

# Navigating the Uncharted Legal Realities of COVID-19

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# Presenters



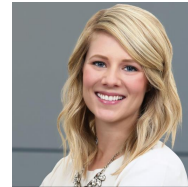
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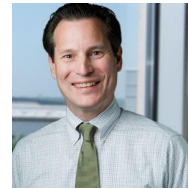
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# Preface & Disclaimer

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# Force Majeure



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# What is a Force Majeure?

- French term that means a superior or irresistible power
- Definition from Black's Law Dictionary
- “...an event or effect that can be neither anticipated nor controlled. The term is commonly understood to encompass both acts of nature, such as floods and hurricanes, and acts of man, such as riots, strikes, and wars.”

# What is a Force Majeure?

- **Other examples include:**

- Earthquakes
- Fires
- Tornados
- Volcanic Eruption
- Lightning
- Drought
- Tidal Waves
- Explosions
- Energy Blackouts
- Unexpected Legislation
- Lockouts
- Slowdowns
- Terrorist Attacks
- Government Sanction
- Government Restrictions
- Embargos
- Rebellions
- Revolutions
- Insurrections
- Civil War
- Pollution of Water Sources
- Contamination by Radioactivity
- **EPIDEMICS**

# Force Majeure Provisions in Contracts

- Provision that excuses non-performance, partial performance or delayed performance if one of the parties is the victim of a force majeure event.
  - Sample:
    - “Force Majeure” means any event or circumstance beyond the reasonable control of the Party affected that prevents or impedes the due performance of this Agreement, which by the exercise of reasonable diligence, such Party is unable to prevent, including, without limitation, acts of God; acts of war, whether declared or not declared; public disorders, rebellion, riot, civil unrest, piracy, or sabotage; acts or attempted acts of terrorism; flood, earthquake, lightning, storms and hurricanes or other natural physical disaster; explosion or fire; expropriation, nationalization, requisition or other interference by any Government Authority; and national or regional strikes and similar labor disputes (unless limited to employees of the Party seeking to invoke Force Majeure). Delays due to Force Majeure shall not be deemed to be a breach of or failure to perform under this Master Agreement, so long as (a) prompt, written notice of the existence of such occurrences shall be given by the affected Party to the other Party, stating the particulars of such Force Majeure and the obligations thereby affected, and (b) the affected Party shall use all reasonable dispatch to remedy the same and to resume performance as soon as reasonably possible after removal of the circumstances of Force Majeure.
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# Force Majeure Provisions in Contracts (continued)

- Particularly important to MVTTC members given the current pandemic and high water on the Mississippi
- If the current pandemic has created circumstances making it impracticable or impossible to perform a contract, you need to look at the force majeure provision in your contract



# A Force Majeure Event is Not a “Get Out of Jail Free” Card

- It is not enough that the event makes performance more difficult or expensive.
  - You must comply with the provisions in the Force Majeure clause
    - Typical requirements:
      - Timely Notice
      - Efforts to Cure the Problem
  - In certain instances, you have to demonstrate you took steps to prepare for the event
  - Read the details of the Force Majeure clause in your contract
    - What is the tone of the Force Majeure clause?
    - Does it specifically mention your Force Majeure event?
      - Epidemic or Pandemic
      - Government Restrictions
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# What if Your Contract Does Not Contain a Force Majeure Provision?

- There is still hope
  - Some jurisdictions recognize the Doctrine of Impossibility of Performance
    - An implied force majeure provision
    - Louisiana Law – Civil Code Article 1873
    - “An obligor is not liable for his failure to perform when it is caused by a fortuitous event that makes performance impossible.”
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# Many states Have Adopted the Uniform Commercial Code – Section 2-615

- Except so far as a seller may have assumed a greater obligation and subject to the preceding section on substituted performance:
    - (a) Delay in delivery or non-delivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.
    - (b) Where the causes mentioned in paragraph (a) affect only a part of the seller's capacity to perform, he must allocate production and deliveries among his customers but may at his option include regular customers not then under contract as well as his own requirements for further manufacture. He may so allocate in any manner which is fair and reasonable.
    - (c) The seller must notify the buyer seasonably that there will be delay or non-delivery and, when allocation is required under paragraph (b), of the estimated quota thus made available for the buyer.
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# Proving Your Case

- Has there been a force majeure event?
- Do you have a force majeure provision in your contract?
- What is the language of your force majeure provision?
- Did you comply with the requirements in your force majeure provision?
- What is the law in your jurisdiction?
- Did you take steps to prevent the effect of the force majeure event?
- Did you take steps to do damage control after the force majeure event?
- What is the history of success of those claiming force majeure in your jurisdiction?
- Do you want a judge or a jury?

