

# CAN I AVOID CONTRACT OBLIGATIONS BECAUSE OF THE CORONAVIRUS?

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If the virus has impacted your income, honoring contractual obligations like rent, equipment leases, car payments, insurance bills, etc. can be problematic. Even if your income hasn't taken a hit, it may be impossible to fulfill a contractual obligation to provide or partake of a service you previously agreed to by contract. What's the law do about these things.

Here, everything is very case specific. There is no one over-arching rule akin to “Thou shalt not steal.” Every person's circumstance is legally different but here are some principles which may help you figure out your particular situation.

**FORCE MAJEURE**: This relatively unknown contract clause is something the virus has shone a light upon recently. It's pronounced force mah-jer. In French it means superior force. Lawyers appropriated the concept for use in contracts as a legal reason to excuse a party's performance under the contract because of a “superior force.” A superior force was typically something well beyond the party's control and unforeseeable. Common examples were things considered to be an “Act of God” like a hurricane, earthquake, volcanic eruption or flood. Lawyers were quick to expand the concept to include other “man-made” events like war, terrorism, fire, labor strikes, electricity or other basic infrastructure failures, etc.

The purpose of the clause was to excuse one or both parties from the contract if an event beyond their control made performance impossible. It has to be impossible; not impractical. So, a contract to rent an outdoor venue for a wedding is still enforceable even if it rains but wouldn't be enforceable if a flood engulfed it.

Not all contracts have a force majeure provision. And not all contracts define all the events that may qualify as a force majeure. And in many contracts the clause is written to benefit just one of the parties and not the other. That's why you have to look at your particular contract to determine if you have this “escape clause” in it, what are its terms and who it benefits.

Many force majeure clauses don't include a pandemic or plague. It's such an alien concept to us today that many lawyers didn't have it on their radar screen when drafting the agreement. But there may be a catch-all sentence to the effect that it includes “any and all other causes beyond the control of the parties.” This pandemic would likely fall in that category.

Just because your contract may have a force majeure clause that covers the pandemic doesn't necessarily mean you can walk away from the contract. That's because the virus doesn't necessarily stop you from honoring your agreement depending on what the agreement was for. For example, if you have a contract to pay rent, the virus doesn't stop you from paying it. By contrast, the virus has cancelled all NBA basketball games so if you had an agreement to buy tickets to a game, you'd be excused from that obligation now. The point is that you have to be able to show specifically how the virus has totally stopped you from honoring a contract. You can pay your rent (it may be hard or extremely difficult because you have no income but you it's still possible) but you can't go to a basketball game. You can have your outdoor wedding in pouring rain but you can't have it if the venue was destroyed by a hurricane. Got it?

So, the bottom line requires that you perform this analysis. 1. Does your contract have a force majeure clause? 2. Does it apply to you rather than just the other party? 3. Is it broad enough to encompass a pandemic? 4. Is the subject matter of the contract such that the pandemic literally makes it impossible for you to comply with your obligations under the contract. If the answer is "Yes" to all four questions, there's a very good chance you can be excused from your contractual obligation. Pay attention to #4. The test is impossibility; not whether it's extremely difficult to perform or would make no sense to perform.

**DOCTRINE OF FRUSTRATION:** What if your analysis shows that force majeure doesn't apply? You're not necessarily out of luck. There are legal doctrines recognized by most states that excuse contractual requirements if a party can show that the circumstances are such that a party can't perform his obligation or that to do so basically defeats the very purpose of the contract. You have to show that performance is impractical, impossible or makes no sense given an unforeseeable change in circumstances beyond the party's control and not his fault and which he can't overcome.

For example, suppose you're a roofer who agreed to put a new roof on a house but a fire burned the house down. There's no longer a house to put new shingles on so you're excused from the contract. Or, turning to the virus, suppose you agreed to do something that required you to be in groups larger than 10 people or fly to China, you simply couldn't do it given current government regulations. Therefore, even without a force majeure clause in your contract, the law might still excuse you from performing.

There are three legal excuses typically recognized by the Courts to trigger this doctrine (which is also known as the Doctrine of Impossibility of Performance). They are (1) death or severe disability of the person, or (2) governmental rule, regulation, law or decree that prevents performance such as the quarantine and shelter in place rules we're now seeing, or (3) an event occurred the non-occurrence of which was a fundamental premise upon which the agreement was made.

**CONCLUSION:** The virus may make your contractual obligations extremely inconvenient or difficult to fulfill. It may create a very hard economic hardship. It may not

make much sense anymore to proceed with the agreement. It may be very unprofitable to proceed. These typically won't qualify as legal excuses. The virus doesn't serve as some super excuse that lets people walk away from each and every one of their contract obligations. You have to show that the contract itself had a clause that includes a pandemic as a reason to excuse your performance. Failing that, you have to show how the virus has resulted in a situation where you literally or practically can no longer comply with the contract even if you desperately wanted to. The law has a bias towards enforcing our agreements with each other. The law isn't inflexible and allows for non-performance under compelling, specific circumstances but the exceptions are narrow and must be clearly applicable to your situation. Applying the principles discussed in this article should give you a good sense as to whether you're excused from a contract or not.