

EMPLOYMENT RIGHTS OF THE PRODUCING TEAM

2016



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This guide is designed to give general information and is not intended comprehensively or exhaustively cover all subjects, nor should it be considered as providing specific legal advice or rendering legal opinion. Readers should not act upon this information without seeking professional counsel.

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1: AM I AN EMPLOYEE?

In general, if you are required to perform producing services for another and that person has the right to control the manner in which the services are to be performed and the results of the work, you are an employee. The existence of an employment relationship determines in large part whether many of the protections discussed below apply to your circumstances. It should be noted, however, that many labor laws provide exemptions for bona fide executives, administrators, and professionals, and, thus, if you qualify for an exemption, you may fall outside of the protections of the law.

2: AM I AN INDEPENDENT CONTRACTOR?

Independent contractors are not employees and do not receive the protections under the

law that are provided for employees. Whether you are an independent contractor is a fact-based inquiry in which particular circumstances will determine the issue. The general rule is that independent contractors control the means and methods of accomplishing particular tasks and the person for whom services are performed only has the right to control or direct the result of the work. If a business tells you when and where to do the work, what equipment to use, what order or sequence to follow, and in essence controls the details of performance, then you are probably an employee and not an independent contractor.

NOTE ON “LOANOUTS”:

In the industry, producers at times incorporate and loan out their services to other businesses. When a producer renders services through his or her own loanout corporation, he or she is acting as a service corporation which acts as the employer. In these circumstances, the company to which services are loaned out may not have any obligations as

an employer. To ensure employee protections, producers should probably not render services through such loanout corporations.

3: AM I AN EXECUTIVE, ADMINISTRATOR, OR PROFESSIONAL?

If you are an executive, administrator, or professional, you likely would be exempt from many, if not all, of the employee rights discussed in this guide. For example, under federal law, effective December 1, 2016 employees will qualify for exemption from overtime pay if they primarily perform executive, administrator, or professional job duties and are paid on a salary basis at not less than \$913 per week.

Whether you are an executive, administrator, or professional is another fact-based inquiry in which particular circumstances will determine the issue. In general, however, one may consider the following guidelines concerning job duties:

Executives typically have responsibilities that involve the management of the enterprise in which they are employed. Executives customarily and regularly direct the work of other employees and have the authority to hire or fire other employees. They customarily and regularly exercise discretion and independent judgment.

Administrators typically have responsibilities that involve the performance of office or non-manual work directly related to management policies or general business operations of their employer or employer's customers. Administrators customarily and regularly exercise discretion and independent judgment.

Professionals are typically licensed or certified in the state where they primarily engage in the practice of their profession. Professionals can include those who primarily en-

gage in an occupation commonly recognized as a learned or artistic profession, requiring knowledge or learning customarily acquired by a prolonged course of specialized intellectual instruction and study. Learned or artistic professions may involve work that is original and creative in character, the result of which depends primarily on the invention, imagination or talent of the employee. Learned or artistic professions also may involve labor that is predominantly intellectual and varied in character (as opposed to routine mental, manual, mechanical, or physical labor) and is of such character that the resulting output cannot be standardized in relation to a given period of time. Professionals customarily and regularly exercise discretion and independent judgment in the performance of their duties.

4: AM I AN AT-WILL EMPLOYEE?

Unless you have a written contract (which could be a collective bargaining agreement) stating otherwise, your employment is probably at-will. At-will employees may be terminated for any reason, or no reason at all, at any time, with certain exceptions related to anti-discrimination laws and other statutes.

5: ARE THERE MINIMUM WAGE RATES FOR PRODUCERS?

