



Antitrust ADVISORY ■

MARCH 26, 2020

COVID-19 and Price Gouging

by [Jason Levine](#), [Valarie Williams](#), and [Kathleen Benway](#)

As often happens during natural disasters, the outbreak of COVID-19 in the U.S. has triggered alleged incidents of price gouging for essential goods. A recent [survey](#) by the Associated Press has revealed over 5,000 potential examples to date, involving products such as N95-rated masks, hospital gowns, and hand sanitizer. Major [e-commerce platforms](#) have also been deluged with attempts by third-party sellers to offer coronavirus-related products at highly inflated prices. Although price gouging is theoretically illegal nationwide, these restrictions are imposed at the state level and vary widely among states.

Overview of Price Gouging Laws

“Price gouging” refers to unjustified and extreme price increases intended to profiteer from a natural disaster or emergency, typically for essential products or basic necessities. Federal law does not specifically target price gouging; however, the federal government has taken steps to respond to those attempting to profit illegally from the coronavirus pandemic. Most notably, on March 23, Present Trump announced an Executive Order aimed at preventing price gouging and hoarding of critical medical supplies amid the coronavirus pandemic. The Order gives the Secretary of Health and Human Services the authority to designate certain supplies as “critical,” and those found to be hoarding or price gouging such equipment could face criminal action. [Designations](#) are currently limited to specific medical equipment, protective items, and disinfectants. In addition, over this past weekend, the U.S. [Department of Justice’s Civil Division](#) brought its first coronavirus-related fraud case in the Western District of Texas, successfully obtaining a temporary restraining order against the operators of the website coronavirusmedialkit.com. The site claimed to be distributing vaccines for a \$4.95 shipping fee – though no known vaccine is effective against COVID-19. Finally, the U.S. Department of Justice’s [National Center for Disaster Fraud](#) is focused on finding and prosecuting those who take advantage of disasters through fraud, including price gouging. Historically, however, price-gouging claims have not been the center’s focus.

As a practical matter, price gouging is addressed at the state level. Thirty-one states plus the District of Columbia have laws specifically banning price gouging, although two of these (Indiana and Vermont) apply to fuel only. All other states *except* Arizona, Colorado, Delaware, Maryland, Washington, and Wyoming have

This advisory is published by Alston & Bird LLP to provide a summary of significant developments to our clients and friends. It is intended to be informational and does not constitute legal advice regarding any specific situation. This material may also be considered attorney advertising under court rules of certain jurisdictions.

statutes banning “unfair” or “unconscionable” trade practices that effectively prohibit price gouging without using the term; the governors of Delaware and Maryland recently enacted orders banning price gouging during the coronavirus pandemic even absent statutes. Typically, state price-gouging laws are triggered by the declaration of a public emergency by the governor (or for D.C., the mayor), which has occurred in all states except Wyoming. State attorneys general can also issue emergency regulations prohibiting price gouging in addition to existing statutes, as occurred recently in [Massachusetts](#). When evaluating price-gouging claims, prices of covered products are usually measured against those charged either immediately (e.g., Alabama, California, Georgia), or within some prescribed timeframe such as 30 days (e.g., Florida, Rhode Island), before the emergency declaration and through the duration of the emergency period.

The level of price increase that constitutes potential “gouging” varies considerably among states. California, for example, prohibits price increases of more than 10% above those charged immediately before an emergency declaration, whereas the threshold is 15% in Maine and Oregon, and 20% in Michigan. Other states, such as New Jersey and Utah, broadly outlaw “excessive” price increases during a public emergency. The scope of products covered by price-gouging statutes varies among states as well. Some state laws encompass essentially all goods and services (e.g., Alabama, Florida, Mississippi). Others are limited to items that might naturally be in higher demand as a result of an emergency (e.g., Kansas) or those necessary for the “health, safety, and welfare” of consumers (e.g., New York). Safe harbors and exceptions also differ among states and mostly include allowances for “pass-on” price increases incurred by the seller or increased production or distribution costs caused by the emergency.

