

Will the COVID-19 Pandemic Trigger Force Majeure Clauses in Your Contracts?

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Force majeure clauses in contracts have been top of mind for many businesses during the pandemic. We've received many questions about whether these clauses are "triggered" by the COVID-19 pandemic. The answer will depend on several factors we've outlined further below but will ultimately be a very fact-specific analysis.

Background:

If you missed our [original article on force majeure clauses](#), below is a brief refresh on these clauses:

- Generally, force majeure is a contractual provision that identifies certain unexpected events that may relieve a contracting party from liability for failure to perform.
- Many force majeure provisions provide that upon a triggering event and condition, and upon appropriate notice, the contract can be terminated. However, other force

majeure provisions state that upon a triggering event and condition performance is merely suspended.

- Typically, force majeure provisions list a litany of predetermined events constituting force majeure events. While there is not one universal force majeure provision, these provisions often include some or all of the following: acts of God; epidemic; government laws or regulation; curtailment of transportation facilities or services; war; acts of terrorism; civil disorder; strikes; work stoppages; fire; flood; severe weather; earthquake; hurricane.

How to determine if the provision is triggered:

- Start with reviewing the actual language used in the force majeure clause and what exactly is covered. The clause may be drafted in many ways, but we recommend confirming (i) what events are expressly listed and (ii) what are the conditions for nonperformance (e.g., impossibility, commercial impracticability, etc.), among other things.
- **Note** : Courts in certain jurisdictions have held that if a party is trying to invoke a force majeure clause, they must prove that the event causing their inability to

perform was not foreseeable when they entered into the contract. This can be a difficult test to meet as the pandemic has been ongoing for several months and depending on when the parties entered into the contract, there are many arguments to be made that the inability to perform could have been foreseen. This foreseeability test is commonly an express requirement in these clauses as well so be sure to look for this language in your clause.

- Check the state law that governs the contract. Different states interpret and/or apply these clauses differently.

Additional steps to take:

- Confirm the notice and timing requirements for invoking the provision.
- Confirm whether the provision requires mitigation efforts by the party seeking to invoke the provision; take any steps to mitigate the harm caused by nonperformance and document such steps.

Attorneys in the Corporate Group at Levenfeld Pearlstein have experience with the COVID-era complexities of contract provisions, and we can help you understand whether the

force majeure clauses in your contracts may be triggered. Please don't hesitate to reach out.