

# BUSINESS ALERT: Coronavirus And Its Potential Impact On Contractual Agreements

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During the Coronavirus (COVID-19) pandemic and the day-to-day intensification of restrictions and limitations on daily behaviors, it is highly important for all business owners to start preparing immediately in the event of a Federal or State Order to close their businesses and shelter in place. If such an Order is given, businesses will only be able to operate with limited capacity or, in some cases, not be able to operate entirely – with both circumstances affecting a businesses' ability to meet its contractual obligations and/or make payments to vendors, suppliers and/or landlords. A failure to perform under a contract, whether voluntarily or involuntary, could have significant and devastating impacts on a business. As such, business owners should carefully examine each and every contract they feel may be impacted to determine whether any relief is provided.

## Force Majeure Provisions

In most contracts, you will find a “boilerplate” provision commonly referred to as “force majeure.” Until recently, these provisions generally do not receive much attention during the drafting and negotiation of a contract. However, under the current state of affairs, force majeure provisions will be the foremost topic of discussion and examination. Generally, force majeure is a contract provision which, under certain described circumstances, will either delay or excuse timely performance, and potentially payments, required by the contract. For example, in [commercial real estate leases](#) you will typically find a provision as follows:

The performance by Landlord and Tenant of their obligations under this Lease will be excused by delays due to strikes, lockouts, labor trouble, inability to procure labor or materials or reasonable substitutes for them, failure of power, governmental requirements, restrictions or laws, fire or other damage, war or civil disorder, or other causes beyond the reasonable control of the party delayed, but not delays resulting from changes in economic or market conditions, or financial or internal problems of

the party delayed, or problems that can be satisfied by the payment of money. As a condition to the right to claim a delay, the delayed party will notify the other within seven (7) days after the delay occurs and describe on at least a weekly basis in reasonable detail the nature and status of its efforts to end the delay.

The above sample provision is only one common form, and as can be seen in this example, this provision would not apply to matters concerning payment of money. However, each force majeure clause in each contract would need to be carefully read and examined to determine, on a case-by-case analysis, which events constitute an excusable delay in performance and/or payment of money. Some force majeure provisions may specifically include “pandemics,” “diseases” and/or “epidemics.” To reiterate, the *exact wording* of the force majeure will determine the types and extent of events that may excuse performance and/or payments. It is important to note that, without a specific force majeure provision or similar contract proviso contained in a contract, Common Law will not generally imply such force measure provisions into contracts.

### **Notice Requirements of Force Majeure Provisions**

In addition, if your contract does contain a force majeure or similar provision, specific attention should also be given to any notice requirements. A party’s failure to strictly adhere to any notice requirements could be fatal to the ability to invoke its protections. Some notice provisions, such as the example above, may require a continuing notice requirement until the event has passed that caused the delay. Furthermore, the delayed party may also be required to take reasonable steps and measures to mitigate, avoid or minimize the effect on the contractual obligations. Force majeure contract provisions are generally narrowly read, construed and enforced by courts.

### **Planning for Government Ordered Closures to Your Business**

Without a force majeure or similar provision in a contract, business owners may find themselves in a difficult position whereby they will be compelled by Government Order to cease or limit operations, but still contractually obligated to perform or make payments. For example, a business may be prevented from going to a leased office, but still obligated to make rent payments, or be faced with late

fees, penalty interest or eviction. As such, business owners should be creating reserves, to the extent able to do so, to anticipate the potential for still having to make payments during any Governmental Ordered closure or the like. There could always be the potential that a Governmental Order specifically requires the delay of performance, and/or forgiveness of certain late payments and penalties or the like, but businesses should be preparing and taking pro-active measures in case such Order does not go so far.

## **Assessing Options for Relief When Businesses Are Ordered to Close**

The Coronavirus epidemic will certainly continue to shed new light on force majeure provisions, and will cover all types of [contracts](#), including supply contracts, leases, security agreements, notes and mortgages. In order to determine your specific rights and obligations, business owners will need to carefully examine all contracts to determine whether the business will have an excusable delay for either performing services, providing products and/or making payments, such as rent. Business owners may also want to review their existing insurance policies, such as whether it carries a business interruption policy or similar coverage. A careful review of existing insurance policies could provide further relief for business owners in this unprecedented time.

Finding the time to undertake a review of contracts and/or insurance policies could be difficult while a business is trying to manage day-to-day current affairs. The [Closely Held Business Group](#) of Einhorn, Barbarito, Frost and Botwinick, has the knowledge and experience to assist you in this review and help alleviate some of the pressure and stress business owners are managing under the current pandemic.