

Force Majeure and More: Evaluating the Impact of COVID-19 on your Contracts

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Coronavirus (COVID-19) has made a quick and unprecedented impact on businesses throughout the United States. Businesses are scrambling to try to get their arms around their current and future operations and to identify risks as proactively as possible. A key component of this risk evaluation needs to be understanding contracts with key customers and suppliers.

The first step is to identify the relationships that need to be evaluated. Top of mind should be relationships with immediate COVID-19 related needs. That includes any customers or suppliers (i) who have provided a force majeure notice or other communication indicating that they may not be able to meet commitments to your company, or (ii) to whom your company may not be able to meet its obligations. Additionally, your company should be identifying key customer and supplier relationships that are not yet strained but have the ability to significantly impact your business if disrupted.

Once key relationships have been identified, contracts should be evaluated. This needs to be done on a case-by-case basis. An appropriate course of action will be determined by the specific facts of the situation and the precise language of the contract. While contracts need to be evaluated as a whole, the most important provisions will often be:

- **Force Majeure:** A key contract term that may have been overlooked or underappreciated in negotiations, force majeure will play an important role as parties attempt to cancel or alter their obligations in response to COVID-19. These provisions determine the responsibilities of the parties when faced with unanticipated events and may potentially delay or excuse performance. The traditional force majeure provision contemplates “Acts of God,” including natural disasters, and war or unrest, but whether it covers COVID-19 will depend on the language of the provision or possibly state law.
- **Termination Rights:** In the absence of a force majeure provision that allows a party to delay or alter its performance, can a party simply terminate the contract? Is there a termination for convenience provision? Most contracts should have terms for termination in the event of a breach of contract. Even if neither party has breached the contract at this time, knowing what to look for can allow your company to more quickly identify a breach. Do the termination provisions require notice? Is there a specific form for the notice? How many days after providing that notice will the termination be effective?
- **Right to Amend the Contract:** It’s important to know whether one or both parties has the ability to amend a contract. Often amendments require mutual consent, but if the contract provides that one party can unilaterally change the contract, it will change negotiating power as the parties work through these current challenges. The parties may also want to proactively change portions of the contract that don’t match current or projected realities like, for example, adjusting purchase obligations that are unrealistic in this environment. The other party may verbally agree to modify the obligations, but having a written amendment (even if it applies only to a limited period of time) will ensure that parties be held accountable for their verbal promises.
- **Governing Law:** Often state law will play a key role in interpreting the language of a contract. The law governing the contract will be an important part of contract analysis.

Keep in mind, this evaluation is even more important if your company has key relationships without written contracts or where the contract contains standard terms and conditions that were not previously negotiated. In relationships without a

contract, the rights of the parties may be set by statute. With standard terms on something like a purchase order, the terms may be completely unfamiliar.

Understanding your company's contracts is an essential part of business planning and identifying risks in this uncertain time. Once your company understands its contracts and risks, it needs to put a plan in place to proactively address them. Tucker Arensberg is here to provide guidance or take these tasks off your plate so that you can focus on other important business planning.

For additional information contact Rebecca Moran.