Most price-gouging statutes do not provide a private right of action but vest prosecutorial authority in the state attorney general’s office. Remedies typically include injunctive relief, restitution orders, and civil penalties calculated per violation. Some states – for example, Michigan, Mississippi, and Nevada – also specify criminal charges for willful acts of price gouging. Additional penalties and private rights of action may be available under a state’s unfair trade practice laws as well.

Guidance for Responding to Price Gouging

Businesses that believe they are subject to price gouging by their suppliers in the wake of the coronavirus pandemic have several potential avenues of relief. For example, they can file complaints with their state attorney general’s office – which can often be done by telephone – and with the National Center for Disaster Fraud. They can also send cease-and-desist letters to their suppliers that identify the products and prices in question, explain that price gouging is illegal, and demand that prices revert to reasonable or pre-emergency market levels. If a private right of action is available under the state’s unfair trade practices law, businesses can also file lawsuits for injunctive relief and damages, in addition to referring the price gouging to state authorities. For large companies in particular, it may be effective to submit complaints to their state legislators and even their Members of Congress, who are typically eager to publicize, pressure, shame, and investigate price gougers. In the case of foreign suppliers seeking to take advantage of the coronavirus pandemic, Members of Congress and Administration officials may be the only governmental actors in a position to provide any assistance to U.S. businesses, given the jurisdictional problems inherent in seeking to apply state price-gouging statutes to foreign entities.

Guidance for Avoiding Charges of Price Gouging

Businesses that consider raising prices for goods and services during the coronavirus pandemic, particularly while emergency declarations are still in effect, should bear in mind that they may be vulnerable to complaints of price gouging. Although state laws differ, it is advisable to raise prices – if at all – only to the extent necessary to offset increased costs of production, supplies, or distribution. Such increases often fall within “safe harbors” and exceptions in price-gouging regulations. However, these cost increases should be documented in detail. Further, to the extent that a price increase was planned before the emergency declaration – for example, if a temporary discount period was scheduled to end on a specified date – it is imperative to keep detailed records showing that the increase was expected (and, ideally, publicized) before an emergency declaration went into effect. If it is possible to delay the price increase, and thus extend a discount period, the long-term goodwill to be gained may outweigh the additional short-term revenue from a higher price. Finally, businesses should think twice about raising prices, particularly for essential goods, merely because it appears the market will bear temporary emergency-related increases. If such price increases exceed the threshold set by state law and are not due solely to cost increases, the business will be susceptible to charges of price gouging, with the attendant legal consequences and negative impact on goodwill.

Conclusion

Although common-sense principles generally apply, the specific laws governing price gouging vary widely from state to state, with important thresholds and potential defenses spelled out differently across jurisdictions. For this reason, businesses that believe they are victims of price gouging, or that seek to raise prices for goods or services during the coronavirus pandemic, would be wise to consult with counsel experienced in this area.

Alston & Bird has formed a multidisciplinary [task force](#) to advise clients on the business and legal implications of the coronavirus (COVID-19). You can [view all our work](#) on the coronavirus across industries and [subscribe](#) to our future webinars and advisories.

You can subscribe to future *Antitrust* advisories and other Alston & Bird publications by completing our [publications subscription form](#).

If you have any questions or would like additional information, please contact your Alston & Bird attorney or any of the following:

