

MEMORANDUM

To: Governors' Offices

From: National Governors Association

Date: March 16, 2020

Re: Price Gouging and Procurement Processes Following Emergency Declarations

Background

As of March 16, 2020, all 55 states and territories have used emergency powers in response to COVID-19.¹ The District of Columbia and a number of localities and tribes have also declared emergencies.² When emergencies occur, increases in prices for necessary supplies and services can cause problems for consumers and, by extension, state governments. Global demand for both

¹ As of March 16, 2020, all states and territories have used emergency powers in response to COVID-19. In chronological order: [American Samoa](#) declared a public health emergency on February 27, 2020. [Washington](#) declared a state of emergency on February 29, 2020. [The Commonwealth of the Northern Mariana Islands](#) declared a state of emergency on January 30, 2020. [Florida](#) declared a public health emergency on March 1, 2020. [California](#) declared a state of emergency on March 4, 2020. [Hawaii](#) declared an emergency disaster declaration on March 4, 2020. [West Virginia](#) declared a state of preparedness on March 4, 2020. [Maryland](#) declared a state of emergency on March 5, 2020. [Indiana](#) declared a public health emergency on March 6, 2020. [Kentucky](#) declared a state of emergency on March 6, 2020. [Pennsylvania](#) declared a disaster emergency on March 6, 2020. [Utah](#) declared a state of emergency on March 6, 2020. [New York](#) declared a disaster emergency on March 7, 2020. [Oregon](#) declared a state of emergency on March 8, 2020. [Ohio](#) declared a state of emergency on March 9, 2020. [New Jersey](#) declared a state of emergency and public health emergency on March 9, 2020. [Rhode Island](#) declared a disaster emergency on March 9, 2020. [Iowa](#) declared a disaster emergency on March 9, 2020. [Illinois](#) declared a disaster on March 9, 2020. [North Carolina](#) declared a state of emergency on March 10, 2020. [Colorado](#) declared a state of emergency on March 10, 2020. [Connecticut](#) declared a public health and civil preparedness emergency on March 10, 2020. [Massachusetts](#) declared a state of emergency on March 10, 2020. [Michigan](#) declared a state of emergency on March 10, 2020. [Arkansas](#) declared an emergency on March 11, 2020. [Arizona](#) declared a public health emergency on March 11, 2020. [Louisiana](#) declared a public health emergency on March 11, 2020. [New Mexico](#) declared a public health emergency on March 11, 2020. [Alaska](#) declared a public health emergency on March 11, 2020. [Tennessee](#) declared a state of emergency on March 12, 2020. [Wisconsin](#) declared a public health emergency on March 12, 2020. [Virginia](#) declared a state of emergency on March 12, 2020. [Puerto Rico](#) declared a state of emergency on March 12, 2020. [Delaware](#) declared a state of emergency on March 12, 2020. [Montana](#) declared a state of emergency on March 12, 2020. [Nevada](#) declared a state of emergency on March 12, 2020. [Kansas](#) declared a state of a disaster emergency on March 12, 2020. [Idaho](#) declared a state of emergency on March 13, 2020. [Texas](#) declared a state of disaster on March 13, 2020. [Minnesota](#) declared a peacetime emergency on March 13, 2020. [Missouri](#) declared a state of emergency on March 13, 2020. [South Dakota](#) declared a state of emergency on March 13, 2020. [South Carolina](#) declared a state of emergency on March 13, 2020. [New Hampshire](#) declared a state of emergency on March 13, 2020. [Vermont](#) declared a state of emergency on March 13, 2020. [Alabama](#) declared a state of emergency on March 13, 2020. [Nebraska](#) declared a state of emergency on March 13, 2020. [Wyoming](#) declared a state of emergency on March 13, 2020. [North Dakota](#) declared a state of emergency on March 13, 2020. [The U.S. Virgin Islands](#) declared a state of emergency on March 13, 2020. [Georgia](#) declared a public health emergency on March 14, 2020. [Mississippi](#) declared a state of emergency on March 14, 2020. [Maine](#) declared a state of civil emergency on March 15, 2020. [Oklahoma](#) declared a state of emergency on March 15, 2020. [Guam](#) declared a state of public health emergency on March 15, 2020. Professor James Hodge and the Network for Public Health Law provided guidance and resources regarding state emergency declarations, available at <https://www.networkforphl.org/resources/emergency-legal-preparedness-covid19/>.

