



**COMMONWEALTH OF  
MASSACHUSETTS  
FORCE MAJEURE LAW  
COMPENDIUM  
(during COVID-19 pandemic)**

**Prepared by**

Noble F. Allen

Sara J. Stankus

Hinckley, Allen & Snyder, LLP

20 Church Street, 18th Floor

Hartford, CT 06103

(860) 725-6200

[www.hinckleyallen.com](http://www.hinckleyallen.com)

## **A. Introduction**

This memorandum will seek to provide a Massachusetts exemplar for the USLAW NETWORK Compendium of Law on relevant considerations with respect to invoking “force majeure” clauses in contracts in light of the ongoing COVID-19 crisis.

## **B. Force Majeure in Massachusetts**

### **1. Introduction**

With many businesses unable to operate or operating at reduced levels due to the COVID-19 pandemic, many commercial parties are reviewing their contractual rights and obligations to determine whether a force majeure clause excuses their performance. “Force Majeure” excuses contracting parties from liability when an extraordinary event or circumstances outside their control (such as war, natural disasters, or an “act of God”) prevents one or both parties from fulfilling their obligations. Most force majeure clauses do not free a party from performing entirely, but suspend performance for the duration of the force majeure event. In the absence of a force majeure clause, the common law recognizes the defenses of commercial impracticability/impossibility, and/or frustration of purpose. These concepts may apply when performance of the contract is radically different from what the parties intended.

### **2. Requirements to Obtaining Relief Using Force Majeure**

Force majeure is controlled by the law governing the contract, rather than general concepts of force majeure. Whether a force majeure clause excuses parties from their contractual obligations depends on the precise wording used, the allocation of risk between the parties in the contract, the circumstances in which the parties entered into the contract, and the particular circumstances of the situation. See, e.g., Itek Corp. v. First Nat. Bank of Bos., 730 F.2d 19, 26 (1st Cir. 1984) (finding the Iranian revolution, which resulted in the suspension of all U.S. export licenses to Iran, was a force majeure event sufficient to relieve performance); Baetjer v. New England Alcohol Co., 319 Mass. 592, 597 (1946) (holding it was necessary to construe force majeure clause with reference to previous clauses of contract).

Force majeure clauses generally define the types of events which relieve a party from performance. If not specifically defined, an event constituting force majeure is one that is “construed as unforeseeable, unanticipated, or uncontrollable.” Harper v. N. Lancaster, LLC, 95 Mass. App. Ct. 1119 (2019). Where the term epidemic or pandemic is used, the force majeure clause will cover COVID-19. Where no relevant event is specifically identified, a court must determine whether the parties intended the event to be covered. Massachusetts has little to no case law specifically addressing the application of force majeure provisions in the context of pandemics or outbreaks of disease.

Contracts may, instead, refer to events or circumstances “beyond the parties’ reasonable control.” In such cases, whether the force majeure clause covers issues arising from COVID-19 is

a question of interpretation and is fact specific. Parties will need to show that their non-performance was truly outside their control and could not have been prevented or mitigated.

Even if COVID-19 or related government closures are the types of events covered by the force majeure clause in the contract, the event must impact a party's ability to perform before they will be relieved from liability. A party seeking to rely on a force majeure clause must show that they cannot perform the contract due to the force majeure event, the force majeure event was the cause of the inability to perform, non-performance was due to circumstances beyond their control, and there were no reasonable steps they could have taken to avoid or mitigate the non-performance. Increased costs is not usually a sufficient basis to excuse non-performance or delay. See, e.g., Iodice v. Bradco Cleaners, Inc., 1993 Mass. App. Div. 54 (Dist. Ct. 1993) (rejecting defenses of impossibility of performance and commercial frustration of purpose where tenant alleged the benefit of its bargain in leasing commercial space was destroyed by the unexpected departure of center's anchor stores and the consequent reduction of consumer traffic and business opportunity in the center).

### **3. Scope of Relief**

Where a force majeure clause is successfully invoked, a party will be excused from its obligations and/or liability under the contract. Force majeure clauses may also provide for extensions of time or termination in the event of continued delay or non-performance. A right of termination could provide significant leverage for a party to renegotiate the terms of the contract.

If the contract lacks a force majeure clause, the affected party will have to look to other provisions of the contract and/or the common law to be relieved of its obligations.

### **4. Other Considerations**

A business seeking to rely on a force majeure clause must also comply with any contractual requirements such as a requirement to give notice of its intention to rely on the clause to the other party within applicable timeframes, including any required notice formalities. Where a party anticipates it will be unable to meet its obligations, it is critical to explore whether there are any steps the party can take to mitigate their non-performance, such as locating alternative sources of labor or materials, or in the case of restaurants and box stores, offering curbside pickup or delivery.

**This Compendium outline contains a brief overview of certain laws concerning various litigation and legal topics. The compendium provides a simple synopsis of current law and is not intended to explore lengthy analysis of legal issues. This compendium is provided for general information and educational purposes only. It does not solicit, establish, or continue an attorney-client relationship with any attorney or law firm identified as an author, editor or contributor. The contents should not be construed as legal advice or opinion. While every effort has been made to be accurate, the contents should not be relied upon in any specific factual situation. These materials are not intended to provide legal advice or to cover all laws or regulations that may be applicable to a specific factual situation. If you have matters or questions to be resolved for which legal advice may be indicated, you are encouraged to contact a lawyer authorized to practice law in the state for which you are investigating and/or seeking legal advice.**