

FACT SHEET – COVID-19 & SMALL BUSINESS CONTRACTS ISSUES

The **COVID-19** pandemic has had a serious impact on small business. We have developed this fact sheet to help you think through, in consultation with a volunteer attorney, contractual issues you may encounter as a result of COVID-19.

UNDERSTAND YOUR RIGHTS AND OBLIGATIONS

Gather any contracts you think may be affected by the current crisis. Make sure you have any amendments and any emails or letters that relate to the contracts.

Points to Consider

1. What are my obligations under the contract?
2. What are the other side’s obligations under the contract?
3. Can I do what I have to do under the contract? If not, why not?
4. Can the counterparty do what it has to under the contract? If not, why not?

PRESERVE YOUR RIGHTS

PROVIDE NOTICE: You should understand any obligation to provide notice to customers / counterparties if you know or think you cannot meet your obligations.

Points to Consider

1. Do I have to provide notice?
2. If so, what do I have to give notice about and in what way?
3. Does the counterparty have to provide notice? If not, why not?

DOCUMENTATION: Keep copies of any emails or letters about your contract. If you have phone calls or conversations about the contract with any counterparty, keep good notes of your discussions. **Any agreement to change the contract (including delaying payment or delivery) should be in writing.**

This information is current as of April 6, 2020, and should not be considered comprehensive. This is not a substitute for, and should not be relied upon as, legal or professional advice; we recommend that you consult professional advisors for guidance on your individual circumstances. Nothing contained herein creates an attorney-client relationship with Cleary Gottlieb.

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GENERAL CONTRACT PROVISIONS

FORCE MAJEURE. A force majeure event (a “FM event”) is an unforeseen event beyond a party’s control that makes it impossible or significantly more difficult for that party to do what the contract requires. A “FM clause” is a provision that says that a party does not have to do what the contract says if there is a FM event.

Points to Consider

1. Does the contract include a FM clause?
2. How is *force majeure* defined?
3. Does the clause include language naming COVID-19 or the government’s response to an epidemic or pandemic as a FM event, or is the definition more general?
3. Is COVID-19 the reason why I cannot perform my obligations or why it is harder to perform my obligations?
4. Does the clause excuse an obligation that becomes:
 - impossible and my obligation is impossible now because of COVID-19?
 - significantly more difficult and my obligation is now more difficult?
5. Are there any exceptions to what might be considered a FM event? In other words, are there any parties or events that won’t be considered FM events?

***NOTE:** Check the FM clause to see if it says your obligation under the contract is **not** excused. Try to make sure that your argument is **not just** that performing is too expensive.*

IMPOSSIBILITY. Even if there is no FM clause in your contract, you may be able to argue that you should not be liable for damages for failing to perform so long as an **unforeseeable** event renders your performance **impossible**.

FRUSTRATION OF PURPOSE. Even if you can still **technically** do what the contract says you have to do, you may be able to avoid your contractual obligation if your contract has been rendered pointless by the unforeseen COVID-19 pandemic.

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FOCUS ON THE POSSIBLE AND THE PRACTICAL

Because of the challenges we now face, the parties to a contract may find that they simply cannot satisfy their obligations under the contract. You may also find it expensive and/or burdensome to pursue your options in court. You may also want to consider creative solutions to come up with a plan that works for both parties.

Points to Consider

- What is my goal?
- What are potential roadblocks to people doing what they are supposed to do under the contract? Is there any way that these roadblocks can be removed or overcome?
- What do I absolutely need? What do I want (but don't need)? What can I give up?
- What does the other side need? What do they want?
- Who holds the power in the relationship?
- Does the language in the contract support my position? Does it support the other side's position?
- Are there possible compromises or creative solutions that are helpful to both parties?
- How important is this business relationship? Do I want to maintain goodwill or simply walk away?
- Is the other side likely to be fair and reasonable if I am?

NOTE: *If you cannot come to an agreement with the other side, try to limit the damage inflicted on you and the other party as much as possible.*

OTHER RESOURCES FOR SMALL BUSINESSES

- Cleary Gottlieb – Federal Financial Relief for Small Businesses Under the CARES Act (COVID-19) (<https://www.clearygottlieb.com/-/media/files/alert-memos-2020/covid19-loan-and-grant-assistance-for-small-businesses-final-pdf.pdf>)
- NYC Small Business Services – Assistance & Guidance for Businesses Impacted Due to Novel Coronavirus (<https://www1.nyc.gov/site/sbs/businesses/covid19-business-outreach.page>)
- New York State Department of Labor – Unemployment Assistance (<https://labor.ny.gov/unemploymentassistance.shtm>)
- U.S. Small Business Administration – Coronavirus (COVID-19): Small Business Guidance & Loan Resources (<https://www.sba.gov/page/coronavirus-covid-19-small-business-guidance-loan-resources>)
- U.S. Chamber of Commerce – Coronavirus Small Business Survival Guide (<https://www.uschamber.com/co/start/strategy/small-business-resources-for-surviving-coronavirus>)

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