

FORCE MAJEURE

Many contracts include a force majeure clause, which is intended to protect a party to the contract when a significant unforeseeable event occurs outside the party's control and makes performing or completing the contract essentially impossible. A force majeure clause may allow the party to be 'excused from performance', that is, to not carry out their obligations under the contract, without the non-performance penalties outlined for usual circumstances.

If the contract HAS a force majeure clause and the organization invokes it, consider the following:



- What does it cover? There may be specific language with respect to pandemics, changes in law, or supply chain disruption. Sometimes, there is a general catch-all phrase that will cover a broad range of situations.
- Is performance of the contract truly impossible or illegal? Business challenges are not usually enough to allow a party to be excused from performance. Parties are still expected to act in a commercially reasonable manner and reasons for non-performance must be tied to the unforeseen event.
- Does the contract have any specific rules about a force majeure event? Are there other remedies in the contract which may apply? For example, does the contract allow performance to be delayed rather than excused?
- Is there a way to mitigate the impact of the event by completing the contract in a different way? Often, the force majeure clause will include a specific obligation to try and complete the contract or minimize the damage your organization suffers from the force majeure event, known as the duty to mitigate.
- If you are relying on a force majeure clause, does the contract require you to let the other parties to the contract know you are going to do so, and have you provided the required notice?
- How far does the force majeure clause go to protect the organization?

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Legal Considerations Series:

Legal Considerations for Nonprofits of Changes to Work and Workplace Related to COVID-19



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If the contract DOES NOT HAVE a force majeure clause, consider the following:

- Is there business interruption insurance that might provide some assistance?
- Is it possible to argue that the contract has been frustrated? Frustration occurs when, without either party failing to do what they are contracted to do, changes in the operating environment have made it impossible to complete the contract, or have made the results of the contract “radically different” than what the parties originally intended when the contract was signed. The bar for claiming that a contract has been frustrated is very high. Note as well that frustration can result in complete termination of the contract in its entirety, which would mean the other party is not obligated to fulfill their side of the agreement either.
- Look at any other contract terms which might apply, such as termination clauses, limitation of liability clauses, or liquidated damages clauses. Governing law and dispute resolution clauses may become important if there is a dispute about the contract.

If your organization is confronted with challenges in fulfilling contractual obligations:



- Reach out to suppliers, funders, partners, and/or clients before taking any drastic steps. Working together may lead to a better result for everyone, and mutually agreed upon amendments to the contract.
- Ensure going forward that any new contracts give appropriate consideration to new circumstances and contain contingencies for further affects and impacts of the COVID-19 pandemic. The pandemic can no longer be considered an unforeseen circumstance in new agreements.

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