
The 'New Normal' – a Preliminary Producer's Guide to Restarting Film and TV Production in the United States

As parts of the United States begin to reopen, production companies, studios, networks and individual content creators are understandably concerned about how to manage the spread of COVID-19 on film and television sets. Any film or television production requires large groups of people working in close proximity for long periods of time each day. Film sets can, therefore, become the perfect spreading ground for a contagious respiratory virus such as COVID-19. We have already seen this. Tom Hanks tested positive for COVID-19 and was hospitalized in Australia while filming a feature film about Elvis Presley directed by Baz Luhrmann. As a result, filming halted and is currently still suspended. Tom Hanks is not alone, and there is a generally held belief among Hollywood experts that productions, as we know them, will need a serious overhaul before they can restart in the United States.

Productions will have to establish their own safety protocols for continuing operations safely as we enter into 'the new normal' as a country. Almost every major production company, guild and industry body in the United States (and around the world) is in the process of fine tuning its own set of production guidelines. Inspired by New York Governor Andrew Cuomo's call to action, an industry-wide task force is drafting a whitepaper outlining safe-opening protocols, which is due to be released any day now. Additionally, Los Angeles Mayor Eric Garcetti created an entertainment industry task force to work alongside the Los Angeles County Department of Public Health to create film and television production re-opening guidelines. The State of California was expected to announce its own set of Film and TV Reopening Guidelines on Memorial Day. Currently it seems the guidelines are delayed, perhaps awaiting completion of the White Paper and further industry input. We will update this memo after California governor Gavin Newsom releases California's guidelines.

In the absence of a clear government directive, however, producers planning to restart their productions in the United States should consider the following concerns:

Safety Protocols

Safety is paramount to the prevention and containment of viruses like COVID-19 on sets. Any production plan in the COVID-19 era should include adequate sanitation and personal

hygiene measures. Several production plans circulating among top Hollywood producers insist upon the addition of a “quarantine supervisor” who can enforce quarantine rules, monitor safety protocols and social distancing, and, if required, take temperatures of the cast and crew. Some plans even advocate taking the temperature of cast and crew every day before permitting entry to a studio lot or production site. Other production plans suggest implementing actual testing for COVID-19 and even antibody testing, if and when widely available, to determine who might already have a level of immunity to the virus. It is important that producers require all employees and personnel to attend training sessions to become familiar with all new safety and sanitation protocols.

Additionally, personal protective equipment (PPE) will be an essential component of any sanitation protocol. Everyone on set, except the on-camera actors, should wear masks and gloves while working, and, in some cases, should also wear goggles or face shields. Frequent hand washing will be mandatory and hand sanitizer stations should be made extensively available throughout production offices and on set. Hairdressers and makeup artists will also need to exercise heightened sanitation protocols, including wearing PPE and disposing of brushes and other tools after each use. In some cases, it may be possible to have actors refrain from wearing makeup or apply their own makeup and do their own hair under the video supervision of a remote hair and makeup artist.

From cameras to headsets, most film sets are notoriously crowded with shared equipment. In light of this commonality, it is important for producers to analyze each production’s workflow patterns and pay special attention to continuously disinfecting commonly touched surfaces, all shared equipment and high traffic touch points like door handles. Crew members should also wear gloves whenever possible on set and producers should be mindful to assign headsets and other individualized equipment to one crew member only for the duration of production, if possible. Air circulation is also a critical concern for film productions taking place indoors on sound stages. It may, therefore, be an important consideration for producers to utilize sound stages or indoor filming locations with modernized ventilation systems to prevent the spread of COVID-19 on film sets. Additional location considerations are addressed below.

Finally, catering protocols are being widely reconsidered. Instead of the lavish buffets that standard productions have grown accustomed to, individually portioned and packaged meals are much more in line with COVID-19 protocol. Even with individually packaged meals, it may be safer for cast and crew to take lunch breaks in shifts to better allow for social distancing in the meal area.

