

Amended California Price Gouging Law Closes Potential Loopholes

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California Penal Code § 396 prohibits price gouging in California during a state of emergency. California enacted a few amendments to Section 396 that are effective now. As explained in more detail below, among other things, the amendments close potential loopholes relating to e-commerce, sales of new products, and the relevant benchmark date for pre-emergency prices.

The entire State of California has been under a state of emergency relating to COVID-19 since Governor Newsom's March 4, 2020 proclamation of a state of emergency, and various California counties have been under separate states of emergency due to the California wildfires. During the current COVID-19 emergency, there has been an explosion of price gouging investigations brought by the State and also by local counties, as well as lawsuits brought by private parties. COVID-19 price gouging investigations and cases have mostly focused on food items (such as eggs) and consumer goods relating to health and hygiene (gloves, toilet paper, hand sanitizer, wipes, etc.).

With the amended version of Section 396, the basic rules for providers of food items and consumer goods remain the same: During a state of emergency, prices may not be increased by more than 10% over pre-emergency prices. Cal. Penal Code § 396(b). A higher price is not unlawful if it is directly attributable to certain costs and is "no more than 10 percent greater than the total of the cost to the seller plus the markup customarily applied by that seller for that good or service in the usual course of business immediately prior to the onset of the state of emergency or local emergency." *Id.*

Amended Section 396 includes new language that gives the Governor the power to do by statute certain things he had previously been doing by executive order. The statute also now expressly covers pandemics and online sales. Key changes of relevance to providers of food items and consumer goods are summarized below:

1. **Governor can select pre-emergency benchmark date.** Prior Section 396 prohibited price increases of more than 10% above the price "immediately prior" to the state of emergency. Amended Section 396(b) expands this to prohibit price increases of 10% above the price "immediately prior to the proclamation or declaration of emergency, or prior to a date set in the proclamation or declaration." This amendment gives the Governor the power to pick the pre-emergency benchmark date that will govern a price gouging analysis. While the prior Section 396 did not include such a provision, Governor Newsom had previously accomplished

this by executive order. See April 3, 2020 Executive Order N-44-20 (establishing Feb. 4, 2020 as the pre-emergency benchmark date for price gouging analysis for food items and consumer goods).

2. **New products cannot be marked up more than 50%.** Prior Section 396 contained no limit on prices for new products that a vendor had not sold prior the emergency. Amended Section 396(b) closes this loophole by prohibiting entities from marking up prices for new products above 50% of cost. Again, Governor Newsom had previously accomplished this by executive order. See April 3, 2020 Executive Order N-44-20 (Section 3, prohibiting “unconscionably excessive” prices for new products, defined as a price more than 50% above cost).
3. **No time limit on extensions set by the Governor or State Legislature.** Prior Section 396(g) provided that price gouging restrictions would expire 30 days after a declaration of a state of emergency, but could be extended by the State Legislature, the Governor, or local officials or local legislative bodies for additional 30-day periods. Amended Section 396(g) eliminates the temporal limits on the ability of the Governor or State Legislature to extend price gouging restrictions, which are only limited by what is “necessary to protect the lives, property, or welfare of the citizens.” However, extensions by a local official or local legislative body “may not exceed 30 days.” In addition, Amended Section 396(g) permits an extension to also specify certain prices that may exceed the price gouging thresholds. Governor Newsom had previously issued two executive orders that extended California’s price gouging restrictions through March 4, 2021. See April 3, 2020 Executive Order N-44-20 (extending price gouging restrictions through Sept. 4, 2020); Sept. 3, 2020 Executive Order N-78-20 (extending price gouging restrictions through March 4, 2021).
4. **E-commerce expressly covered.** Amended Section 396(a) now expressly covers online sales with new language making clear that price gouging restrictions apply to sales of products or services whether they are sold “in person, in stores, or online.”
5. **Pandemics expressly covered.** Amended Section 396(a) now expressly covers emergencies based on “pandemic or epidemic disease outbreak.”

With the ongoing COVID-19 pandemic and continuing state of emergency in California, companies doing business in California need to remain vigilant about compliance with California’s Penal Code § 396, Governor Newsom’s price gouging executive orders, and local ordinances relating to price gouging.

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