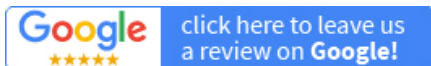




- [321-255-2332](tel:321-255-2332)
- [Client Login](#)

Make Payment



[HOME](#) [PRACTICE AREAS](#) ▾ [TEAM](#) ▾ [FIRM](#) ▾ [FAQ](#) [CONTACT](#) ▾ [BLOG](#)

# Contracts, Force Majeure and COVID-19 Impacts: What You Need to Know

[John M. Frazier Jr.](#)

May 4th, 2020

[Blog](#), [Business Law](#), [News](#)



Every industry has been or will be affected by the consequences of the COVID-19 pandemic. Accordingly, as the world continues to grapple with the ongoing health and financial crisis, businesses are trying to determine and guard against the impacts. For example, there are ongoing contractual obligations to many parties and in a multitude of areas, including: real estate contracts, construction contracts, landlord-tenant contracts, supplier contracts, event contracts, and many other written agreements.

If you haven't yet, you should begin reviewing all of your written agreements and contractual obligations. There are certain terms and clauses that may be highly relevant right now. And, as is often the case with clauses, time may be of the essence.

## I. Does COVID-19 impact contractual obligations

In order to limit the health threat of COVID-19, government restrictions have been implemented in regard to borders, travel, crowd size, and non-essential businesses. Consequently, many companies are unable to fulfill existing contractual obligations, and it is likely that impossibility of performance and the term "force majeure" will quickly become more important. This seldom-used contract clause could become fertile grounds for litigation in the aftermath of COVID-19.

Some businesses may consider invoking the *force majeure* clause, if included in a pertinent contract, to excuse or delay their contractual obligations. If a *force majeure* clause is not included in an affected contract, there may still be remedies to lessen liability impact.

### What is *force majeure*

*Force majeure* refers to contractual specifications that may excuse or limit liability of a party due to unforeseen events outside the control of the party that delay or completely prevent performance of the contract. However, not all force majeure clauses are the same in every contract. Terms are usually negotiated before a contract is finalized and may be broad or specific.

All contract law matters in the United States are determined by state law. *Force majeure* is determined by the exact language of the relevant contract, applicable laws and pertinent facts. Along with the event being unforeseeable and outside the invoking party's control, the party must show that inability to meet contractual obligations was unpreventable and insurmountable. Additionally, there must not be any fault or negligence on the part of the party invoking *force majeure*. It is important to note that economic difficulty and hardship are usually not sufficient to excuse performance.

*Force majeure* clauses often include a very precise list of events that are covered as unforeseeable. As it pertains to COVID-19, if the terms "pandemic," "epidemic" and/or "disease" are included in the list, then *force majeure* may be more likely to apply. If it does not contain such specific references, there is still a possibility that broader language, such as "acts of God" or "disasters," may be applied to COVID-19 to determine it as a qualifying event.

Though, a list of unforeseeable events is not the only thing that may be specified in a *force majeure* clause. It may require notice by the invoking party, as well as things like documentation and mitigation.

## Your contract and *force majeure*

If a catastrophic event like COVID-19 disrupts your business and contractual obligations become affected, you must assess your contract and determine the answers to certain questions related to *force majeure* and impossibility of performance, such as:

1. What are the exact *force majeure* clause terms and other relevant contract language?
2. What type of events qualify as *force majeure*?
3. Is there a causal link between the event and contract performance?
4. What proves that an event was unforeseeable and uncontrollable?
5. What proves sufficient notice and proper mitigation for a *force majeure* event?

The answers to the last four questions are likely dependent on the answer to the first question. There are many factors that can impact outcomes, and every case is different. That is why it is imperative to have a knowledgeable attorney advising you about preparing and finalizing your contracts, as well as assisting you when problems arise. An experienced attorney will help you navigate your specific circumstances as effectively as possible before and after challenges occur.

For instance, not only will you need to ensure that you take the required actions explicit to the clause, such as notice and mitigation, you will need to be aware of and understand the relevant laws and other issues that may apply to your situation. Even if *force majeure* applies and all procedures are followed, litigation may still occur if the applicable parties disagree about the interpretation of the contract terms and/or if requirements were properly followed. Additionally, if *force majeure* is claimed prematurely or improperly, an opposing party may have cause to file a breach of contract or terminate the contract.

