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Force Majeure and the Entertainment Industry During COVID-19

BY [ZACHARY KARETSKY](#)/ FEBRUARY 17, 2021



Photo by Tyler Casey on Unsplash

As the COVID-19 pandemic has impacted almost every aspect of life, it has had a colossal effect on the production of TV shows and the contractual obligations of the various parties involved. While the production of almost all motion pictures came to a screeching halt, many shows are beginning to resume their efforts to continue to create new content even with reduced resources. Popular TV shows such as "Law and Order: Special Victims Unit"¹, "This Is Us"², and "Grey's Anatomy"³ have all adapted to the current circumstances in both their production efforts but also their storylines. Force majeure clauses, most commonly included in contracts using boilerplate language, have grabbed the attention of entertainment industry professionals unlike ever before.

A force majeure clause is a “contractual provision allocating the risk of loss if performance becomes impossible or impractical, especially as a result of an event or effect that the parties could not have anticipated or controlled.”⁴ The COVID-19 pandemic prohibited many production employees and actors from filming and as a result, many of these individuals lost their only source of income. The terminology and phrasing used in a contract will help determine if the pandemic can be used to escape obligations, but that is evaluated on a case-by-case basis.

Various factors were considered by production companies for how to proceed during the pandemic. While some employers could not afford to pay their employees with halted production, it is believed that Netflix and HBO paid their series regulars despite no filming.⁵ Even though some of the larger corporations could afford to do this, many production companies were unable to keep up with their payroll obligations during this time. The companies that needed to get out of their contractual obligations turned to force majeure clauses as a defense mechanism and justification for lack of performance.

Warner Bros was forced to send many of their television writers notice that they were suspending their employment agreements.⁶ This came as a surprise to many writers as they believed that they could continue with their assigned tasks, no matter the location.⁷ As this situation is very fluid with the quarantine and with COVID-19 protocols constantly changing, new issues can arise at any moment for attorneys in the field.

Entertainment attorneys are now faced with the difficult yet essential task of rewriting contractual agreements for their clients to contain effective, all-encompassing force majeure clauses. Many attorneys have had to refamiliarize themselves with the logistics and ramifications of a basic force majeure clause.⁸ Neema Sahni, an attorney based out of Los Angeles, claims that it is “the first time in my career where so much attention has been given to those clauses and what they mean.”⁹ Much like a force majeure clause, “material adverse change” and “material adverse effect” clauses also play a major role in the obligations a company owes to their employees when faced with unforeseen circumstances.¹⁰

With the United States learning to adapt to the “new norm,” TV production has begun to resume in unprecedented ways. “Grey’s Anatomy”, a popular ABC TV medical series, had to adapt to ensure safe working conditions for their employees. The show took this opportunity to highlight the impact that COVID-19 has had on the health system in the United States.¹¹ While wearing medical masks in a medical drama does not seem that unusual, other non-medical shows did not have such a seamless transition. “This Is Us” requires mask-wearing on set, even when filming.¹² The drastic change in societal behavior has forced many shows to recognize and address the realistic struggles that people throughout the world are facing.¹³

Intending to flatten the curve of the COVID-19 pandemic, state governments throughout the United States have implemented various safety protocols that impact the entertainment industry. Entertainment attorneys are now confronted with unusual client concerns including the prohibition of production activities, unmet deadlines, fears of becoming ill and what the future holds for the industry.¹⁴ These uncertainties have led to an enhanced focus on force majeure clauses and will continue to impact the way in which entertainment attorneys provide creative solutions to their clients.

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