

THE BOTTOM LINE

>> TV and film producers need to be aware of the unexpected ways that the coronavirus crisis is impacting numerous aspects of their business, from “force majeure” and cancellations, to union and talent issues, and content order agreements.

>> COVID-19 ALERT

COVID-19 Impact on TV and Film Production

The rapid spread of the coronavirus (COVID-19) has disrupted nearly every aspect of daily life, and has caused widespread changes in how companies worldwide are doing business.

The entertainment industry has been particularly hard hit. Travel restrictions and bans on non-essential work have paused nearly all film and television production. The few programs that continue in production are news and talk shows, sometimes with dramatic changes to the format.

The halts on some productions, and changes in others, presents novel questions about “force majeure” and suspension clauses, raises potentially widespread impacts on compensation and scheduling for both above-the-line and below-the-line talent and may spark a fundamental shift away from the production of TV pilots to, potentially, full-series orders.

FORCE MAJEURE AND SUSPENSION

The International Alliance of Theatrical Stage Employees (IATSE) — the guild whose members are responsible for all technical, logistical and operational aspects of TV and film production — estimates that 90 – 95 percent of its members lost a job because of COVID-19. This nearly complete standstill of TV and film production has led to the widespread invocation of either:

- >> A “force majeure” clause, which allows a party to terminate a contract without liability if an outside event beyond the party’s control makes fulfilling the contract impossible or impractical; or
- >> A suspension clause, which allows producers to suspend filming for a period of time and bring the whole cast and crew back after the suspension is lifted.

Given the unique timeline of the spread of the COVID-19 virus itself, as well as the spread of the fear of the virus, the entertainment industry is seeing the same questions about “force majeure” invocation alongside many other industries: Was the situation with the virus at the specific time the contract was terminated enough to satisfy the “force majeure” provision? And, if not (instead, a party terminated based solely on fear and not, for example, on a mandated quarantine), was the termination actually a breach, and what obligations are still owed by the terminating party? These determinations can turn on the specific day when a decision was made.

If a production was merely suspended, typically the producer can hold much of the talent involved to exclusive terms during the period of suspension, and require that talent to

rejoin the production within a few days' notice after the suspension is lifted. But, in the likely scenario that a high number of productions either begin or restart nearly simultaneously when quarantines are lifted, inevitably the requirement to return to a suspended project will clash with other already-scheduled projects. It appears likely that multi-party negotiations will need to take place to resolve significant scheduling issues, and certain parties may need to let go of some rights otherwise due to them under a suspension clause.

TALENT AND UNION ISSUES

Some programs, primarily news and talk shows, have been fortunate enough to proceed during this difficult time. Particularly with talk shows, the hosts are filming from their homes, and all guests call in virtually. Some secondary characters and co-hosts have seen their roles diminish, and many of the crew that typically inhabit a bustling studio stage are no longer part of the production. Ad-hoc production from celebrities' homes raises novel questions of insurance coverage and workplace safety; production companies may need to

purchase new policies to cover these unusual circumstances.

It also raises unusual employment contract questions, particularly for below-the-line crew. For example, IATSE has a robust professional seniority system, which is based on the number of days and projects an individual has worked at his craft. If crew on a talk show is not needed because the filming is taking place in the host's living room on a personal camera, but the show is still in active production, producers and networks will need to work closely with the guild to determine how to treat unused crew for payment and seniority purposes.

SPRING PRODUCTION SEASON

The COVID-19 shutdown hit Hollywood just as pilot season was gearing up. Of the 56 pilots that networks had ordered in 2020, only one had finished filming. Some industry insiders predict that, whenever production restarts, networks will mostly rush directly into series orders and forego most pilots.

The TV "upfronts" which typically occur in May (where networks use pilot episodes to showcase their

line-ups to advertisers) have been cancelled, so a primary economic driver of the pilot process is, at best, dramatically reduced. And networks may look to make quick decisions about programming, removing the pilot step and diving right into a series commitment to ramp up production as fast as possible. If that is the case, we may see hybrid production contracts that give financiers more flexibility than a typical full series order, but lock in key talent and concepts for longer than a single pilot.

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