

Contract Obligations during COVID-19 and “*Force Majeure*”

You may have read or heard of a “*force majeure*” event in a contract and may be curious about whether such a provision (or event) can be invoked with respect to the COVID-19 pandemic. This resource provides an explanation of “*force majeure*” contractual provisions and events and how they may be relevant in current circumstances.

Do I still need to perform my contract obligations during the COVID-19 pandemic? Does my vendor? What is a “*force majeure*”?

First, you should review the terms of your agreement. The agreement might contain a “*force majeure*” provision. A “*force majeure*” provision is intended to address what happens when an event occurs which is beyond the control of the parties that prevents, or delays, a party from performing its contractual obligations. If the event that occurs falls within the ambit of the provision, a party (or both parties) may be excused from their performance (or allow for delay) during the duration of the event.

Your starting point is to review the language of the *force majeure* provision; the language used is important. Some contracts include language that will excuse a party’s nonperformance for “an event outside of the party’s control,” and include a litany of events, which may include some or all of the following: wars, fires, government orders or mandates, terrorism, natural disasters, labor strikes, acts of God, and disease. A party seeking to excuse their non-performance is in a stronger position to the extent that the cause of their non-performance falls within the contractual litany. In the case of COVID-19, for example, the position of a party seeking to be excused would be improved if a word like “pandemic” (or “epidemic” or “disease”) is listed as a *force majeure* event.

But even if your contract contains a *force majeure* provision, and even if it seems to clearly encompass the current situation, be careful - some contracts expressly provide that payment will be due under a contract regardless of a *force majeure* event. For example, many office leases contain a *force majeure* provision that excludes the tenant from benefiting from it, by providing that the *force majeure* provision only runs in favor of the landlord, or that it excuses only non-monetary defaults or delays due to *force majeure* events. In short, it is likely that most office leases do not allow a tenant to delay or withhold rent payments due to a *force majeure* event.¹

A few final points: First, it is strongly recommended that you consult a lawyer in your own state - state laws and state judicial precedents differ, and a lawyer in your state should be best able to guide you in your specific situation. Secondly, if you believe that you might be able to benefit from a contractual provision, make certain that you comply with any contractual notice requirements. Courts generally require the party seeking to invoke the *force majeure* to bear the burden of proof.

Note finally that, even if the contract that is the subject of your concern does not contain a *force majeure* provision, other legal doctrines (e.g. impossibility of performance, frustration of purpose, impracticability) might provide grounds for relief. Again, your own lawyer should be able to advise with respect to your individual circumstances.

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¹ Even if your office lease does not allow you to avoid or delay payment due to the pandemic, this should not inhibit you from seeking to negotiate a rent reduction from the landlord. A sympathetic landlord, a concern that a tenant may seek bankruptcy protection, a desire for the tenant to extend the term of the lease; these are all reasons that a landlord may be willing to negotiate a rent accommodation.