Quarantine/Isolation/Work Patterns

One approach under discussion is that production companies may require a production's full cast and crew to self-isolate in a 14-day quarantine prior to the start of production. Quarantine from non-production personnel could also be mandated for the duration of filming, perhaps even by housing all cast and crew together in the same hotel or living facility. In some proposed production plans, cast and crew will not be able to see their friends and family for the duration of the shoot. Enforcing such quarantine methods is a significant issue (for example, in Germany, a professional soccer coach was forced to sit out a league resumption match after it was discovered that the coach violated quarantine rules by leaving the hotel where he and the team were quarantined in order to buy toothpaste). Quarantine measures such as these may make producers think twice about adding extras or additional day players to scenes. Most production plans suggest cutting down the number of cast and crew, and some productions have gone so far as suggesting using crew members in place of extras.

Even on set, some production plans advocate the division of the cast and crew into isolated "pods" or "cohorts" during principal photography. These pods would operate independently and without contact with other pods. The idea is that if one member of a pod tests positive for the virus, that pod can shut down and quarantine for 14 days without causing the entire production to come to a grinding halt.

In sum, a site-specific plan is tantamount—as is workplace redesign in some cases—to address possible physical plant issues. Any such plan should include temporary walls and even directional signage to limit the number of actors and crew members coming in contact with one another in hallways or other areas in the physical production space. It may even be helpful for producers to consider designating protocols and separate areas for each production department and maintaining completely separate areas for routine activities to limit physical contact amongst cast and crew on sets (e.g. individual holding areas for actors, rest areas and carefully delineated seating areas, including for meals). In addition, production plans should also consider setting up "video villages" to further enable social distancing and limit the number of crew members around shared video monitors.

Social Distancing

Social distancing both on and off camera is essential to any effective COVID-19 reopening television or film production plan. Notwithstanding any quarantine limitations, social distancing will be easier with small casts and crew. Generally, the presence of non-essential persons on sets should be drastically reduced, if not eliminated altogether.

Additionally, social distancing protocols mandated locally by individual states or localities may encourage shifts away from the production of certain types of content in areas where protocols are particularly strict. Certain scenes may even be highly risky to film, such as intimate love scenes, crowd scenes with numerous extras, indoor scenes in enclosed spaces with multiple actors, and combat scenes with stunt actors in close contact with each other.

Producers may also want to consider increasing the use of animation and special effects in live action television and film productions for scenes that are difficult to film using social distancing, because both can be performed remotely. Animators and special effects personnel are already amendable to “remote work” and have systems in place well-situated for complete shifts, if necessary, to fully-remote and socially-distanced production plans during COVID-19. Animation productions for children and adults may see a general increase as a result. One example is the live action TV drama series “One Day at a Time” which announced plans to produce an animated special episode while production is on hold due to COVID-19.

Locations

Before selecting a shooting location, several production plans insist on the importance of producers reviewing the federal, state, and local rules that may impact the ability to film at a particular location. Just because a state has reopened does not mean that all counties within a particular state have been cleared to reopen. For example, the State of Georgia has dramatically opened up as a general matter, but there are still many additional restrictions in place in Atlanta, a popular shooting location. On May 22, Georgia Governor Brian Kemp released an 11-page document outlining “best practices” for opening Georgia. In the forefront of Georgia’s reopening for production is film and television producer, Tyler Perry, who recently outlined how he intends to re-open his Atlanta studio and resume filming his current network television productions, *Sistas* and *The Oval Office* in July. First, he plans to house the cast and crew of each show on his estimated 330-acre studio grounds throughout production. Second, Perry plans to provide private jet travel to the cast and crew who are not based in Atlanta, but primarily use local crew if possible, to lessen the likelihood of the cast and crew contracting COVID-19 in transit from their homes to the studio. Third, he plans to implement social distancing throughout production and follow the additional best practices discussed in this memo.

Santa Clarita, a suburb of Los Angeles, California, where increasing numbers of productions are moving, is seeking fast approval to move ahead of the county in reopening since its rate of infection is much lower than other densely populated cities in the county.

Additionally, Film Florida has released Recommendations for Clean & Healthy Production Sets for productions taking place in the State of Florida.

