

LEGAL ALERT

COVID-19: Force Majeure

March 16, 2020

Companies are currently facing great uncertainty as the reach and impact of the novel coronavirus (COVID-19) pandemic continues to develop. Disruptions in supply chains, on premise operations, office closures, worker shortages, and the resulting inability to perform under contracts are inevitable for many companies. Many contracts contain a force majeure clause (FMC) contemplating delay or termination in the event of a "force majeure" event, typically defined to include specific events that are not foreseeable by the party required to act. FMCs excuse or defer performance by a party in certain situations without a breach of the applicable contract for such non-performance.

How to Invoke an FMC to Delay Required Performance.

FMCs come in all shapes and sizes and are not always obvious in a contract. Whether an FMC can excuse performance by a party requires an evaluation of many factors, including: how an FMC is defined in the contract, which state's law governs the contract, and how COVID-19 has impacted the business's ability to perform. Review of the language in the contract is the starting point for this analysis.

How is FMC defined in the applicable contract? For example:

- Is a pandemic explicitly contemplated?
- What about government action, such as California's ban on events with over 250 attendees or Minnesota's recommendation to limit gatherings to under 250 individuals?
- Is there a catch-all provision allowing for delay for anything outside of the party's control?

Which state's law governs the contract can be as important as the language of the clause itself. For instance, courts in some states interpret FMCs very narrowly and will even limit catch-all provisions to those events *similar* to events explicitly listed in the FMC. Courts in other states take the opposite approach and will only allow a catch-all provision to include those events *dissimilar* to the ones enumerated in the FMC.

Beyond the contract language itself, an important consideration is also whether COVID-19 has sufficiently impacted a business's ability to perform under the contract. Common standards of analysis include whether performance is actually rendered impossible or substantially hindered.

Action Required Before Invoking an FMC.

Courts are less willing to hold that invoking an FMC was appropriate where the invoking company could have taken measures to mitigate the damage associated with a catastrophic event but failed to do so. Proper notices regarding contemplated actions are essential.

How Does a Company Defend Against an FMC Invoked by a Third Party?

The company must consider whether the invoking party has the ability to continue performing under the contract but invoked the FMC due to financial considerations. Financial difficulties are often carved out from FMCs and likely cannot be relied upon by the invoking party. However, this rule of thumb is not universal and a thorough analysis of the specific facts—including the contract in question—of any given invocation is crucial.

Even if the Contract Does Not Have an FMC, Alternative Actions Can be Taken.

Sometimes the language in the actual contract might refer to "office closures in an emergency situation" but not specifically be labelled a "force majeure" event. Therefore, contracts need to be reviewed carefully. In addition, there are multiple common law (*i.e.*, not contract specific) legal doctrines that can potentially excuse a party from performance under a contract because of some unforeseen event, like the doctrine of frustration of purpose and legal impossibility. *However*, these are narrowly interpreted doctrines, so a thorough analysis is highly recommended before relying on any of these doctrines.

Proactive Next Steps.

Gather your contracts, check for FMCs or other "emergency related" clauses, and develop a strategy to engage with the counterparty to the applicable contract in the event of business disruptions or potential performance issues.

We Can Help.

Maslon can help with these and all relevant questions related to FMC, contract interpretation, and negotiating strategy that are certain to arise in the coming weeks. Please contact Maslon's Contract/Force Majeure Team identified below or your regular Maslon lawyer with any questions—we are ready to help in this daunting time.

To view Maslon's coverage of further legal considerations for COVID-19, go to: [COVID-19 Legal Updates: Critical Business Considerations](#).

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