

Force Majeure Clauses – What Are They and What Do They Mean?

The widespread impact of the COVID-19 virus on our daily lives is evident. Restaurants and bars are closed or closing, travel is restricted, and many of us are working remotely. For businesses, the outbreak may mean an inability to fulfill orders, provide services, make payments, or meet other contractual obligations.

Does COVID-19 excuse parties from performing under a contract? What happens if such parties cannot perform? In many contracts, including real estate leases, a “force majeure” clause can provide the answers.

The Force Majeure Clause – What is it?

A force majeure clause is a contractual provision that seeks to **(a) allocate among the parties the risk of certain events that are beyond their control and (b) mitigate the negative effects of such events**. These clauses are usually found at the end of a contract (commonly known as the “boilerplate”) and typically consist of four components:

- A statement that performance under the contract is excused for one or both parties upon the occurrence of certain events
- A list of force majeure events (specific or general)
- The impacted party’s obligations if an event occurs (notify the other party, attempt to mitigate, etc.)
- Other remedies (e.g., termination without liability, suspension of certain obligations, refund of deposits)

Typical force majeure events include: (a) acts of God; (b) flood, fire, earthquake, epidemics, or explosions; (c) war, invasion, hostilities (whether war is declared or not), terrorist threats or acts, riot or other civil unrest; (d) government order or law; (e) actions, embargoes or blockades; (f) action by any governmental authority; (g) national or regional emergency; (h) strikes, labor stoppages or slowdowns or other industrial disturbances; (i) shortage of adequate power or transportation facilities; and (j) other events beyond the reasonable control of the impacted party.



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My Contract Contains a Force Majeure Clause – Am I or the Other Party Excused?

Read the language of the clause carefully. Not all clauses allocate risk to both parties equally. For example, many force majeure provisions favor the party with non-payment obligations (such as the party providing services or delivering goods) and may carve out payment obligations from the clause altogether (meaning a force majeure event might not excuse a party's obligation to make payments, such as an obligation to pay rent).

If you (or another contract party) are being affected by a force majeure type of event, there are several threshold questions to consider. Is the type of event specifically listed in the contract as a force majeure event, or is the contract language broad enough to encompass it? If the event is covered, does your business need to comply with certain obligations before taking advantage of the clause? For example, must you attempt to mitigate the effects of the event or must the event be ongoing for a certain duration before you can terminate the contract?

If you find yourself on the other side of a force majeure clause and the other party to your contract is attempting to terminate it or excuse their performance, consider the same questions. Merely because a party's performance is being impacted by an external event does not necessarily mean the force majeure clause is triggered.

Conclusion

As the impact of COVID-19 continues to spread and forces businesses to cancel events and otherwise struggle to meet contractual obligations (like rent payments), the importance of force majeure provisions will become evident. For those seeking to terminate a contract or otherwise excuse performance because of COVID-19, such clauses may provide relief, but should be examined carefully.

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