

## LEGAL SERVICES:

# Writing Contracts that Protect your Business FORCE MAJEURE CLAUSES IN A POST-PANDEMIC WORLD



the contract prevent a party from fulfilling its contractual obligations. While many generally equate force majeure with only excusing acts of God, such as extreme weather events (e.g., tornados, earthquakes, etc.), force majeure can also extend to those impossibilities caused by humans, like governmental actions, acts of war, economic downturn, and terrorism.

### Drafting your next force majeure clause

Whether a future pandemic or governmental shut down constitutes a qualified force majeure event under your contract will depend on the express terms of a particular contract.

- First, does your force majeure clause specifically identify epidemics, pandemics, health crises, viruses, illnesses, or governmental actions as qualifying events? It's important to define the triggering event to include (or exclude) such events and not simply rely upon "act of God" language. Businesses should also consider whether they want to add secondary events affecting performance like material or labor disruptions.
- Second, does your force majeure clause state the ex-



act performance that will be excused because of the triggering event such as defining the breach the promisor seeks to be excused from? Parties may agree that force majeure will excuse a default, or a delay, or a failure to satisfy some condition. This can be described in broad terms or with specificity. Your force majeure provision can also excuse the performance of both parties or just one.

- Third, a good force majeure clause will give guidance on what remedies exist if performance is excused. Does your force majeure provision allow a party to terminate an agreement, suspend performance indefinitely, or obtain a refund? A party who seeks any relief due to a triggering force majeure event will need to demonstrate that

the remedy sought is expressly contemplated by the contract.

- Fourth, many force majeure clauses include a requirement that a party seeking to exercise such a clause must provide notice to the other party (specifying the exact form of that notice) and mitigate their damages.

In the end, whether a court will enforce your post-pandemic force majeure provision will depend on a number of variables, including the terms of the contract, the specific facts, the governing law, and how courts in the relevant jurisdiction interpret force majeure provisions, among other things.

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Before the COVID-19 pandemic, businesses were not alone in glossing over or even dismissing force majeure clauses in their contracts. That's because force majeure clauses were generally a long list of potential catastrophes, embedded in boilerplate at the back of a commercial contract, and unlikely to occur. But with the COVID-19 pandemic's unprecedented disruption to the global economy, this has brought renewed focus to these often-overlooked contractual clauses.

### What is a force majeure clause?

General commercial contracts usually contain a force majeure clause that excuses a party's nonperformance when unexpected events identified in