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Force Majeure Clauses in the Employment Context

The term *force majeure* is French and literally translates to "superior force." A *force majeure* clause in any contract is a contractual provision that excuses performance by a party when that "superior force" prevents such party from performing under the contract. The *force majeure* or "superior forces" commonly listed in contracts include "war", "riot", "strikes", "acts of God", "terrorism", and "natural disasters"—all occurrences that are generally thought to be unexpected and beyond the control of the parties at the time that the contract is made. In an employment context, said *force majeure* events can impact enforceability of employment contracts, mitigation of employment related issues, and obligations on an employer to timely notify workers of its inability to perform under a contract.

Is COVID-19 another *force majeure* event that would prevent performance under an employment contract? It depends. As COVID-19 is no longer an "unforeseen" or "unexpected" event, it may not be a viable excuse for non-performance under an employment contract. It also depends on the language crafted in the *force majeure* clause of a contract. Not all *force majeure* clauses are created equal. Some explicitly address delayed performance due to an "epidemic," but many other clauses lack such specificity. A court might be more willing to find a *force majeure* event excuses performance when a clause lists events described in more detail than an "act of God." In any event, the plain language of the clause will often govern a court's interpretation.

Recently, a bill was introduced at the 2020 Colorado extraordinary legislative session to establish civil immunity for small businesses for any act or omission that results in exposure, loss, damage, injury, or death arising out of COVID-19 if the small business attempts in good faith to comply with applicable public health guidelines. The bill would arguably have included liability for non-performance under an employment contract due to COVID-19 related issues. The bill, however, did not pass hence did not become law in Colorado. It remains to be seen if similar legislation will be introduced in the 2021 legislative session or if such legislation would, in fact, be enacted into law in Colorado.

So, what can an employer do to protect itself should it elect to invoke a *force majeure* clause in an employment agreement? Initially it should consider whether the employment contract, or Colorado law for that matter, imposes an obligation on the party invoking the *force majeure* event to timely notify the other party of its inability to perform under the contract. Complying with all notice requirements is critical to enforcement.

An employer should also evaluate whether the *force majeure* clause excuses the employer's nonperformance completely or only during the pendency of the *force majeure* event. For example, if an employer has made an employment offer to a prospective employee but the business has stopped operating due to a statewide shelter-in-place or quarantine order, the employer should consider whether the *force majeure* provision allows the employer to withdraw the offer entirely or simply delays the prospective employee's start date until the business can resume operations.

An employer should consider whether it is under a duty to mitigate the impact that COVID-19 has on its ability to perform under the employment contract, such as allowing employees to work from home to mitigate a shelter in place order.

Employers should also consider clarifying any vague or ambiguous *force majeure* clauses and ensure that pandemics, epidemics, and other outbreaks of disease are specifically carved out as *force majeure* events moving forward. Equally important, employers should think about what contractual remedies are available to the parties if a *force majeure* event should occur, such as a liquidated damages remedy if a *force majeure* event requires termination of the contract.

Another important step for employers is to review the "choice of law" provisions in their employment contracts and determine how widely or narrowly the courts in the chosen jurisdiction have interpreted *force majeure* clauses. This will also assist in crafting appropriate language to enforce these clauses in the future.

At the end of the day, if employers do nothing else, they must consider the value of contingency planning and have business continuity plans in place. Preparing for business disruptions in this way may obviate the need for some employers to invoke *force majeure* clauses at all.