Choice of location or type of set will be a key consideration for producers looking to reopen production safely and maintain social distancing protocols. Sound stages may be more attractive in the 'new normal' COVID-19 era because they are large enough to address social distancing concerns, can be secured from outside guests, and can be more easily monitored and sanitized than other physical shooting locations. Outdoor locations may be the next preferable option for producers as recent studies related to the spread of COVID-19 have demonstrated that the virus can be spread through air circulation in buildings. Furthermore, many (but not all) outdoor locations are more favorable when it comes to social distancing concerns in general. However, when selecting an outdoor location, it will be useful to consult federal, state, and local regulations to determine if outdoor filming is permissible. Of course, with any location that is not a traditional sound stage, extra attention to sanitation concerns will be necessary.

Travel

Remote locations are often a perfect backdrop for a film or television production. For producers considering shooting at a distant location, infection rates and transportation options should be factored into the production plan. Proposals to make shooting at a distant location feasible include hiring local crew if possible, arranging for private and individual transportation for essential cast and crew, quarantining before and after arrival, and testing on both sides of the journey. On the other hand, producers requiring cast and crew to quarantine during filming may prefer to shoot an entire production at a remote location to minimize the temptation to visit with friends, guests and/or family. If international travel is required, it is essential to check the travel advisories of each country. Some countries, such as Hungary still prohibit arrivals from the UK and the United States, while others, like Iceland, may require a 14-day quarantine upon arrival (currently in place until June 15, 2020).

Insurance

Although there remain many unanswered questions, acquiring certain types of insurance for film and television productions will likely be almost impossible in the short term and certainly more difficult and more expensive as we transition to producing film and television content during "the new normal." The insurance companies that insure productions took a serious hit from claims due to the mass production shutdown in March

that has left them reluctant to write new policies without significant premium increases and exceptions to coverage.

Generally speaking, most independent producers need bank and/or other financing, which usually requires completion bond(s) from third party completion bond companies to ensure completion of a project on time and within a particular budget, or, alternatively if a project is abandoned, ensures repayment to financiers. Completion bonds are not typically provided to producers who are unable to obtain insurance to cover the vast majority of risks facing a production, which now includes shutdown due to COVID-19.

As an overview, different types of production insurance have been impacted by COVID-19, including: (i) cast insurance, which covers the producer's costs if a cast member gets ill, either for a temporary hiatus while the cast member recovers or the costs to reshoot certain scenes if the cast member needs to be replaced (now a broader risk as one cast member with COVID-19 can easily close or quarantine an entire film set); (ii) "essential element" insurance, which provides a full payout to financiers if the principal star who has been deemed "essential" by the financiers and/or the distributor, gets ill or dies and cannot perform at all, allowing the producer to abandon the project altogether; and (iii) liability insurance to protect the producer against claims if a member of the cast, crew, or a third party contracts COVID-19 on the set or from someone who contracted it on set.

As a consequence of producers facing increasing difficulties in obtaining insurance to cover the myriad of risks now associated with shooting during a pandemic, many think a federal government backstop is the only solution. As of May 26, 2020, there is a bill in the United States Congress, penned by Congresswoman Carolyn Maloney (D-NY), intended to establish a reinsurance pool that would allow carriers to cover pandemic losses, similar in structure to the Terrorism Risk Insurance Act passed in the wake of 9/11. Supporters of the bill hope it will be signed into law before 2021. Because this legislation is still in its nascent stages, one stop-gap alternative for producers is to obtain whatever insurance possible and self-insure the uninsurable risks. Blumhouse and Universal are currently contemplating this self-insured approach on a \$6.5 million horror film that will be shot entirely on the Universal lot in Los Angeles once all state, city and local governmental permissions are obtained.

Waivers

Production entities are concerned about lawsuits if a cast or crew member (or their family or friends) become sick with COVID-19 while rendering services on a production. Persons engaged to work on productions who are classified as employees are also covered by state

mandated Workers Compensation insurance which offers some limits on liability for employers to such employees who get sick from a work related cause.

There has been much discussion about the legislature providing some legal immunity for those reopening businesses, particularly bars and restaurants, and this may include productions. However, we note that Congressman Adam Schiff (D-CA) has pledged to oppose Mitch McConnell's efforts to include legal immunity to employers on this very point.

Producers may wish to seek the advice of counsel regarding the newly passed law in California, AB 5 (and similar laws in other states) and the unresolved issues it presents regarding the classification of "employees" versus "independent contractors" in the film and television business. Whether a particular cast or crew member would be classified as an "employee" is relevant to these issues not only for the availability of Workers Compensation insurance but also to other employee protection legislation, and quite possibly to the employer protection bills currently being proposed.

