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## LABOR &amp; EMPLOYMENT

## The long and winding road for Hollywood employers to get back to business

By Anthony J. Oncidi  
and Philippe Lebel

**F**or the entertainment industry, March's shelter-in-place orders meant a total production shutdown. Entertainment employers have now been given the greenlight to resume production in the Golden State — even in hard-hit Los Angeles County. But, before they do so, they must navigate a complicated minefield of new compliance challenges.

Part of the reason that resuming production is so difficult stems from the vacuum created by a lack of clear guidance from government officials. On May 20, Gov. Gavin Newsom suggested that California would release guidelines for reopening the industry by Memorial Day.

However, it was not until June 5 that Gov. Newsom announced that production could resume on or after June 12. And, in authorizing the industry to reopen, the state public health officer took a markedly different approach than with other industries. Rather than issuing tailored safety protocols, the public health officer stated that production could resume subject to "safety protocols agreed by labor and management, which may be further enhanced by county public health officers."

Fortunately, the entertainment



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A pedestrian with a face mask walks past the El Capitan Theatre, closed due to the coronavirus, on Hollywood Boulevard in Los Angeles, June 25, 2020.

industry had convened a task force, comprised of representatives from several studios and guilds, to develop recommendations. The result of these efforts was a June 1, "Industry White Paper." The white paper addressed virtually every aspect of production, and proposed many specifically tailored safety measures that could be implemented including, among other things: social distancing to the greatest extent possible; regular, periodic COVID-19 testing (without specific timelines); symptom

monitoring and questionnaires; and sanitation requirements. The white paper also introduced the concept of a new on-set position, a "COVID-19 Compliance Officer."

Next, Los Angeles County — the epicenter of film and television production — got involved. On June 11, the Los Angeles County director of public health issued a Reopening Protocol for Music, Television and Film Production, which was updated on June 29. While they provide concrete guidance, the L.A. pro-

ocols impose a variety of new requirements that make resuming production exceedingly burdensome — if not impossible for some projects.

Like the white paper, the L.A. protocols require the designation of a COVID-19 compliance officer responsible for establishing and enforcing safety protocols, training staff, and monitoring compliance. The L.A. protocols also require "regular, period testing," except in the case of one-time productions operating under a very short filming schedule

(e.g., commercials) and smaller music recording sessions, in which case they advise planning work to “eliminate close physical contact between cast, crew and performers as much as possible.”

As for social distancing, the L.A. protocols advise producers that any work that cannot be done with a minimum of six feet of social distance must be as brief and silent as possible, to avoid spreading droplets. They also discourage scenes that require prolonged close contact — including intimate and fight scenes.

The L.A. protocols also leave many questions unanswered. For example, they give no specifics about the frequency of testing, not to mention details about where, how or by whom testing should be performed. The L.A. protocols further provide that “staff may include paid employees that serve as an audience,” but fail to address how such employees would be treated for other purposes — e.g., overtime, meal periods and discrimination laws. Also unstated is where a production is supposed to find the heretofore unknown “COVID-19 Compliance Officer.”

As if the L.A. protocols were not enough for employers to tackle, on June 12, the Directors Guild of America, SAG-AFTRA, IATSE and the Teamsters’ collectively released their own proposed guidelines, titled “The Safe Way Forward.” Like the white paper and L.A. protocols, the guidelines require social distancing when possible, mandate symptom checks, prohibit shared paper documents, discourage in-person casting, and eliminate all communal food or craft services, among other requirements.

The guidelines also separate the production environment into “zones”: Zone A consists of a limited group of individu-

als (including actors) who, because of their positions, are not required to adhere to strict social distancing or mask protocols at all times. In Zone B, which consists of all other parts of the production worksite, individuals are encouraged to wear the ever-elusive N-95 masks and adhere to stringent safety protocols and social distancing rules. The guidelines envision that, “from door to door, people working in Zone A [will] travel along a cocooned path ... laid out and controlled by people working in Zone B.”

The guidelines significantly expand the number of employees productions must hire. They require that each production have a health safety supervisor (i.e., a COVID-19 compliance officer), and mandate the creation of an entirely new Health Safety Department, responsible for overseeing testing and enforcing other COVID-19-related protocols. The guidelines also require hiring a dedicated hygiene crew responsible for sanitizing all production spaces overnight and regularly throughout each day, as well as a security unit responsible for, among other things, “[k]eeping outsiders from entering Zone A without a testing clearance.”

The guidelines are particularly burdensome with respect to testing. First, they mandate that all personnel in Zones A and B be tested and cleared no more than 24 hours before they begin work. Second, they provide that “Zone A personnel should be tested three times a week *at a minimum*, with the understanding that certain circumstances may require daily testing,” including for scenes involving intimate contact or exertion.

It remains unclear what parts of the production budget will have to be trimmed to hire all of these new safety personnel (assuming they could even be

found). In addition to the significant added expense, the L.A. protocols and, to the extent adopted, the white paper and the guidelines also raise new legal and compliance issues unrelated to COVID-19. For example, employers must now collect an enormous amount of new employee health information.

Added to the new wage-and-hour burden stemming from compensable time spent by non-exempt employees completing multiple questionnaires and temperature checks, employers must also ensure that they comply with data privacy laws, including the California Consumer Privacy Act of 2018. On top of providing CCPA notice, employers also will need to ensure they comply with any legal requirements or limitations relating to sharing information, to the extent that is required by a network or other third party.

Entertainment employers must also be mindful of state and federal employment discrimination laws, which the existing protocols seem to have neglected. Fortunately, the U.S. Equal Employment Opportunity Commission released guidance permitting employers to conduct COVID-19 testing and disclose the names of employees who test positive to public health

agencies. However, neither the EEOC nor the California Department of Fair Employment and Housing has issued guidance permitting an employer to disclose the names of employees who test positive to others in the workplace.

On top of the maze of new safety protocols, entertainment employers also face questions about managing potential future claims. On May 6, Gov. Newsom issued Executive Order N-62-20, which created a rebuttable presumption that employees who tested positive for COVID-19 through July 5 were infected in the course and scope of work.

Now that the presumption is gone, given the risks attendant to the production process, as well as the prevalence of cast and crew employed through loan-outs, third parties, or as independent contractors, many industry employers have begun exploring whether to implement liability waivers or assumption of risk agreements. However, because of the unprecedented nature of the pandemic, there are many open questions. And, notwithstanding major pushes from employees to get back to work, guilds (including SAG-AFTRA) have instructed their members not to sign any such agreements. ■

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**Anthony J. Oncidi**, left, is a partner in and the chair of the Labor and Employment Department of Proskauer Rose’s Los Angeles office. **Philippe Lebel** is an associate in the Department.

