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An Overview of Basic Employment Laws Affecting Production Companies in California [\(1\)](#)

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1. Wage & Hour Laws (General Overview): California Industrial Wage Order 12-80 governs Wages, Hours & Working Conditions in the Motion Picture Industry. All employers in the motion picture industry are required to post a copy of Wage Order 12-80 in a conspicuous place where employees can view it. In January 2000, California Assembly Bill 60 became law and drastically revised all existing wage orders. The Department of Labor Standards Enforcement ("DLSE") is anticipating publishing revised wage orders reflecting the revisions mandated by A.B. 60 by mid-year. Until such time, A.B. 60 in conjunction with the existing wage orders should be posted by all employers.

2. Employees v. Independent Contractors: There is no one concrete definition for an independent contractor. A variety of tests for identifying the existence of a bona fide "independent contractor relationship" have been established by courts, the IRS, unemployment departments, the Department of Labor and other government agencies. These different tests often place an employer in peril as one agency may find a bona fide independent contractor relationship exists while another unrelated agency may deem the independent contractor relationship a sham thereby causing liability to the employer.

While employers must pay payroll tax (both federal and state withholding), unemployment tax, workers' compensation premiums, and comply with wage-hour laws for employees, none of these obligations exist when an individual is an independent contract. The state and federal government impose substantial penalties for misclassifying individuals as "independent contractors." Not surprisingly, the government has a strong tendency to deny "independent contractor" status in "close cases." The IRS follows a 20 point test for determining whether an individual is or is not a *bona fide* independent contractor, although the IRS does not state how many of the 20 points are needed to allow the individual to be a *bona fide* independent contractor. Thus, there is a certain element of subjectivity associated with the test. Generally, the question is whether the individual is providing a service that a separate company would provide and whether the individual is acting like a separate company rather than as an employee. Independent

contractors work at an "arms length" basis with the company that hires it and the contractor must exercise a level of discretion and independent intellect in the manner that he/she performs the contracted assignment. Generally, all of the various tests and definitions ask: Does the individual have the right to control both what will be done and how it will be done.

Substantial penalties exist when individuals are mis-classified as individual contractors. The determinations are very fact specific and such decisions should not be made without first consulting an attorney well-versed in the subject.

3. Volunteers & Interns: An individual who qualifies as a volunteer is not an "employee" and therefore not subject to wage-hour laws. The issue of whether someone is a volunteer arises in 2 situations: (1) where the individual has never been an employee and all of the individual's work for the organization has been without compensation solely for his/her personal purpose or pleasure, and (2) when an employee volunteers to perform services during his/her off hours without expectation of compensation in an effort to help a financially strapped employer.

A bona fide "volunteer" is one who intends to work without contemplation of any pay for his or her services for (1) public service, (2) religious, or (3) humanitarian objectives, and the individual must not be a regular employee of the religious, charitable, or similar non-profit corporation which receives the services. The decision to work without contemplation of pay must be the clear voluntary choice of the individual and coercion must not be present. Alamo Foundation v. Secretary of Labor (U.S. Supreme Court, 1985) 85 L.Ed.2d 278; see also, California DLSE Operations and Procedures Manual sections 224.10-11.

No matter how lofty the film, rarely are for profit production companies engaged in public service, religious or humanitarian objects. It is almost impossible for a private for-profit film production company to lawfully use volunteers exempt from the wage/hour laws. Similarly, an employer in financial difficulties who asks employees to work overtime without pay will be liable for overtime even if the employee is willing to lend such a helping hand. Such employees will be deemed to have been "suffered or permitted" (allowed either explicitly or tacitly) to work; therefore the overtime is "hours worked" for which compensation is due. California IWC Wage-Order 12-80 "Governing Motion Picture Industry" section 2(H).

A bona fide "Intern" exempt from wage-hour laws is an individual who is working in an academically oriented program designed primarily for the benefit of the student. Dept. Of Labor Field Operations Handbook section 10(b)(21). If students are being used to perform work that would otherwise be needed to be done by a paid employee, it may be deemed that the work is not being performed primarily for the student's benefit and thus the student may be deemed an employee. However, note students that engage in film production work on student films will likely be viewed as merely participating in

extracurricular activities part of their overall education program. U.S. Dept. Of Labor Field Operations Handbook section 10(b)(03)(e)

NOTE: Regardless of what type of "arrangement" you think you have with your crew, if anyone of them changes their mind about the relationship and attempts to bring a claim for back wages, it is unlikely that the production company will succeed in defending against such a claim.

Arrangements where individuals who work on the film work in exchange for an interest in the film as a "limited partner" or "corporate shareholder" will generally nonetheless be considered an "employee" entitled to minimum wage and overtime, unless the individual is a bona fide "partner" with all rights and privileges associated with partnership or is within the controlling/management group of the corporation. U.S. DOL Field Operations Handbook section 10(c)(01)-(03).

