

## FAQ: Conquering Contracts During the Coronavirus Pandemic

Whether due to budget constraints or changing plans, many organizations are reevaluating their existing contracts and template contracts to adapt to COVID-19 challenges. This FAQ will address contract law basics and answer some questions about how nonprofits can and should deal with contract issues due to COVID-19.

### ***What is a contract?***

A contract is a set of promises between two parties that sets out the expectations for the relationship between the two parties and clarifies each party's responsibilities. A contract also entitles each party to remedies if the other party breaches or fails to perform its promises. Keep in mind that contracts come in many forms (e.g., oral or written) and under many names (e.g., memorandum of understanding (MOU), subcontract, or agreement). Some common types of contracts for nonprofit organizations include leases, vendor contracts, grant agreements, consultant agreements, services agreements, and employment agreements.

All contracts have three basic elements:

1. Offer: one party offers to do (or not do) something
2. Consideration: something of value that is exchanged for the promise
3. Acceptance: the other party accepts the offer

Once these elements are present, the parties will be subject to a legally binding contract—meaning, the parties cannot simply walk away from their responsibilities under the contract. A well drafted contract will also identify the risks of “what if” scenarios and allocate those risks between the parties.

### ***How do we know if our contracts are or will be affected by COVID-19?***

The first step in understanding the impact of COVID-19 on your existing contracts and what you can do going forward is to take stock of your contracts. As the landscape is changing, contracts with third parties may need to be reevaluated. You should obtain a copy of every contract—including any amendments, riders, subcontracts, and documents incorporated by reference—so that you can fully understand your rights and obligations under your contracts. Ideally, you should make these documents available electronically to facilitate review by multiple staff members. Make sure you know of any upcoming deadlines under your existing contracts, such as deadlines to extend the contract, filing and reporting deadlines, and schedules for delivering services.

### ***What if we can't fulfill our obligations under one of our contracts due to COVID-19?***

Organizations have been facing unprecedented challenges since the advent of COVID-19. Once you've taken stock of your contracts, you may realize that circumstances, like budget cuts, have made or will make certain obligations under the contract difficult or impossible to fulfill, e.g., pricing terms of a vendor or consultant contract. If you feel that you need to cancel or change the terms of an existing contract, below are several important provisions to review and the key elements to look for:

- Amendments and Modifications: Who has the right to amend? What must the party seeking amendment do? Must amendments be in writing? Do amendments require approval? Are there notice requirements?
- Termination or Cancellation: Who has the right to terminate? Under what circumstances can the contract be terminated (e.g., for any reason or no reason, or only for specified reasons)? What are the notice requirements? How will payment be calculated for partially performed work (e.g., pro rata)? Are there any penalties or fees for termination? Are there notice requirements (e.g., 30 days' advance notice before contract can be terminated)?

Be sure to read the entire contract, and not just the headings or these few provisions. Many contracts make cross-references so that the provisions are interdependent or unclear without reviewing the entire agreement.

***What if the other party isn't fulfilling their obligations under a contract?***

If you are party to a contract where the other party isn't able to fulfill their obligations, you should review the same amendment/modification or termination/cancellation provisions to determine what rights you have under the contract to enforce it. It is possible that the parties will mutually agree to amend or terminate the contract, or you may want to consider releasing the other party from its obligations. Each circumstance is unique.

***What about force majeure?***

Typically, "force majeure" means an event or circumstances that cannot be reasonably foreseen or controlled. However, there is no standard definition of force majeure, and the term can often cover events that narrowly affect only the parties (e.g., a fire to a supply warehouse or a labor strike at a factory) and large-scale and monumental events (e.g., natural disasters like Hurricane Sandy, acts of terrorism like 9/11, or even a global pandemic). Also, some force majeure provisions are drafted to include only the specific triggering events listed in the contract ("limited to the following"), while other provisions provide a list of examples but cover all triggering events that fit within the general definition ("including, but not limited to, the following").

***If our contract has a force majeure provision, are we definitely able to get out of our contract?***

If your contract has a force majeure provision, this provision may also be implicated by the current public health emergency. However, you will need to read the specific force majeure provisions in your contracts to determine whether the coronavirus pandemic is covered.

Also know that in New York, the courts will interpret force majeure provisions narrowly. Typically, a party must show that the force majeure event made performance *impossible* (not just impracticable or inadvisable). The party invoking the force majeure provision must also be able to show a *connection* between the force majeure event and the party's nonperformance—the existence of a force majeure event does not guarantee an automatic way out of your obligations.

***What if we don't have a force majeure provision in our contract?***

If your contract does not include a force majeure provision, there are two common law doctrines that a party may invoke in a court proceeding to excuse its nonperformance:

1. Impossibility of Performance: where an unanticipated event makes performance objectively impossible (not merely impracticable or unprofitable) by destroying the subject matter of the contract or the means of performance
2. Frustration of Purpose: when a change in circumstances makes one party's performance virtually worthless to the other; the frustrated purpose must be a substantial purpose of the contract, such that without this purpose the transaction would have made little sense

Similar to force majeure provisions, courts will apply these doctrines narrowly. These doctrines can be even more difficult to navigate, because they rely on case law precedents. For this reason, you should speak with a lawyer if you think these doctrines might apply to your specific situation.

***What options do we have if the other party won't let us out of our contract?***

Even if the terms of your contract do not give you the right to terminate your contract or delay your performance, you may still try to negotiate with the other party. Consider what leverage you have under the circumstances and reach out to the other party. Given that COVID-19 has affected everyone, the other party may be interested in working with you to preserve your relationship or minimize losses for both parties. You should consider working with an attorney to determine what options you have.

***Will insurance help us?***

Having the proper insurance coverage (e.g., business interruption insurance or event cancellation insurance) may cushion your economic loss if you cannot avoid breaching your contract or lose money by failing to perform under your contract. If you believe you will be in this situation, you should be proactive and contact your insurance broker or agent to assess your coverage, as well as timely file any applicable claims. Every coverage determination will depend on the wording of the insurance policy itself, including any exclusions, and the factual circumstances surrounding the event. For more information on insurance and COVID-19, see our legal alert "[COVID-19 and Insurance Coverage Considerations for Nonprofits.](#)"

***We are concerned about our current contracts – we don't need to worry about future contracts now, right?***

It's never too early to proactively plan for the future! Don't forget about your contracts (or subcontracts) that will terminate or that have deadlines over the summer or even next year. Even though many things about the future remain uncertain, it is in your organization's best interest to begin the process now.

The COVID-19 pandemic is still evolving, and there is no guarantee where this public health emergency could go from here. So, when entering into new contracts, you should plan ahead and make sure that new termination, amendment, and force majeure provisions are broadly drafted and work in your favor. You should also consider how the unfolding situation may have already impacted the interpretation of your standard language—what was an unforeseeable event several months ago may no longer be unforeseeable. It may be helpful to work with an attorney to review any new contracts and draft appropriate language.

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**This alert is meant to provide general information only, not legal advice.**

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