² The [District of Columbia](#) declared a Public Health Emergency on March 11, 2020. Cities, counties, and tribes have also declared states of emergency/disaster, including San Francisco, San Diego County, Orange County, Santa Clara County, King County (Seattle), San Antonio, the District of Columbia, and the Oglala Sioux Tribe. Please note this list is not exhaustive.

durable and disposable medical equipment will increase during a pandemic and can cause stress on the supply chain. Healthcare facilities, as well as government entities, may find themselves competing for goggles, gloves, oxygen concentrators, respiratory tubing and support equipment, ventilators, and other supplies.

The purpose of this memorandum is to highlight current state statutory approaches regarding price gouging during emergencies and identify strategies certain states have taken to prevent price gouging as well as address procurement concerns in response to public health emergencies like COVID-19. This memorandum is structured accordingly: Part I articulates current state statutory standards for anti-price gouging following declarations of emergencies; Part II provides state approaches to addressing price gouging during public health emergencies; and Part III addresses changes to state procurement processes following declarations of emergencies. This memorandum is not intended to provide legal advice. States should consult their legal counsel and Attorney General's office and reference relevant statutes for state-specific procedures and guidance.

I. State Laws Regarding Price Gouging and Declarations of Emergencies

Thirty-four states and the District of Columbia have anti-price gouging laws on products and services following declarations of emergencies.³ Price gouging is the practice of increasing the price of necessary products or services. In general, price gouging is not illegal unless it is during a time of emergency.⁴ Most anti-price gouging statutes include three elements: 1) the trigger of an emergency; 2) the necessary goods and services; and, 3) a price increase of some kind.

In most states, price gouging during a time of emergency is considered a violation of unfair or deceptive trade practices law. Most anti-price gouging laws provide for civil penalties, as enforced by the state attorney general, while some state laws also enforce criminal penalties for price gouging violations.⁵ States take different approaches to crafting anti-price gouging strategies, from standard setting to outright bans, which can result in the potential for litigation.

State anti-price gouging laws set different standards for determining price gouging. At least nine states use a percent increase limit, such as a supplier cannot increase the price of supply more than ten percent during a declared emergency.⁶ For example, California's statute states: "[u]pon the proclamation of a state of emergency ... and for a period of 30 days following that proclamation or declaration, it is unlawful for a person, contractor, business, or other entity to sell or offer to sell any consumer food items or goods, goods or services used for emergency cleanup, emergency supplies, medical supplies, home heating oil, building materials, housing, transportation, freight, and storage services, or gasoline or other motor fuels for a price of more than [10 percent] above the price charged by that person for those goods or services immediately prior to the proclamation or declaration of emergency."⁷

³ "Price Gouging Laws by State," FindLaw, (accessed March 10, 2020)

<https://consumer.findlaw.com/consumer-transactions/price-gouging-laws-by-state.html>.

⁴ In 2017, Maryland passed a law to prohibit price gouging of prescription drugs. It was challenged in court and the 4th Circuit Court of Appeals found it to be an unconstitutional burden on interstate commerce. This was an anti-price gouging law without the trigger of an emergency declaration. Assoc. For Accessible Medicine v. Frosh, 4th Cir. Ct. Appeals (2018), *available at* <http://www.ca4.uscourts.gov/Opinions/172166.P.pdf>.

⁵ "Price Gouging Laws by State," FindLaw, (accessed March 10, 2020)

<https://consumer.findlaw.com/consumer-transactions/price-gouging-laws-by-state.html>.

⁶ *Id.* Those states are AR, CA, DC, KS, ME, NJ, OK, OR, and WV.

⁷ CA Penal Code § 396, *available at* <https://codes.findlaw.com/ca/penal-code/pen-sect-396.html>.

