florida who purchased hygienic products from [Amazon] following the declaration of a state of emergency, on March 9, 2020.”

While some states, like Mississippi, have price gouging statutes that prohibit class actions to challenge a business’s alleged price gouging, California’s statute — California Penal Code section 396 — does not. On the contrary, the Legislature makes clear that a violation of section 396 constitutes an unlawful business practice and an act of unfair competition within the meaning of section 17200 of the Business and Professions Code, which expressly permits class action lawsuits.

At the same time, differences in each state’s laws may also be a potential trap for businesses operating nationwide. For example, Florida prohibits a “gross disparity” between the prior price and the current charge, a so-called unconscionable price, which is a more nebulous standard than the 10% threshold in California. And even in states without anti-price gouging laws, the declaration of a state of emergency can result in emergency legislation.

Although this may be a precarious time, even in emergencies (and especially in emergencies), businesses must continue to act prudently and stay informed. Not only do consumers demand it, but also the law demands it. Please feel free to reach out to us if you need help charting a path forward or if we can address any pressing issues.

## Authored By

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