

THINKING AHEAD...

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FORCE MAJEURE RESOURCE

INCORPORATING THIS LANGUAGE INTO YOUR CONTRACTS

force ma ▪ jeure [fors mah-zhər]

an event or effect that cannot be anticipated or controlled; especially, an unexpected event that prevents the parties to a contract from doing or completing something they agreed to doⁱ

What Are the Parts of a Force Majeure Clause?ⁱⁱ

A wide range of documents include force majeure clauses. The basic parts of a force majeure clause are:

- **Parties Excused from Performance.** The clause usually begins with language allowing one or both parties to not complete their obligations under the contract if a force majeure event occurs. **You should always ensure you have the ability to invoke the force majeure clause.**
- **List of Force Majeure Events.** The list of events that trigger the force majeure clause is important. If a specific event is listed, the parties may invoke the clause and not have to fulfill their obligations. If the specific event is not listed, the parties will still need to fulfill their obligations. Failing to fulfill an obligation under the contract would be a breach if the force majeure clause is not triggered.

Each jurisdiction interprets the list of force majeure events differently. Some jurisdictions narrowly interpret force majeure clauses to only cover those events expressly listed. Other jurisdictions interpret the list of force majeure events broadly. Including other “events beyond the parties’ reasonable control” in the list of force majeure events may offer some additional protection for unexpected occurrences.

- **Notice Requirements & Duty to Mitigate.** A party may be required to provide written notice if the force majeure clause is being invoked. The party invoking the clause may also be obligated to minimize the effects of the force majeure event.

What Is the Effect of a Force Majeure Clause?

A force majeure clause excuses a party’s inability to perform or delay in performing its obligations under a contract without creating a breach of the agreement that would allow the other party to sue. The clause may also allow the parties to terminate the contract without penalty if the force majeure event causes a continued failure or delay in one party’s ability to meet its contractual obligations.

Is There Sample Language I Can Use?ⁱⁱⁱ

Because each jurisdiction interprets force majeure clauses differently, you should consult with a local attorney when drafting your contract. In general, the Definitions section of the contract should include the following:

“Force Majeure Event” means any act beyond a party’s reasonable control, including but not limited to

- (a) acts of God;
- (b) natural disasters, including floods, fires, earthquakes, or severe weather events;
- (c) pandemics, epidemics, quarantines, and declared public health crises;
- (d) wars, hostilities (whether war is declared or not), terrorist threats or acts, riot, or other civil unrest;
- (e) government orders, laws, or actions;
- (f) embargoes or blockades in effect on or after the date of this Agreement;
- (g) national or regional emergencies;
- (h) strikes, labor stoppages or slowdowns, or other industrial disturbances;
- (i) shortages of adequate power or transportation facilities; or
- (j) events beyond the parties’ reasonable control.

The contract should also include the following provisions:

1. Force Majeure.

- 1.1 Excused Performance.** If a Force Majeure Event causes a failure or delay in a party fulfilling or performing any term of this Agreement, the party shall not be in breach or default of this Agreement and shall not be liable to the other party, except for a failure or delay in the party’s obligation to pay.
- 1.2 Notice.** The party whose failure or delay is caused by the Force Majeure Event (the **“Impacted Party”**) shall give the other party **timely** written notice of the Force Majeure Event. The Impacted Party shall state the length of time the Force Majeure Event is expected to continue in the notice.
- 1.3 Impacted Party’s Duty to Mitigate.** The Impacted Party shall use diligent efforts to end the failure or delay and minimize the effects of the Force Majeure Event.
- 1.4 Resuming Performance.** The Impacted Party shall resume the performance of its obligations as soon as reasonably practicable after the cause of the failure or delay ends.

- 1.5 Right to Terminate.** If the Impacted Party's failure or delay remains uncured for [days] consecutive days following written notice under Section 1.2, either party may terminate the Agreement upon [days] days' written notice.

Does My Force Majeure Clause Cover the COVID-19 Pandemic?

Whether the current COVID-19 pandemic is covered by your force majeure clause will depend on your jurisdiction, unless the clause specifically includes pandemics, epidemics, quarantines, declared public health crises, etc.

What If My Contract Doesn't Have a Force Majeure Clause?

Depending on your state law, four general contract principles may still apply:

- **Impossibility.** Contractual duties may be discharged when it becomes impossible to perform them at no fault of the party with the obligation under the agreement.^{iv} Impossibility must be objective (i.e., nobody could perform the duty), rather than subjective (i.e., the party to the agreement does no longer has the capacity to perform the duty).^v
- **Supervening Illegality.** Contractual duties may be discharged when compliance with a government regulation or order makes it impossible to perform them.^{vi} As a general rule, the government regulation or order must come into existence *after* the parties signed the contract.^{vii}
- **Impracticability.** When performing a party's duties under a contract is *extremely or unreasonably* difficult or expensive (e.g., would cause a devastating loss), even though performance *could* be possible, contractual duties may be discharged as impracticable.^{viii} Although possible, impracticability is rarely granted as a reason for discharging contractual duties.
- **Frustration of Purpose.** When a supervening event frustrates an agreement's principle purpose and makes one party's fulfillment of its contractual duties virtually worthless to the other party, a court may discharge the contractual duties.^{ix}

You should consult with a local attorney to determine if any of these principles apply to your contract.

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ⁱ Force Majeure, BLACK'S LAW DICTIONARY (11th ed. 2019).

ⁱⁱ See General Contract Clauses: Force Majeure, PRAC. LAW STANDARD CLAUSES (West 2020).

ⁱⁱⁱ See *id.*

^{iv} See RESTATEMENT (SECOND) OF CONTRACTS § 261 (AM. LAW INST. 1981); see also U.C.C. § 2-261 (AM. LAW. INST. & UNIF. LAW COMM'N 1977) (outlining the elements of commercial impracticability when the contract involves the sale of goods).

^v RESTATEMENT (SECOND) OF CONTRACTS § 261, cmt. e (AM. LAW INST. 1981).

^{vi} *Id.* § 264.

^{vii} Compare *id.* (describing supervening illegality), with *id.* § 266(1) (describing frustration by a condition unknown to the party at the time of contract formation).

^{viii} See *id.* § 261, cmt. d.

^{ix} *Id.* § 265.