# COVID-19 Related Clauses in Standard Ocean Charter Parties



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- Standard form charter parties may contain language providing relief or excuse from liability, and directives on liability apportionment, aside from Force Majeure.
  - From a standard clause perspective, one might expect to see items entitled, Quarantine, General Exceptions, and Strikes, Stoppages, etc.
  - From a doctrinal view one might rely on other contractual remedies grounded in frustration of purpose or commercial impracticability. And in Civil Law Jurisdictions there are doctrines such as hardship and changed circumstances.
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# Types of Charter Parties:

- Standard forms of charter parties are numerous throughout the arena of ocean-freight carriage, and may be recommended or promulgated by any number of organizations including The Baltic and International Maritime Council (BIMCO), The Association of Ship Brokers & Agents (U.S.A.), Inc., and many others. For bulk cargoes some of the most common are:
- North American Fertilizer Charter Party 1978/88 – codename FERTIVOY 88
- The Association of Ship Brokers & Agents (U.S.A.), Inc. – codename ASBATANKVOY
- Other forms are tailored to a particular cargo, such as the PHOSPHATE CHARTER PARTY – codename FOSFO (F.I.O.)

- Even if force majeure does not apply, a party may be excused from performing under other legal doctrines, depending on the governing law of the contract. As mentioned above, these include frustration of purpose or commercial impracticability, and in civil law jurisdictions, doctrines like hardship and changed circumstances. As we do not have time to present and examine the legal doctrines and their enforceability by jurisdiction, we will examine a couple of specific clauses that might govern in the event of a Coronavirus COVID-19 related event.



# ASBATANKVOY – Quarantine Clause

- 17 (a) QUARANTINE – Should the charterer send the Vessel to any port or place where a quarantine exists, any delay thereby caused to the Vessel shall count as used laytime, but should the quarantine not be declared until the Vessel is on passage to such port, the charterer shall not be liable for any resulting delay.
- 17 (b) FUMIGATION – If the Vessel prior to or after entering upon this Charter, has docked or docks at any wharf which is not rat free or stegomyia free, she shall, before proceeding to a rat-free or stegomyia-free wharf, be fumigated by the Owner at his expense, except that if the Charterer ordered the Vessel to an infected wharf the Charterer shall bear the expense of fumigation.

# COVID-19 Clause (Offered by Owner-Operator to Charterer)

- “Affected area” means any port or place, where there is a verifiable risk of exposure to the vessel, crew or other persons on board to the corona virus covid-19 and/or to a risk of quarantine or other restrictions being imposed in connection with the corona virus covid-19.
- The vessel shall not be obliged to proceed to or continue to or remain at any place which, in the reasonable judgment of the master/owners, becomes an affected area after the date of this charter party
- Any delay due to corona virus covid-19 related measures at the charterer’s nominated ports, including vessel quarantine at any of charterer’s nominated ports, to be for charterer’s account, except for delays caused by crew(s) having been infected with coronavirus covid-19 prior to the vessel’s arrival at the load port under the charter party. Same also to apply where valid nor has not been tendered due to delay in obtaining free pratique due to coronavirus covid-19. Should charterers nominated port be closed due to coronavirus covid-19 or coronavirus covid-19 related causes, fifty percent of cost and time waiting to be for charterer’s account.

