



FULFILLING OUR PROMISES
TO THE MEN AND WOMEN WHO SERVED

NONPROFIT ADVISOR

For DAV Departments and Chapters

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MAY THE *FORCE MAJEURE* BE WITH YOU

In light of May 4th, we thought it appropriate to tip our hat to Star Wars fans, present company included, to delve into the legal topic of event cancellation. It is no secret in the past several months, organizations around the country have canceled events, and this pattern will likely continue with the advent of the COVID-19 pandemic. Reliance on event cancellation clauses, once rarely invoked, have become the new norm and a hot topic in the legal community as companies scour to determine if such clauses help or harm them.

Event cancellation contracts are often one-sided in favor of the drafting party (usually the event center, hotel, etc.) and increase in penalties as the date approaches. However, certain contract clauses, known commonly as *force majeure* provisions, may protect the cancelling party from incurring fees that at times are substantial. *Force majeure*, which appears frequently in contracts, excuses parties from certain responsibilities and obligations due to events that are deemed to be out of the realm of control. However, as discussed in more detail below, COVID-19 does not automatically trigger the *force majeure* clause – one must show that the clause covers the unforeseeable act at issue in addition to proving a causal connection. Also, we briefly explore alternatives that the cancelling party may rely on if the *force majeure* clause is inapplicable or nonexistent in the contract.

1. *Force Majeure*
 - a. Words Matter

It is important to note that there is no generic definition of *force majeure* in common law. It is a matter of contractual interpretation in each case. First, the contract must contain such clause and specify the type of event capable of encompassing the COVID-19 outbreak. Most clauses do not expressly mention pandemics. However, the clause may be drafted broadly enough to include “any circumstance making it illegal or impossible to provide or use facilities... including government regulations or curtailment of transportation facilities.” Courts will likely find government shelter-in-place orders, restrictions on group gatherings and travel bans due to COVID-19 to fall under government regulations or curtailment of transportation facilities.

Moreover, moving forward, we recommend you consider including health threats, such as COVID-19, in your *force majeure* clause for an event contract. For example:

The performance of the agreement by either party shall be subject to *force majeure*, including but not limited to... recognized health threats as determined by the World Health Organization, the Centers for Disease Control, or local government authority or health agencies (including but not limited to the health threats of COVID-19), or other similar occurrence beyond the control of the parties.



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b. Causal Relationship

Second, the party seeking to enforce the *force majeure* clause has to scrutinize not only the contract language but also the underlying facts to answer the question: is there really a causal relationship? A way of answering this is to ask: But for the occurrence of COVID-19, would the event had taken place? The answer is most likely yes.

Because it is largely judge-made law, the application of this defense will vary based on your jurisdiction.

2. The Absence of *Force Majeure*

What happens if the *force majeure* is not with you, and your contract is devoid of such a clause? The good news is there are still other avenues to explore.

b. Amendment to Reschedule Event

Many organizations are looking to reschedule events for some future date. If this is the case with your event, we would recommend contacting the event center to discuss amending the contract for a later date without penalty to either party.

a. The Impossibility Defense

Impossibility is a common law principle that you can use to terminate the contract if the contract does not have an adequate cancellation or *force majeure* clause. Generally, factors to consider:

As always, if you are faced with having to cancel an event due to COVID-19, we recommend you consult with your legal counsel. The Legal Department hopes you and your friends and family are staying healthy and safe during these unprecedented times.

- foreseeability of an event occurring (COVID-19 not foreseeable)
- the fault of the nonperforming party (no fault here)
- the severity of harm and other circumstances affecting the just allocation of risk (certainly COVID-19 has caused severe harm)