Additionally, at least six states have outright bans on any increase in the price of necessary supplies or services during an emergency.⁸ For example, Georgia’s statute states: [i]t shall be an unlawful, unfair, and deceptive trade practice for any person, firm, or corporation doing business in any area in which a state of emergency ... has been declared, for so long as such state of emergency exists, to sell or offer for sale at retail any goods or services identified by the Governor in the declaration of the state of emergency necessary to preserve, protect, or sustain the life, health, or safety of persons or their property at a price higher than the price at which such goods were sold or offered for sale immediately prior to the declaration of a state of emergency.”⁹ Notably, Georgia’s law does allow for a price to be increased in an amount “which accurately reflects an increase in cost of the goods or services to the person selling the goods or services or an increase in the cost of transporting the goods or services into the area.”¹⁰

At least twenty states also ban “unconscionable” price increases of supplies following declarations of emergency.¹¹ Virginia’s anti-price gouging statute prohibits a supplier from charging “unconscionable prices” for “necessary goods and services” during the thirty-day period following a declared state of emergency.¹² According to the Virginia Attorney General, “the basic test for determining if a price is unconscionable is whether the post-disaster price grossly exceeds the price charged for the same or similar goods or services during the ten days immediately prior to the disaster.”¹³

a. Price Gouging Litigation

Following declarations of emergency, some states have sued businesses and individuals for failure to comply with anti-price gouging statutes. For example, New Jersey filed a lawsuit against Vinny Fuel Corporation for unlawfully increasing the price of gasoline following the declaration of emergency for Hurricane Sandy in 2012.¹⁴ New Jersey’s anti-price gouging statute has a set standard prohibiting an increase in price of ten percent or more following a declaration of emergency. In this case, Vinny Fuel Corporation increased the price by 21.4% during the state of emergency. The court found in favor of New Jersey and Vinny Fuel Corporation was fined \$15,000.¹⁵

⁸ Those states are CT, GA, HI, LA, MS, and UT. <https://consumer.findlaw.com/consumer-transactions/price-gouging-laws-by-state.html>.

⁹ GA Code Title 10 § 10-1-393.4, available at <https://codes.findlaw.com/ga/title-10-commerce-and-trade/ga-code-sect-10-1-393-4.html>.

¹⁰ *Id.*

¹¹ “Price Gouging Laws by State,” FindLaw, (accessed March 10, 2020)

<https://consumer.findlaw.com/consumer-transactions/price-gouging-laws-by-state.html>.

Those states are AL, FL, ID, IL, IN, IA, KY, MA, MI, MO, NY, NC, PA, RI, SC, TN, TX, VT, VA, and WI.

¹² Virginia Post-Disaster Anti-Price Gouging Act § 59.1-527, available at <https://law.lis.virginia.gov/vacodepopularnames/virginia-post-disaster-anti-price-gouging-act/>.

¹³ Press Release, Commonwealth of Virginia Office of the Attorney General, “Price Gouging Protections In Effect As Cleanup From Winds Continues,” (March 5, 2020), available at <https://www.oag.state.va.us/consumer-protection/index.php/news/270-march-5-2018-price-gouging-protections-in-effect-as-cleanup-from-winds-continues>.

¹⁴ Emily Naranjo, “Price Gouging In The Wake Of Natural Disaster: A Legal Ambiguity,” Columbia Undergraduate Law Review (November 19, 2017), available at https://blogs.cuit.columbia.edu/culr/2017/11/19/price-gouging-in-the-wake-of-natural-disaster-a-legal-ambiguity/#_ftn14.

¹⁵ *Id.*

However, in a state with an “unconscionable” standard, there is the potential for more discretion for a court to determine what amounts to an “unconscionable” or “grossly excessive” increase. This lack of clarity has occasionally led to lengthy litigation for states. In 2007, the Kentucky Attorney General filed a lawsuit against Marathon Petroleum Company, LLC for unlawfully raising the price of gasoline following Kentucky’s declaration of emergency in 2005 after Hurricane Katrina.¹⁶ Kentucky’s anti-price gouging law prohibits “[s]elling or renting goods or services for a price which is grossly in excess of the price prior to the declaration and unrelated to any increased cost to the seller.”¹⁷ Marathon raised the price per gallon of gasoline either twenty-five or fifty cents, depending on the station.¹⁸ The state argued that this constituted a price “grossly in excess” of the price prior to the disaster declaration. Marathon argued that the vagueness of the standard allowed them to unknowingly increase prices illegally. The ambiguity of the definition of price gouging under the Kentucky law resulted in a standstill between the Attorney General and Marathon. The case worked its way through the court system for twelve years until finally reaching a settlement in July 2019.¹⁹

