

Advertising + Marketing

# Unions Reach Agreement with Advertising Industry to End Mandatory COVID-19 Protocols for Commercial Productions

## The Bottom Line

- On May 11, 2023, the COVID-19 testing and safety protocols required for advertisers and producers of commercials will expire.
- Following expiration of these requirements, no COVID-19 protocols will be permitted on any union productions unless the applicable union(s) approve of them in each instance.
- Agencies and advertisers should take this opportunity to review and revise their standard production agreements and any COVID-19 addendums or similar documents that have been utilized over the last three years.

The Screen Actors Guild-American Federation of Television and Radio Artists (SAG-AFTRA), representing union performers, and the Joint Policy Committee (JPC), representing advertisers and agencies, recently announced their agreement to terminate the COVID-19 Commercial Production Safety and Testing Protocol Agreement (the JPC-SAG COVID Protocols). The JPC-SAG COVID Protocols, which were first introduced on April 16, 2021 to protect union performers working on commercial productions, will expire on May 11, 2023.

On the production company side, the Association of Independent Commercial Producers (AICP) and unions representing production company crew members also reached an agreement to terminate the COVID-19 Commercial Production Safety and Testing Protocol Agreement they had made on December 1, 2020 (the AICP COVID Protocols). After numerous extensions and revisions since that date, most recently on March 3, 2023, the AICP COVID Protocols will also expire on May 11.

These announcements have been widely anticipated by the advertising industry. After the March 30, 2023 announcement by the Alliance of Motion Picture and Television Producers (AMPTP) and unions representing various Hollywood guilds and crafts that their own "Return to Work" agreement governing mandatory COVID-19 health and safety protocols for performers and crew members in the film and television sector would end on May 11, many expected the advertising production industry to follow suit.

These decisions come against a backdrop of the Biden administration's announcement that, as of May 11, the federal COVID-19 public health emergency and all ongoing federal measures and health mandates related to the pandemic would expire.

### How are Advertisers and Agencies Impacted?

The end of mandatory COVID-19 protocols will come as a relief to many advertisers and their agencies. Over time, as immunity spread, case counts decreased and illnesses became milder, many in the industry began to feel that the significant costs of complying with rigorous health, safety and testing requirements greatly exceeded the perceived risks around cast or crew members contracting COVID-19, and that there was a lower practical risk of COVID-19 significantly disrupting productions. Accordingly, with the elimination of protocols like testing and hiring COVID-19 compliance officers, many advertisers will be happy to see production costs decrease.

However, one of the great benefits of the mandatory COVID-19 protocols was that they were standardized across all productions. This minimized the need to negotiate and debate over what protocols should be implemented by, and imposed upon, individual production companies, agencies and workers. But with the protocols now terminating, companies and workers in the commercial production industry may be left to determine on their own what rules and requirements, if any, they believe are appropriate.

This arrangement may present challenges for companies that remain conscious of ongoing COVID-19 health and safety concerns if their production partners, performers or crew members are unwilling to follow any safety requirements. Moreover, as part of the termination of both the JPC-SAG COVID Protocols and the AICP COVID Protocols, the unions have specified that any COVID-19 protocols proposed to be implemented on a union production after May 11 will require the applicable union's prior approval. It remains to be seen whether, and to what degree, these unions may object to advertisers, agencies and/or production companies intending to implement voluntary COVID-19 protocols in the coming weeks and months. This arrangement could lead to more time-consuming negotiations in advance of production and could be frustrating to companies that remain concerned about COVID-19 health risks.

### What Steps Should Agencies & Advertisers Take?

The end of these mandatory protocols will likely give rise to a period of uncertainty as companies readjust to negotiating specific policies on a per-production basis and attempt to seek approvals from relevant unions when applicable. During this time, agencies and advertisers should be mindful of several considerations when planning new productions:

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- **Plan Ahead.** Agencies and advertisers should jointly determine early in pre-production whether they believe COVID-19 is a significant concern for the shoot and whether any health and safety protocols are desired. If they are, agencies and advertisers should account for longer negotiations before awarding a bid and finalizing a production contract, allowing time for the production company (if using union crew members) to seek approval from the relevant unions and for the advertiser/agency to seek approval from SAG-AFTRA if using any union performers. Since the relevant unions may not grant approval to implement COVID-19 protocols, agencies and advertisers should be prepared to pivot to an alternative plan if necessary.
- **Maintain Flexibility.** Just as the rise of COVID-19 ushered in a time of immense, rapid change within the production industry, so too will the removal of the standardized health protocols that the industry has become familiar with over the last three years. In the coming months, the industry will likely see new fluctuations in how COVID-19-related issues are handled. Agencies and advertisers should remain flexible during this time, with an understanding that, even as the current practices fade, new standards will soon take shape.
- **Update Production Contracts.** Agencies and advertisers should revisit their existing production contracts and COVID-19 compliance policies. To the extent production contracts speak to COVID-19 directly, this approach may no longer make sense. While it will be important to ensure that unanticipated interruptions arising from COVID-19 are properly captured in a *force majeure* clause, it may no longer be necessary to detail the specifics around a COVID-19 occurrence or an obligation to mitigate against the same. Additionally, the COVID-19 addendums that many companies adopted during the pandemic may no longer be necessary for most productions. Nevertheless, they may be helpful to maintain, with modifications, for individual productions that call for special health and safety vigilance, or for non-union productions where the parties will have more flexibility to negotiate for individual COVID-19 protocols.

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## For More Information

Please contact the attorneys listed below or the Davis+Gilbert attorney with whom you have regular contact.

**Samantha Rothaus****Partner**

212 468 4868

[srothaus@dglaw.com](mailto:srothaus@dglaw.com)**Howard Weingrad****Partner**

212 468 4829

[hweingrad@dglaw.com](mailto:hweingrad@dglaw.com)