SPORTS, MEDIA & ENTERTAINMENT

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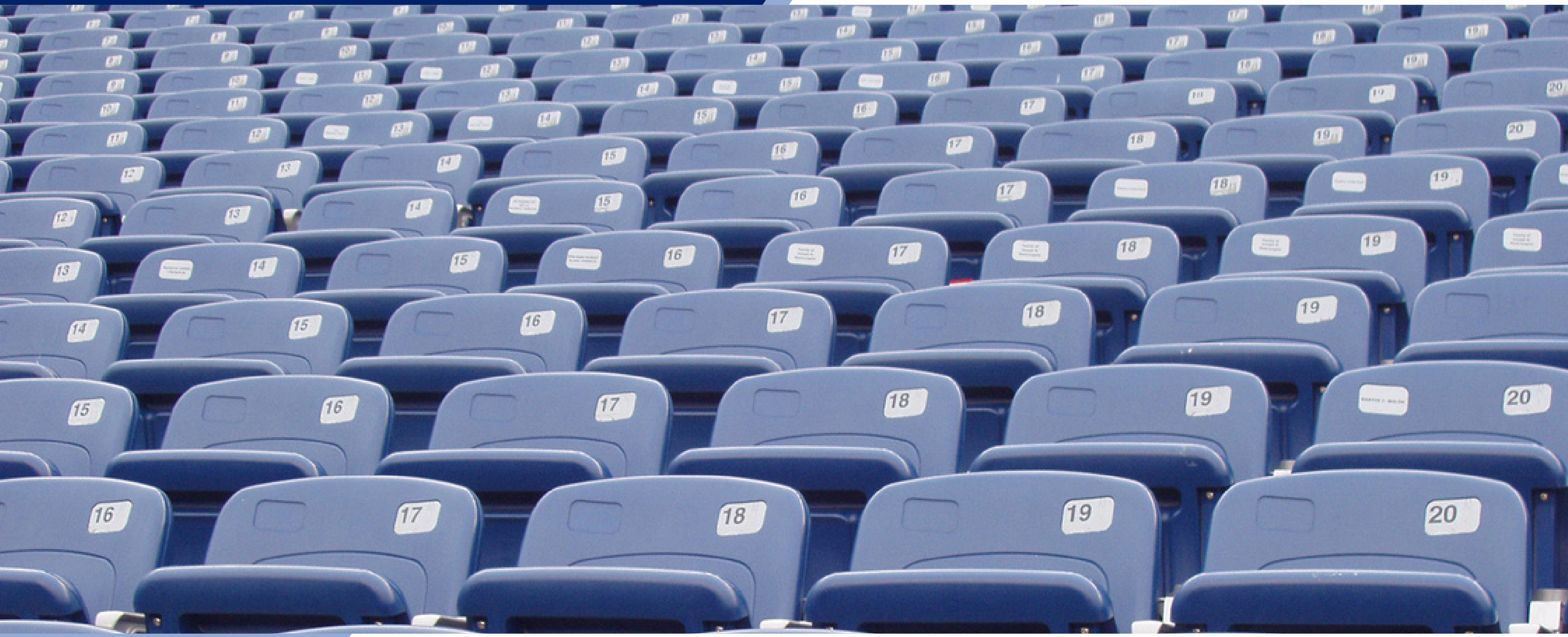

What's Inside / Summer 2024

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What Insurance Has To Do With Baseball's Most Expensive Cups of Coffee

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Gabriel Moya was seventeen when he signed a minor league deal with the Arizona Diamondbacks in 2012. By 2017, Moya had developed into a promising prospect with real hopes of making it in the bigs. That year, the young pitcher struck out 87 batters in 57.1 innings of relief, posting 24 saves, an ERA of 0.77 and a WHIP of 0.771 while playing with the D-Backs' AA club in Jackson and the Twins' AA franchise in Chattanooga.[i] While this sounds like the beginning of a baseball fairy tale, people familiar with the grind of minor league baseball know that Gabriel's road ahead was far from certain. It is estimated that only 10% of all minor league players will play even one game in the Majors.[ii] If Moya was going to hit paydirt in the major leagues, he would need to stay hot and have things break just right.