Minimum wage rates for all employees are established by state and federal law. In California the minimum wage for employees in the motion picture industry is currently \$10.00 per hour with an exception for "learners" who are employees during their first one hundred and sixty hours of employment in

occupations in which they have no previous similar or related experience. Learners may be paid not less than eighty-five percent of the minimum wage rounded to the nearest nickel. LA County currently has a higher minimum wage for larger employers (26 or more employees), which is \$10.50 per hour. San Francisco has a minimum wage of \$13 per hour. There are also a handful of smaller cities, such as Berkeley, Mountain View, Oakland, Palo Alto, Richmond, with higher minimum wages. While we cannot list them all here, please review any relevant county and/or municipal minimums prior to making an offer of employment.

New York's current minimum wage is \$9.00 per hour. In New York City, for large employers (11 or more employees), the minimum wage will increase to \$11.00 per hour on December 31, 2016, \$13.00 per hour on December 31, 2017, and \$15.00 per hour on December 31, 2018. In New York City, for small employers (10 or less employees), the minimum wage will increase to \$10.50 per hour on December 31, 2016, \$12.00 per hour on December 31, 2017, \$13.50 per hour on December 31, 2018, and \$15.00 per hour on December 31, 2019.

On Long Island and in Westchester County, the minimum wage will increase to \$10.00 per hour on December 31, 2016, \$11.00 per hour on December 31, 2017, \$12.00 per hour on December 31, 2018, \$13.00 per hour on December 31, 2019, \$14.00 per hour on December 31, 2020, and \$15.00 per hour on December 31, 2021.

For the remainder of New York State, the minimum wage will increase to \$9.70 on December 31, 2016, \$10.40 on December 31, 2017, \$11.10 on December 31, 2018, \$11.80 on December 31, 2019, and \$12.50 on December 31, 2020.

Federal law requires that all employees be compensated at least \$7.25 per hour for all hours worked in a workweek and time and

one-half an employee's regular rate for time worked over 40 hours in a workweek.

6: AM I ENTITLED TO DAILY OVERTIME?

In California, non-exempt employees in the motion picture industry must be paid time and one-half for any work in excess of eight hours in a workday, any work in excess of 40 hours in a workweek, and for the first eight hours worked on the seventh consecutive day of work in a workweek. California also requires that non-exempt employees in the motion picture industry be paid double-time for all work in excess of 12 hours in a workday and all work in excess of eight hours on the seventh consecutive day of work in a workweek.

New York does not require daily overtime pay. In New York, the overtime pay requirement provides that employees are to receive one and one-half times their regular, "straight time" rate of pay for all hours worked over 40 hours in a given payroll week. Thus, time and one-half, double-time – or any amount higher than the agreed rate – is not required simply because the work is performed after eight hours per day or on a Saturday or Sunday. Federal law is also based on workweeks and only requires overtime pay at a rate of not less than one and one-half times an employee's regular rate of pay after 40 hours of work.

7: ARE THERE LIMITS TO HOW MANY HOURS I CAN BE ASKED TO WORK?

In California, employees in the motion picture industry may be employed only up to a maximum of sixteen hours (including meal periods) in any one day from the time they are required and do report, until dismissed, pro-

vided the employee is compensated for such overtime. New York, however, follows federal law and does not limit the maximum number of hours an employee can work.

8: HOW FREQUENTLY MUST I BE PAID?

In California, wages must be paid at least twice during each calendar month on days designated in advance by the employer. Payment of wages on a weekly, biweekly or semimonthly basis suffices, provided that wages are paid not more than seven calendar days following the close of the payroll period. Employers must post notices defining the regular payday and the time and place of payment. In New York, employees must be paid not less frequently than semi-monthly on regular pay days designated in advance by the employer. Like New York, Federal law does not limit the maximum number of hours an employee can work.

9: IF I REPORT FOR WORK BUT AM NOT PUT TO WORK, MUST I BE PAID ANYTHING?

In California, when an employee in the motion picture industry reports to work and is not put to work or is worked for less than a half his or her usual or scheduled day, the employee must be paid at least half his or her usual or scheduled daily wages, but in no event less than two nor more than four hours pay. If an employee is called back a second time in a workday, he or she must receive at least two hours of pay for that period.