Select Members of Alston & Bird's Antitrust Group

Simon Albert +44.0.20.3823.2226 simon.albert@alston.com	Elizabeth Broadway Brown 404.881.4688 liz.brown@alston.com	Edward T. Kang 202.239.3728 edward.kang@alston.com	Andrew E. Paris 213.576.1119 drew.paris@alston.com
James Ashe-Taylor +44.0.20.3823.2232 james.ashetaylor@alston.com	Kristine McAlister Brown 404.881.7584 kristy.brown@alston.com	Kara F. Kennedy 404.881.4944 kara.kennedy@alston.com	Stuart Plunkett 415.243.1057 stuart.plunkett@alston.com
Kelley Connolly Barnaby 202.239.3687 kelley.barnaby@alston.com	R. Joseph Burby IV 404.881.7670 joey.burby@alston.com	Michael P. Kenny 404.881.7179 mike.kenny@alston.com	Lydia Rachianiotti +44.0.20.3823.2227 lydia.rachianiotti@alston.com
Kathleen Benway 202.239.3034 kathleen.benway@alston.com	Mark T. Calloway 704.444.1089 mark.calloway@alston.com	Matthew D. Kent 404.881.7948 matthew.kent@alston.com	Matthew D. Richardson 404.881.4478 matt.richardson@alston.com
Debra D. Bernstein 404.881.4476 debra.bernstein@alston.com	Elizabeth Helmer 404.881.4724 elizabeth.helmer@alston.com	Meredith Jones Kingsley 404.881.4793 meredith.kingsley@alston.com	John M. Snyder 202.239.3960 john.snyder@alston.com
Adam J. Biegel 202.239.3692 adam.biegel@alston.com	Michael R. Hoernlein 704.444.1041 michael.hoernlein@alston.com	Jason A. Levine 202.239.3039 jason.levine@alston.com	Allison S. Thompson 404.881.4536 allison.thompson@alston.com
Teresa T. Bonder 415.243.1010 teresa.bonder@alston.com	Donald Houser 404.881.4749 donald.houser@alston.com	Mark A. McCarty 404.881.7861 mark.mccarty@alston.com	Andrew J. Tuck 404.881.7134 andy.tuck@alston.com
Brian D. Boone 704.444.1106 202.239.3206 brian.boone@alston.com	William H. Jordan 404.881.7850 202.756.3494 bill.jordan@alston.com	B. Parker Miller 404.881.4970 parker.miller@alston.com	Valarie C. Williams 415.243.1058 valarie.williams@alston.com
Alexander G. Brown 404.881.7943 alex.brown@alston.com	Michael Kaeding 919.862.2208 mike.kaeding@alston.com	Jonathan D. Parente 404.881.7184 jonathan.parente@alston.com	

ALSTON & BIRD

WWW.ALSTON.COM

© ALSTON & BIRD LLP 2020

ATLANTA: One Atlantic Center ■ 1201 West Peachtree Street ■ Atlanta, Georgia, USA, 30309-3424 ■ 404.881.7000 ■ Fax: 404.881.7777
 BEIJING: Hanwei Plaza West Wing ■ Suite 21B2 ■ No. 7 Guanghua Road ■ Chaoyang District ■ Beijing, 100004 CN ■ +86.10.85927500
 BRUSSELS: Level 20 Bastion Tower ■ Place du Champ de Mars ■ B-1050 Brussels, BE ■ +32 2 550 3700 ■ Fax: +32 2 550 3719
 CHARLOTTE: Bank of America Plaza ■ 101 South Tryon Street ■ Suite 4000 ■ Charlotte, North Carolina, USA, 28280-4000 ■ 704.444.1000 ■ Fax: 704.444.1111
 DALLAS: Chase Tower ■ 2200 Ross Avenue ■ Suite 2300 ■ Dallas, Texas, Usa, 75201 ■ 214.922.3400 ■ Fax: 214.922.3899
 LONDON: 5th Floor, Octagon Point, St. Paul's ■ 5 Cheapside ■ London, EC2V 6AA, UK ■ +44.0.20.3823.2225
 LOS ANGELES: 333 South Hope Street ■ 16th Floor ■ Los Angeles, California, USA, 90071-3004 ■ 213.576.1000 ■ Fax: 213.576.1100
 NEW YORK: 90 Park Avenue ■ 15th Floor ■ New York, New York, USA, 10016-1387 ■ 212.210.9400 ■ Fax: 212.210.9444
 RALEIGH: 555 Fayetteville Street ■ Suite 600 ■ Raleigh, North Carolina, USA, 27601-3034 ■ 919.862.2200 ■ Fax: 919.862.2260
 SAN FRANCISCO: 560 Mission Street ■ Suite 2100 ■ San Francisco, California, USA, 94105-0912 ■ 415.243.1000 ■ Fax: 415.243.1001
 SILICON VALLEY: 950 Page Mill Road ■ Palo Alto, California, USA 94304-1012 ■ 650.838.2000 ■ Fax: 650.838.2001
 WASHINGTON, DC: The Atlantic Building ■ 950 F Street, NW ■ Washington, DC, USA, 20004-1404 ■ 202.239.3300 ■ Fax: 202.239.3333