



# CLIENT ALERT

## COVID-19 and Force Majeure Clauses

Since the outbreak of COVID-19, many businesses have faced challenges that have made it difficult or impossible to fulfill the terms of pre-existing contracts or to even operate at all. The terms of such contracts and existing legal doctrines may excuse performance of these contracts under certain circumstances.

**It is important that businesses review their contracts, preferably with experienced professionals to determine their legal rights and responsibilities. A prompt review of relevant contract provisions will allow businesses to mitigate their damages in this time of uncertainty.**

“Force majeure,” meaning “superior force,” is a common clause in contracts that may allow one or both parties to avoid obligations under a contract due to an extraordinary event or circumstance beyond the control of the parties, such as a war, strike, riot, crime, plague, or an event described by the legal term “Act of God” (hurricane, flood, earthquake, volcanic eruption, etc.) that prevents the performance by one or both parties under the contract either entirely or only for the duration of the force majeure.

Whether a party is excused from performing under its contract is a fact-intensive question specific to the language used in the contract

and the invalidation of the contract is an extreme remedy.

The analysis of such a clause with respect to COVID-19 raises questions such as whether COVID-19 is a force majeure under the language of the contract, whether the risk was foreseeable or avoidable in whole or in part, and whether performance is impossible as opposed to merely more difficult.

The two developments that are most likely to trigger force majeure clauses in contracts are the governmental declarations of the COVID-19 outbreak as a “pandemic” and the restrictions placed upon businesses by federal, state, and local governments. These developments would likely trigger clauses in contracts that excuse performance due to disease outbreaks and governmental orders and regulations that make performance impossible or illegal.

It is important to note that just because COVID-19 or the ensuing governmental restrictions may constitute a force majeure, does not mean that businesses are automatically excused from any performance at all. For example, even with identical force majeure clauses in their contracts, a banquet hall may be excused from making their event available for a large public gathering, while an author writing a work he or she was under contract to

complete without any required attendance at a particular location may not be.

Even where contracts do not contain force majeure clauses, there are several existing legal doctrines that may provide some relief to a party under a contract. These include frustration of purpose, mistake, impossibility or, impracticability (in certain states). Some examples of the operation of these doctrines are:

**Frustration of purpose:** A florist is under contract to provide flowers for a wedding that is canceled due to the governmental prohibition against large gatherings.

**Mistake:** The parties entered into a contract believing that an executive order concerning COVID-19 did not prohibit performance when, in fact, it did.

**Impossibility (or, by difference in degree, impracticability):** A performer contracted to personally deliver an artistic performance is placed under involuntary quarantine.

Such defenses to performance all involve fact-intensive inquiries into the intent of the parties to the contract, whether the circumstances were foreseeable, and whether any steps can be taken to mitigate losses.

These inquiries are not only relevant to whether a business may be excused from performance under a given contract, but also to whether a business expecting performance from the other party has any rights to enforce the contract according to its terms.

**What is most important at this time is for businesses to promptly review their contracts and take steps to mitigate damages or even negotiate amendments**

**to their contracts to avoid liability or secure alternative performance from the other party to the contract that will meet their immediate needs. This is particularly important given the uncertainty that exists from not knowing what government intervention may come next or how courts may apply existing doctrines under these extraordinary circumstances.**

We will continue to monitor developments surrounding the COVID-19 outbreak and provide updated information as it becomes available. Additional information for business affected by the COVID-19 outbreak can be found at <http://www.raimondi-law.com/covid19>

The attorneys of Raimondi Law, P.C. have nearly 40 years of combined experience in advising and litigating on behalf of business with respect to business law matters, including drafting, analyzing, and litigating contractual language.

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This information update is provided as a service to our clients, colleagues, and acquaintances. It is designed to give general information on the particular matters presented. It is not intended to be a comprehensive summary of recent developments in the law, be an exhaustive treatment of the subjects covered, provide legal advice, or render a legal opinion.

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Raimondi Law, P.C. is a full-service law firm catering to the needs of small and medium sized businesses in New York and New Jersey with experience in corporate formation and governance, succession planning, sales and mergers, employment matters, contract review and drafting, and litigation of disputes.

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