

# COVID-19: The Impossibly Impractical Force Majeure Frustrating Business Contracts Everywhere

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We live in unprecedented times when, for the first time in recent history, all types of business are being forced to shut down for extended periods, from mom-and-pop restaurants to retail giants like South Coast Plaza to Orange County staples such as Disneyland. Even John Wayne Airport, although still open, is essentially a ghost town. There is no way to sugar coat the reality that COVID-19 has devastated and will continue to devastate local businesses for the foreseeable future.

One question that many businesses are asking is whether and how they can excuse or delay performance under certain contracts that they cannot honor due to the effects of the COVID-19 crisis. Although no one answer fits every situation, there are several potential ways that businesses can explore when faced with these types of decisions.

## DOES MY CONTRACT HAVE AN APPLICABLE FORCE MAJEURE PROVISION?

The first thing to look for is whether your contract has a *force majeure* provision. These are provisions that are normally located near the end of your contracts that allocate the risks associated with a *force majeure* event, i.e., an unforeseeable circumstance that prevents one or both parties from fulfilling a contract.

**Scope of the Provision.** If the contract contains a *force majeure* provision, the next step is to determine whether the provision is broad enough to cover the COVID-19 crisis. Some provisions will expressly state that epidemics or pandemics qualify as a *force majeure* event. Others may include things such as government regulatory actions, which could potentially apply here given the numerous government orders that have been recently issued causing businesses to shut down. If neither of these things are mentioned, perhaps your provision contains “catch-all” language like “acts beyond the parties’ control” or “similar events” which leaves the definition of a *force majeure* open-ended. The more specifically an event like the COVID-19 crisis is described in your provision, the better your argument will be that the provision was intended to cover events such as this.

**Notice.** Assuming your provision is broad enough to cover this event, many provisions require you to give prompt notice to the other party of your intent to invoke the provision to either excuse or delay your performance and to give specific details supporting your position. Therefore, time is usually of the essence with regard to these provisions.

**Things to Watch Out For.** Be aware that these provisions can normally be invoked only if the *force majeure* event was unforeseeable, truly prevents you from fulfilling a contractual obligation (rather than just making it more difficult or costly), and you have used diligent efforts to minimize the effects of the event. Also, many provisions specifically state that parties are not excused from payment obligations even in the face of a *force majeure* event. A potential pitfall of invoking these provisions is that the other party can treat your *force majeure* notice as a repudiation of the contract and sue for breach of contract damages, so it is advisable to contact your attorney to discuss the strengths and weaknesses of your position before invoking such provisions.



## WHAT IF MY CONTRACT DOES NOT HAVE A FORCE MAJEURE PROVISION?

If your contract does not contain a *force majeure* provision, there are still other ways you may be able to excuse or delay performance of a contract due to COVID-19.

**Impossibility/Impracticability.** Under California common law, a party may be excused from performance if an unforeseen event makes performance of a contract impossible or impracticable. Like with *force majeure* provisions, this requires more than just increased cost or burden; the party seeking to invoke these doctrines must show that performance is either entirely impossible or can only be done with extraordinary or excessive cost or burden due to the unforeseeable event. Whether or not you are able to meet this high burden is a very fact-specific inquiry. For example, a contract to perform services may become impossible to perform if you are in a jurisdiction where your employees are ordered to shelter at home.

**Frustration of Purpose.** Under the frustration of purpose doctrine, a party’s obligations can potentially be discharged if the primary purpose of the contract is substantially frustrated by an unforeseen event. Unlike with impossibility/impracticability, under this doctrine, performance may still be possible, but performance is futile because there is no longer a purpose for the performance. For example, if a company ordered 5,000 balloons for a corporate event that it planned to hold, it may still be possible to fulfill that contract but performance of the contract would be futile if recent regulations prohibit large gatherings and the event had to be cancelled, since the company would end up with 5,000 balloons that it has no use for.

**Illegality/Against Public Policy.** Another related defense is that the contract is rendered illegal as a result of COVID-19 because following through with the contract would be against public policy. This is probably the most difficult of the defenses to invoke and would only be appropriate in certain circumstances. As an example, an event contract to hold a wedding with 300 guests could potentially fall under this doctrine; if the parties were forced to proceed with the contract, the parties would likely be in violation of numerous recent regulations prohibiting large gatherings, making the contract against public policy.

## FINAL THOUGHTS

In sum, if your business has been affected by the COVID-19 crisis as many businesses have been, you may be having to make difficult decisions like determining whether you can circumvent certain contracts to save costs or cut down on obligations in order to make ends meet and to provide for your employees. If you have contracts that you believe you are no longer able to honor because of the crisis, you may have numerous different avenues by which you can seek relief as summarized above. In addition to the defenses discussed herein, you may have more defenses to invoke depending on the specific type of agreement at issue (e.g., rent abatement for lease agreements). An attorney versed in these issues can help you navigate how to best handle these types of difficult questions.



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