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Executive Order Prohibits Profiteering and Extends Price Gouging Protections

On April 3, 2020, the Governor's Office issued Executive Order N-44-20, which was issued to bolster existing laws relating to price gouging and expand protections to include unconscionable profiteering. The new rules regarding price gouging and profiteering took effect on April 4, 2020.

The Executive Order provides clarity and extends price-gouging protections, while adding new rules to prevent profiteering. The District Attorney's Office has investigated more than sixty complaints of price-gouging allegations over the past several weeks. One persistent theme that has come up in these investigations is an increase in profiteering activity in Kern County that often did not meet the previous legal definition of price gouging, but nonetheless presented a form of unconscionable profiteering that statutes did not clearly and directly prohibit. Understanding the distinction between price-gouging and profiteering is helpful to explain the problem, and why the executive order is a welcome tool for the District Attorney's ability to enforce the principles underpinning price gouging and consumer protection laws:

1. **Price Gouging** occurs when a person or business who already sold included items prior to a state of emergency raises prices *after* the state of emergency by more than 10 percent, when that increase is not attributed to increased costs of obtaining the item being sold.
2. **Profiteering** occurs when a person or business did not sell the included items prior to the state of emergency, but obtains and places the items for sale *during* the state of emergency, for purposes of selling them at a high profit due to increased demand.

Until the recent executive order took effect on April 4, the law did not have a clear legal impediment to prevent unconscionable profiteering on food, household items, and medical supplies.

The effect of the executive order upon these related, but distinct areas is summarized below:

Re: Price Gouging

1. Clarifies that the price-gouging prohibitions under Penal Code 396 for the Covid-19 state of emergency extend through September 4, 2020. Under the statute, the price gouging limitations would otherwise have expired on April 4, 2020.
2. Clarifies that price increases of more than 10% on the specified items from the price sold by a business on February 4, 2020 is “price gouging” *unless*:
 - a. The price increase is directly attributable to added costs on the seller by suppliers of the item, and the price set is not more than 10 percent greater than the total cost to the seller plus the customary markup that was applied by the seller in the course of business on February 4, 2020, or
 - b. The increased price is not more than 10 percent greater than the ordinary sale price of the item on February 4, 2020.

Re: Profiteering

1. Prohibits profiteering with unconscionably excessive pricing from April 4, 2020 through September 4, 2020.
2. If a person or business did not offer an item for sale on February 4, 2020, and the item is a food item, consumer good, medical supplies, or emergency supplies, and a person or business began selling the item after February 4, 2020, it is unlawful to sell or offer to sell that item **for an unconscionably excessive price** beginning on April 4, 2020. [This prohibition on new sellers selling items for unconscionably excessive prices addresses the most common form of complaints that the District Attorney’s investigations have uncovered.]
 - a. A price is “unconscionably excessive” if:
 - i. The price is more than 50 percent greater than amount the person or business paid for the item, *or*
 - ii. [For persons or businesses that did not purchase the item] The price is more than 50 percent greater than the total cost to the person or business of producing and selling the item.

Both price gouging and profiteering by selling at an “unconscionably excessive price” are misdemeanors under the executive order. Price gouging is punishable by up to a year in jail and a \$10,000 fine. Violations of the profiteering executive order are punishable by up to six months in jail and a \$1,000 fine. The punishments can apply multiple times if there are multiple violations identified.

Notified of the Executive Order, District Attorney Cynthia Zimmer commented: “The executive order on profiteering and price gouging provides greater ability for law enforcement to protect both consumers and businesses. The existing statute prohibiting price gouging was not written to cover supply issues on the scale that Covid-19 has caused, and this new order provides clear guidance to businesses on how to comply with the law. By expanding the law to cover profiteering and prohibiting unconscionably excessive prices, the order increases our ability to protect businesses and consumers alike from unfair competition practices.”

A copy of the Executive Order is attached.

EXECUTIVE ORDER N-44-20

WHEREAS on March 4, 2020, I proclaimed a State of Emergency to exist in California as a result of the threat of COVID-19; and

WHEREAS despite sustained efforts, COVID-19 continues to spread and is impacting nearly all sectors of California; and

WHEREAS it is vital that California's health care workers, first responders, and others engaged in the fight against COVID-19 be able to obtain the medical and emergency supplies they need, and that all Californians be able to obtain food and consumer goods; and

WHEREAS the State is prepared to take strong action against price gouging, profiteering, and other unscrupulous business practices that threaten these vital interests; and

WHEREAS under the provisions of Government Code section 8571, I find that strict compliance with various statutes and regulations specified in this order would prevent, hinder, or delay appropriate actions to prevent and mitigate the effects of the COVID-19 pandemic.

