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The End of Price Restrictions in California… Or Merely a Step Towards Normal

Minding Your Business Blog on **March 15, 2021**

One year after declaring a state of emergency in California due to COVID-19, the California Governor issued a new Executive Order lifting pricing restrictions on most categories of products previously subject to California's price gouging statute. Governor Gavin Newsom's 2021 Order comes as states across the nation slowly reopen. This 2021 Executive Order marks a change for businesses in California.

Extending the State of Emergency

On March 3, 2020, Governor Newsom proclaimed a state of emergency in California, triggering the state's price gouging statute. The 2020 Executive Order detailed four categories of goods to which the pricing restrictions applied: food items, consumer goods, medical or emergency supplies, and designated "scarce materials" under the Defense Production Act. The California Penal Code prohibits selling, or offering for sale, covered products at a price more than 10% greater than the price offered for that good in the 30 days prior to the declaration of an emergency.

As the 2020 Executive Order was slated to expire on March 4, 2021, it comes as no surprise that Governor Newsom issued a revised Executive Order on March 4, 2021. However, the Governor did not merely extend the status quo. Instead, Governor Newsom chose to extend the scope of the emergency declaration to fewer product categories. Under the terms of the 2021 Executive Order, the California price gouging statute continues to apply, but only as to medical supplies and emergency supplies. Under the 2021 Executive Order, price gouging prohibitions no longer apply to other categories, including food and consumer goods.

Medical and Emergency Supplies

According to the statute, *emergency supplies* include items such as water, blankets, soaps, diapers, and toiletries. *Medical supplies* include "prescription and nonprescription medications, bandages, gauze, isopropyl alcohol, and antibacterial products." The law provides that the goods listed are merely examples, not a comprehensive inventory.

Despite lifting the price gouging restrictions for most products in California, the 2021 Executive Order is not the end of the story for businesses. The price gouging statute continues to apply to a variety of products related to the COVID-19 emergency. Business should continue to monitor the types of products that could be considered "emergency or medical supplies." The statutory list is not exhaustive and COVID specific items will likely remain covered under the statute for some time.

Why Lift the Restrictions and What's Next?

The Governor's 2021 Executive Order provides several justifications for lifting the blanket emergency declaration that has been force for a full year. According to Governor Newsom, the protections are no longer necessary "to ensure Californians' access to many necessary goods and services." Instead, the Governor believes that a variety of mechanisms are sufficient to achieve the purposes underlying the statute.

During the 2019-2020 legislative session, the California Legislature amended the price gouging statute: (1) allowing the Governor to designate the applicable date of the pricing restrictions, (2) allowing the Governor to extend the duration of the prohibitions, and (3) creating a new restriction, prohibiting sellers from charging a price more than 50% of the sellers cost if the seller did not market the product before the state of emergency. According to the Governor, the Legislature's "intent to protect residents from price gouging during states of emergency" and its recent statutory amendments provided the latitude for the 2021 Executive Order.

Looking forward, businesses should continue to monitor the COVID related products that could be construed as "emergency" supplies. While many of the California pricing restrictions have been lifted by the 2021 Executive Order, the Governor was clear that should circumstances change, these restrictions may be put back into effect.

Finally, the California statute provides for a 4 year statute of limitations for bringing price gouging complaints. Businesses should continue to use best practices to evaluate the risk of a price gouging suit as price changes over the past year could continue to invoke scrutiny.

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