



This article presents general guidelines for Ohio nonprofit organizations as of the date written and should not be construed as legal advice. Always consult an attorney to address your particular situation.

Contract Considerations for Nonprofits During COVID-19

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The COVID-19 pandemic has disrupted nonprofit operations throughout Ohio and worldwide. Many of these interruptions include the inability of nonprofit organizations or their partners to fulfill contractual obligations. For a nonprofit, this could look like the cancellation of a gala event, an annual fundraiser, making payments under a supplier or vendor contract, a lease, or commercial building contract. This article gives a high-level overview of important contractual considerations for nonprofits to consider if they are looking to either modify or cancel, or enforce an agreement.

Know Your Whole Contract

First, a nonprofit should take a quick inventory of the contract at issue, including all amendments, appendices, riders, or subcontracts (if applicable). It is important that the contract be read as a whole, and not just one clause, heading, or provision in isolation. Further, it is important to understand how the contract can be amended and by whom, if necessary. Special attention should be paid to how the contract can be terminated, how performance can be suspended, how and upon what events notices must be given and to whom as well as the timing requirements for such notices. It is important to analyze what the effect of such termination or suspension would be and whether any mitigation of damages is required. Last, note the applicable law of the relevant jurisdiction governing the contract in question. Just because the two parties signing it might be in Ohio does not necessarily mean that Ohio law governs.

Force Majeure

Second, many contracts anticipate events that are completely out of the parties' control, such as an "act of God", natural disaster, an act of terrorism, or "any act beyond a party's reasonable control" that would prevent contract performance. Such provisions are typically referred to as "Force Majeure" provisions, although that may not be what the provision is titled in the contract. The term literally means, "superior force", and frees one or both parties from fulfilling their contractual obligations when such events occur. A force majeure provision is not a boilerplate provision but rather can be narrowly or broadly drafted, so it should be read carefully to determine the extent of the scope of the excuse, the possible suspension of



performance, determination of any notice requirements, as well as what the result is of any excused or suspended performance.

If the force majeure clause requires notice, it is extremely important for the party invoking force majeure to provide proper notice. Part of providing notice may be determining when the start of the force majeure event occurred. Failure to provide proper notice could result in waiving one's right to invoke force majeure. However, this might prove difficult as the trigger for when the clock starts ticking for when to provide notice might be unclear. When exactly was the start date for the COVID-19 pandemic? Who determines this? The World Health Organization? The Center for Disease Control? When the Ohio governor implemented the stay at home order? As one can surmise, it will be important to consult legal counsel regarding the facts and circumstances of your organization's situation.

Further, there may be an obligation for the party invoking force majeure to mitigate the effect of force majeure. Sometimes one may find obligations to mitigate damages in another section, apart from the force majeure clause, thus, it is always necessary to read through the whole contract, as well as to carefully review the particular facts and circumstances surrounding the party's failure to perform.

In Ohio, there is limited case law interpreting force majeure clauses. However, Ohio courts do require the following: (1) the event must be beyond a party's control and without its' fault or negligence, (2) force majeure provisions must not be invoked simply because performance under the contract is burdensome, difficult, or economically disadvantageous. Thus, in a pandemic scenario, a court will utilize a factual analysis to determine whether the pandemic was the proximate cause of the failure to perform, and whether the invoking party used reasonable efforts to avoid the effects.

Broadly written force majeure clauses that include any event "not reasonably within the control" of a party will be given the effect such that the specific event does not have to be named. In contrast, Ohio courts have interpreted force majeure clauses that specifically list events more narrowly; they will evaluate whether the event in question is similar to those events specifically named.

Remedies for Force Majeure

Third, in the event force majeure is invoked, an organization's remedies may include:

- an extension of time to perform certain obligations;
- suspension of performance for a period of time with or without some payment or liability; or
- permission for the invoking party to terminate without liability.



Any specific remedy should be spelled out in the contract and be considered as part of any parties' strategic decision on whether to invoke the clause as opposed to breaching or renegotiating the contract.

Impracticability

Fourth, if the contract does not contain a Force Majeure clause, Ohio courts have excused performance on the basis of impracticability when a government mandate prohibited performance in cases primarily involving the sales of goods. But as in every case, courts may hold differently based on the facts and circumstances of the case. Specifically, a court will examine the following:

1. That an unforeseeable event occurred;
2. That the non-occurrence of the event was a basic assumption of the underlying agreement;
3. That the event rendered performance impracticable; and
4. That the unforeseeable event upon which excuse is predicated is due to factors beyond a party's reasonable control.

For nonprofits who are also sellers of goods, a seller will have to assess and evaluate any short and medium-term obligations, and the ability to perform. Additionally, they will need to document any assessment or communications done and provide adequate notice, mitigate disruptions, devise a reasonable allocation system and take reasonable measures to seek alternative suppliers as well as, to the extent they are able, partially perform and reasonably allocate goods. It will also be important to provide prompt notice to all buyers of any disruption and the connection of such disruption to the pandemic.

Renegotiate

Alternatively, the parties to a contract may simply want to renegotiate the terms and conditions of the original agreement due to the current circumstances. This is a perfectly acceptable solution and very common. Consider what leverage or bargaining power you may have before negotiating. Consult with your attorney to draft an amendment to the current agreement and make sure anyone agreeing to amend the agreement actually has the authority to do so. Again, ensure you have a copy of the original agreement along with all amendments, attachments, or riders so that any amendment is correctly done.



Conclusion

We encourage nonprofits to be proactive in evaluating their contracts. Contact PBPO or your legal counsel before taking action. If your current contracts do not contain a force majeure provision, take steps now to include one, with specific references to events currently impacting commercial transactions such as governmental actions and orders, as well as the COVID-19 pandemic.

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