

What Retailers Should Know Ahead Of Calif. 'Pink Tax' Law

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Starting Jan. 1, a new law in California will prohibit higher prices for products marketed to a particular gender. The law specifically takes aim at higher prices on products marketed for women, sometimes known as the "pink tax."

California's new ban broadens the scope of the state's existing gender-based pricing discrimination laws and follows a similar New York law that took effect in September 2020.

Existing California law prohibits charging a different price because of the gender of a known customer. The new law expands on that premise to focus on the product.

New Law

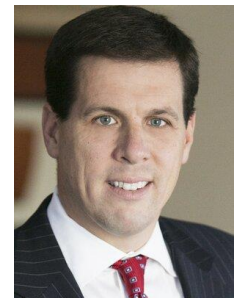
Under the new law, a "person, firm, partnership, company, corporation, or business shall not charge a different price for any two goods that are substantially similar if those goods are priced differently based on the gender of the individuals for whom the goods are marketed and intended."

The law applies to any business acting in California, including, but not limited to, retailers, suppliers, manufacturers and distributors, that sell goods — i.e., consumer products used, bought or rendered primarily for personal, family or household purposes.

The law applies to products that are substantially similar, meaning two goods that exhibit all of the following characteristics:

- There are no substantial differences in the materials used in production;
- The intended use is similar;
- The functional design and features are similar; and
- The brand is the same or both brands are owned by the same individual or entity.

Common examples of products that may be substantially similar include lotions, shampoos, deodorants and shaving razors. In some instances, these products may be the exact same for men and women,



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except for different packaging and labels.

A court may issue an injunction restraining or enjoining any violation of the pink tax ban, without proof that any person has, in fact, been damaged or injured thereby. Restitution may also be available in certain circumstances.

In addition, courts may impose a civil penalty up to \$10,000 for an initial violation, and \$1,000 for every subsequent violation, with the total penalty not to exceed \$100,000. Each instance of charging a different price for two substantially similar goods is considered a single violation.

Courts may impose additional civil penalties beyond the \$100,000 maximum if a defendant subsequently violates the pink tax law with regard to the same goods for which the maximum penalty had been previously imposed under a separate civil action or for any good for which the attorney general has not brought a civil action under the pink tax law.

Key Considerations for Retailers in Anticipation of Pink Tax Law

Gender-neutral reasons for price differences are not prohibited.

The new law does not prohibit price differences in services or goods based specifically on any gender-neutral reasons, including, but not limited to:

- The amount of time it took to manufacture the goods;
- The difficulty in manufacturing those goods;
- The cost incurred in manufacturing those goods;
- The labor used in manufacturing those goods;
- The materials used in manufacturing those goods: and
- Moreover, to qualify as substantially similar, the "functional design and features" must be similar.

There should be no private right of action or class action relief.

The pink tax law provides for an enforcement mechanism through the attorney general, who may, upon prior notice to the defendant, seek a court order to enjoin and restrain the continuance of violations. Significantly, the new law does not expressly provide for a private right of action.

Under California law, a "violation of a state statute does not necessarily give rise to a private cause of action. Instead, whether a party has a right to sue depends on whether the Legislature has 'manifested an intent to create such a private cause of action' under the statute."^[1]

According to the California Court of Appeal's Second Appellate District's 2017 decision in *Julian v. Mission Community Hospital*, courts "consider the statute's language first, as it is the best indicator of whether a private right to sue exists" to ascertain the legislature's intent.^[2]

The court said, "It is well settled that there is a private right of action to enforce a statute 'only if the

statutory language or legislative history affirmatively indicates such an intent." [3]

Here, the language of the pink tax law expressly states that "whenever the Attorney General has cause to believe that a violation of this section has occurred, the Attorney General may ... seek a court order to enjoin and restrain the continuance of those violations." The legislative history for the law further explains that "the imposition of these penalties remains exclusively in the hands of the Attorney General."

The purposeful selection of the attorney general as the enforcer indicates that the legislature did not intend for this law to be enforceable by private right of action, including a class action.

The law does provide that a court may impose additional civil penalties upon a defendant exceeding \$100,000 "for any good for which the Attorney General has not brought civil action pursuant to this section." But this clause was included to ensure that a violator can be fined more than \$100,000 if it has multiple offending products, not to create a private right of action.

Indeed, the legislative history explains that there is a cap of \$100,000, "except that further penalties may be imposed if the business continues to engage in discriminatory pricing as to the good for which it already received the maximum penalty or is found to have engaged in discriminatory pricing as to a different good."

Nothing in the new law affirmatively indicates an intent to create a private right to sue. Under California law, such a right therefore should not exist.

California's law largely mirrors New York's existing pink tax law, with harsher penalties.

New York has a similar law, with many of the same requirements, which became effective in September 2020. Like California's law, New York does not expressly provide for a private right of action, and it is enforced by the attorney general.

Courts may issue injunctions restraining or enjoining violations of New York's pink tax law without proof of injury, and may also order direct restitution. Courts may impose a \$250 civil penalty for an initial violation of the New York law, with such penalties for every subsequent violation not to exceed \$500.

New York's law did not generate significant enforcement interest or publicity. But the greater penalties, increased enforcement appetite, larger California market, and other factors may bring more attention to the new California law.

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[1] Lu v. Hawaiian Gardens Casino, Inc., 50 Cal. 4th 592, 596 (2010).

[2] Julian v. Mission Cmty. Hosp., 11 Cal. App. 5th 360, 378-79 (2017).

[3] Id. at 379.