Bumpy Roads and Baseball Dreams

Many people assume that all professional athletes make millions. Not so for minor league ballplayers – or even young players struggling to prove themselves over their early years in the big leagues. It is not hard to find horror stories told by minor leaguers about the not-so-glamorous conditions endured while chasing their dreams. Dirk Hayhurst wrote that while playing Low-A ball, he mostly ate PB&J because it wouldn't spoil, since he did not have a refrigerator at the time.[iii] While playing Single-A, some players were described as "spread killers" because they ate more than their rationed amount, leaving other players to go hungry.[iv] In Double-A, players passed a hat around so a teammate could travel back to the Dominican Republic to see his newborn baby.[v] Even in Triple-A, he slept on an air mattress in the living room, while another player slept on the floor in a sleeping bag.[vi] These anecdotes don't even account for the players who are married with kids, those players who work third and fourth jobs, or the international players who arguably suffer more due to lack of familial connections. (A charity called "Adopt A Minor Leaguer" will allow you to sponsor a minor league player and support them,[vii] including donating 'Chipotle Gift Cards.'[viii])

In 2023, Major League Baseball ratified a collective bargaining agreement that provided a pay increase for minor league players.[ix] Minimum salaries increased from $4,800 to $19,800 for rookie ball; $11,000 to $27,300 at Single-A; $13,800 to $27,300 at Double-A; and $17,500 to $45,800 at Triple-A.[x] Yet even these higher salaries leave many players wanting. It's hard for many to get by making $30,000 a year and spending 100 days of it on a bus[xi] travelling from town to town while trying to develop the truly elite athletic skills needed to make it in the Majors. The spread between these minor league salaries and what potentially awaits in the bigs is pretty huge: under the new CBA, the minimum major league salary is $740,000 in 2024,[xii] with the average salary now $4.5 million.[xiii] For those on the cusp, with tons of talent but still perhaps only a 10% shot at cashing in, it is reasonable for them to want to lock in a certain cash return.

Yet even these higher salaries leave many players wanting.

Investing in Player Futures

That uncertainty and spread has given rise to companies such as RockFence Capital, LLC ("RockFence"); Fantex Inc. ("Fantex"); and Big League Advantage, LLC ("BLA") – service loan providers that cater to professional athletes. These companies offer players an upfront payment of hundreds of thousands, even millions, in exchange for a percentage of the player's future career earnings. Basically, the lenders are placing a bet on the player's chances of making it in the major leagues. If the player never makes it in professional baseball, then he keeps the money and never has to repay the loan. If he succeeds, then the loan is repaid over time plus profits to the lender out of the player's (substantial) salary.

Per a Fantex statement in 2016, it advanced between $2-4 million to certain players in exchange for promises to pay back 10-12% of their lifetime professional earnings, on and off the field.[xiv] Fernando Tatis Jr, received a $500,000 loan from BLA when he was in the minor leagues, and now that he has made it big with the Padres – he signed a 14-year $340 million contract in 2021 – BLA will receive back about $27 million over the span of that deal.[xv]

Some have called these arrangements predatory,[xvi] but it is not hard to see why they are desirable for both sides. From the prospect's perspective, there are two ways in which these deals make sense. One is a player that uses the money to enhance his chances for a career as a major league ballplayer – spending it on training, nutrition and other investments likely to enhance his chances of success as a professional athlete – something that many players cannot afford on an annual salary of $27,300. Another is a player that uses the money as a hedge in the event he does not end up one of the 10% of players that make it to the major leagues. If it turns out that the player's baseball dreams do not come true, a $500,000 advance wisely invested can be used to pay for a belated college education or to start a small business once the cleats are hung up. That is a far better position for the significant number of players that never make it out of the minors and find themselves

starting over in their mid- to late-20s with no advanced education or seed money for life after baseball.

Even for Tatis, the deal made sense, although it did turn out to be very expensive. Tatis spent six years in the Minor Leagues[xvii]– two with a rookie ball salary of about $5,000 and three in AA being paid $14,000 – with no guaranty that he would ever make it to the Majors. While the $27 million cut of his salary that will go to BLA spread over 14 years is quite a sum, it still pales in comparison to the $313 million that Tatis will be paid by the Padres, plus many millions more in endorsement deals.

From the lender's perspective, they underwrite a portfolio of investments knowing that only some of them are going to be profitable (i.e., knowing that some of the players will not make it to the big leagues and will not repay the money advanced), but expecting that the ones that are profitable will more than offset those losses. BLA, for example, uses a proprietary method to evaluate players to identify a certain type of prospect they want to invest in – a "Ben Zrobist, moneyball type guy."[xviii]

Insurance as Protection on Lenders' Investments

On occasion, a player's path to the major leagues is undermined by injury. To protect against that risk, investors like BLA typically purchase insurance policies on the athletes that insures against their injury or death. Such insurance is not uncommon, especially in professional athletics, and there are a variety of insurance companies eager to accept premiums in exchange for accepting the risk of loss. In insurance arrangements with investors such as BLA, the insurance company promises to pay the outstanding balance on the loan or investment if coverage is triggered.

