
Addressing the Novel Coronavirus In Your Contracts

Description

In our previously published client alerts regarding the coronavirus, we highlighted the importance of reviewing the terms of existing agreements in light of the threats posed by novel coronavirus COVID-19 ("coronavirus"). While businesses may not be able to easily change existing agreements, they should take steps to ensure that they are protected going forward. This advisory addresses some common pitfalls and highlights issues to consider when negotiating agreements in light of the current state of affairs.

For the foreseeable future, businesses should negotiate and include force majeure provisions in their contracts that sufficiently address the risks posed by the coronavirus. These clauses should indicate that force majeure events include, but are not limited to, "outbreak," "epidemic," or "pandemic," and, ideally, refer to "novel coronavirus" and "COVID-19."

The force majeure provisions should also address the available remedies, timing and form of notice to be provided by a party looking to invoke the force majeure provision. Remedies can vary significantly. Some provisions merely allow for an extension of time to perform under the agreement or excuse a temporary breach, while other provisions permit a party to stop performing altogether or to terminate the agreement.

Given that delays from the coronavirus could impact businesses for weeks, months or longer, businesses should at least discuss including language to the effect that certain deadlines may be tolled (i.e. paused) for the duration of the force majeure event. This would allow contracts to remain in effect, with performance delays and breaches excused, for the duration of the force majeure event without penalty.

Even if the parties agree that tolling deadlines is a good idea, they should consider including an outside deadline for performance, beyond which the parties can terminate the agreement. For example, the parties could include language to the effect that "If the force majeure event lasts for longer than X days after the date of the non-performing party's force majeure notice, then the other party may terminate this Agreement immediately by notice in writing to the non-performing party."

It is unusual for force majeure provisions to excuse a party's performance of monetary obligations under an agreement (e.g., the payment of rent, or paying vendors for goods delivered). But given the current uncertainty, parties may benefit from negotiating the parameters under which payment obligations will be tolled or excused, if any. Parties hoping to receive rent abatement or other monetary concessions under existing agreements are unlikely to be successful under a theory of force majeure unless the agreement specifically excuses performance of monetary obligations.

The parties should also ensure that the notice requirements in their force majeure provisions are clear. For example, rather than saying notices must be delivered "promptly," the parties might require notice to be delivered "no later than five days after the occurrence of a force majeure event and prior to a party's failure to perform." The provision should be clear as to whether the notice must be provided prior to a party's failure to perform or if a notice can be provided after the fact.

Finally, with many businesses currently operating remotely, parties should indicate that notices may be delivered electronically to an e-mail address of record, with notice deemed received when sent by the notifying party. Including such language will help parties avoid ambiguity over whether notice was received.

With the current situation evolving on an hourly basis, there are many considerations for any business entering into any kind of agreement, and this article highlights only a few of those considerations. Parties will need to be creative in developing solutions to the risks posed by coronavirus.

Previously published client alerts related to coronavirus, include [What Businesses Can Do To Prepare For Coronavirus](#) and [Interpreting the Force Majeure Clause In Your Contract](#).

Partridge Snow & Hahn's [Business Law Group](#) is ready to answer questions and to provide advice on how to address general and specific business risks posed by the coronavirus. For additional current information and resources visit the firm's [COVID-19 Advisory Group](#) page.

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