In New York, an employee who by request or permission of the employer reports for work on any day shall be paid "call-in pay" for at least four hours, or the number of hours in the

regularly scheduled shift, whichever is less, at the basic minimum hourly wage. Exceptions may apply. Federal law does not require call-in or show-up pay. However, under federal law, an employer may be obligated to compensate employees for "waiting time" when the employer requires the employee to wait for work and the waiting time primarily benefits the employer and its business.

10: AM I ENTITLED TO ANY REST BREAKS DURING THE WORK DAY?

In California, employees in the motion picture industry working shifts of at least three and one-half hours must be authorized and permitted to take paid rest periods at the rate of 10 minutes per four hours worked, or major fraction thereof. This means that 10 minutes of rest time must be authorized for shifts lasting from 3.5 hours up to 6 hours, 20 minutes of rest time must be authorized for shifts of more than 6 hours up to 10 hours, 30 minutes of rest time must be authorized for shifts of more than 10 hours up to 14 hours, and so on. California employees in the motion picture industry may work no longer than six hours without a meal period of not less than 30 minutes, nor more than one hour. A subsequent meal period must be called not later than six hours after the termination of the preceding meal period. If an employer fails to provide an employee a rest or meal period, the employer shall pay the employee one hour of pay at the employee's regular rate of pay for each workday that a meal or rest period has not been provided.

In New York, employees who work a shift of more than six hours starting before 11 a.m. and continuing until 2 p.m. must have an uninterrupted lunch period of at least half an hour between 11 a.m. and 2 p.m.

Federal law does not require that an employer give its employees mandatory rest breaks or meal breaks.

11: AM I ENTITLED TO A MINIMUM NUMBER OF HOURS OFF BEFORE THE NEXT WORK DAY?

California employers in the motion picture industry, however, may not require employees to report to work unless ten hours have elapsed since the termination of the previous day's employment. California requires that employees be given one day off in seven days, with certain exceptions. In California, the one day of rest requirement does not prevent an accumulation of days of rest when the nature of the employment reasonably requires the employee to work seven or more consecutive days; provided, however, that in each calendar month, the employee shall receive the equivalent of one day's rest in seven. New York, on the other hand, follows federal law, which does not require mandatory time off.

12: IF I USE MY CAR FOR BUSINESS PURPOSES, AM I ENTITLED TO REIMBURSEMENTS FOR GAS AND MILEAGE?

In California, employees must be reimbursed for all employment related expenses incurred as a direct consequence of discharging their duties or obeying the directions of their employer. An employer is not required to reimburse its employee at the rate set by the Internal Revenue Service. (A lower rate can be used.) However, regardless of the rate set by the employer, California law requires that the employee be reimbursed for all of his or

her employment-related expenses. New York, however, does not require employers to reimburse employee expenses, with certain exceptions. Federal law likewise does not require employers to reimburse employment-related expenses, but employees may deduct these expenses from their federal taxes.

13: IF I MOVED TO A NEW LOCATION BASED ON LIES MY EMPLOYER TOLD ME, DO I HAVE ANY RIGHTS?

In California, it is illegal to induce an employee to move from one location to another, whether within the state or across state lines, by misrepresenting the kind, character, length of work, housing conditions of work or the existence or nonexistence of a labor dispute. Double damages may be awarded. In New York, an employee may have a claim of fraudulent inducement for damages flowing from the employee's reliance on a representation of an existing fact (known to be false by the employer) and made by the employer with the intention of inducing reliance on the misstatement.

14: IF I AM TERMINATED, AM I ENTITLED TO ANY SEVERANCE PAY?

The states of California and New York also do not require severance pay. Nor is there any requirement under federal law for severance pay. Severance pay is a matter of agreement between an employer and an employee (or the employee's representative).

15: IF I AM DISCHARGED OR LAID OFF, HOW QUICKLY MUST MY EMPLOYER PAY MY UNPAID WAGES?

