



*This article presents general guidelines for Georgia nonprofit organizations as of the date written and should not be construed as legal advice. Always consult an attorney to address your particular situation.*

### **Contract Considerations Related to the COVID-19 Outbreak**

Have you had to cancel your annual fundraising gala that was going to be held at a hotel? Or does your organization rent out facilities for community events that have been postponed or cancelled due to the shelter-in-place order? Do you have other types of contracts that have been impacted by the COVID-19 outbreak? Don't panic. We are all facing unprecedented times and you are not alone.

There will be a variety of emerging issues on this topic over the next several weeks and months, but below are some general guidelines to help you plan your next steps. Keep in mind, however, that contract interpretation under these circumstances is highly fact-specific. After reviewing this article, we encourage you to gather all relevant documentation and then consult your PBPA Attorney to determine the best course of action for your organization.

#### **First, look to your contract.**

You may be "excused" from performing your contract obligations, if the reason you are unable to perform them is due to unexpected events. While every contract is different, the provision most likely to help you will be a *force majeure* clause, which relieves the parties from performing their contractual obligations under various extreme circumstances. "Force majeure" translates to "superior force" in French and traditionally has been applied to unpredictable events such as natural disasters, war, disease, or certain government actions. The list of potential triggering events may be very general and limited, such as "acts of God or government authorities, natural disasters, or other emergencies" or it may consist of a long list of potential, but generally unforeseeable, events. The clause may also include a catch-all provision that introduces the list of events as "including but not limited to" those listed or comes at the end of the list through language to the same effect.

Generally speaking, *force majeure* clauses are strictly construed by Georgia courts, which means specificity matters. If an event or occurrence is not explicitly named, it may not trigger the clause's provisions. Ideally, your contract will identify "pandemic" or "disease" as a triggering event, or if a shelter in place order was the ultimate cause for the contract interruption, "government acts" might also apply.

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If your contract does not have a *force majeure* clause, look for other provisions that might govern the situation such as a cancellation, termination, or impossibility clause. For example, an impossibility clause may state that “neither party shall be responsible for its nonperformance where such nonperformance is impossible due to acts of God or other causes reasonably outside of that party’s control.”

At the end of the day, whether or not a provision will apply will depend on the language contained in the contract. In interpreting the clause, courts will also consider whether the event was outside of the control of a party, whether it was unforeseeable, and how the triggering event (in this case, a global pandemic) affected the ability of the parties to perform. For example, the mere fact that a party was unable to meet its obligations *during* the pandemic would not excuse duties under the contract—the pandemic (or perhaps government orders related to the pandemic) must have been the ultimate reason for the failure to perform.

### **Determine your obligations.**

Also important to interpreting a *force majeure* clause is recognizing and understanding its notice requirements. Notice requirements may specify both *how* and *when* a party should let the other party know that its ability to perform under the contract has been impacted. Just because both parties may be aware of the occurrence of an event, that does not mean you do not have to provide notice if it is required under the contract. While notice requirements under different contracts vary, *force majeure* clauses may provide for a relatively short notice period, such as five or ten days, between the occurrence of the triggering event and notification by the affected party. Thus, knowing and understanding exactly what your contract requires is vital to the successful invocation of a *force majeure* clause. Further, the clause may impose additional obligations after invoked, such as an explicit obligation to mitigate (or minimize) all losses.

### **What if my contract does not contain a *force majeure* clause or there is no contract?**

Where a contract does not contain a *force majeure* clause, or where there is no written contract, parties may be able to rely upon “equity” to relieve themselves of obligations under the agreement. A court’s equitable power is its ability to fashion a fair resolution in light of the circumstances involved. Equity can be viewed as akin to the Golden Rule—a party must give equity to receive equity. So in all your dealings with the other party to the contract in the coming days and weeks, it’s important to be fair and make good faith efforts to work things out before turning to the courts—not to mention that our legal system will likely be strained for years to come deciding issues that stem from the COVID-19 pandemic. Reaching a mutually agreeable resolution, even if at a slight loss, may be a better outcome than resorting to costly litigation. When attempting to reach such a resolution, keep a complete and accurate record of all your dealings.

### **What will the remedy be?**

Although a *force majeure* clause may allow for complete cancellation of a meeting or termination of the agreement without penalty, what happens when a deposit has been paid or one of the parties is otherwise injured by the failure to perform under the contract? Again, it depends on the language in your contract. Some clauses are drafted to require a refund of pre-paid fees, while others address only prospective payments. Similarly, if a *force majeure* event occurs during performance, the contract may provide for pro-rated payment for services already rendered. If the contract is silent, or if there is no contract in place, the principles of equity described above will likely dictate the end result. It is also significant that, in the past, courts have exercised greater latitude in their interpretation of contracts in times of extreme hardship, such as during the days following the September 11<sup>th</sup> terrorist attacks.

### **Check In With Your Insurance Carrier**

This is also a good time to check in with your insurance carrier. If your organization obtained event insurance, it may lessen the impact of losses stemming from cancellation or interruption. Also, if your organization holds a business interruption policy, it may help to mitigate some COVID-19 related losses, such as cancellation of a fundraiser or inability to otherwise rent out facilities.

### **Lessons Learned**

The COVID-19 pandemic presents us with an important lesson learned moving forward—to pay special care and attention to include a comprehensive *force majeure* clause in all contracts. And it may be prudent to review current contracts to see if they need revisions in light of the recent global events. COVID-19 also highlights the importance of obtaining insurance wherever reasonable to better allocate risk and insulate your organization from loss.