

Best Practices For Food And Beverage Pricing Right Now

By **Katie Gates Calderon** and **Elizabeth Fessler** (April 24, 2020, 6:06 PM EDT)

COVID-19 has affected almost every aspect of our daily lives and the economy.

But while some industries have seen business dry up, industries selling essential products have seen demand explode. In the face of this pandemic, legislators and government agencies at both the state and federal level have taken action to stop price-gouging.

With increased demand and potentially increasing production costs due to supply chain disruptions, many in the food and beverage industry may be wondering how to deal with the economic pressures without running afoul of price-gouging statutes.

Demand Whiplash

With many nonessential American workers staying home to help slow the spread of COVID-19, demand in the food and beverage industry has undergone drastic changes, leading to surpluses in some supply chains and shortages in others. Demand from hotel, restaurant and other hospitality industries has dropped substantially, leading some farmers to destroy crops and food that cannot be sold or donated.[1]

For example, Dairy Farmers of America, the largest dairy cooperative in the U.S., estimated that 3.7 million gallons of milk were being dumped by farmers each day.[2] Many of these foods could be used by individual consumers at home, but there is often a lack of infrastructure needed to divert the food for processing and packaging for sale to those individual consumers.[3]

Even donating the food is not always a viable option as food banks may not be able to handle the volume, particularly of perishable items, and farmers, already taking financial hits due to the loss of paying customers, would be forced to pay for shipping and processing the food for donation.[4]

On the other hand, demand at grocery stores has increased substantially, particularly for nonperishables, like canned soups, boxed dinners, dried pasta and frozen foods.[5] For example, Campbell Soup Co. is working around the clock to supply canned soups as demand outpaces even the typical peak demand for soup during the fall and winter months.[6] Further, price spikes are



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now anticipated for rice and wheat.[7]

Market Disruptions

The inability to meet shifting demand is not the only anticipated challenge as the food supply chain has experienced disruptions, with additional issues visible in the coming months. There have been issues with logistics, with reduced air freight and trucking to deliver products and reductions in imports to the U.S., as well as anticipated shortages in the laborers needed for planting and harvesting crops, which could lead to additional disruptions in the coming months.[8]

Clusters of infections have occurred at meat-packing facilities, including a Smithfield Foods Inc. pork facility in Sioux Falls, South Dakota, that was forced to close with later testing revealing that about 16% of the 3,700 employees had the coronavirus.[9] It seems that meat-processing facilities may be particularly vulnerable due to the required close proximity of workers on production lines.[10]

While efforts to stay at home have flattened infection curves in many areas, the risk of clustered infections in food facilities operating during the pandemic remains present.[11]

Price-Gouging Enforcement

All of these disruptions or potential disruptions in both supply and demand could lead to price increases that may have to be passed on to the end consumer. But the Federal Trade Commission and many state attorneys general have been vocal in their opposition to increasing prices when they verge into price-gouging. In late March, 33 attorneys general wrote letters to several major retailers, including Amazon.com Inc. and eBay Inc., demanding increased efforts to remove unconscionably priced critical supplies.[12]

Complaints have flooded into retailers and attorney general offices regarding price increases.[13] A report from the U.S. Public Interest Research Group Education Fund found that prices for hand sanitizer and surgical masks had risen at least 50% over the previous 90-day average.[14]

When demand drives up prices, the line between responding to economic conditions and price-gouging can be difficult to determine, and the laws on the issue vary. Generally, state laws are triggered due to some type of emergency, but the definition of price-gouging varies from the vague unconscionable price increases to more concrete guidelines, with a specific percentage above market prices before the emergency triggering enforcement.[15]

Those percentages vary with 10% tending to be the lower end, although the language of some states' statutes do not allow any price increase.[16] Fourteen states have no price-gouging laws, and in two states — Massachusetts and Vermont — price-gouging laws only apply to gasoline.[17]

In addition to the patchwork of state laws, there have been efforts on the federal level to introduce legislation to establish federal price-gouging laws, although it is unclear whether any of the introduced legislation will pass.[18] Despite the lack of federal price-gouging statutes, enforcement efforts at the federal level may still be attempted under fraud, antitrust or other consumer protection statutes.[19]

Amid the calls for enforcement, some economists contend that price-gouging statutes are actually counterproductive because artificially reduced prices block market signals regarding demand, reduce the number of innovators that may try to meet the demand and create black markets.[20]

Moreover, the patchwork of state price-gouging laws could divert supply of necessary goods to states without such laws regardless of the actual need in other states.[21] While these economic arguments may well be valid, it seems many companies will have to contend with market volatility and increased price-gouging enforcement.

