

ARTICLES

Force majeure: contract clause critical to Oregon businesses after COVID-19

APRIL 24, 2020

By [Jack L. Caynon, III](#) and [Darin D. Honn](#)

Published in the [Portland Business Journal](#)

The virus has impacted almost every business in the country and how they carry on in the ordinary course. While additional restrictions continue on gatherings, work and travel, many businesses may find their contractual obligations may impose burdensome obligations or that the benefits they bargained for are precluded.

Depending on your situation, a contract's *force majeure* clause may be a blessing or a curse depending on which side the transaction you find yourself.

"*Force majeure*" is a French term that means "superior force." It is an event or crisis that can be neither anticipated nor controlled by the contracting parties. It has been understood to cover both acts of nature (earthquakes and floods) and acts of man (war and strikes).

These contractual provisions cover situations where contractual performance becomes impossible or impracticable due to events that could not have been foreseen or controlled by either party. Generally, these clauses don't terminate the parties' agreement: They suspend a party's duty to perform for the duration of the *force majeure* event.

Force majeure clauses may be specific or general as to the terms that qualify as a *force majeure* event and what notice requirements must be

met to obtain relief from required performance. *Force majeure* clauses are almost never implied at law: They must be written into the contract to be effective. Also, the burden of proof is on the party seeking relief under the clause and it is a “defense” that can be used if one party wants to bring suit against the other for non-performance during a *force majeure* event.

Force majeure is a double-edged sword. It can be used by your business, if applicable to your circumstances, to excuse your company’s performance on a contract (for instance, your workforce is unable to come into the workplace and produce the goods or services the company renders due to the virus). However, it may also be used by a vendor to prevent it from providing the goods and services your company purchased from the vendor.

So, what should businesses consider when dealing with *force majeure* clauses?

1. Engage counsel to review all your mission critical agreements.
2. Sort contracts on whether you or the other party is seeking to use the *force majeure* clause. Can you find an alternative supplier or vendor? When will you be able to perform your contractual obligations if you are the supplier?
3. Understand the basis for either party’s non-performance. For example, does it fit within the express written terms of the *force majeure* clause, or is it implied or otherwise implicit in the terms of the contract?
4. Communicate early and clearly with the other party. Each party should demonstrate it is acting reasonably and intends to resume performance as soon as crisis is resolved.
5. Consider whether long-term performance of the agreement can be renegotiated to accommodate both parties.

[Jack L. Caynon](#) is a business and health care lawyer at Sussman Shank LLP.

[Darin D. Honn](#) is a business lawyer who specializes in business, construction, and real estate matters.

Related Attorneys

Jackie (Jack) L. Caynon III

Special Counsel
(RETIRED)

Darin D. Honn

Partner
503.243.1629
dhonn@sussmanshank.com