

You Are Excused:

Force Majeure in the Workplace in the COVID-19 Era

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Goals for Today:



- ✓ Background discussion on force majeure clauses
- ✓ The legal nuts and bolts regarding interpretation and enforcement of force majeure clauses
- ✓ Employer considerations of force majeure clauses in the post-COVID world
- ✓ Audience Q&A



Force Majeure Clauses in Employment Contracts

COVID-19 and the Workplace

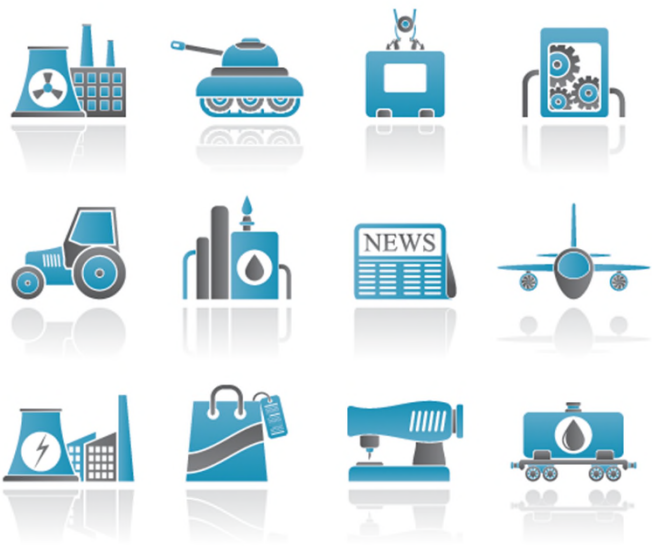


- The pandemic has forced many employers to make rapid decisions about hiring, terminations, layoffs, furloughs, and compensation, among others
- In cases where written contracts exist, employers are now parsing through “force majeure” clauses
- Use of force majeure clauses in employment agreements:
 - Executive employment agreements
 - Collective bargaining agreements
 - Healthcare employment agreements

Examples of the Range of Force Majeure Clauses

- **Example from a Management Services Agreement:** Neither Party will be liable for any failure or inability to perform, or delay in performing, such Party's obligations under this Agreement **if such failure, inability or delay arises from an extraordinary cause beyond the reasonable control of the non-performing Party**; provided that such Party diligently and in good faith attempts to cure such non-performance as promptly as practicable.
- **Example from a Collective Bargaining Agreement:** If a production cannot be performed and/or the theater cannot operate because of **fire, accident, strike, riot or act of God, or the public enemy**, which could not be reasonably anticipated or prevented, the Employer will only be responsible to pay one (1) day's pay to each employee who lost at least one (1) day's work regardless of how long the incident lasts.
- **Example from a Healthcare Employment Agreement:** Neither Party will be liable for any delay or failure in performance under this Agreement deemed as a result, directly or indirectly, **of any act of God, acts of civil or military authority, acts of public enemy, terrorism, war, accidents, fires, explosions, earthquakes, floods, failure of public transportation, or any similar or dissimilar cause beyond the reasonable control of either Party.**

Industry Use of Force Majeure Clauses



- Lessons from the healthcare industry
- Force Majeure “down South”



The Nuts and Bolts of Force Majeure Clauses

What Is “Force Majeure”



- *Black’s Law Dictionary* defines “force majeure” as “an event or effect that can be neither anticipated nor controlled.”
- Not all force majeure clauses are created equal:
 - Some clauses delineate specific force majeure events.
 - Some clauses are drafted more generally and refer to “Acts of God” or “events outside of the parties’ control.”
- The exact language of the clause will determine whether or not an employer is excused from performance due to the pandemic.

