

Force Majeure and Coronavirus

The novel coronavirus (COVID-19) global pandemic has caused organizations around the world to experience disruptions to their normal course of business. Common problems include mandatory remote work, business closures and quarantines, travel restrictions and breakdowns in the supply chain. The issues caused by the pandemic have raised an important question for many businesses:

Does the COVID-19 global pandemic qualify as a “force majeure” event for purposes of their business contracts?

What Is Force Majeure?

The term “force majeure” is French for “superior force.” Force majeure clauses are common business-related contractual provisions. They provide for a suspension or cancellation of a company’s performance of obligations under the contract should an extraordinary event occur that is beyond the control of either party. Force majeure generally describes such uncontrollable events (e.g., war or extreme weather) that are not the fault of either party and that make it extremely difficult, or impossible, to carry out normal business.

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Does COVID-19 Qualify as a Force Majeure Event?

The short answer to this question is: It depends. Whether the global pandemic is considered a force majeure event will depend on three factors:

1. **The language of the individual contract**—Many contracts include language that will specify examples of covered force majeure events such as, for instance, a hurricane or outbreak of war. Unfortunately, many force majeure provisions remain ambiguous, failing to directly address the specific situations in which the force majeure provision would be triggered. Check to see if your contract’s force majeure clause includes language specific to “pandemics,” “epidemics,” “illness” or “disease.”
2. **Jurisdiction**—States vary in their interpretation and enforcement of force majeure clauses.
3. **Facts of the case**—How has COVID-19 affected the parties’ businesses and their ability to fulfill their obligations at the time the triggering event occurred? This is a fact-based analysis that will vary in almost every instance.

There is no one-size-fits-all response to the question of whether COVID-19 qualifies as a force majeure event. The answer in each situation must be determined by considering the facts at hand. For this reason, businesses may need to audit their existing contracts to determine whether COVID-19 will affect either party’s ability to fulfill their obligations under the agreement. After conducting an audit, businesses may need to consult with legal counsel as to the enforcement and performance of their obligations under the existing contracts.

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Tips for Employers

Of course, the primary concern of all employers should be the health and welfare of their employees and customers. Employers should stay informed and follow the advice of federal, state and local health officials. However, businesses must also assess the practical impacts of the pandemic on their operations.

Employers analyzing force majeure clauses may consider the following:

1. Document the specifics of your business interruption. This may be required to defend your invocation of a force majeure clause.
2. Consider modifying future contract language to include specific circumstances such as pandemics.
3. Review your current insurance coverage to determine whether your policies contain coverage that might assist in a force majeure situation.

Additionally, regardless of whether a contract includes a force majeure clause, companies might find success in simply contacting customers, suppliers and employees directly to explain and discuss delays or other issues. A clear line of communication can ensure everyone is on the same page, and the individuals and companies involved typically appreciate a proactive approach during a particularly tumultuous period.

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