

COVID-19's Impact on Commercial Productions

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Ever since COVID-19 was declared a global pandemic in March 2020, it would be an understatement to say that the world has changed.

In particular, the world of producing advertising content has certainly changed significantly. Production of commercials, film and television shows all paused for a brief period that felt like a lifetime during the spring 2020. As production activities slowly began to resume in summer 2020, a number of new and continually evolving protocols, best practices and expectations have emerged.

The two key issues that every production must now consider:

1. What is the financial impact if the production needs to be unexpectedly postponed or cancelled due to circumstances arising from COVID-19?
2. What protocols and guidelines should be implemented in order to reduce the spread of COVID-19 and protect the health and safety of those participating in the production?

Pre-COVID-19

- Most companies did not enter into production contracts with an expectation that cancellation or postponement would be likely.
- At the outset of the pandemic, before shut-down restrictions and regulations, it was unclear what cancelling or postponing due to health and safety concerns would mean financially. Many production contracts did not address this situation very clearly.
- Cancellation and postponement provisions, and force majeure provisions — which excuse performance when it becomes impossible or illegal due to an unforeseeable event — typically consisted of boilerplate legal terms that were not often heavily negotiated.

Postponement or Cancellation

All productions for advertising content should be done pursuant to a production agreement or other contract. The COVID-19 pandemic has given rise to a reconsideration of contractual provisions related to cancellation, postponement and force majeure.

Health and Safety Precautions

Over the course of the pandemic, new guidelines and best practices have emerged to mitigate the risk of a production being interrupted by COVID-19, and to protect the health and safety of participants on set while working to avoid ongoing spread of the virus. Many of these protocols and precautions have been determined by federal, state and local authorities, and have been adopted by industry authorities.

Some of the precautions that have become standard practice for advertisers and agencies to require, and for production companies to implement and enforce are:

- Carefully selecting shooting locations, considering: indoors versus outdoors; level of infection in the proposed location; and whether people would need to travel long distance.

Post-COVID-19:

- All parties have become more aware of the likelihood of production delays or cancellations due to unplanned circumstances arising from COVID-19 — such as key personnel getting sick or testing positive for the virus, becoming unavailable due to quarantine measures, or legal restrictions rapidly changing in various jurisdictions.
- Cancellation/postponement and force majeure provisions are being renegotiated much more carefully, and are now more likely to specifically address COVID-19 and distinguish it from other events that may cause a production to be cancelled or postponed.

Pre-COVID-19 (cont'd)

- Force majeure provisions sometimes did not specify how costs should be allocated in such an event, and sometimes provided that such costs would be handled in an identical manner as if the advertiser terminated “without cause.”
 - Termination “without cause” would typically result in the advertiser’s obligation to pay for a significant portion of the total production budget (including all out-of-pocket costs, and the director and production company’s service fees), based upon how far in advance of the production the cancellation occurred.
 - Termination for “breach” typically required the advertiser to pay only for the production company’s non-refundable out-of-pocket costs.
- Preparing a back-up plan to avoid cancellation if a COVID-19 interruption arises (such as having a back-up location or back-up personnel lined up).
 - Minimizing the number of people necessary to attend, and using remote technologies to enable participation without being physically present.
 - Requiring personnel to provide a negative COVID-19 test, and/or proof of full vaccination, prior to beginning work on the production, and additional periodic testing if a multi-day production or if circumstances otherwise warrant.
 - Requiring all attendees to complete a health symptom questionnaire and submit to a temperature check upon arrival on set.
 - Requiring social distancing and restricting mingling of groups on set.
 - Requiring the use of face masks and other PPE whenever possible.
 - Limiting food and beverages on set, and providing single-use, individually wrapped and served refreshments.
 - Increasing sanitizing of common spaces and restrooms.
 - Using improved air flow and filtration systems.

Different productions may require different sets of precautions, as the particular circumstances of each shoot vary widely.

Post-COVID-19: (cont'd)

- More attention is being paid to the notion that a COVID-19 interruption should only be viewed as a force majeure event if it is truly out of any party’s control. One lesson from the pandemic has been that many COVID-19 risks are, in fact, within the parties’ control. Therefore, not every COVID-19 event may be deemed as a force majeure.
- Cancellation provisions now often focus on the importance of proper precautions and preparation to avoid a last minute COVID-19-related interruption. If appropriate precautions are taken and a COVID-19 event still interferes with the production, then it may be truly a force majeure. But a failure to take such precautions could also be viewed as a breach.
- Properly determining whether a COVID-19-related cancellation or postponement to a production is due to a force majeure event or a breach has significant implications on the amount of money each party must bear.

While advertisers and agencies may have some input and are ultimately responsible to pay for the additional costs required by COVID-19 protocols, the production company is the party in charge of overseeing and managing the production on set. As a result, the production company is typically in the best position to take responsibility for implementing and enforcing these health and safety measures, and it has become common for production companies to hire a COVID-19 safety officer to help manage and enforce such protocols.

Production contracts should specify each party’s obligations for the foregoing COVID-19 protocols so that responsibility is clear in the event they are not properly followed and an interruption occurs as a result.