Navigating Price Increases to Avoid Allegations of Price-Gouging

Unlike many emergencies that may have triggered price-gouging in the past, this emergency could last for months. The possible duration of the emergency makes it particularly concerning given that numerous issues could, under normal circumstances, cause price increases. Companies can consider a few things when evaluating a price increase on food and beverage products during this pandemic.

What state or states will be affected by this price increase? What price-gouging statutes are in effect?

Evaluating the specific statutes in play may assist in providing guidance on any price increases, particularly if the state has a specific percentage increase that constitutes price-gouging. Companies must also understand what the price comparator will be, as state laws vary on how the pre-emergency price is calculated.

Companies should also understand what products are covered by price-gouging laws. Again, state laws may vary and some products may not be covered by state laws. While companies should still carefully consider price increases in those cases, if the product is not covered by law, price-gouging enforcement may not be an issue.

What is the reason for the price increase? Have other options besides a price increase been fully explored?

It is best to fully understand and document the reasons for any price increase as well as the justification for the amount of any price increase. While some statutes have per se price increase limitations, others do not, and a well-justified increase in price may not be subject to any action.

Given the legal and consumer perception issues surrounding price increases during a pandemic, it is critical that the company has considered and rejected other reasonable options before considering a price increase. Even a threatened enforcement action could tarnish a company's image, so careful consideration must be given to whether the price increase is worth the potential public relations risk.

What if you are contacted by a government agency regarding your pricing practices?

If you are contacted about pricing issues, it may be best to contact outside counsel before providing any records or documents to government agents because the laws, and potential defenses, vary by state.

There is no question that all of us are facing unprecedented challenges, both today and in the months to come. Many of our essential workers are those who continue to provide us with the food we need, from farmers, to factory workers, to grocery store employees. Those of us who are working from home thank you and look forward to better days.

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[2] Id.

[3] Yaffe-Bellany, supra, note 1; Nathan Bomey & Kelly Tyko, Meat Shortage 2020: Coronavirus Has Led Smithfield, Other Plants to Close, Farmers to Dump Milk, USA Today (Apr. 16, 2020), <https://www.usatoday.com/story/money/2020/04/16/coronavirus-shopping-chicken-shortage-meat-covid-19/2990212001/>.

[4] Yaffe-Bellany, supra, note 1; Bomey, supra, note 3.

[5] Bomey, supra, note 3.

[6] Aleksandra Sagan, Plants 'Operating 24/7' to Meet Food Demand Amid COVID-19, The Canadian Press (Apr. 20, 2020), <https://www.bnnbloomberg.ca/plants-operating-24-7-to-meet-food-demand-amid-covid-19-1.1423932>.

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[13] Mansee Khurana, States Push Price-Gouging Measures as Coronavirus Fuels Consumer Fears, NBC News (Mar. 20, 2020), <https://www.nbcnews.com/politics/politics-news/states-push-price-gouging-measures-coronavirus-fuels-consumer-fears-n1163846>.

[14] U.S. P.I.R.G., Coronavirus Worry Triggers Most Surgical Mask, Sanitizer Prices to Spike at Least 50% on Amazon (Mar. 11, 2020), <https://uspirg.org/news/usp/coronavirus-worry-triggers-most-surgical-mask-sanitizer-prices-spike-least-50-amazon>.

[15] See, e.g., N.Y. Gen. Bus. Law § 396-r(2) (prohibiting sales of products at an “unconscionably excessive price”).

[16] See, e.g., Cal. Penal Code § 396(b) (prohibiting increases in “price of more than 10 percent”); Conn. Gen. Stat. Ann. § 42-230 (prohibiting any increase in price); see also Richard Lawson & Shoshana Speiser, Cloudy With a Change of Price Gouging, Law360 (Aug. 28, 2018), <https://www.law360.com/articles/1076395/cloudy-with-a-chance-of-price-gouging>.

[17] Khurana, *supra*, note 13.

[18] See, e.g., H.R. 6264, 116th Cong. (2020).

[19] Kendra L. Berardi & Ian T. Clarke-Fisher, Responding to Government Inquiries Related to Price Gouging During the COVID-19 Pandemic, Nat'l L. Rev. (Apr. 21, 2020), <https://www.natlawreview.com/article/responding-to-government-inquires-related-to-price-gouging-during-covid-19-pandemic>. See also Khurana, *supra*, note 13; Federal Trade Commission, FTC Chairman Joe Simons Outlines the Agency's Approach to Safeguarding Consumers During the Coronavirus Pandemic (Mar. 26, 2020), <https://www.ftc.gov/news-events/press-releases/2020/03/ftc-chairman-joe-simons-outlines-agencys-approach-safeguarding>.

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[21] *Id.*