

COVID-19 and Force Majeure: What Businesses Should Know

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The effects of COVID-19 on our interpersonal and business relationships grow each day.

The virus has prevented countless North Carolina companies from carrying on in the ordinary course. For example, little more than three weeks ago, Governor Roy Cooper announced Executive Order No. 118, ordering all restaurants and bars be closed to dine-in customers; and

two weeks ago Executive Order No. 121 was issued, prohibiting North Carolina residents from leaving their homes other than in connection with certain "essential" activities.

The full effects of COVID-19 on North Carolina businesses are yet to be realized but are likely to be substantial. As additional restrictions are imposed on gatherings, work, and travel, businesses' ability to perform their contractual obligations may be impaired or altogether precluded. Fortunately, your business may have contractual recourse as a result of a force majeure clause.

Black's Law Dictionary defines force majeure—French for "superior force"—as an event or effect that can be neither anticipated nor controlled. The term is commonly understood to encompass both acts of nature, such as floods and hurricanes, and acts of man, such as riots, strikes, and wars. Black's Law Dictionary further defines force majeure clauses as contractual provisions that address circumstances in which contractual performance becomes impossible or impracticable due to events that could not have been foreseen, and are not within a party's control. It is important to note force majeure clauses do not generally provide for termination of an agreement; rather, they generally **suspend** a party's obligation to perform under the agreement for the duration of the force majeure event.

The rationale behind force majeure clauses is that there will always be events that cannot be anticipated and addressed, and for which neither party to an agreement is responsible. In such circumstances, it is equitable and reasonable to suspend performance and extend contract deadlines. However, contracts can and usually do include terms as to what qualifies as a force majeure event and what notice requirements must be met to obtain relief from required performance.

Force majeure clauses are present in a broad variety of contracts, from those for provision of software services to manufacturing, licensing, and real estate agreements. A force majeure clause may even determine whether the NBA is required to pay its players this year as a result of its decision to postpone the current season. In business contracts, the language of the specific force majeure provision is the key factor in determining whether the force majeure clause will apply in a pandemic situation, such as the current COVID-

19 situation. Some force majeure provisions will expressly exclude pandemics or global health crises from the application of the force majeure clause, while others will expressly include such health events, and still others will be silent on the issue.

If the spread of COVID-19 has affected your business and its ability to perform contractual obligations, the time to be proactive is now: review your business' agreements for force majeure clauses, and communicate with counterparties as early and clearly as possible the impact of COVID-19 on your business' ability to perform. Our COVID-19 Response Team and Business attorneys stand ready to work with you and your management team to analyze the force majeure clauses in your key vendor and customer contracts, and we also are working with businesses to revise force majeure provisions in their form contracts, if needed.

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