Amidst the widespread disruptions caused by the COVID-19 pandemic, nonprofit organizations must make difficult decisions on whether to cancel meetings, conferences, expos and other events. In addition to contracts with event venues such as hotels and convention centers, there may be contracts with vendors of event-related services, such as providers of transportation, decoration, drayage, and audio-visual services. And there may be contracts or obligations with sponsors, part-time help, and others. Finally, consideration must be given to registrants, exhibitors, speakers, and others who may be depending upon the event going forward. Decisions by nonprofit organization event sponsors on how to address all of these issues are made particularly challenging by the uncertainty regarding how long the virus’s threat will last and the length of government-mandated shelter-in-place orders, bans on mass gatherings, and social-distancing policies and recommendations.

Takeaways

- Nonprofit organizations should carefully review their event contracts before deciding whether to cancel due to COVID-19, in order to ascertain potential penalties and determine options for canceling without penalty.

- The specific contract language and the status of the COVID-19 pandemic crisis and response at the time the event is scheduled will be critical in determining whether an event contract can be canceled based upon force majeure.

- Regardless of the contract terms, nonprofit organizations may still be relieved of obligations and penalties due to the circumstances; or they may be able to negotiate with event venues and vendors for postponements, credits or other mutually agreeable solutions.

03.27.20
Most event venue contracts provide for the payment of liquidated damages in the event of cancellation, and those payments often escalate as the event dates draw nearer. Organizations should be sure to track these scheduled dates and fees so that decisions can be made with reference to them. In considering a cancellation, to shield themselves from these often steep penalties, nonprofit organizations should look at whether the event can be cancelled under the contract’s force majeure provision. As discussed in Pillsbury’s advisories about insurance implications of coronavirus cancellations, organizations should also review their insurance coverage for cancellation-related losses in connection with evaluating when, whether and how to cancel event contracts.

The specific force majeure language in each contract varies, but nonprofit organizations should consider the following issues:

- Nonprofit organizations should first determine whether the force majeure provision clearly and obviously permits event cancellation at any time without penalty in circumstances of “mass illness,” “health pandemic,” or similar language; many force majeure provisions in event venue contracts do not address these circumstances and are written very narrowly to limit options for cancellation, thereby protecting the venue or vendor.

- Force majeure provisions generally include a standard of severity for assessing whether circumstances rise to the level of a force majeure event. Many provisions are written narrowly, only to encompass circumstances making performance “illegal or impossible” (with some actually titled “Impossibility” rather than “Force Majeure”). Others are broader and may include circumstances making it “inadvisable” or “commercially impracticable” to hold the event. In making a case for cancellation under force majeure, nonprofit organizations will need to present the available facts most favorable to meet the applicable standards. For example, concern for community spread may be enough to render an event inadvisable, but not illegal or impossible, while a shelter-in-place order or a ban on travel in effect at the time of an event would support an impossibility argument.

- Some force majeure provisions include an exhaustive list of force majeure events (e.g. “acts of God, strikes, and acts of terrorism”), while others provide a list of examples and/or include catch-all language (e.g. “such as” or “other similar occurrences beyond the reasonable control of the parties”). Note that, unless otherwise defined in the contract, acts of God are generally interpreted to include natural disasters but not public health emergencies like COVID-19. As noted, most force majeure provisions do not specifically list disease outbreaks, epidemics or pandemics as force majeure events, so nonprofit organizations likely would need to rely on broader language where available.

- Many contracts include “curtailment of transportation facilities” and “government regulation” as force majeure events. A majority of U.S. states and the District of Columbia have now banned large gatherings or closed non-essential businesses. Further, many countries have suspended international travel, and many localities have asked that public transportation be used only for essential purposes. Various governmental orders extend for different lengths of time, however, with some specifying end dates in April 2020 and others indefinite. Nonprofit organizations therefore may not be able to rely on government action as triggering force majeure for events scheduled more than a month or two out.
• Some contracts permit cancellation if a force majeure event prevents or unreasonably delays attendance of a certain percentage of the event attendees (for example, 25 percent); other contracts include such a percentage of attrition as a requirement for cancellation under force majeure. Under these contracts, it helps to show evidence of actual cancellations by prospective attendees due to COVID-19.