NOW, THEREFORE, I, GAVIN NEWSOM, Governor of the State of California, in accordance with the authority vested in me by the State Constitution and statutes of the State of California, and in particular, Government Code sections 8567, 8571, 8627, and 8665, do hereby issue the following Order to become effective immediately:

IT IS HEREBY ORDERED THAT:

- 1) The time limitation set forth in Penal Code section 396, subdivision (b), prohibiting price gouging in time of emergency, is hereby waived. All prohibitions against price gouging set forth in subdivision (b) shall be in effect through September 4, 2020.
- 2) In addition to the prohibitions set forth in Penal Code section 396, a person or other entity (including, but not limited to, any business enterprise of any kind) shall not—from April 4, 2020 until September 4, 2020, and except as set forth below—sell or offer to sell any item from among the following categories of goods for a price that is more than 10 percent greater than the highest price charged by that person or entity for that item on February 4, 2020:
 - Food items;
 - Consumer goods;
 - Medical or emergency supplies; and
 - Any other materials previously designated by the U.S. Secretary of Health and Human Services as Scarce Materials or Threatened

Materials pursuant to section 102 of the Defense Production Act, 50 U.S.C. § 4512.

A price increase greater than the 10 percent increase specified above shall not be unlawful if the seller can prove either of the following:

- a) The increase was directly attributable to additional costs imposed on the seller by suppliers of the item, 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 4, 2020; or
- b) The seller was offering the relevant item for sale at a reduced price on February 4, 2020, and the increased price is not more than 10 percent greater than the price at which the seller ordinarily sold the item.

Additionally, and notwithstanding the foregoing, it shall not be a violation of this Paragraph 2 to sell or offer to sell any medical or emergency supplies to the State (including, but not limited to, any agency, department, board, commission, or office of the State), or to any political subdivision of the State, on terms acceptable to the State or to the relevant political subdivision of the State, as determined by the Governor's Office of Emergency Services (as to sales or offers of sale to the State) or by the officer or entity within the political subdivision that is responsible for procuring such supplies (as to sales or offers of sale to that subdivision).

- 3) If a person or other entity (including, but not limited to, any business enterprise of any kind) did not offer an item for sale on February 4, 2020, and that item is among the categories of goods listed in Paragraph 2, that person or entity shall not—from April 4, 2020 until September 4, 2020, and except as set forth below—sell or offer to sell that item for an unconscionably excessive price.

For purposes of this Paragraph 3, a price is unconscionably excessive if that price is more than 50 percent greater than whichever of the following applies:

- a) The amount that the person or entity paid for the item; or
- b) If the person or entity did not purchase the item, the total cost, to the person or entity, of producing and selling the item.

Notwithstanding the foregoing, it shall not be a violation of this Paragraph 3 to sell or offer to sell any medical or emergency supplies to the State (including, but not limited to, any agency, department, board, commission, or office of the State), or to any political subdivision of the State, on any terms acceptable to the State or to the relevant political subdivision of the State, as determined by the Governor's Office of Emergency Services (as to sales or offers of sale to the State) or by the officer or entity within the political subdivision that is responsible for procuring such supplies (as to sales or offers of sale to

that subdivision).

- 4) Each instance in which an item is sold or offered for sale in a manner prohibited by Paragraph 2 or Paragraph 3 shall constitute a separate violation of this Order. Each violation of this Order shall be a misdemeanor punishable as set forth in Government Code section 8665. Each such violation shall also be redressable in the same manner as any other unlawful business practice under the Unfair Competition Law, Business and Professions Code section 17200 et seq., and as otherwise provided by the laws of the State. These remedies are cumulative.

IT IS FURTHER ORDERED that as soon as hereafter possible, this Order be filed in the Office of the Secretary of State and that widespread publicity and notice be given of this Order.

This Order is not intended to, and does not, create any rights or benefits, substantive or procedural, enforceable at law or in equity, against the State of California, its agencies, departments, entities, officers, employees, or any other person.

IN WITNESS WHEREOF I have hereunto set my hand and caused the Great Seal of the State of California to be affixed this 3rd day of April 2020.

GAVIN NEWSOM
Governor of California

ATTEST:

ALEX PADILLA
Secretary of State