II. Anti-Price Gouging Following Declarations of Public Health Emergencies

Anti-price gouging laws can be triggered by any declaration of emergency, including public health emergencies. In response to COVID-19, some state attorneys general issued price gouging alerts and encouraged the public to file complaints of potential price gouging. Likewise, public health emergency declarations in response to the opioid epidemic have also led states to conduct investigations into price gouging of pharmaceutical drugs.

a. In Response to COVID-19

In response to COVID-19, a number of states have prioritized strategies to address price gouging. The following represents a brief summary of such actions but is not an exhaustive list.²⁰

¹⁶ Marathon Petroleum Co. LLC v. Stumbo, 528 F. Supp. 2d 639 (E.D. Ky. 2007).

¹⁷ Kentucky Revised Statutes Title XXIX § 367.372, available at <https://codes.findlaw.com/ky/title-xxix-commerce-and-trade/ky-rev-st-sect-367-372.html>.

¹⁸ Emily Naranjo, “Price Gouging In The Wake Of Natural Disaster: A Legal Ambiguity,” Columbia Undergraduate Law Review (November 19, 2017), available at https://blogs.cuit.columbia.edu/culr/2017/11/19/price-gouging-in-the-wake-of-natural-disaster-a-legal-ambiguity/#_ftn14.

¹⁹ Chris Otts, “Marathon Petroleum pays \$22.5 million to settle Kentucky gas prices lawsuit,” WDRB.com, (July 31, 2019), available at https://www.wdrb.com/in-depth/marathon-petroleum-pays-million-to-settle-kentucky-gas-prices-lawsuit/article_07f29ee2-b3bd-11e9-988e-37d8b3cf4fc4.html.

²⁰ Such list does not include scams or other consumer protection concerns related to COVID-19. For example, there are a number of consumer issues that states are attempting to address, such as concerns about hospital bills that are out of network. On March 13, Oklahoma Attorney General Mike Hunter announced that Oklahoma’s price gouging statute went into effect following the federal government’s emergency declaration regarding COVID-19. Oklahoma’s statute prohibits an increase of more than 10% for the price of goods or services after a declared emergency. Press Release, State of Oklahoma Office of the Attorney General, “Attorney General Hunter Announces Price Gouging Statute in Effect Statewide Following Federal Emergency Declaration Regarding COVID-19,” (March 13, 2020), available at <http://www.oag.ok.gov/attorney-general-hunter-announces-price-gouging-statute-in-effect-statewide-following-federal-emergency-declaration-regarding-covid-19>.

On March 4, 2020, Washington Attorney General Bob Ferguson announced an investigation into price gouging following the declaration of emergency on February 29.²¹ The Attorney General announced that they are accepting public complaints of price gouging and “taking formal investigative actions.” Washington does not currently have an anti-price gouging law and relies on unfair competition and deceptive practices standards within Washington consumer protection law, which is another potential strategy for states.²²

California Attorney General Xavier Becerra also announced an investigation into price gouging following the state’s declaration of emergency on March 4.²³ In such declaration, Governor Newsom also included a provision waiving the time limit set in the California anti-price gouging statute.²⁴ The statute sets a limit of 30 days following the declaration of emergency.²⁵ In this case, the anti-price gouging law is in effect through September 4, 2020. California’s anti-price gouging statute prohibits increasing prices for food, emergency supplies, medical supplies, gasoline and other consumer products and services more than ten percent.²⁶ The Attorney General’s office is asking members of the public to report any suspected price gouging to their office or the local police office.

Additionally, in her declaration of emergency in response to COVID-19 on March 8, Oregon Governor Kate Brown directed individuals who believe that they may have been subjected to price gouging to report it to the Oregon Department of Justice Consumer Protection hotline. Oregon’s anti-price gouging statute prohibits merchants or wholesalers from selling “essential consumer goods” at a fifteen percent or more increase in price following the declaration of emergency.²⁷ “Essential consumer goods” includes goods or services bought primarily for personal use and “necessary for the health, safety, or welfare of consumers.”²⁸

Finally, Amazon.com Inc. announced that it is working with state attorneys general to identify and prosecute third-party sellers who are taking advantage of fears of the spreading COVID-19 to engage in price-gouging on the Amazon website.²⁹ Amazon’s current “Fair Pricing Policy” states that Amazon might intervene to either remove the “buy box,” remove the offer, or suspend selling

²¹ Press Release, State of Washington Office of the Attorney General, “Ag Ferguson Statement On Price Gouging In Public-Health Emergency,” (March 4, 2020), available at <https://www.atg.wa.gov/news/news-releases/ag-ferguson-statement-price-gouging-public-health-emergency>.

