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To: FCA International Contractor Members  
From: FCA International Legal Counsel  
Subject: **Is COVID-19 Covered Under “Force Majeure” Clauses?**  
Date: March 24, 2020

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## **IS COVID-19 AN EXCUSE TO NOT PERFORM UNDER A CONTRACT?**

The answer: it depends. The COVID-19 pandemic took an unfortunate turn when a variety of events, performances, jobs and conferences were all canceled to “flatten the curve.” In addition, local jurisdictions are now starting to declare mandatory quarantines or isolations in order to stymie the spread of COVID-19.

Such arrangements are done for good reason, but they have left many wondering what their obligations are with respect to previously executed contracts. More specifically, many companies are wondering what their rights are in the event of their, or another party’s, nonperformance or inability to perform under a contract.

The first step to answer this important question is to review the governing contract to determine whether there are any provisions that cover unforeseen delays or nonperformance. Such provisions are typically referred to as *force majeure*, acts of God, impossibility, or impracticability provisions.

A *force majeure* provision, for example, allows a party—under certain situations—to delay or excuse nonperformance under a contract due to unforeseen circumstances. While there is little question that a global pandemic is an unforeseen circumstance, the party that bears the risk and loss for any resulting delay or nonperformance will be dictated by the specific language used in the controlling agreement.

Therefore, whether the COVID-19 pandemic will be considered a *force majeure* will depend upon the contractual language previously agreed to by both parties. Some courts have previously held that prior similar outbreaks were *force majeure* events. However, it is important to note that any prior legal decision will depend on the specific language of the agreement and the applicable law of the jurisdiction.

Another consideration is to review any business insurance that your organization may have in the event there are any business interruption provisions, or other similar provisions covering such inability to perform. In some cases, insurance policies have similar language that will provide some protections.

**Bottom Line:** *Force majeure* provisions can either be a blessing or a curse depending on what side of the contractual language your company is on. These types of provisions vary greatly in scope and allocation of risk. Therefore, it is crucial that you review any contracts with your attorney in order to better understand your specific situation.