Force Majeure in **New York**: Some Concepts to Consider

- Force majeure clauses are construed **very narrowly**. Parties must allocate the risk of a specific event.
 - *Reade v. Stonybrook Realty, LLC*, 882 N.Y.S. 2d 8 (1st Dep’t 2009)
- NY courts will examine foreseeability when a party relies on the catch-all force majeure language. This is important to consider when evaluating contracts in light of the next pandemic.
 - *Rochester Gas & Elec. Corp. v. Delta Star, Inc.*, 2009 WL 368508 (W.D.N.Y. Feb. 13, 2009)
- A material breach of the duty to give notice can affect the right to invoke force majeure.
 - *Toyomenka Pac. Petroleum, Inc. v. Hess Oil Virgin Islands Corp.*, 771 F. Supp 63, 67 (S.D.N.Y 1991)
- NY courts interpret “catch-all” force majeure language to include those events that are similar to the events that are listed.
 - *Wuhan Airlines v. Air Alaska, Inc.*, 1998 WL 689957 (S.D.N.Y Oct 2, 1998)

Force Majeure in Illinois: Some Concepts to Consider

- If the parties have listed a specific force majeure event, the courts will not conduct a foreseeability analysis and the party is excused from performance.
 - *Veath v. Specialty Grains, Inc.*, 190 Ill. App. 3d 787, 797-98 (1989)
- But using force majeure clauses may preclude you from asserting other common law contract defenses.
 - *Commonwealth Edison Co. v. Allied-Gen. Nuclear Services.*, 731 F. Supp. 850, 855 (N.D.Ill. 1990) (applying NY law)
- Performance may be permanently excused if the force majeure event is prolonged.
 - *Commonwealth Edison Co. v. Allied-Gen. Nuclear Services.*, 731 F. Supp. 850, 855 (N.D.Ill. 1990) (applying NY law)
- Change in cost is generally not a force majeure event.
 - *USX Corp. V. Int'l Minerals & Chemicals Corp.*, 1989 WL 10851 (N.D.Ill Feb 8, 1989)

Force Majeure in **California**: Some Concepts to Consider

- If contracting parties do not explicitly identify a force majeure event, courts will employ a foreseeability analysis to determine whether boilerplate or catch-all force majeure language covers a certain event.
 - *Free Range Content, Inc. v. Google Inc.*, 2016 WL 2902332 (N.D. Cal. May 13, 2016)
- CA law requires a party that is invoking a force majeure clause to show that “in spite of skill, diligence and good faith” performance was impossible.
 - *Jin Rui Group, Inc. v. Societe Kamel Bekdache & Fils S.A.L.*, 621 Fed. Appx. 511 (9th. Cir. 2015)



No Force Majeure Clause?

Take the “Off-the Rack” Option

- Where no force majeure clause exists, the common law doctrines of impossibility, impracticability, and frustration of purpose may fill the gap.
 - Impossibility may provide a defense where events or occurrences outside the parties’ control render the employer’s performance impossible.
 - Impracticability may provide a defense where performance may be possible but unfeasibly difficult because of the unforeseeable events.
 - Frustration of purpose occurs where the unforeseeable event or occurrence destroys the very basic premise of the employment contract.
- The problem with relying on these doctrines is the lack of control.
- Will these doctrines provide protection during the next pandemic?

The Future of Force Majeure Post-COVID-19



Force Majeure in the Post-COVID-19 World?



■ Is This the New Norm?

- Pandemics, hurricanes, floods, earthquakes, wildfires, and acts of terrorism are no longer infrequent events



■ Contract Review

- Consider including force majeure clauses or broadening existing force majeure clauses to include pandemics
- Consider the available remedies if a force majeure event occurs
- Consider whether to incorporate any force majeure exclusions e.g. what occurrences are not force majeure events
- Consider whether notice is required and whether it is a condition precedent
- Review of choice of law provisions and force majeure interpretation under that state's law



■ Contingency Planning

- Business interruption plans



Force Majeure on the High Seas

Pirates and Force Majeure



“**Force Majeure:** Neither you nor us shall be responsible for any loss, damage, delay or failure of performance hereunder arising or resulting from: acts of God; acts of war; **perils of the sea; acts of public enemies, pirates or assailing thieves; arrest or restraint of princes, rulers or people,** or seizure under legal process (provided bond is promptly furnished to release the vessel); strike or omission; or thing whatsoever beyond the control of you or us. Should either party be unable to perform due to the above, all your deposits and payments will be credited towards a future cruise event to be performed within 12 months of initial cruise date.”

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Questions

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