²² Revised Code of Washington § 19.86.020, available at <https://app.leg.wa.gov/RCW/default.aspx?cite=19.86.020>.

²³ Press Release, State of California Department of Justice, “Attorney General Becerra Issues Consumer Alert on Price Gouging Following Statewide Declaration of Emergency for Novel Coronavirus Cases in California Communities” (March 4, 2020), available at <https://www.oag.ca.gov/news/press-releases/attorney-general-becerra-issues-consumer-alert-price-gouging-following-statewide>.

²⁴ Proclamation of a State of Emergency, Executive Office State of California, (March 4, 2020), available at <https://www.gov.ca.gov/wp-content/uploads/2020/03/3.4.20-Coronavirus-SOE-Proclamation.pdf>.

²⁵ California Penal Code § 396, available at <https://codes.findlaw.com/ca/penal-code/pen-sect-396.html>.

²⁶ *Id.*

²⁷ Oregon Revised Statutes Title 32 § 401.965, available at <https://codes.findlaw.com/or/title-32-military-affairs-emergency-services/or-rev-st-sect-401-965.html>.

²⁸ *Id.*

²⁹ Nandita Bose and David Shepardson, “Amazon says working with state AGs to nab sellers engaged in price-gouging over coronavirus,” Reuters, (March 6, 2020), available at <https://www.reuters.com/article/us-health-coronavirus-amazon-com/amazon-says-working-with-state-ags-to-nab-sellers-engaged-in-price-gouging-over-coronavirus-idUSKBN20T2Y8>.

privileges if they believe the pricing practices “harm customer trust.”³⁰ Potential prohibited pricing practices include “setting a price on a product or service that is significantly higher than recent prices offered on or off Amazon.”³¹

b. In Response to the Opioid Crisis

On March 27, 2014, former Massachusetts Governor Deval Patrick declared a public health emergency in response to the opioid crisis. Under his emergency powers, Governor Patrick instituted regulatory changes that made naloxone immediately available to all first responders. Following this change, naloxone manufacturer Amphastar increased the price of its drug from \$19.56 to \$41.43 for a 2-milliliter dose, a 111% price increase. Although the purchase price varied between municipalities, some first responders reported paying more than \$65 for a single unit of the drug.³² In February 2015, Massachusetts Attorney General Healey sent a letter to Amphastar Pharmaceuticals seeking information related to the price increase.³³ In August 2015, Attorney General Healey announced a \$325,000 agreement with Amphastar to resolve the price-gouging investigation. The money was deposited into the Commonwealth’s Municipal Naloxone Bulk Purchase Trust Fund.³⁴

III. Changes to Procurement Processes Following Declarations of Emergencies

Standard procurement processes can pose a challenge to state and local governments when supplies and services are needed to quickly respond to an emergency. Procurement provisions under emergency declarations can give agencies the authority to award a contract without public advertising for bids or make emergency purchases without prior approval. Whether provisions involve waiving a bidding process or granting the ability to bypass routine forms, such provisions are unique to each jurisdiction.³⁵

a. In Response to COVID-19

In response to COVID-19, a number of states have issued emergency declarations that include procurement provisions. The following is not an exhaustive list but includes the following states:

³⁰ Amazon Seller Central, Amazon Marketplace Fair Pricing Policy, (accessed March 10, 2020), https://sellercentral.amazon.com/gp/help/external/G5TUVJKZHUVMN77V?linkCode=w50&tag=w050b-20&imprToken=9BnV8WsuQJJJaXIIutitG4Q&slotNum=4&language=en_US.

³¹ Id.

³² Press Release, The Commonwealth of Massachusetts Office of the Attorney General, “AG Healey Announces \$325K Agreement with Naloxone Manufacturer, Dedicates Funds to Help First Responders Statewide Access Life-Saving Drug,” (August 31, 2015), available at <https://www.mass.gov/news/ag-healey-announces-325k-agreement-with-naloxone-manufacturer-dedicates-funds-to-help-first>.