# COVID-19 Clause (Offered by Owner-Operator to Charterer) Continued

- Any additional costs, expenses or liabilities incurred at the charter's nominated ports, whatsoever arising out of or in connection with the vessel visiting or having visited an affected area, including but not limited to screening, cleaning, fumigating and/or quarantining the vessel and its crew and reasonable time spent waiting for the same, shall be for the charterers' account and half for owner's account. Fifty percent of any time lost shall count as laytime or time on demurrage.
- The terms of this clause shall override any conflicting provisions in the charter party."

# COVID-19 Clause (Offered by Charterer to Customer)

- Corona Virus COVID-19 Clause Addendum To Sales Agreement
  - “Affected area” means any port or place, where there is a verifiable risk of exposure to the vessel, crew or other persons on board to the corona virus covid-19 and/or to a risk of quarantine or other restrictions being imposed in connection with the corona virus covid-19.
  - “Customer” means buyer of the goods shipped per the sales agreement or the counterparty to the sales agreement with seller.
  - The vessel shall not be obliged to proceed to or continue to or remain at any place which, in the reasonable judgment of the seller, becomes an affected area after the date of this agreement.

# COVID-19 Clause (Offered by Charterer to Customer) Continued

- Corona Virus COVID-19 Clause Addendum To Sales Agreement
    - 50% of any additional costs, expenses or liabilities incurred at the customer's nominated port(s), whatsoever arising out of or in connection with the vessel visiting or having visited an affected area, including but not limited to screening, cleaning, fumigating and/or quarantining the vessel and its crew and reasonable time spent waiting for the same, shall be for customer's account based on customer's pro rata share, as further qualified in this clause. Fifty percent of any time lost shall count as laytime or time on demurrage.
    - Any delay due to corona virus covid-19 related measures at the customer's nominated ports, including vessel quarantine at any of customer's nominated ports, to be for customer's account. Should customer's nominated port be closed due to coronavirus covid-19 or coronavirus covid-19 related causes, fifty percent of cost and time waiting to be for customer's account. Customer's exposure to be limited to those costs and expenses incurred on a pro rata basis determined by customer's ownership percentage of the cargo on board at the time of the delay. If the delay due to corona virus covid-19 occurs at customer's nominated port, and such delay prevents unloading or delivery at subsequent ports, then customer's share of cost and time waiting shall be the entire 50%.
    - The terms of this clause shall override any conflicting provisions in the agreement.
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# Families First Coronavirus Relief Act



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# Emergency Paid Sick Leave (EPSL) (“sick” leave and “care” leave)

- Covered employers include private employers with fewer than 500 employees
  - Eligible employees include all full-time and part-time employees (immediately eligible)
  - 80 hours of paid leave for full-time employees (pro rata portion of paid leave for part-time employees)
  - Qualifying need for leave
    - Unable to work or telework because:
      - subject to a quarantine or isolation order (including stay-home orders)
      - advised by a healthcare provider to quarantine or isolate
      - experiencing COVID-19 symptoms and seeking a medical diagnosis (i.e., “sick” leave)
    - Unable to work or telework because:
      - caring for an individual subject to a quarantine or isolation order
      - caring for a son or daughter whose school or place of care is closed because of COVID-19
      - other declared public health emergencies (i.e., “care” leave)
  - “Sick” leave is paid at full pay up to \$511 per day or \$5110 in the aggregate
  - “Care” leave is paid at 2/3 pay up to \$200 per day or \$2000 in the aggregate
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# Extended Family and Medical Leave Act Leave (EFMLA)

- Covered employers include private employers with fewer than 500 employees
  - Eligible employees are those on the payroll for 30 days
  - Qualifying need for leave:
  - Unable to work or telework because of the need to care for a minor child if the child's school or daycare is closed or unavailable because of a public health emergency
  - Leave Entitlement
    - 12 total weeks of FMLA
    - First 10 days of leave are unpaid
    - Remainder of leave paid at 2/3 pay (capped at \$200/day or \$10,000 in the aggregate)
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# EPSL and EFMLA Overlap

- Unable to work or telework because of the need to care for a minor child if the child's school or daycare is closed or unavailable because of a public health emergency
- Employee can choose to apply paid EPSL leave or other employer paid leave for unpaid EFMLA (employee choice)
- If EFMLA is otherwise unpaid, an employer can require the employee to apply employer-provided paid leave during the unpaid portion of EFMLA, and the leaves will run concurrently

