

Evaluating Your Contracts in the Wake of the Coronavirus Pandemic

Home builders should expect delays caused by supply chain disruption, workforce unavailability, and even permitting due to shelter-in-place recommendations to stem the spread of COVID-19 caused by a novel coronavirus. Companies should carefully review their contracts now for certain provisions that allow for such delays.

One of the principal roles of a commercial contract is to allocate risk between the parties. A force majeure provision allocates risk and provides notice to the parties of events that may suspend or excuse performance under the contract if specified events occur that are beyond the party's control.

A force majeure provision allows a contracting party to mitigate its risk of breach due to events or circumstances it did not cause and could not have anticipated. In addition to allowing a builder additional time to complete the project, it might also allow for termination of the contract if performance is prevented beyond a specified period.

With the spread of coronavirus, businesses may be unable to fulfill pre-existing contractual obligations due to delays in production, shortages of materials, or lack of employee availability due to quarantine or inability to travel due to travel restrictions. Business restrictions imposed by governments are becoming more commonplace.

For example, Boston Mayor Marty Walsh suspended all regular construction activity in the City of Boston starting Tuesday, March 17, 2020, and the San Francisco Mayor issued an Order, which began at 12:01 a.m. Tuesday, requiring all individuals anywhere in San Francisco to shelter in place—that is, stay at home—except for certain essential activities and work to provide essential business and government services. Quarantines are resulting in disruptions in supply chains, delaying imported building materials. And slowdown of permit processing due to government office closure or telecommuting might also further impede a builder's performance under the contract.

Builders should review their contracts with their attorney to determine whether they include a force majeure clause or a similar clause dealing with the concept of delays and extensions of time for performance. To avail itself of a force majeure provision, the builder may need to comply with other relevant contractual provisions, such as one requiring the giving of notice to the other party. Failure to provide such notice may constitute a breach of the agreement.

Force majeure events and circumstances may be either:

- Natural occurrences
- Man-made events or circumstances

What types of events constitute force majeure depend on the specific language included in the clause itself.

Common examples of force majeure events include:

- Unavailability of materials
- Inclement weather
- Strikes
- Changes in government regulations
- Acts of government agencies or their employees
- Acts of God
- Any event reasonably beyond the Builder's control but not caused by the Purchaser

A party seeking to rely on a force majeure clause must first establish that the intervening event falls within the contract's definition of force majeure. Most force majeure clauses provide a list of triggering events. Where coronavirus, or COVID-19, is not captured by a specific or analogous term, it may nevertheless be covered by broader language in the contract. It remains to be seen how courts, arbitration panels, and other tribunals will resolve the issue of whether COVID-19 and the associated impacts, such as quarantine, constitute a force majeure event.

It is critical to understand how your contractual rights can protect your company – now is the time to review key contract and insurance policies, and if you have questions or need advice, contact your local attorney.

Additional information for home builders may be found on the Coronavirus Preparedness and Response page on nahb.org.