

Algorithmic Software Faces Growing State and Local Regulation – What Companies Should Do Now

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With advancements in artificial intelligence, the use of algorithmic software has increased across a variety of industries. So too has scrutiny by antitrust agencies, private plaintiffs, and state and local governments across the country. In recent months, laws aimed at curbing the use of algorithmic software to recommend residential rental rates have been enacted in jurisdictions spanning from Hoboken to Minneapolis to Washington. Most recently, New York Governor Kathy Hochul signed into law [legislation](#) that prohibits New York landlords from setting or adjusting rents, lease terms, or occupancy targets based on recommendations from software or data analytics services that perform a “coordinating function.”

While many of the ordinances have focused on the housing industry, earlier this month, California enacted [AB 325](#), which more broadly prohibits competitors from using a “common pricing algorithm”—defined as any methodology used by two or more persons that uses competitor data to recommend, align, stabilize, set, or influence a price or commercial term—to restrain trade in any industry. Antitrust enforcement and private litigation have likewise not been limited to the housing industry and have spanned across other industries, including hotels, airlines, and banking. More generally, states are increasingly enhancing their enforcement focus, resources, and law as [state attorneys general step into a more prominent position in shaping antitrust policy](#).

There are several key takeaways from the legislation enacted to date that should be considered to the extent that similar legislation continues to be enacted more broadly.

- **Focus on Nonpublic Competitor Data:** Most algorithmic pricing laws define conduct related to “nonpublic competitor data” broadly, although there are some limitations. Hoboken’s [ordinance](#) defines noncompetitor data as data that is less than 365 days old and not widely available. Certain ordinances, however, such as [Seattle’s](#), even reach algorithms that run on information that is sourced “from public databases.”
- **Targets Both Users and Providers:** Ordinances typically prohibit both landlords from using or paying for covered tools and vendors from selling or providing them. California’s statute further bans users or distributors from “coercing” the adoption of algorithm-recommended terms.
- **Provides Some Safe Harbors:** Most legislation permits periodic aggregated reports that do not recommend future rents or occupancy and allow the use of products for affordable housing programs. Jersey City’s [ordinance](#)

specifically exempts coordination among properties under the same ownership and licensed agents operating under regulations.

- **Enforcement:** City or county attorneys can typically seek injunctive relief, damages, restitution, and civil penalties and many ordinances also authorize private suits by tenants or other injured persons. California’s statute ties enforcement to the existing antitrust framework of the Cartwright Act.
- **Varying Penalties:** Seattle and King County authorize up to \$7,500 per violation (with King County also permitting actual damages plus fees). San Francisco and San Diego authorize up to \$1,000 per violation, with San Francisco treating each unit or day as a separate violation. Many, but not all, ordinances also entitle a prevailing plaintiff to reasonable attorneys’ fees.

Given the increased focus on pricing algorithms and the continued passage of new algorithmic pricing laws, businesses should collaborate with IT to understand how their pricing algorithm software operates. Once they have this insight, businesses can revisit their use of this software and their pricing policies as a whole and determine whether any steps need to be taken to safeguard confidential information. As the landscape continues to evolve and scrutiny continues to build, companies should regularly consult with antitrust counsel to ensure that their use of such software continues to comply with antitrust law and emerging states and local laws. Winston’s antitrust group is particularly well-suited to help navigate these issues. Please contact the authors of this article or your Winston & Strawn relationship attorney with any questions.

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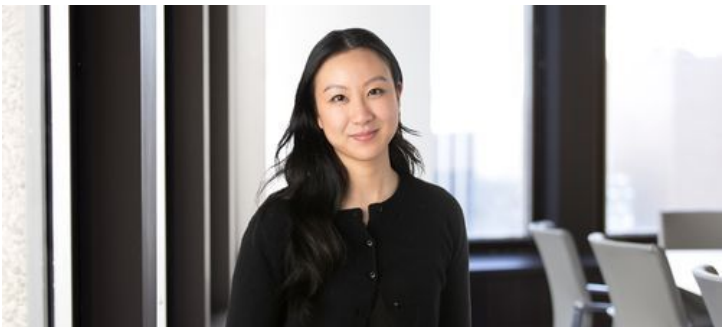
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