³³ Letter, The Commonwealth of Massachusetts Office of the Attorney General, (February 5, 2015), available at <http://wayback.archive-it.org/1101/20180104150146/http://www.mass.gov/ago/docs/press/2015/ago-letter-to-amphastar.pdf>.

³⁴ Press Release, The Commonwealth of Massachusetts Office of the Attorney General, “AG Healey Announces \$325K Agreement with Naloxone Manufacturer, Dedicates Funds to Help First Responders Statewide Access Life-Saving Drug,” (August 31, 2015), available at <https://www.mass.gov/news/ag-healey-announces-325k-agreement-with-naloxone-manufacturer-dedicates-funds-to-help-first>.

³⁵ National Association of County and City Health Officials, Administrative Preparedness Legal Guidebook, (accessed on March 10, 2020) <https://www.naccho.org/programs/public-health-preparedness/systems-preparedness/administrative-preparedness-legal-guidebook>.

Pennsylvania

Pennsylvania's declaration of emergency in response to COVID-19 on March 6 includes an authorization for all state agencies to utilize the emergency procurement process. Pennsylvania's emergency procurement statute states: "[t]he head of a purchasing agency may make or authorize others to make an emergency procurement when there exists a threat to public health, welfare or safety or circumstances outside the control of the agency create an urgency of need which does not permit the delay involved in using more formal competitive methods. Whenever practical, in the case of a procurement of a supply, at least two quotes shall be solicited. A written determination of the basis for the emergency and for the selection of the particular contractor shall be included in the procurement file. No written contract may be required. The supplier of the supply, service or construction may be paid based on the emergency approval and approved invoice."³⁶

Hawaii

Hawaii's declaration of emergency in response to COVID-19 on March 4 also addressed potential issues with procurement. The declaration authorizes the use of Hawaii's emergency procurement process. Hawaii's statute states: "[t]he head of a purchasing agency may obtain a good, service, or construction essential to meet an emergency by means other than specified in this chapter when the following conditions exist:

- a) A situation of an unusual or compelling urgency creates a threat to life, public health, welfare, or safety by reason of major natural disaster, epidemic, riot, fire, or such other reason as may be determined by the head of that purchasing agency;
- b) The emergency condition generates an immediate and serious need for goods, services, or construction that cannot be met through normal procurement methods and the government would be seriously injured if the purchasing agency is not permitted to employ the means it proposes to use to obtain the goods, services, or construction; and
- c) Without the needed good, service, or construction, the continued functioning of government, the preservation or protection of irreplaceable property, or the health and safety of any person will be seriously threatened.

The emergency procurement shall be made with such competition as is practicable under the circumstances and, where practicable, approval from the chief procurement officer shall be obtained prior to the procurement. A written determination of the basis for the emergency and for the selection of the particular contractor shall be included in the contract file."³⁷

California

California's declaration of emergency includes a provision to waive procurement processes for "materials, goods, and services needed to assist in preparing for, containing, responding to, mitigating the effects of, and recovering from the spread of COVID-19."³⁸ This provision also includes suspending requirements for travel, advertising, and competitive bidding "to the extent necessary to address the effects of COVID-19."³⁹

³⁶ Pennsylvania Consolidated Statutes Title 62 § 516, available at <https://www.legis.state.pa.us/cfdocs/legis/LI/consCheck.cfm?txtType=HTM&ttl=62&div=0&chpt=5§n=16&subsectn=0>.

³⁷ Hawaii Revised Statutes § 103D-307, available at <https://law.justia.com/codes/hawaii/2015/title-9/chapter-103d/section-103d-307/>.

³⁸ Press Release, Office of Governor Gavin Newsom, "Governor Newsom Declares State of Emergency to Help State Prepare for Broader Spread of COVID-19" (March 4, 2020), available at <https://www.gov.ca.gov/2020/03/04/governor-newsom-declares-state-of-emergency-to-help-state-prepare-for-broader-spread-of-covid-19/>.

³⁹ *Id.*

Conclusion

As additional states declare emergencies in response to COVID-19, there may be additional procurement and anti-price gouging provisions included or triggered as a result of such declarations. State approaches vary regarding both price gouging and procurement in response to public health emergencies.