4. "Loan Out" Corporations: "Loan Out Corporations" are generally established as S-corps owned by an individual artist that provide the services of the artist to third party production companies. This set-up is designed to provide a framework for withstanding a challenge to the artist's status as a bona fide independent contractor and take advantage of tax benefits, such as writing off items as business expenses of the corporation.

In order to preserve the integrity of the loan out corp. all production contracts should be entered into between the loan-our corp. and the production company, and the individual artist and his/her loan-out should execute a "certificate of employment" and comply with the federally required employment eligibility requirements mandated by Form I-9 (see discussion of I-9 Form's in section 8 below). However, in order to protect the production company, the producer should also insist that the individual artist sign an "inducement acknowledgment" agreement for the benefit of the producer. This type of document provides privity between the production company and the artist, and will protect the producer by preventing the talent from "quitting" his own company and in effect breaching the employment contract with the production company without negative consequence. The inducement acknowledgment permits the producer to enjoin the artists from working for others in the event of such an occurrence.

5. Minors: A production company must petition a California court for ratification of a contract with a minor, or else the minor can disavow his/her contract at anytime (even after the minor reaches majority). The minor need not return any money paid to him/her and the entire contract will be voided including, but not limited to clauses relating to clearance releases and no injunction clauses! In addition, the California Labor Code sets forth additional rules governing working conditions and maximum work hours of minors. The Labor Code also requires production companies to obtain child labor permits and requires mandatory Studio Teachers on film & television productions. The Studio Teacher perform not only educational services, but also act in a guardian capacity to

protect the child in any situation that the Studio Teacher places the child at risk. The DLSE regulates and enforces child labor laws on film and television productions.

The relevant statutes concerning employment of minors include:

Family Code section 6710 (formerly Civil Code section 35): "Except as otherwise provided by statute, a contract of a minor may be disaffirmed by the minor before majority or within a reasonable time afterwards; or, in case of the minor's death within that period, by the minor's heirs or personal representatives."

Family Code section 6750-6753: "Contracts in Art, Entertainment & Professional Sports": These sections set forth the framework for obtaining court approval of contract with a minor via earnings set aside and preservation in court monitored trust. Newly revised code sections effective 1/1/00.

Title 8 CAC section 11750, et seq defines the scope of the regulations governing child labor on production sets.

Title 8 CAC section 11753 sets forth the application procedures and requirements for work permits.

Labor Code section 1308.7: "Minors-- Employment In Entertainment Industry."

(a) No minor shall be employed in the entertainment industry more than eight hours in one day of 24 hours, or more than 48 hours in one week, or before 5 a.m., or after 10 p.m. on any day preceding a schoolday. However, a minor may work the hours authorized by this section during any evening preceding a nonschoolday until 12:30 a.m. of the nonschoolday.

...

(c) Any person . . . who *directly or indirectly* violates or causes or suffers the violation of this section, is guilty of a misdemeanor punishable by a fine of not less than five hundred dollars (\$500) nor more than one thousand dollars (\$1,000), or imprisonment in the county jail for not more than 60 days or both.

Civil Code sections 60 et seq sets forth the process for Emancipation of Minors.

6. OSHA Safety Laws: The federal Occupational Safety & Health Act ("OSHA") requires employers with 10 or more employees to maintain OSHA records consisting of a daily log of occupational injuries and illnesses and supplementary information on the incident. See: 29 C.F.R. 1904, et seq. Information must be posted in the log within 6 working days after the employer receives notice of an incident. There are a multitude of other record keeping requirements under OSHA that a production company should discuss with production counsel prior to hiring employees. Remember, filmmaking is a dangerous activity. Employers must report to the Area Director of OSHA, any work-related accident

requiring 5 or more employees to go to the hospital within 48 hours. Employer must also report to the Area Director of OSHA, any work-related death within 48 hours.

Twenty-one states have state OSHA-agencies that may impose requirements above and beyond that established by federal OSHA. California is one such state. Cal-OSHA requires production companies to have an Illness & Injury Prevention Program and to have regular safety meetings of 10 minutes in duration for crew members.

Significant fines, in addition to criminal liability, can be imposed if a serious accident occurs on the set and the production company is found to not have a written Illness & Injury Prevention Program. Production companies should speak with an attorney that understands both OSHA requirements and the unique aspects of motion picture production before production begins. A qualified production counsel can draft an appropriate Illness & Injury Prevention Program for your company.

