

The Price is Right? Legal Risk in Algorithmic Pricing

Hannah Taylor

FKKS Tech Law Summit

May 12, 2026

What is Surveillance (or Algorithmic) Pricing?

- Prices set based on individual consumer data
 - Browsing and purchase history
 - Location and device type
 - Demographics/inferred characteristic
 - Cart Behavior
- Similarly situated consumers treated differently

State Legislation

60+ bills introduced at the state + federal levels

- Disclosure requirements
- Prohibit with exemptions (loyalty programs)
- Prohibit altogether

New York

- Algorithmic Pricing Disclosure Act
 - Must disclose “THIS PRICE WAS SET BY AN ALGORITHM USING YOUR PERSONAL DATA”
 - Survived First Amendment challenge

Maryland

- Effective October 1, 2026, [HB 0895](#) will prohibit food retailers and third-party delivery services from (1) using protected class data to offer or price goods in a way that denies consumers equal access to benefits or services; and (2) engaging in dynamic pricing, defined generally as the discriminatory practice of offering or setting a personalized price for a good or service that is specific to a consumer based on the consumer’s personal data

Connecticut

Would require disclosures regarding the use of personalized algorithmic pricing

Note the Definitions

- “Algorithm or automated system” is typically defined very broadly to include not just machine learning models, but also simple rules engines (e.g., logic such as assigning discounts based on customer behavior)
- “Personal data” includes any data linked or reasonably linkable to a consumer or device, including purchase history, browsing behavior, device identifiers, and inferred preferences such as willingness to pay
- Many bills layer on an additional rule that you cannot use protected characteristics, or proxies for them, in pricing decisions at all. That means:
 - Direct use (e.g., pricing based on race, gender, etc.) is clearly prohibited
 - Indirect use (for example, using ZIP code or other proxies that correlate with protected traits) can also create risk
- “Similarly situated consumers” generally refers to customers purchasing the same product under comparable conditions of time, place, and transaction context
- Often distinguish between “price” and “discount.” Hidden individualized discounts that vary per customer based on personal data without a transparent governing structure can fall under the law(s)

Common Exemptions

- **Cost-based pricing.** Price differences tied to legitimate cost differences across locations or channels.
- **Time-based or demand-based promotions.** Discounts applied uniformly based on timing, inventory, or demand, so long as they are not individualized.
- **Public promotions.** Storewide sales, broadly available coupons, and clearly defined group discounts not tied to individual profiling.
- **Loyalty and contractor programs.** Many bills also exempt from these requirements prices offered through a loyalty, membership, or rewards program that:
 - Is voluntary (meaning customers affirmatively choose to participate rather than being automatically subjected to differentiated pricing);
 - Has clearly defined and disclosed terms (including how customers qualify for benefits and what those benefits are);
 - Operates based on consistent, pre-established rules rather than discretionary or ad hoc decision-making; and
 - Offers a clear exchange of value, such as participation, data sharing, or purchase activity in return for defined rewards.

Essentially...

- The more a system moves toward individualized optimization, the more closely it aligns with the core concern.
- For example, sending a uniform offer to a defined group such as “inactive customers” is generally lower risk, but where each customer within that group receives a different discount based on predicted behavior, the practice becomes higher risk.

CA and NY Enforcement Activity

CA AG Bonta announced a sweep in Jan. 2026

- Focused on business' use of consumer personal data to set individualized prices
- Letters issued to businesses with significant online presence in retail, grocery and hotel sectors
- CCPA violation?

NY AG James' Enforcement + Legislative Push

- Sent letter to Instacart
- Expressed support for ban on surveillance pricing statewide
- Also expressed support for ban on electronic shelf labels/surveillance pricing in grocery stores and pharmacies

Best Practices

Even though many laws are merely pending, consider these issues now

Map and track data that feeds into pricing engines

Evaluate training data and algorithms for bias and discriminatory effects

Establish internal data use policies

Disclose early where required

Vendor alignment & contractual controls on third-party data use

Thank you!



Hannah E. Taylor
(212) 705-4849
htaylor@fkks.com

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