

# Now Is the Time to Review Your Force Majeure Clause

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## **Virtually every industry has, or will be, significantly affected by COVID-19.**

Just recently, Governor Roy Cooper issued an executive order to close sit-down service at restaurants and bars. The construction industry will be no exception to the effects of the virus. As more restrictions are placed on gatherings, work, and travel, contractors and

subcontractors will likely encounter labor and material shortages. These will, in turn, result in project delays. Now is the time to review your contracts' force majeure clause and be proactive about obtaining extensions of contract deadlines. Most construction contracts contain time limits for requesting extensions of time, and some may be within days of the event that first causes delays. Failure to timely request extensions could result in your company being saddled with liquidated damages and other delay damages when all the dust settles.

Black's Law Dictionary defines force majeure as an event or effect that can be neither anticipated nor controlled; the term includes both acts of nature such as floods and hurricanes, and acts of people such as riots, strikes, and wars. It goes on to define force majeure clauses as contractual provisions that address contract performance if such performance becomes impossible or impracticable due to events that could not have been foreseen. The event typically must be extraordinary. This is why rain tomorrow, by itself, would not constitute a force majeure event, but the coronavirus pandemic surely would. In the construction context, delays resulting from force majeure events are often referred to as excusable or justifiable delays.

The idea behind these clauses is that the contracting parties cannot reasonably anticipate and allocate every single risk. There will always be events, such as acts of God, which cannot be anticipated and addressed and for which neither party is responsible. In such circumstances, it is equitable and reasonable to 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.

Although not typically labeled "force majeure clauses," most standard construction contracts contain a provision that addresses delays outside of the contractor's control. For example, the AIA A201-2017 provides that the contractor is entitled to a time extension for labor disputes, fire, unusual delay in deliveries, unavoidable casualties, adverse weather conditions, and other causes beyond the Contractor's control. The Consensus Docs 200 Standard Agreement specifically lists epidemics as a justifiable delay. While the North Carolina Department of Transportation's (NCDOT) 2018 Standard Specifications doesn't list examples of excusable delays, it does provide that the contractor is entitled to an extension of time if its operations are

"delayed because of circumstances beyond the control of and without the fault or negligence of the [c]ontractor."

A worldwide pandemic should fall within these definitions. Indeed, the World Health Organization has declared coronavirus a pandemic, and Governor Cooper has declared a state of emergency. That in and of itself, however, does not entitle you to a contract extension. You must document and show how the effects of the coronavirus crisis have caused a delay to the critical path. You must also strictly follow all notice requirements for delay claims in your contract. Notice and documentation are key.

You should not wait until the end of the Project to make a claim that the effects of the coronavirus delayed your work. Pay close attention to the requirements for making a claim under the contract. There will likely be time limits within which a claim must be submitted; these usually run from first notice of the delay (or when you should have had notice of the delay). For example, the AIA A201-2017 provides that a claim must be initiated within 21 days after the occurrence of the event giving rise to the claim. Twenty-one days is generous compared to some of the contracts I have reviewed. I have seen time limits as short as 24 hours.

You should assume that North Carolina courts will enforce these notice requirements. If a claim is not made timely, the contractor risks that it will be waived. Even if there are no express time limits, waiting too long to make a claim for an extension could be deemed a waiver of the claim under a variety of legal theories. In a recent article, my law partner, Jason Strickland, highlighted what he expects will be similarities between the coronavirus crisis and the Great Recession, which saw an uptick in the frequency and intensity of litigation in the construction field. Complying with time requirements for delay claims will be one less defense you have to address. **This is important: a wholly valid claim for delay or valid request for time extension can be completely barred by failing to provide proper notice that strictly adheres to the contract requirements.**

The contract may also contain other requirements for a delay claim. For example, the 2018 NCDOT specifications provide that the claim or request must include documentation of the circumstances resulting in the alleged delay, the calendar dates on which the controlling operation was delayed, and the number of days requested for an extension. You should also assume that North Carolina courts will enforce these and similar notice requirements.

Some may be wondering what recourse they may have if their contracts or purchase orders don't have a force majeure clause. While not ideal, this does not mean you are without a remedy. There are several legal bases under which you still may be entitled to an extension of time, or your contract performance may be excused. Two that come to mind are the common law doctrines of impossibility and frustration of purpose. These are common law defenses to breach of contract claims. The underlying premise of these doctrines is that some unforeseen and unexpected event has made contract performance impossible or impracticable. The purpose of the doctrines is to grant relief where "the parties could not reasonably have protected themselves by the terms of the contract against contingencies which later arose." These remedies are not available if your contract addresses delays or allocates the risks of the subject event occurring. In addition, these doctrines are generally used to excuse contract performance altogether and not just to obtain an extension of time. They are not perfect remedies. However, these doctrines may provide some partial relief if your contract is silent on the issue of excusable delay. Even if you are compelled to resort to these common law remedies, notice and documentation are still key. You should document and provide notice regarding the nature, extent, and impact of the delay early and often.

While we all have important things on our mind, the health and well-being of employees and neighbors chief among them, now is the time to best position your company to weather the inevitable storm. Review your contracts for any time limitations and other claim requirements. Document how the coronavirus crisis has

delayed the critical path. Even if the total impact is yet to be known, provide notice that your operations are being impacted and that you intend to seek an extension once the full extent is known. There is little, if any, downside to exercising rights based on a force majeure event in a timely manner. The worst that can happen is that your claim may be denied. Providing timely notice is also relatively easy and inexpensive to do. If these steps are not carefully followed, however, you could end up having money withheld for liquidated damages or other delay-related damages for delays that were completely outside of your control.

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