# FFCRA Leave Documentation and Enforcement



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# FFCRA – Employee Leave Requests

- Notice may not be required in advance, and may only be required after the first workday (or portion thereof) for which an employee takes EPSL or FMLA+.
- It will be reasonable for notice to be given by the employee or by employee's spokesperson (*e.g.*, spouse, adult family member, or other responsible party) if the employee is unable to do so personally.
- It will be reasonable for an employer to require oral notice and sufficient information for an Employer to determine whether the requested leave is covered by the EPSL or the FMLA+ provisions.
- Employer may not require the notice to include documentation beyond what is allowed by DOL regulations § 826.100.

# FFCRA – General Documentation Requirements

An employee is required to provide documentation containing the following information prior to taking EPSL or FMLA+ paid leave:

- Employee's name.
- Date(s) for which leave is requested.
- Qualifying reason for the leave.
- Oral or written statement that the employee is unable to work (or telework) due to qualified reason.

# FFCRA – Specific Leave-Type Documentation Requirements

- The name of the governmental entity if due to the employee (or individual the employee is caring for) being subject to a governmental quarantine or isolation order.
  - The **name of the healthcare provider** who ordered quarantine if due to the employee (or individual the employee is caring for) being ordered to quarantine by a healthcare provider. (**Note – the reg. does not say a doctor’s note can be required**)
  - In the case of need to care for minor son or daughter: (i) the name of the child being cared for; (ii) the name of the school, place of care, or child care provider that has closed or become unavailable; and (iii.) a representation that no other suitable person will be caring for the child.
  - Such additional material as needed for the employer to support a request for tax credits pursuant to the FFCRA.
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# IRS Guidelines (Documentation From Employee to Substantiate Tax Credits)

- IRS guidance regarding required documentation to support payroll tax credit (FAQ 44) closely mirrors the DOL regulations.
- A statement of the COVID-19 related reason the employee is requesting leave **and written support for such reason.**
- In the case of the need to care for minor son or daughter the age of the child (or children) to be cared for, and, in the case of a child older than fourteen during daylight hours, a statement that special circumstances exist requiring the employee to provide care.

# Employer Best Practices Regarding FFCRA Documentation

- Employers should adopt a FFCRA leave request form for use by employees.
- Request that an employee provide as much documentation as they have available (physician note, documentation regarding closure of school or unavailability of child care provider, etc.) (more documentation is better to substantiate the payroll tax credit)
- But avoid drawing a hard line regarding documentation requirements beyond what the DOL regulations require (to avoid improper denial of FFCRA leave requests).
- Be reasonable regarding timing of paid leave requests (opportunity to cure deficiencies).

# FFCRA Posting Requirements

- Every employer covered by FFCRA's paid leave provisions is required to post on its premises, in conspicuous places, a notice explaining FFCRA paid leave rights and process for filing complaints of violations with the DOL.
- Employer may satisfy this requirement by emailing or direct mailing this notice to employees, or posting this notice on an internal or external website.
- Notice of employee rights form has been published by the DOL:  
[https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA\\_Poster\\_WH1422\\_Non-Federal.pdf](https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf)



# Prohibited Employer Acts

- Employer is prohibited from refusing to provide the required paid leave.
- Employer is prohibited from discharging, disciplining, or discriminating against any employee for exercise of FFCRA leave rights.
- Employer is prohibited from discharging, disciplining, or discriminating against any Employee because they have filed any complaint or instituted any enforcements proceeding regarding FFCRA rights.

# Employer Liability for FFCRA Violations

- Failure to provide paid sick leave is considered failure to pay the minimum wage as required by the federal Fair Labor Standards Act. Employer can be liable for the amount of unpaid sick leave benefit (up to 80 hours of pay), an equal amount of liquidated damages and attorney fees.
- Violations of the expanded FMLA provisions are subject to claims under the federal Family Medical Leave Act. Employer can be liable for back pay, an equal amount of liquidated damages and attorney fees.
- Back pay and injunctive relief (reinstatement) are also available to remedy retaliation and interference claims.

