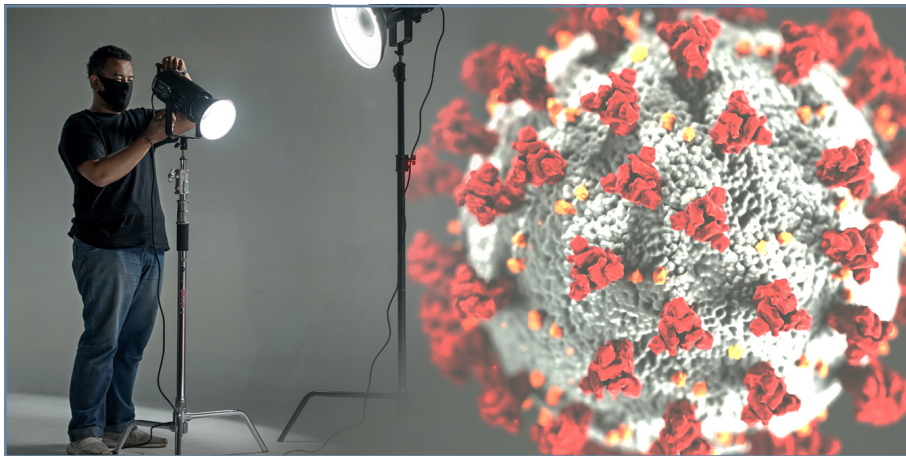


LEGAL

PLANNING MEDIA PRODUCTIONS AND EVENTS DURING COVID-19



As we mark the one-year anniversary of the first coronavirus shutdown orders in the U.S., the lessons learned and best practices distilled from entertainment and advertising productions should be applied more broadly throughout the communications and marketing industries.

Communications firms may not necessarily be organizing large-scale commercial shoots. However, many of the same protocols and best practices are appropriate even when smaller video productions and photo shoots are conducted. Live events with in-person staff, talent and attendees should also utilize the same best practices consistent with the relevant guidelines and regulations.

At the outset, every production — whether a photo shoot, a video production, or an event — should be supported by contracts that take into account two key issues:

1. What happens if the production needs to be postponed or cancelled; and

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2. Implementing and enforcing compliance with various COVID-19 health and safety protocols, the specifics of which may vary depending on the details of the production, and determining responsibility in the event of a failure to satisfy these requirements

Postponement or Cancellation of a Production

Pre-COVID, contracts for video, photo, and event productions usually included a clause related to a client's cancellation rights, along with a force majeure provision.

- Most companies did not enter into production contracts with an expectation that cancellation or postponement would be likely.
- These provisions were often not heavily negotiated and often consisted of boilerplate legal terms.

Since March 2020, the expectations among agencies, marketers, and vendors have become quite different.

- Companies have come to understand that planning a production during a global pandemic means there is a serious possibility of plans changing due to rapidly evolving public health and safety circumstances.
- In many cases, proceeding with a production as originally planned may become untenable.
- Companies have been paying much closer attention to their cancellation and force majeure provisions to make sure they account for the realistic possibility of COVID-19 interfering with the production schedule.

Here are some key questions and issues for marketing communications firms to consider in reviewing and negotiating cancellation and force majeure provisions in production contracts:

Question: *Do these provisions account for payment of fees and expenses already incurred, plus additional costs in the event the production is rescheduled?*

Answer: A number of expenses may already have been incurred and significant pre-production services may already have been rendered, depending on just how last-minute the cancellation is. If a shoot or event will be rescheduled, additional costs to re-hire and re-book talent, crew, locations, and equipment could be significant. Agencies should discuss this with their clients and with their production vendors to ensure that all parties are on the same page regarding what fees and costs will be passed through and which party will be responsible for what portion of these expenditures. It is common for production vendors to be reimbursed for approved out-of-pocket costs and expenses they have already incurred, in addition to a portion of their service fees attributable to work already performed.

Question: *Does the force majeure clause specify that an event of force majeure is one that is caused by forces outside of any party's control? If so, consider what forces are within each party's control.*

Answer: Marketers and agencies should consider implementing, and requiring their production vendors to implement, commercially practicable steps to mitigate the likelihood that the production will need to be cancelled or postponed due to COVID-19. Examples include:

- > Using due care in deciding where a production should take place (e.g., shooting or holding an event in an outdoor location in a city or town with low COVID-19 infection numbers, or in a location where attendees are local and will not need to travel).
- > Minimizing the number of people necessary to attend, and using remote technologies or live-streaming services so that people can participate without being physically present.
- > Preparing a back-up plan (e.g., if an original location can no longer be used, or if a key crew member or talent can no longer participate due to COVID-19 illness, having a back-up location or back-up personnel ready to fill in will reduce the need to cancel the entire production.)
- > Implementing appropriate health and safety protocols.

Health and Safety Protocols, and Responsibility for Enforcement

1. Production companies and event vendors who are in charge of running a given production should implement a series of COVID-19 health and safety protocols to minimize the risk of the virus becoming present or spreading at the site of a production. Many states, counties, and cities also have their own guidelines for how various kinds of businesses and activities, including media production and live events, should be conducted safely. Typical protocols may include:

- Restricting the congregation or mingling of groups;
- Limiting availability, service, and consumption of food and beverages;
- Increasing cleaning of common spaces and restrooms;
- Using improved air flow and air filtration systems;
- Requiring the use of face masks and other personal protective equipment;
- Requiring social distancing; and
- Requiring crew, talent, and other attendees to complete a health symptom questionnaire and/or submit to a temperature check upon to arrival at a production site.

It is vital that all personnel and attendees are made aware of the rules and protocols so that they can properly follow them.

2. COVID-19 testing in advance of arrival at a production has also become more common. Marketers and agencies working on smaller productions may want to consider a testing strategy that makes sense for the specific project. Having a plan in place is important to ensure the same standards are applied to all personnel working on a production, and to avoid any surprises regarding positive test results upon arrival. Certain jurisdictions may require a particular testing policy, so it is important to check the most current rules and restrictions applicable to each individual production.

It is important to determine which company involved in a production should be responsible for implementing the above requirements, and to take responsibility in the event agreed-upon protocols are not followed. Although a designated COVID-19 compliance manager may be brought on to assist, the general approach is that the company in charge of overseeing the specifics of the production should be the one in the best position to be responsible for implementing and enforcing COVID-19 health and safety measures.

Final Thoughts

Various states, counties, and cities, along with industry associations and labor unions, may require specific measures that could be applicable to different types of productions depending on the circumstances. The above information is meant to provide an overview of these issues but agencies and marketers should always consult with their counsel to determine the best approach for their particular production needs as the COVID-19 pandemic continues.