In California, workers engaged in the production of motion pictures must be paid all wages earned and unpaid at the time of termination by the next regular payday. In New York, terminated employees must be paid no later than the regular pay day for the pay period during which the termination occurred.

16: CAN I BE BLACKLISTED?

In California, employers may not misrepresent a former employee's work history to prevent him or her from obtaining employment.

17: WHAT RIGHTS DO I HAVE CONCERNING EMPLOYMENT DISCRIMINATION?

Federal laws prohibit employment discrimination based on race, color, religion, sex, national origin, or genetic information. They protect men and women who perform substantially equal work in the same establishment from sex-based wage discrimination. They protect individuals who are 40 years of age or older. They prohibit employment discrimination against qualified individuals with disabilities.

In general, it is illegal to discriminate in any aspect of employment, including: hiring and firing; compensation, assignment, or classification of employees; transfer, promotion, lay-off, or recall; job advertisements; recruitment; testing; use of company facilities; training and apprenticeship programs; fringe benefits; pay, retirement plans, and disability leave; or other

terms and conditions of employment.

Discriminatory practices under these laws also include: harassment on the basis of race, color, religion, sex, national origin, disability, genetic information or age; retaliation against an individual for filing a charge of discrimination, participating in an investigation, or opposing discriminatory practices; employment decisions based on stereotypes or assumptions about the abilities, traits, or performance of individuals of a certain sex, race, age, religion, or ethnic group, or individuals with disabilities, or based on myths or assumptions about an individual's genetic information.

In addition to federal laws, state laws typically offer additional protections against discrimination. Both California and New York, for example, also prohibit discrimination because of actual or perceived sexual orientation.

The U.S. Equal Employment Opportunity Commission, the California Department of Fair Employment and Housing, and the New York State Division of Human Rights each receives and investigates charges of discrimination against employers.

18: IF MY EMPLOYER TAKES ME OUT OF STATE OR OUT OF THE COUNTRY TO WORK AS A PRODUCER, WHAT LAWS APPLY?

There are no uniform answers for this circumstance. In some cases, the state law where a contract was entered applies, and in other cases the law of the state where the contract was performed applies. For example, under Title 8, Section 11756 of the California Code of Regulations, when minors, who are residents of the State of California, contractually agree to employment by an entertainment company located in California, and are subsequently

taken from California to work on location in another state, California's child labor laws continue to apply.

19: ARE THERE HAZARDOUS AND DANGEROUS WORK CONDITIONS TO BE AWARE OF?

There are many potential hazards that you may face in production work. Production work may bring you into contact with construction crews where scaffolds, ladders, power tools, and other equipment pose hazards. During production, unusual and remote locations may provide potential dangers if buildings are not secure. Wilderness locations also pose dangers related to severe weather, animal bites, and insect bites. Other daily on-the-set dangers include potential tripping hazards near cables and equipment. You have a right to a safe and healthful workplace and have the right to file complaints about unsafe work environments with federal and state authorities. The U.S. Occupational Safety and Health Administration, the California Department of Industrial Relations Division of Occupational Safety

and Health, and the New York Department of Labor Division of Safety and Health each receives and investigates such complaints.

20: DOES THE LAW PROTECT ME FROM GENERALLY ABUSIVE AND DENIGRATING CONDUCT BY AN EMPLOYER?

In general, the law is very tolerant of what might be considered abusive conduct in the workplace. However, both California and New York provide protection against extreme and outrageous conduct. In California and New York, employees can bring a legal action for intentional infliction of emotional distress, but the conduct must be so outrageous in character, and so extreme in degree as to go beyond all possible bounds of decency, and be regarded as atrocious, and utterly intolerable in a civilized community. This is a difficult standard to meet and involves a detailed fact-based inquiry in which particular circumstances will determine the issue. These claims may be brought in state courts (and possibly federal courts) depending upon the circumstances.

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