Some producers have considered including waivers of liability in their contracts. The industry guilds and unions are likely to oppose such provisions. SAG-AFTRA released a memo on May 15, 2020 prohibiting any SAG-AFTRA actor from signing a document releasing a producer/signatory entity from liability for the health and safety of its members.

Furthermore, a waiver of liability may be legally unenforceable by employers as against public policy. However, it may still be wise for producers to explore having employees and other individuals working on a production sign a written notice acknowledging disclosure(s) by producers of certain health and safety risks involved in working on a specific production in a pandemic and/or asking potential employees to consider their own vulnerable conditions such as underlying health issues, age, pregnancy, etc. Several proposed production plans consider this precaution, which may require attention to additional considerations addressed below.

Unions/Guilds

Unions governing actors, above-the-line crew members and below-the-line crew members such as the Directors Guild of America (DGA), the Writers Guild of America (WGA), the International Alliance of Theatrical Stage Employees (IATSE) and Screen Actors Guild/American Federation of Television and Radio Artists (SAG-AFTRA) are currently developing individual safety protocols and rules to protect their members. If a production

intends to employ union members, it will be necessary to comply with the safety requirements set forth by each relevant union, most of which are in the works and will be released during the upcoming months. IATSE has expressed a desire to negotiate with studios to establish a standardized set of terms and conditions irrespective of where a production takes place in the United States.

Preexisting Health/Privacy Concerns

It is important for producers to consider that they may now need to understand the preexisting health conditions of everyone on set, which may trigger privacy as well as labor and employment legal issues.

For example, producers, or a particular production's insurance carrier, may require a declaration of health from each member of the cast and crew rendering services on a particular production as well as testing. It is already customary for insurance carriers to require directors and key actors to pass a physical exam, but the rest of the cast and crew have not historically been required to undergo such evaluation. This could, however, constitute an invasion of privacy and producers will have to determine how to address this issue with cast and crew members when it arises.

Furthermore, even if an employee reveals a preexisting health condition, anti-discrimination laws should be considered and discussed with legal counsel. It is well understood and accepted that individuals over the age of 65, Black and Latinx individuals, and individuals with preexisting health conditions are at higher risk of hospitalization and death from COVID-19, but if a production decides not to hire from this age bracket, health or racial group, an age discrimination, an Americans with Disabilities Act ("ADA") claim, equal protection claim or applicable state law claim may be triggered. To avoid discrimination claims, production companies should participate in meaningful dialogue regarding reasonable accommodations, which, with all the aforementioned newly instituted COVID-19 accommodations, may prove to be an extremely difficult task. Employers will need to be careful to limit access to employees' health information.

Producers may also face issues surrounding the contact tracing of its workers who may show symptoms of COVID-19. Voluntary tracking may be acceptable. However, mandatory tracking will require a closer legal examination of the ADA, the Health Insurance Portability and Accountability Act ("HIPAA") and the California Consumer Privacy Act ("CCPA").

Federal, State and Local Laws

There are no effective shutdown prohibitions currently under federal law. However, the CDC guidelines play an important role in recommended “best practices” as well the state and local labor and employment laws of a particular production location. Other federal laws such as discrimination laws under the ADA or the recommended guidelines related to COVID-19 set forth by Occupational Health and Safety Administration may be applicable. State governors are active in issuing orders that prohibit various forms of conduct and in many cases mandate certain precautions such as masks and social distancing. Similarly, county and local authorities, particularly public health authorities, are active in issuing orders and directives. The differences between orders and recommendations will need to be understood by producers and particular attention will need to be paid to changing rules and orders.

The first concern in any production plan must always be the health and safety of the cast and crew. The COVID-19 global pandemic will force producers to reevaluate the way things have been done on set and adapt to a ‘new normal.’ It is possible that many COVID-19 related adjustments will turn into permanent practices well past this particular virus. Along with this novel virus come novel legal questions.

The experienced attorneys at Pryor Cashman LLP are here to help unravel these continually developing challenges that producers will face in the COVID-19 era, and we encourage you to contact us with any additional questions or for clarification.

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