• Most contracts require written notice of cancellation due to a force majeure event, sometimes within a set number of days from the occurrence of the force majeure event. This notice requirement is complicated by the uncertainty of the COVID-19 crisis and response. For instance, while everyone is aware of the crisis, it is unclear how long some government orders that shutter non-essential businesses or prohibit gatherings will remain in effect. Organizations might choose to wait to cancel until closer to the event dates to determine whether the facts will support the standard required by the contract; though this can risk incurring escalated cancellation penalties if the force majeure clause ultimately does not apply. Nonprofit organizations are also well aware that it is difficult to promote an event to prospective attendees, even one scheduled several months out, when it cannot be determined if the event is actually going to be held (i.e. when the COVID-19 crisis will have an “end”).

• Force majeure provisions generally excuse performance without penalty by either the event sponsor or the venue. Because event contracts often require large deposits, nonprofit organizations should determine whether the contract provides for a return of pre-paid fees or payments for services already rendered.

• Contracts may require the parties to make an effort to schedule the event for a later date or may provide the option to credit amounts paid or cancellation fees toward a future event.

• Even where a force majeure provision is narrowly drafted and fails to address pandemic situations, nonprofit organizations might successfully negotiate with venues and vendors to avoid steep penalties from a full or partial cancellation. Organizations might be able to postpone an event to a later date, enter into contracts for a future event as a replacement for the cancelled one, or credit deposits towards one or more different or additional meetings. Alternatively, if an event goes forward as planned over the scheduled dates, an organization might agree with the venue to waive any fees for attrition or failure to meet minimums that are specified in the contract.

If a nonprofit organization is considering cancelling an event due to COVID-19, it should carefully review the relevant provisions, particularly force majeure, in all venue, vendor, and other contracts for obligations related to the event, as well as the instant circumstances.

Experts warn that even after the current COVID-19 outbreak is contained, there could be future resurgences of the virus. As nonprofit organizations look ahead toward planning future events, we suggest including a force majeure provision that specifically covers COVID-19 and similar developments. We’ve drafted the following sample force majeure language, which can be edited as needed for your event contracts:

The performance of the Agreement by either party shall be subject to force majeure, including but not limited to acts of God, fire, flood, natural disaster, war or threat of war, acts or threats of terrorism, civil disorder, unauthorized strikes, governmental regulation or advisory, recognized health threats as determined by the World Health Organization, the Centers for Disease Control, or local government
authority or health agencies (including but not limited to the health threats of COVID-19, H1N1, or similar infectious diseases), curtailment of transportation facilities, or other similar occurrence beyond the control of the parties, where any of those factors, circumstances, situations, or conditions or similar ones prevent, dissuade, or unreasonably delay at least 25 percent of prospective Event attendees from appearing at the Hotel, or where any of them make it illegal, impossible, inadvisable, or commercially impracticable to hold the Event or to fully perform the terms of the Agreement. The Agreement may be cancelled by either party, without liability, damages, fees, or penalty, and any unused deposits or amounts paid shall be refunded, for any one or more of the above reasons, by written notice to the other party.

Pillsbury’s Nonprofit Organizations Practice is available to help you examine these issues as you make difficult decisions regarding your organization’s upcoming and future events.

Pillsbury’s experienced crisis management professionals are closely monitoring the global threat of COVID-19, drawing on the firm’s capabilities in supply chain management, insurance law, cybersecurity, employment law, corporate law and other areas to provide critical guidance to clients in an urgent and quickly evolving situation. For more thought leadership on this rapidly developing topic, please visit our COVID-19 (Coronavirus) Resource Center.

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