



Why Nonprofits Should Care About Force Majeure Clauses

Litigation and Dispute Resolution



Force majeure contracts are often not a big focus when nonprofit organizations negotiate contracts, except when they involve conferences, fundraisers, and other events. In the time of COVID-19, the importance of force majeure clauses has come to the forefront of contract negotiations and

considerations.

These clauses are generally thought of as those that arise when a party cannot perform under a contract due to circumstances beyond their control, such as acts of God, like hurricanes, tornadoes, or floods; human-made catastrophes like labor strikes; or acts of terrorism. More recently, force majeure clauses have been triggered by the global COVID-19 pandemic. The applicability of force majeure clauses depends greatly on how the clause is drafted, and whether a party's performance is considered impossible or impracticable under the circumstances.

[Related: [Would Your Company Be Liable if Someone Contracts COVID-19? 6 Litigation Lessons to Consider](#)]

As with their commercial counterparts, nonprofits rely on force majeure clauses in contracts when they are unable to perform due to circumstances beyond their control. However, it is important to note that the key is whether a party can perform despite the circumstances.

For example, nonprofit organizations often enter into contracts with convention centers and hotels years in advance for their annual conferences. During the time of COVID-19 — when stay-at-home orders and travel restrictions are sanctioned worldwide — it may be impossible for a nonprofit to hold its event because its attendees cannot attend the conference.

A well-drafted force majeure clause will ensure that the nonprofit can cancel the contracts due to circumstances beyond its control without the imposition of penalties or damages. The force majeure clause usually consists of these [key attributes](#):

- It is mutual or one-way.
- It lists events that trigger the clause.
- It requires notice, certain information in the notice, or being silent to notice.
- It specifies the effect of a force majeure event.

Interpretation of force majeure clauses is rooted in case law, and many jurisdictions [interpret the clause narrowly](#) and do not include the concept of foreseeability as a factor. That said, if the clause is drafted with only specific triggering events and only benefits the other party, it will be problematic for a nonprofit to use it to excuse performance, regardless of the circumstances.

[Related: [May the Force Majeure Be with You: Understanding Impossibility, Impracticability, and Frustration of Purpose](#)]

Generally, the “test” for force majeure usually requires the satisfaction of [three distinct criteria](#):

1. The event must be beyond the reasonable control of the affected party;
2. The affected party's ability to perform its obligations under the contract must have been prevented, impeded, or hindered by the event; and
3. The affected party must have taken all reasonable steps to seek to avoid or mitigate the event or its consequences.

Force majeure clauses should be scrutinized in all contracts, not just those that involve events. For example, with COVID-19, a nonprofit organization may have grants or other funding suspended.

If that happens, the nonprofit may not be able to perform under agreements with vendors or

subcontractors. Or, due to COVID-19, a nonprofit may need to reduce its staff and consequently no longer has the resources available to perform under a contract.

It is important that all force majeure clauses are reviewed to ensure that they can be relied upon if it is impossible to perform, including payment obligations, due to force majeure circumstances.

An alternate approach is to determine whether performance is impossible, or whether it can merely be delayed or changed. Some situations arise where, due to a current force majeure situation, a party cannot currently perform, but the parties do not want to cancel obligations.

In these situations, the parties can agree to delay performance without liability if the force majeure clauses and other aspects of the contract allow for such changes.

In light of COVID-19, nonprofit organizations should review the force majeure clauses in their contracts to ensure that they are appropriately protected in case a force majeure event arises.

For more advice and information on the coronavirus pandemic, visit the [ACC COVID-19 Resource Center](#).

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