

Contracts & Coronavirus: The Impact on Your Business and Potential Force Majeure Issues

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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 is 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. Burr & Forman is maintaining a COVID-19 resource center that can be accessed from our website (www.burr.com), but this is a summary of some contractual and corporate legal issues that may be expected to be faced by businesses going forward.

Contract Performance:

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.

It seems likely that force majeure clauses will be the topic of more careful and thoughtful negotiation moving forward, and clients should be prepared for these discussions when negotiating contracts moving forward.

Aside from force majeure clauses, there are other ways in which contract performance can be excused, such as impossibility of performance or contractual frustration, but these tend to be very narrow standards and not easily invoked. Each situation may turn on the facts and the caselaw in the relevant jurisdiction, but in many cases, economic hardship or delay of performance may not constitute impossibility.

Material Adverse Change Clauses:

Undoubtedly, the outbreak and spread of COVID-19 creates a tremendous amount of uncertainty for businesses and the economy in general. Many definitive agreements in merger and acquisition (M&A) transactions include a definition of “Material Adverse Change”, and there may be termination rights triggered by the occurrence of a Material Adverse Change. If your business is in the middle of an M&A transaction, it will be important to review definitive agreements to determine the effect of COVID-19 on the transaction, but general economic events, pandemics and natural disasters are often excluded from the definition of Material Adverse Change. Additionally, the long term effects of COVID-19 on businesses is generally unknown at this point, and given the fact that much of the relevant caselaw requires a significant and long term impact, it may be difficult to walk away from an M&A transaction until more is known about the impact of COVID-19. Any concerns on the effect of COVID-19 on M&A transactions should be discussed thoroughly with legal counsel.

Business Interruption Policies:

If a business has a business interruption policy, it is important to review that policy with appropriate insurance professionals and counsel to review what may be covered. It is likely that losses surrounding the COVID-19 outbreak are not covered, but this will depend on the language in the applicable policy. Please see Burr & Forman’s [COVID-19 Resource Center](#) for additional information on business interruption policies.

Employee Related Issues:

Any business that has employees is already struggling with how to deal with the rapidly changing guidelines and navigating existing laws through the COVID-19 crisis. Please see Burr & Forman’s [COVID-19 Resource Center](#) for more information on these issues.

Cash Availability/Financial Planning:

It is becoming clear that COVID-19 is disrupting many industries throughout the US and global economy. All businesses that expect cash flow to be interrupted should be communicating with their existing lenders and source of funds to review availability of credit and funds. Businesses should be advised to check with their legal and financial advisors on loan documents to try to get ahead of issues with loan covenants or other potential defaults. Assistance programs are being established for certain types of businesses and in certain locations, and businesses should consider whether they qualify for this assistance.

To discuss this further, please contact:

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