

Coronavirus and Cancellations: What Your Organization Should Know



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There are many questions about the novel COVID-19 virus still being answered. Amid issues of general health and safety, many of our clients are facing tough decisions about their regularly held events, which are often essential parts of a nonprofit organization's mission and services. Whether your organization puts on association member meetings, trade shows, educational conferences or other events where large groups meet, you may be facing difficult decisions about whether to hold the event and what consequences to expect if you cancel.

Cancellation Clauses: What happens if we cancel our event?

Most contracts provide for an orderly way of canceling them in the event circumstances change. However, because a hotel or resort relies on income scheduled from these events, there is usually a cost associated with cancellations. These costs will escalate as the event date gets closer and it becomes harder for the venue to replace your event with other paying customers. Escalating cancellation clauses provide for a stepped increase of costs, often described as liquidated damages that will be due upon cancellation. These increase at increments and vary from one contract to another. Another option within the contract may be a clause governing attrition rates for room revenue, space rentals, and food and beverage guaranteed minimum purchases. A good first step to getting a handle on the consequences of cancellation is to identify potential costs based on the liquidated damages or attrition percentages, keeping in mind any dates on which those damages and percentages increase.

Force Majeure: Can't we avoid liability if the cancellation is for circumstances beyond our control?

It's likely the contract also includes terms under which the contract can be canceled without incurring the liquidated damages or attrition percentage amounts. Often this is termed a force majeure clause, although some contracts provide for similar terms under sections addressing performance, frustration or impossibility of completing the contract bargain. The purpose is to allow the parties to exit a contract without penalty where the purpose of the contract has been

thwarted by circumstances that were not foreseeable by either of the parties at the time the contract was made. The terms here are contract-specific, so it's important to read them closely; the same COVID-19-caused cancellation may have different effects on whether you can cancel the contract without damages depending on how this clause is phrased. These are the key items to look for:

- Does the force majeure clause list circumstances that trigger it in an exhaustive way (it lists only those events to which it applies) or in a non-exhaustive way (it gives examples of what events would qualify but leaves room for other events)?
- In the case of COVID-19, is there a specific allowance for epidemic/pandemic events or public health emergencies?
- Is there an option for curtailment of transportation that might apply even if the specific location of the event is not placed off-limits by public health or local government officials? A widespread suspension of travel at the federal level or among significant private transportation carriers could have a similar effect.
- Does any non-performance clause require a certain level of attrition among your attendees in order to apply? Some hotel contracts require 30% to 50% of your attendees are unable to arrive at the location in order for force majeure circumstances to apply.
- What notice requirements are there to exercise this option? Many contracts request notice as soon as reasonably possible or within 10 days of the force majeure event. Successfully using this provision will mean making sure you comply with the notice requirements.

Insurance Options: How are we going to cover the losses from a cancellation?

For many conferences, conventions and trade shows, the best option is to have event cancellation insurance coverage in place. If you purchased this coverage, check the requirements of your coverage to ensure your event is covered for this purpose. And make sure to put your insurance carrier on notice as soon as it becomes clear the event will need to be canceled and comply with any requirements or limits.

If you do not have event cancellation insurance coverage in place, your general business liability insurance is the next place to turn. In a few cases, there is coverage for events beyond normal business operations, but these are not common. If your event is actually a regular part of your business operations, it is possible that coverage for business income loss would apply. However, that is the exception rather than the norm for most nonprofit organizations with annual events, and frequently, business income loss



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coverage is strictly tied to the geographic location of the regular business location of the company.

As a final fallback to limit damages and recover costs, you can also approach the venue to open a discussion of other options. A hotel, resort, or event space may be willing to come up with a way to work around the damages, such as by postponing the event, providing a future credit, or waiving some of the damages based on your relationship where there may be a history of events held by your organization at this location.

Factors Influencing Decisions: How can we decide when the situation is evolving daily?

As you consider whether to hold or cancel an event, the following list of questions may help you come to a decision that's driven by facts and not fears.

How close to the dates of the event is it? If the event isn't for three to six months, circumstances may have changed drastically by then. Consider whether you can wait a bit longer for more information or need to make a decision now.

- Does your venue (hotel, restaurant, resort, meeting center, etc.) have an escalating cancellation clause? If so, what are the key dates at which damages will increase? This may alter your thinking on the question above if you are leaning toward canceling.
- Where will the event be held? It's unlikely that any area of the country will be entirely free of COVID-19 cases, but some regions will be more affected than others — either in the incidence of infection or in a locality's ability to deal with the health crisis.
- Are your event sponsors (funding the event) and speakers (providing the substance) going to be able to attend the event? This is particularly important if their respective companies are restricting travel or if their own business (for example, medical staff) will need to divert its staffing resources to other areas.

- Are attendees actively canceling their participation, or are they looking to the event planners to make the decision before they respond?
- If you go forward with the event, what precautions will be taken at the event location, and are there others you should consider adding? Additionally, how can you best communicate this decision to your members?
- Can you use technology to continue the event in a modified form? For example, speakers who can't travel could provide their talks by videoconference, attendees who have corporate travel restrictions can attend virtually, etc. This may not help with attrition costs for room revenue or food and beverage minimum guaranteed sales, but it would at least allow you and your members to have some of the benefits of the gathering.

- Do you have event cancellation insurance coverage to recoup costs? Is there any chance your business liability policy could cover some or all of the event under business income losses? While cost recovery takes a backseat to health and safety, knowing your potential loss and possible recovery may help when it is a close call.

We will continue to monitor the situation for our clients and advise on this and other legal issues related to COVID-19. While a special event is its own circumstance, we are also advising on employment practices, insurance coverage, and other workplace and business issues being created by the uncertainty surrounding this public health crisis.