

COVID-19



CORONAVIRUS: COVID-19 AND YOUR CONTRACTUAL OBLIGATIONS

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Foulston has produced a series of issue alerts as we continue to monitor the evolving COVID-19 situation and provide additional guidance. Please find all updates and our latest resources available [here](#).

With newly confirmed cases of COVID-19 in the region, including the large metro areas of Kansas City and Wichita as of March 13, Foulston's series of alerts continues. **What does the spread of COVID-19 in Kansas and Missouri mean for the performance of contractual obligations?** While there are just a few COVID-19 patients in the region today, what happens if 10 employees from your workforce are at the hospital or sick at home tomorrow? Will you be excused from performing your contractual obligations? What about your contractual counterparties?

It depends.

Facing such uncertainty, a threshold legal question that numerous providers of goods and services are trying to answer is ***whether the COVID-19 global pandemic constitutes a force majeure event under their contracts?***

"Force majeure" events typically occur *beyond the control* of the parties. While COVID-19 certainly feels beyond anyone's control at this time, the intuitive response to the above question would tend to be "yes." However, there is no bright line answer.

It depends on the language of your contract, the actual circumstances surrounding nonperformance of contractual obligations, and the applicable law governing your agreement.

Force majeure clauses can vary widely across contracts and industries. Some provisions are sweepingly broad, and others are starkly narrow—with many that fall in between. Consequently, whether COVID-19 constitutes a force majeure event, thus excusing or delaying performance obligations, depends on the terms of the provision as drafted and the unique facts and circumstances of the party claiming an inability to perform.

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Since the likelihood that force majeure clauses will soon be invoked is growing, now is the time to review your contracts and ask yourself the following:

- EXISTENCE: Is there a force majeure clause in my agreement?
- SCOPE: Which causes explicitly trigger a force majeure event? Are any causes explicitly prohibited from triggering a force majeure event? Are other implicit force majeure events triggered by catch-all language?
- CONNECTION: How does my contract connect the force majeure event with performance? Does my contract require the event to make performance illegal or impossible? Does my contract require the event to make performance inadvisable or impractical?
- EFFECT: If a force majeure event is triggered, how are my obligations affected? Is my performance completely excused or merely delayed? What about the performance of my contractual counterparties? How long may my performance be excused or delayed? Does a force majeure event affect the term of my contract? Am I or my contractual counterparty able to terminate or renegotiate the contract after a certain period of time passes?

Having a basic understanding of the force majeure language in your contracts will serve you well if you should soon find yourself in a situation where you must answer the following questions:

1. Does COVID-19 (or my actual circumstances) fall within the scope of the definition of “force majeure” in my contract provision?
2. Is there a causal connection between the COVID-19 triggering circumstances and my (or my counterparties’) claimed inability to perform?

While we can envision various scenarios where strong arguments can be made in support of claims that COVID-19 constitutes a force majeure event, ultimately, each contract’s terms and the actual circumstances surrounding nonperformance will have to be analyzed on a case-by-case basis under the applicable law.

FOR MORE INFORMATION

If you have questions or want more information, contact your legal counsel. If you do not have regular counsel for such matters, Foulston Siefkin LLP would welcome the opportunity to work with you to meet your specific business needs. Please contact **Francis J. Baalman** at fbalman@foulston.com or 316.291.9559 or **Samantha K. Ernst** at sernst@foulston.com or 316.291.9714. Foulston's lawyers maintain a high level of expertise regarding federal and state regulations affecting businesses. At the same time, our supply chain practice group's relationship with Foulston's other practice groups, including the taxation, general business, healthcare, employment and labor, and commercial litigation groups, enhances our ability to consider all of the legal ramifications of any situation or strategy. For more information about Foulston, please visit our website at www.foulston.com.

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RESOURCES

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