

Infant Formula Shortage Update

Minding Your Business Blog on July 13, 2022

Lawmakers in Washington, D.C., and California have taken recent steps to further protect the infant formula market from price gouging. On June 7, 2022, the D.C. Council passed the [“Infant Formula Consumer Protection Emergency Act.”](#) The Act, which will remain in effect for 90 days, targets companies selling baby formula at extremely high prices. The Act provides that companies may be subject to a \$5,000 fine, for first-time offenses, or a \$10,000 fine, for subsequent offenses, if they sell infant formula at a price greater than 20% of what they previously sold substantially similar formula in the District over the 90-day period prior to February 17, 2022. If the retailer never sold a substantially similar formula product in that 90-day period, they would face fines if they sell infant formula at a price greater than 20% of the average price of substantially similar infant formula product from substantially similar retailers.

D.C. Councilmember Brianne Nadeau, one of the sponsors of the Act, released a [statement](#) on the passing of the bill. She said that, “[T]he District can and should protect our residents from opportunistic and unscrupulous actors who are harming our children.” Councilmember Nadeau also noted the high prices of infant formula both on shelves and online. Formula retailed online is often marked up in price by 200 or 300 percent, and formula bought in stores is “increasingly expensive.”

DC Attorney General Karl Racine provided further commentary in support of the Act: “No family should have to worry about whether they can feed their children. Councilmember Nadeau’s crucial legislation will help ensure families across the District can get the formula they need for their babies at a reasonable price....”

In light of the new legislation, businesses selling infant formula in Washington, D.C., should examine their pricing of formula products to maintain compliance with pricing restrictions.

Governor Gavin Newsom of California enacted similar rules, issuing an [executive order](#) targeting price gouging with respect to infant formula the same day the D.C. legislation passed. The order provides that any person or business that sells infant formula at a price higher than 10 percent of what they charged for that formula on February 17, 2022 may be charged with a misdemeanor. There are exceptions to this rule if: “a) The increase was directly attributable to additional costs imposed on the seller by its supplier(s) of infant formula, and the price is no more than 10 percent greater than the total of the cost to the seller plus the markup customarily applied by the seller for that item in the usual course of business on February 17, 2022; or b) The seller was offering infant formula for sale at a reduced price on February 17, 2022, and the increased price is not more than 10 percent greater than the price at which the seller ordinarily sold the infant formula.” If the retailer did not offer formula for sale on February 17, 2022, then the order prohibits them from selling or offering to sell formula products at an “unconscionably excessive price.”

Governor Newsom delivered a [statement](#) on the executive order, saying that, “California continues to take urgent action to support families feeling the impacts of the nationwide formula shortage. We’re connecting families in need with helpful resources and working to improve access for all parents and caregivers to keep California families safe and healthy.”

As lawmakers at all levels continue to monitor the infant formula market with increased scrutiny, suppliers and retailers of infant formula should stay abreast of newly imposed pricing restrictions and monitor compliance across all jurisdictions they operate in. While the shortage is ongoing, the U.S. government, retailers, and the formula industry have taken [measures](#) to mitigate its effects and increase the supply of infant formula. Production of formula has risen by 30-50% and, on July 1, 2022, President Biden released a [statement](#) announcing the thirteenth Operation Fly Formula mission to deliver infant formula base powder to the United States on July 12, 14, and 19.

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