# Enforcement of FFCRA Obligations

- Employee complaints may be filed with the DOL Wage and Hour Division.
- DOL has full investigative authority and subpoena power to remedy alleged violations. DOL may file suit to enforce FFCRA requirements.
- Individual employee complaint is likely to lead to broader DOL investigation of employer's FFCRA compliance practices. It may also lead to FMLA and FLSA compliance audits.
- Employees have a private right of action under the FMLA and FLSA to enforce paid leave provisions of the FFCRA. A collective action (*ie.* opt-in-class action) is also available to enforce paid sick leave rights under the FFCRA.

# Guidance for Reopening Workplaces



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# “Opening Up America Again” Guidelines

- Starting to focus on what it looks like to re-open businesses
- White House issued guidance for states and local governments on April 16
- Leaves much discretion to the states and local governments
- Also look to guidance from OSHA and CDC

# “Opening Up America Again” Guidelines

## **Gating Criteria**

- Downward trajectory of reported of influenza-like illnesses and COVID-like syndromic cases within a 14-day period
- Downward trajectory of documented cases or positive tests as a percentage of total tests within a 14-day period
- Treating all patients without crisis care and a robust testing program for at-risk healthcare workers, including antibody testing

## **Preparedness Guidelines**

- Appropriate methods for testing and contact tracing
- Healthcare system capacity (meaning being able to withstand a surge in ICU capacity and the ability to provide sufficient PPE and medical equipment in the event of a surge)
- Having plans to protect the health and safety of workers in critical industries, protecting employees and users of mass transit, and monitoring conditions and immediately taking steps to limit and mitigate any rebounds

# “Opening Up America Again” Guidelines

- At all stages employers should:
  - Develop and implement policies regarding:
    - Social distancing and protective equipment
    - Temperature checks
    - Testing, isolating, and contact tracing
    - Sanitation
    - Use and disinfection of common and high-traffic areas
    - Business travel
  - Monitor workforce for indicative symptoms. Do not allow symptomatic people to physically return to work until cleared by a medical provider
  - Develop and implement policies and procedures for contact tracing following an employee COVID+ test

# PHASE 1

- States and regions that satisfy the gating criteria
- All Employers
  - Encourage telework
  - Return to work in phases
  - Close common areas
  - Minimize non-essential travel
  - Strongly consider special accommodations for members of a vulnerable population



## PHASE 2

- States and regions with no evidence of a rebound and that satisfy gating criteria a second time
- All Employers
  - Continue to encourage telework
  - Keep common areas closed
  - Non-essential travel can resume
  - Continue to strongly consider special accommodations for members of a vulnerable population

# PHASE 3

- States and regions with no evidence of a rebound and that satisfy the gating criteria a third time
- All Employers
  - Unrestricted staffing of worksites

# OSHA GUIDANCE

- Implement basic infection prevention measures
- Develop policies and procedures for prompt identification and isolation of sick people
- Develop, implement, and communicate about workplace flexibilities and protections
- Implement workplace controls to mitigate hazards
- Follow existing OSHA standards

# CDC GUIDANCE

- Promote healthy hygiene practices
  - Intensify cleaning, disinfection, and ventilation
  - Ensure social distancing, including installing physical barriers, changing workspace layouts, closing communal spaces, etc.
  - Limit travel
  - Train all staff on safety actions
  - Ongoing monitoring of workforce
-

# Suggestions for Employers

- Think about policies for reopening now:
  - Screening protocols
  - Encouraging good hygiene
  - Implementing additional cleaning measures
  - Providing PPE
  - Encouraging continued telework
  - Staged re-entry
  - Staggering work shifts, breaks, meals
  - Closing common areas
  - Limiting visitors to the business
  - Limit in-office conversations
  - Reconfiguring office spaces
  - Creating a recovery management team
- **Be flexible**

# QUESTIONS?

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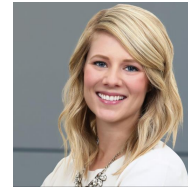
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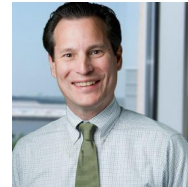
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