There are numerous other scenarios and impacts that may result when declaring *force majeure*. Unintentional missteps could be costly. You need to consider all factors and know your legal options. To reiterate, the decision about the effects and consequences of an event qualifying as *force majeure* relies on the terms of the contract, state laws, specific facts, and ultimately how the relevant courts interpret those.

## What if *force majeure* does not apply

If it is impossible to perform the contract due to circumstances that could not be reasonably foreseen but there is no *force majeure* clause, then there may still be remedy under common law. Some states have laws that may apply to excuse delay or performance failure of a contract due to unexpected events. However, like *force majeure*, an "impossibility" defense case will be scrutinized for facts, therefore, proof and documentation are crucial.

Depending on the circumstances, there also may be an opportunity for alternative resolutions, such as renegotiating the contract; if all parties are agreeable. This could be especially feasible if costs and burdens are adding up, and the work or services are still needed and

## What happens next

We all have urgent issues vying for our attention, and health and safety are the most important. However, your business is also important, and now is the time to review your contracts. If *force majeure* or impossibility of performance is relevant to your contract situation, either as a claiming party or a party receiving or suspecting a claim, you should begin taking action, such as:

- Ensuring that you follow the explicit language of the *force majeure* clause, including time limits and other requirements.
- Documenting all pertinent details and effects of the causal event (e.g., COVID-19).
- Providing appropriate notice to all affected contractual parties.
- Reviewing relevant laws and consulting your attorney to determine a plan that minimizes impact.

Because of so much uncertainty surrounding COVID-19, it is difficult to know how courts will rule on relevant cases – we are dealing with a unique situation. Given the widespread effects of this crisis, there is a possibility that contract laws may evolve. However, you should not automatically assume terms like *force majeure*, "impossibility" or "Acts of God" will apply to your situation, even if included in your contract. Each case will be determined by factors specific to that case and current laws.

Additionally, many contracts involve complex transactions and multiple parties. Mix that in with complicated legal clauses and an unprecedented event like COVID-19, and that increases the importance of consulting with an experienced attorney as soon as there is a hint of a contractual problem, especially before taking any steps that may lead to litigation. Litigation is expensive, and it is essential for you to be as aware and prepared as possible.

Even if you currently have no known contract issues related to COVID-19, it is best to be proactive and conduct a review of your existing business documents to ensure you limit negative impacts. To protect your business, you should also begin thinking about how you will negotiate and prepare future contracts. COVID-19 may have far-reaching effects on companies and how they conduct business going forward.

If you need assistance with reviewing or drafting your contracts, find yourself involved in a contract dispute, or have other business-related legal matters, please do not hesitate to [contact me](#).

## Search Widerman Malek

## Latest Posts

[Contracts, Force Majeure and COVID-19 Impacts: What You Need to Know](#)

May 4, 2020

[U.S. Executive Order Ceases Immigration for Many Applicants During COVID-19 Crisis](#)

April 24, 2020

[“Save Small Business” Initiative and Grant Fund from U.S. Chamber of Commerce Foundation](#)

April 20, 2020

[Real Estate Market and COVID-19 Crisis: Impacts, Lessons and Plans](#)

April 13, 2020

[USCIS Provides Updated Response to COVID-19 Crisis](#)

April 6, 2020

## Categories

- » [Blog](#) (8)
- » [Business](#) (2)
- » [Careers at WM](#) (5)
- ▶ [Civil Law General](#) (424)
- » [Estate Planning](#) (1)
- » [Event](#) (2)
- ▶ [General Legal Blog](#) (377)
- ▶ [Intellectual Property](#) (853)
- » [Local Stories](#) (46)
- ▶ [News](#) (147)
- » [Press Release](#) (1)
- » [Resources](#) (10)
- » [Small Business Law](#) (1)
- ▶ [UAS](#) (61)
- » [Uncategorized](#) (7)



[Site Map](#) | [Terms of Use](#) | [Privacy Notice](#) | [Login](#) | [Support Login](#)

© Copyright 2020 Widerman Malek