7. Unemployment Compensation & Workers' Compensation: Unemployment insurance must be paid to the state by all employers. Producers should understand their obligations under their state's unemployment laws before hiring employees. Only "employees" are entitled to unemployment compensation, not "independent contractors." Problems often arise for producers after production wraps and an individual who was treated as an independent contractor files for unemployment benefits. The state will not have that individual listed in their records as an employee of the production company. If the state determines that the individual was not a bona fide independent contractor, a full audit by the unemployment department can be triggered, subjecting the producer to substantial penalties.

Employers are also required to provide workers compensation insurance for all employees. The workers' compensation laws are "strict liability" laws. This means that the sole question for determining liability is whether the injury occurred "within the course and scope of the employee's employment." It does not matter whether the company was negligent or acted with great care; the workers' compensation laws are only concerned with whether or not the employee was injured while working. The upside of this arrangement is that in exchange for the employer being strictly liable, the employee cannot sue the employer in civil court and can only seek remedies under the workers' compensation program.

Conversely, a company is generally not liable for the injuries of an independent contractor unless the company was negligent and that negligence caused the injury to the independent contractor. Just as the payroll tax laws and unemployment benefits are inapplicable to independent contractors, workers' compensation laws are also inapplicable to independent contractors. However, insurance carriers now offer special additional workers' compensation coverage for the purposes of covering independent contractors, provided the independent contractor is willing to agree to be bound by that arrangement.

States also impose significant penalties for failure to have workers' compensation insurance for your employees. Moreover, if an employee is injured on the job and there is no workers' compensation insurance, your company and any officer personally responsible can be subject to extreme liability. Remember, movie-making can be a dangerous activity where people routinely get injured (and sometimes killed) on the set.

8. Immigration: The Immigration Reform & Control Act ("IRCA") requires all employees to complete an "I-9" employment eligibility form. See: 8 C.F.R. section 274(a)(2)(b)(iii). I-9 forms must be completed prior to new-hires commencing work. An employer has 3 days to verify the information and sign verification portion of the I-9 form. The employer is required to maintain the I-9 form for the duration of the employee's employment plus 1 full year after the employee's termination. However, in the event the employee worked two years or less for the company, the employer must maintain the document for at least 3 years from the date the document was signed.

Motion picture performers who are citizens of other countries must obtain a Form "O-1" visa to lawfully work on motion pictures in the United States. The O-1 visa is specifically designed for the entertainment industry. The petition process for this visa is performed by the production company and can often take a substantial period of time. A skilled immigration law attorney familiar with the O-1 process should be used to help navigate the maze of "redtape." associated with the process. Plan accordingly to permit yourself time to obtain this visa. If the United States government learns of a performer working on a film illegally (something easily demonstrated by the performer's work being captured on film in a theater near you), the performer can be prohibited from ever again working in the United States. The production company will also face penalties.

9. Discrimination and Harassment Laws: Production companies, like all companies, are subject to federal and state discrimination and harassment laws. California law (Government Code section 12840) further requires all employers to distribute a written no harassment policy to all employees and the statute sets forth specific information that must be included in that policy.

10. Unions: All of the Guilds (the DGA, WGA, SAG, IATSE (electricians & grips), and Teamsters) require that a producer become a signatory to their respective collective bargaining agreement prior to using the services of a guild member. The process of becoming a signatory can take several weeks, as there is a significant amount of paperwork that must be completed, submitted and reviewed. In addition, after becoming a signatory, your company will be bound by the rules and regulations of each Guild's Basic Agreement. Some guilds, such as SAG, will require the independent producer to post a security bond to ensure producer compliance with union rules, in the event of a grievance, penalties can be automatically deducted from the amount on deposit with SAG.

Only production companies that choose to be signatories with union contract are subject to union rules. A production company is able to choose whether to sign with one union, all unions are selected unions. Union members are prohibited from working for production companies that do not sign with a union; it is the individual union member who works for a non-union production company that is penalized by the union (not the production company itself). "Financial core" membership in a union permits an individual to work for both union and non-union productions without penalty while still permitting the "Financial Core" member to enjoy most rights and privileges of union membership (such as participation in union health and pension plans). See Communications Workers of America v. Beck 487 U.S. 735 (1988); NLRB v. General Motors 373 U.S. 743, 742-744.

Union Telephone Numbers:

Screen Actors Guild (SAG): 323-954-1600

Writers' Guild of America (WGA): 323-951-4000

Directors' Guild of America (DGA): 310-289-2000

International Brotherhood of Teamsters: 202-624-6800

International Alliance of Theatrical Stage Employees (IATSE a/k/a/ IA): 213-627-4745

1. The following information represents only a brief summary of certain employment laws and does not identify all laws confronting employers. This information is for the purpose of seminar discussion and should not be taken as legal advice. The subject of labor & employment law issues can be quite complex and all such questions involving you or your company should be presented to legal counsel before proceeding with any labor & employment related transactions.