

Neutral is the New Pink: New York's 'Pink Tax' Ban Goes into Effect

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New York Governor Andrew Cuomo's execution of the state's fiscal year 2021 budget had eliminated the "pink tax," effective September 30, 2020, as part of the Governor's 2020 Women's Agenda.

The "pink tax" refers to situations whereby retailers, manufacturers, and service providers charge different (higher) prices for "substantially similar" consumer goods or services that are marketed to different genders, with women often being the bearer of the higher cost. Supporters of the "pink tax" ban claim that charging different prices for substantially similar goods or services is a form of gender-based discrimination. The provisions of this new law require certain service providers to list their prices and standard services upon request to ensure any such difference are not discriminatory.

According to New York State, "substantially similar goods" is defined as two goods that exhibit little difference in the materials used in production, intended use, functional design and features, and brand. For example, selling a toy in blue for \$5.00 and the identical toy in pink for \$10.00 would be prohibited under this new prohibition.

"Substantially similar services" is defined as two services that exhibit little difference in the amount of time delivering, difficulty, and cost in providing the service. For example, a dry cleaner that charges a higher price to dry clean a woman's dress suit than a man's dress suit could run afoul of the prohibition.

Businesses found in violation of the law can be subject to a monetary fine and required to provide restitution to consumers. While restitution for individual violations may appear inconsequential, class action cases can arise under the ban.

According to New York State, anyone selling products or providing services can avoid liability by proving that any price difference is based upon:

1. The additional amount of time it took to manufacture such goods or provide such services;
2. The additional difficulty in manufacturing such goods or offering such services;
3. The additional cost incurred in manufacturing such goods or offering such services;
4. The additional or more sophisticated labor used in manufacturing such goods or providing such services;
5. The additional or more expensive materials used in manufacturing such goods or providing such services; or
6. Any other gender-neutral reason for having increased the cost of such goods or services.

While determining whether a good or service marketed and priced differently based upon gender is fact-specific and arguably contains varying shades of gray, it is

important for all New York retailers, manufacturers, and service providers to take steps to ensure compliance with this law. This includes a review of all pricing and gender-specific marketing efforts and (assuming they exist) documenting the distinctions between products and services. If such distinctions are hard to determine or prove, it is time to get the price “gun” out and remark products and services to assure price equity. After all, no one would want to be caught “red-handed” violating the “pink tax” ban.

(For other changes in New York law enacted in the budget, see our article [New York Budget Includes Changes to State Employment Laws.](#))

Jackson Lewis attorneys are available to answer questions and provide assistance in achieving compliance.

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