



MEMORANDUM

From: Loveless Law Firm, LLP

Date: April 3, 2020

Re: Contracts & COVID-19: A Closer Look at *Force Majeure* clauses

Recently, I reached out to update you about recent changes to federal employment law and paid leave. Another important area to consider right now is the health and viability of business contracts/agreements.

You might already be wondering if your agreements are in danger of being breached or nullified due to the economic fallout of the coronavirus (COVID-19) pandemic. If this concerns you, then you should know that businesses everywhere are wondering the same thing. The truth is, even if a contract contains provisions that plan for unforeseeable circumstances, that alone may not absolve a business from all liability.

The types of contracts that are going to be affected will depend on the specific contract language, local law, and the causal connection between the COVID-19 pandemic and the contractual parties' ability to perform their obligations. More specifically, the answer may turn on whether a given contract's *force majeure* clause justifies the suspension of performance of a party's duties.

What are *force majeure* clauses?

In many contracts, there are clauses which excuse the performance by a party due to extraordinary or unforeseen circumstances. These clauses are called *force majeure* ("superior force") or *acts of God* clauses. Force majeure clauses excuse companies (or other parties to a contract) from meeting certain obligations when events beyond their control interfere with their ability to hold up their end of the bargain. If invoked, these clauses can relieve companies from commitments, temporarily or permanently, without being in breach of their agreement.

Does a pandemic event like COVID-19 qualify under *force majeure*?

Contracts that include force majeure provisions tend to spell out qualifying events, often listing natural disasters, war and unforeseen government actions. They sometimes also include pandemics, epidemics, and broad "catch-all" language for events beyond a party's control. It is also important to note is that these clauses expand upon the common law doctrines of *impracticability* and *impossibility*, which also may relieve parties of their contractual obligations, even in the absence of an express *force majeure* clause.

Do differences in each state laws effect a *force majeure* clause's coverage?

In short, yes. In many states, when a *force majeure* clause lists specific events, it precludes other force majeure events from being included. For example, if earthquakes and fires are listed, but a viral pandemic is not listed, many of these courts will not find the *force majeure* provision to excuse performance obligations.

California. Unfortunately, no published California decision has squarely confronted a virus or pandemic in relation to these contractual principles. California interprets these *force majeure* provisions a bit less narrowly than other states, in as much as a non-listed event can still fit within a written force majeure provision if it is “unforeseeable at the time of contracting.” Thus, California courts may be more willing to open the door for non-listed *force majeure* events to be covered than other states.

Texas. Under Texas law, if any incident related to COVID-19 does not fit into one of the specific incidents of *force majeure* outlined in a given agreement, one may have to rely on catch-all language in the provision to excuse performance. In fact, a Texas court has recently held that a party must not only demonstrate that the incident in question falls into the catch-all language of the force majeure provision, but that the event in question was not foreseeable by the parties when the contract was agreed to. If there is no *force majeure* language in a contract at all, then it will not be possible to assert a *force majeure* defense, and other doctrines must be asserted to excuse performance. One such alternative argument under Texas common law is the affirmative defense of impossibility of performance. And contracts for sales of goods may find further relief under the Texas Business and Commerce Code.

If the other party in my contract invokes a force majeure clause, how should I respond?

It is important for us to remember that everyone is struggling, and that businesses will need to maintain, as much as possible, good relationships. Before things escalate, we strongly encourage negotiated resolutions where they can be reached. In many cases, the partners you have now will be the same ones you will need in the future. Of course, if that approach fails then other legal remedies do exist, and Loveless Law Firm will stand ready to help you vigorously defend your contractual rights.

That said, if you receive notice from a party you have contracted with alleging *force majeure* due to COVID-19, please let us know. We can request that the other party provide relevant information and/or documentation that substantiates the *force majeure* claim. We can also review the subject agreement and verify that the *force majeure* provision applies to the prevailing circumstances. The mere existence of the provision will not necessarily mean that it can be properly invoked by a party. We will ascertain the rights and remedies available to you, including possible termination of the agreement.

If I need to invoke a contract’s force majeure clause, what things should I consider?

Typically, a contract requires prompt notice of a claim of *force majeure*. Several courts have refused parties’ *force majeure* claims when they failed to provide adequate notice under the contract. Also, a party may be required to demonstrate that the event that triggered the *force majeure* provision was beyond its reasonable control, and without its fault or negligence. In many cases, your contractual requirements will compel you to prove that you first tried to mitigate the adverse consequences of a force majeure event, which need to be well-documented.

If this is your situation, please allow us to review your options with you before proceeding.

What about force majeure in new or future contracts?

Companies should take special precaution when entering new contracts. They must understand any applicable *force majeure* provisions, including what will trigger the provision and

Locations:
30021 Tomas, Suite 260, RSM, CA 92688
1438 Gower Street, LA, CA 90028
1301 Ballinger St, Ft. Worth, TX 76102

PHONE 949.679.4690
FAX 949.666.7424
EMAIL andrea@lovelesslawfirm.com
WEB SITE www.lovelesslawfirm.com

Mailing address:
30021 Tomas, Suite 260
Rancho Santa Margarita, CA 92688

who bears the risk of a force majeure event. We recommend expressly including pandemic (and, perhaps for the time being, COVID-19 by name) in the list of *force majeure* events in contracts going forward.

Parties should also consider the potential remedies triggered by *force majeure* events such as, for example, excusing performance only until the end of the emergency declaration or providing a party the option to purchase a lesser quantity of goods. As with most contractual provisions, *force majeure* clauses can offer significant flexibility to the parties in implementing more creative, flexible solutions to the default rules.

What to do next--a few questions to ask yourself about your contracts:

1. Do I have *force majeure* clauses in my existing contracts? If so, does the language specifically reference epidemics or pandemics?
2. Have I been notified by any contractual parties of an invocation of *force majeure*? Does my business have a legal and logistical response strategy ready?
3. Have I envisioned when my own business needs would cause me to invoke a *force majeure* provision, and have I factored in adequate time to give notice?
4. Have I carefully considered the *force majeure* aspects of new future agreements?

If you have questions, or if we can be of service in any of these areas, please be sure to let us know.

NOTE:

****This is not meant to be construed as legal advice or guidance on a particular circumstance as each issue that arises for a particular employer will require a fact-intensive evaluation of many factors, including without limitation the employer's policies, the severity of COVID-19 as indicated by public health officials, and local or nationwide emergency regulations and directives.**

If you have questions regarding particular situations or circumstances, please feel free to contact any member of Loveless Law Firm, LLP directly.

Locations:
 30021 Tomas, Suite 260, RSM, CA 92688
 1438 Gower Street, LA, CA 90028
 1301 Ballinger St, Ft. Worth, TX 76102

PHONE 949.679.4690
 FAX 949.666.7424
 EMAIL andrea@lovelesslawfirm.com
 WEB SITE www.lovelesslawfirm.com

Mailing address:
 30021 Tomas, Suite 260
 Rancho Santa Margarita, CA 92688