

COVID-19 and Contract Performance

By Callie Whatley

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As the spread of COVID-19 continues and the situation and circumstances surrounding COVID-19 seem to be changing by the minute, it is expected that the health and safety of people are on the forefront of everyone's mind. However, with the growing impact of the spread of COVID-19 and the recommended/mandated social distancing measures to reduce the spread, it seems inevitable that many businesses will be affected.

Given the likely impact of COVID-19, many businesses may face a situation where they cannot perform under a contract or a number of contracts. However, contracts contain force majeure clauses, excusing non-performance under certain conditions for things outside the parties' reasonable control. Without these types of provisions, contractual nonperformance (or delayed performance) may not otherwise be excused, causing further issues to businesses. Assuming that a force majeure clause is included, it could be that COVID-19 constitutes force majeure under an applicable contract, however, this may not always be the case. This will largely depend on how the clause is drafted. For example, some force majeure clauses contain an exclusive list of what the parties negotiated as force majeure events under that particular contract. If that is the case, and pandemic or health emergency is not in the laundry list of items, then it may be more challenging to argue COVID-19 is a force majeure event. Other force majeure clauses may also have notice requirements, requiring the party impacted by force majeure to notify the other party within a certain period of time. Therefore, it is important to carefully review a force majeure clause to determine the potential impact that COVID-19 may have on a party's ability to perform under that particular contract.

If you have questions about how COVID-19 may impact your business's contracts, please contact the Burr attorney with whom you regularly work.

To discuss this further, please contact:

[Callie Whatley](mailto:cwhatley@burr.com) in Birmingham at cwhatley@burr.com or at 205-458-5441 or the Burr & Forman attorney with whom you regularly work.

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