



By: Jared K. Cook, Esq.
Tel. (585) 327-4163
jcook@adamsleclair.law

Updated March 30, 2020

CONTRACT OBLIGATIONS DURING THE COVID-19 PANDEMIC - WHAT ARE YOUR RIGHTS?

What if I cannot meet my current business obligations?

In addition to the concern that we all have for the sick, business owners need to be thinking about how they will meet their obligations in the current situation, and if they cannot, what are their options, and how they will respond.

The best strategy, in almost all cases, is going to be to get out in front of the problem as soon as possible and to communicate clearly with all parties involved. If you have a contract that you are no longer able to meet because of the coronavirus pandemic, you should raise that issue with the other party as soon as it appears that you will not be able to do so, and if possible, attempt to negotiate an extension of your obligation, or negotiate to be released from your obligation on terms that both sides can agree on.

If you're not able to reach an agreement with the other party, and the other party wants to enforce the contract, then you may have certain defenses available to you:

Force Majeure. Some contracts will include a clause known as a “force majeure” clause—a provision of the contract that releases the parties from some obligations or terminates the contract if some unforeseen event makes it impossible for them to perform their obligations. Sometimes such provisions will explicitly name a pandemic as an example of an event that qualifies as a force majeure event. Sometimes they might refer to natural disasters or “acts of God” or acts of government that make it impossible to perform. The current coronavirus pandemic may qualify under multiple possibilities. If your contract does not specifically name pandemics, the pandemic itself may qualify as an act of God or a natural disaster that triggers the force majeure clause. Or, if you do business in an area subject to a mandatory quarantine order or shelter in place order, such orders may

qualify as acts of government that trigger the force majeure clause. Ultimately, whether the coronavirus pandemic qualifies as a defense under such a clause will depend on the specifics of your particular contract.

Such provisions frequently include mandatory notice provisions that require you to notify the other party within a certain period of time, and in writing. That is another reason why it is extremely important to communicate with the other party as soon as possible.

Impossibility. The common law doctrine of impossibility states that if an unforeseen event makes it impossible to fulfill the contract obligations, the court is empowered to release the obligated party from those obligations if the other party seeks to enforce the contract. This generally will not apply if circumstances make compliance with the contract merely inconvenient or more expensive than you had planned on. Generally, you have to show that the circumstances make it impossible to comply.

Note that these defenses apply to contractual obligations and not, in most cases, to statutory obligations, such as the obligation to pay the minimum wage.

Illegality. If it would now be illegal to perform your obligations under the contract based on new laws or regulations, you may be able to cancel based on the common law doctrine of illegality, which says that an illegal contract is void and unenforceable.

Frustration of purpose. Another common law doctrine that may apply, frustration of purpose applies when the fundamental purpose of the contract is frustrated by events beyond the contracting parties' control, where the events were not foreseeable when the contract was entered.

What if others cannot fulfill their obligations to me?

If the coronavirus pandemic and the government response to it have made it impossible for others to fulfill their contractual obligations to you, and you seek to enforce the contract, they may be able to use the defenses explained above. But whether those defenses apply will depend on the specific language of the contract and the particular circumstances of your situation.

You may be able to overcome such a defense, for example, by showing that the pandemic did not actually make it impossible for the other person to perform their obligations. If, for example, the other person was not on track to finish their obligation in time before the pandemic, you may be able to show that the pandemic was not the cause of their failure to perform. Or you may be able to show that the other party did not comply with the provisions requiring them to give you notice. Ultimately, that is an issue that will depend on the particular contract.

Again, your best strategy in most cases is going to be to get out in front of the problem and communicate with the other party and attempt to negotiate a solution that will work for both sides.

Do I have other options?

Ultimately, if one party is unable to perform, somebody is going to lose money. And while negotiating a solution may mitigate that loss, it may not eliminate it, and that can put pressure on businesses as they continue to meet their ongoing operating expenses.

Fortunately, the emergency aid legislation recently passed may give you some additional options to relief for such losses and prevent layoffs. A two trillion dollar package was passed on March 27, 2020. This package includes, among other things, a provision for Small Business Administration loans with loan forgiveness.

This loan provision makes SBA loans, with relaxed requirements, available to small businesses and certain non-profits, who need to borrow money to continue their operations because of the uncertainty caused by the pandemic. Under this program, between February 15 and June 30, 2020, businesses can borrow up to 2.5 times their average monthly operation costs over the past year, up to \$10 million.

The loan can only be used for payroll, mortgage interest, rent, and utilities. The loan amount spent by businesses during the first eight weeks will be completely forgiven if the business has not reduced the number of employees or the employees' compensation. If the workforce or employee compensation is reduced, the amount of forgiveness will be significantly reduced in proportion to these reductions.

Conclusion

If you or someone you do business with is unable to perform under a contract, you should have a lawyer review the contract and the specifics of the inability to perform in order to be able to advise you about the likelihood of success of a defense against a claim for breach of contract.

Experts are saying that it could take up to 18 months to contain the coronavirus pandemic, and that that period may include multiple rounds of social distancing and quarantine orders. You should also consider reducing the uncertainty of future events by having a lawyer review your existing contracts and advise you about including a contract provision to address these types of events in future contracts you enter into.



www.adamsleclair.law