



Hot Compliance Topics for In-House Counsel

**MANUFACTURING LAW GROUP
Q1 - 2021 ROUNDTABLE**

Edward Heath – Moderator
Sasha Glassman – Panelist
Joanne Rapuano – Panelist
Ryan Roth – Panelist

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Please Note

This roundtable is designed to provide accurate information about the subject matter. However, it only provides general information and does not constitute legal advice. No attorney-client relationship has been created. If legal advice or other assistance is required, let us know directly.

Preliminary Considerations

- This platform should not be used for activities prohibited by antitrust law.
- Avoid discussions leading to a restriction, or coordination, of competition between or among attendees.
- Attendees should not share information, have discussions, and/or make arrangements on, among other things, pricing, market conduct, terms of sale, individual manufacturing costs and costs of sale, output, or supplier or customer relations/allocation.

Panelists

Sasha Glassman
*Assistant General Counsel
Rogers Corporation*

Joanne Rapuano
*Chief Compliance Officer – North America
Embraer*

Ryan Roth
*Vice President of Legal Affairs and Human
Resources
Carling Technologies*

Moderator

Edward Heath
*Partner
Robinson+Cole*

Price Gouging

Price Gouging – Overview

- **What it is:** Broadly defined as raising prices without regard to cost in order to take advantage of an abnormal market disruption, usually the result of emergency declaration or public crisis
- **Who it applies to:** In most states, everyone from the suppliers to manufacturers to distributors to retailers are within the scope.
- **Why it matters:** Enforcement Actions and Class Actions. State Attorneys General and plaintiffs lawyers have “discovered” that this tool has significant media/political appeal, revenue-generating potential, and potential juror sympathy.

W.B. Mason Class Action Complaint (D.Mass): Company sued WB Mason on unjust enrichment theory, claiming to have purchased N95 masks sold as 3M masks but were actually counterfeit product. Given the price charged vs. value of the alleged counterfeit, claimed to be price gouging.

Price Gouging – Scope (Examples)

- California: “any consumer food items or goods” - *CA Penal Code § 396*
- Texas: “food . . . or another necessity” - *Tex. Bus. & Com. Code § 17.4625*
- New York: goods that are “vital and necessary for the health, safety and welfare of consumers or the general public” - *NY GBS § 396-r*
- Florida: “essential commodities” - *FL Stat. 501.160*

Price Gouging – Standard

Most states use either the “percentage increase” model or the “gross excess/disparity” model:

- In the first model, a violation occurs if the price increases by more than a certain percentage (e.g., 10%) after the emergency is declared. (See, e.g., CA Penal Code § 396)
- In the second model, rather than a set percentage, a violation occurs if the price charged after the onset of the emergency “grossly exceeds” the pre-pandemic price. Laws typically do not define what constitutes a “gross excess”, leaving that to be decided on the particular facts of each case. (See, e.g., NY GBS § 396-r)

If the price increase is entirely attributable to increased costs, that may be a defense.

Price Gouging – Takeaways

Consider adopting a corporate price gouging policy:

1. zero tolerance standard for gouging
2. process for monitoring emergency declarations/conditions
3. mechanisms for requiring price increase approvals in times of crisis/emergency
4. recordkeeping related to support for price increases
5. education of personnel involved in pricing decisions

Force Majeure

Force Majeure – General Considerations

Typical elements

- Circumstance or event
- Beyond the control of the parties
- Occurring without the fault or negligence of the party affected
- Party unable to perform/hindered in performance

Force Majeure provisions are generally not implied or read into contracts

Supporting Materials: R+C Handout on Force Majeure

Force Majeure – Practical Considerations

- Risk allocation provision
- Opens the door to a business discussion
- Litigation as a last resort
- More precise the language, the greater the negotiation leverage

Force Majeure – Avoiding Boilerplate

- Boilerplate may not be sufficient
- Tailor the provision to the circumstances
- Develop a company model
- If non-lawyers are entering agreements, consider providing a checklist of what to look for

Force Majeure – Defining the Event

- Courts apply strict construction rules in the FM context
- Limited scope or may be non-exhaustive list with catch-all language
 - A limited list creates the possibility that an event will be missed
 - A non-exhaustive list reduced predictability, opens the door disputes
- Traditional events (e.g., war, natural disaster, man-made disaster (fire), pandemics)
- But consider going broader - supply chain shortages and work stoppages?

Case Example: In *G&H Diversified Mfg. LP v. Regreen Techs. Inc.* (CD Cal 2021), one manufacturer sued another manufacturer over failure to deliver a machine. The defendant relief on FM provision, but the plaintiff claims the lack of an express reference to “pandemics” makes the provision irrelevant.

Force Majeure – Defining the Trigger and the Effect

What is the trigger? Must the event:

- “Prevents” performance, or
- “Delays” or “hinder” performance

What is the effect? Should the clause:

- Excuse performance
- Extend the time to perform

Force Majeure – Mitigation Provision

Mitigation provision requires affected party to take all reasonable steps to

- minimize damages, and
- resume performance

May use “best efforts”, “good faith”, or the similar qualifiers

Force Majeure – Most Favored Nations Clause

How should the FM provision interact with the contract's "Most Favored Nations" provision?

Force Majeure – Control Measures

- Drafting model provisions?
- Checklists for employees?
- Training sessions?
- Contract re-reviews?

Remote Workforce Issues

Remote Workforce Issues

- Compliance Messaging and Reporting
- Training Challenges (including triggering new state requirements)
- Tax, Insurance, WFH Expense Reimbursement
- Personal Jurisdiction Exposure

Mandatory COVID-19 Vaccinations for Employees

Mandatory COVID-19 Vaccinations – EEOC Guidance

- * EEOC Guidance is included in the Supplemental Materials for this MLG meeting.
- EEOC addressed various laws implicated by the availability of COVID-19 vaccinations, including the Americans with Disabilities Act, Title VII of the Civil Rights Act of 1964 (including religious accommodation), and the Genetic Information Nondiscrimination Act.
- Guidance does not say expressly that mandatory vaccination requirements are legal, but it does offer some considerations.
- Guidance provides that employer should consider whether an employee is unable to receive a COVID-19 vaccination because of a disability, medical reason, or sincerely held religious belief.
- Requesting Proof of Vaccination/Medical Records: Simply asking for proof is not necessarily an issue, but anything beyond a yes/no to that one question could open the door to an ADA issue – a Disability Related Inquiry (DRI) which may expose the employer to liability under the ADA.
- As the vaccine rollout expands, more guidance from the government is expected.

Mandatory COVID-19 Vaccinations – Practical Considerations

- What are the health risks/side effects?
- What is the impact on morale?
- Does it matter what the industry is doing?
- What about landlord and third-party mandates?

Mandatory COVID-19 Vaccinations – Strategies

Encouraging the Vaccine

- Education
- Participatory rewards/incentive programs (Trader Joes, Aldi – pay for time)
- Covering/assisting with costs
- Vaccination clinics

Others' experiences?