

Performance During a Pandemic: Are Contracts Enforceable?

As our country comes to grip with the COVID-19 pandemic, extraordinary measures are significantly impacting our everyday lives. This applies to our contracts—different rules apply in extraordinary times. Many individuals and businesses are finding that stay-in-place and public health orders are impacting their ability to perform on their contracts—or are impacting the ability of their contractors to perform.

When deciding whether performance of a contract is required during the COVID-19 pandemic, or whether contracts can be enforced, individuals and businesses should consider the following pandemic-related contract doctrines. These doctrines might apply in all kinds of contracts, including leases, real estate contracts, construction contracts, service contracts, manufacturing contracts, and the sale of goods.

Force Majeure

Some contracts contain what are called “force majeure” provisions (Latin for “superior force”). These provisions govern whether performance is required when an event occurs that is outside the control of the parties and which prevents performance. It may be possible that under many force majeure provisions, the COVID-19 pandemic constitutes a superior force that prevents performance, especially given the numerous public health orders issued by federal, state, and local governments. However, not all force majeure provisions are the same—each contract must be inspected individually.

Excusable Delay

Contracts may also contain “excusable delay” provisions, which, as their name implies, excuse late performance because of an unforeseen circumstance. These provisions can be broader than force majeure provisions and may also excuse delay in less drastic circumstances, for example, during a strike, labor shortage, or shortage of materials that are a byproduct of the COVID-19 pandemic. But again, no excusable delay provisions are the same—each contract must be analyzed individually.

Impossibility & Impracticability

Even if your contract lacks a force majeure or excusable delay provision, the impossibility and impracticability doctrines developed by courts may apply to excuse performance of a contractual duty. Typically, for the impossibility or impracticability doctrine to apply, it must be shown that an unforeseen event, which the parties did not contemplate at the time of contracting, occurred and completely prevents or makes impracticable the performance of the contract. This event could be natural, such as the COVID-19 pandemic itself, or the reactions to the pandemic, such as government-issued public health orders.

Frustration of Purpose

In some instances, while a contract is still technically performable, but its purpose is frustrated by an unforeseen event, performance of the contract may be excused as long as the contract’s purpose is frustrated. For example, if a concert venue contracted with a food truck vendor to provide food during a concert that is now cancelled because of a COVID-19 public health order, the food truck vendor may still technically be able to perform the contract by showing up at the venue and preparing food, but the purpose of the contract is frustrated: there are no concert goers who will eat the food.

Termination or Delay

In some instances, these court-created doctrines might apply to allow a party to completely terminate the contract without full or any performance. In other situations, the doctrines might apply to temporarily suspend performance while the impracticability or frustration exists—here, while the public health orders are in place.

Despite the COVID-19 pandemic, there will be many contracts that are still capable of being performed. Additionally, there may be contracts that lack force majeure or excusable delay provisions and do not clearly implicate the doctrines of impossibility, impracticability, or frustration of purpose.

Eventually, these public health orders will be lifted and we will move past this crisis. However, the impact on our contracts may be felt for a while. Individuals and businesses that are impacted should consult with counsel regarding their options and rights under those contracts.

We would be happy to answer any questions you may have. The attorneys at Fabian VanCott are here for you during these unique times.



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