

Force Majeure in a Tight Labor Market

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2018 has produced a tight labor market for many manufacturers. Particularly in the electronics, aerospace, and trucking/automotive sectors, skilled laborers are becoming increasingly difficult to find. As a consequence, many manufacturers are finding themselves in a position where they are unable to perform contracts that have any degree of complexity without a level of scrap and/or corrective action that renders the contract uneconomical – because they don't have skilled workers capable of shepherding these difficult contracts to performance. And products that have manufacturing difficulties may not be apparent to the eye: Truck panels or circuit boards that appear no different from standard-issue products may involve tight tolerances and specifications that only become apparent when the resulting products fail to perform as intended or fail to meet applicable specifications.

Solving the problem of insufficient skilled manufacturing workers on a policy level will involve time, coordination, and careful strategy. American education institutions need to stay in close communication with industry, to know what skills the modern manufacturing worker needs to have. Economic incentives have to be right to retain the most skilled workers. And technology has to adequately support the manufacturing workforce to produce robust products. But, in the short and medium term, is there anything that manufacturers can do to cope with these difficulties caused by labor shortages?

If you are a supplier, you may feel like it is impossible to succeed. Your most difficult contracts are becoming decidedly uneconomical, and you may be torn between your obligations under difficult customer contracts. If this is the case, can you find relief? Possibly. The force majeure doctrine may provide a way to gain breathing room. Force majeure is the legal doctrine that excuses performance of a contract due to – broadly speaking – circumstances beyond a party's control. Some supply chain contracts have force majeure clauses. Others do not. Not having a force majeure clause, however, does not mean that the force majeure doctrine does not apply. In the 49 states that have adopted the UCC (all but Louisiana), UCC 2-615 provides for “excuse by failure of presupposed conditions.” Under this provision, failure to perform a contract obligation that “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” is excused. If such a situation arises and affects only part of the seller's ability to perform, the seller “must allocate production and deliveries among his customers... in any manner which is fair and reasonable.” Of course, supply chain contracts that do contain an express force majeure clause override this UCC default provision.

Whether a labor shortage constitutes a “contingency the non-occurrence of which was a basic assumption” of the contract could go either way – and likely depends on the circumstances of the contract and the specific labor problem at issue. Courts do go either way. But UCC 2-615 (and its comparable contract provisions) may provide some relief for suppliers impacted by the lack of skilled workers.

Of course, allowing suppliers to excuse or delay contract performance due to labor shortage conditions does not help supply chain buyers, who need suppliers’ components to satisfy their customers or end-users. Indeed, buyers may well be tempted to argue that a supplier’s failure to adequately manage or optimize its work force is a problem of the supplier’s own making, and is not the kind of “Act of God” that gives rise to a justifiable force majeure. Buyers will want to examine their supply chain contracts to ensure that they contain force majeure contracts that exclude labor conditions as permissible force majeure events. In any case, vagueness in supply chain contracts is unhelpful to all parties. Supply chain contracts should at minimum be clear so that parties know what to expect and can plan accordingly.

Labor shortages are not the only modern phenomenon that may give rise to force majeure events. In many industries now, tariffs are impacting the fundamental economics of supply chain contracts. In addition to the analysis above, contracts impacted by tariffs may be helped by another provision of UCC 2-615. This provision states that performance may be excused if performance has been made impracticable “by compliance with good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.”

In any case, communication is key to resolving force majeure conditions in a way that minimally impacts all parties involved. Indeed, UCC 2-615 expressly dictates “seasonable” notice by the seller to the buyer concerning force majeure events.

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