With these contracts in place, the various parties are all hoping for the same thing – a healthy player making it big as a major leaguer. But what happens if these interests come out of alignment? This brings us back to Gabriel Moya and a lawsuit playing out in California Federal court – *RockFence Baseball, LLC v. Certain Interested Underwriters at Lloyds, et al* 23-cv-01211.[xix]

Insurance Coverage Litigation – Gabriel Moya Case Study
RockFence entered into a player loan agreement with Moya on March 9, 2018, a year when he bounced between the Minnesota Twins and their AAA farm team in Rochester, New York. Under that agreement, RockFence loaned Moya $3,159,450 in exchange for a promise to repay the loan plus interest and fees out of his earnings as a major league ballplayer. If Moya never made it as a professional athlete and was unable to repay the loan with baseball earnings, RockFence would take a loss and write off the debt.

This loan agreement includes accident and sickness permanent and total disability insurance policy

To secure its investment, RockFence purchased annual accident and sickness permanent and total disability insurance policies, including a policy purchased from Underwriters at Lloyd's, London ("Lloyd's") covering the period from March 25, 2019 to March 15, 2020 (the "Policy"). Pursuant to the Policy, if Moya suffered an injury during the policy period that prevented him from playing professional baseball, Lloyd's promised to pay RockFence up to $4,947,514 or the balance of the loan, whichever is less. Specifically, coverage would be owed if Moya suffered an injury that directly culminated in "Permanent Total Disablement" of Moya – defined as "continuous Total Disablement" for twelve months with "no likely hope of improvement, sufficient to Participate ever again in [Moya's] occupation." The Policy defines "Total Disablement" as "complete and total physical inability to Participate" as a "professional baseball player." In turn, the Policy defines "Participate" as being "on the active roster of a professional sports team for which [Moya] is contractually obligated to play, and/or is dressed, and/or is available and/or is physically able to practice or play for such team." The Policy further identifies the "professional sports team for which the Insured is contractually obligated to play" as the Minnesota Twins.

Moya appeared in 35 games for the Twins in 2018, including 6 starts, posting a 3-1 record, a 4.71 ERA and 31 strikeouts over 36.1 innings. In 2019, however, things took a sharp turn for the worse. On February 23, 2019, Moya suffered an injury to his left shoulder during spring training. After some treatment in March, Moya started throwing bullpen sessions in early April, pitched a scoreless inning in a rehab appearance on April 21 and was activated of the 10-day injured list on April 24, 2019. Moya spent the first five months of the 2019 regular season in the minors, posting a 5.56 ERA and 55 strikeouts over 45.1 innings with Twins' AAA and AA squads. Then, on August 23, 2019, after striking out the first two batters he faced, Moya suffered another shoulder injury. He underwent a series of shoulder surgeries in September 2019, January 2020 and July 2020, seemingly dashing his chances of ever making it in the major leagues. On September 23, 2020, RockFence declared Moya permanently disabled, submitted a proof of loss to Lloyd's on June 14, 2021, and requested payment under the Policy.

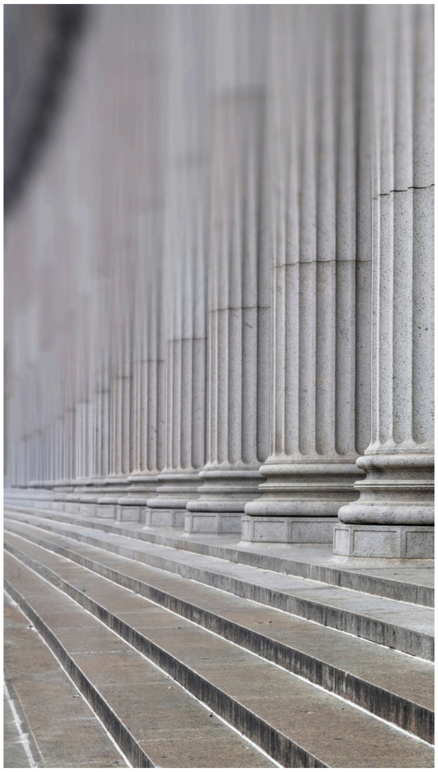
Moya never returned to play in the major leagues, but he did try to get there. In June 2021, he signed with the Lancaster Barnstormers, one of a handful of teams playing in an "independent league" outside the MLB / MiLB umbrella. Tickets to games in this league are under $15 and games are played before a few thousand fans each night. Moya pitched in 44 games with the Barnstormers in 2021, striking out 51 batters over 45.2 innings of relief – posting an ERA of 4.14. In 2022, Moya moved to another team in the same league – the Kentucky Wild Health Genomes – pitching in just 16 games with an ERA of 10.34.

On June 30, 2022, Lloyd's denied coverage on two grounds. First, that Moya's injury occurred in February 2018, prior to the Policy's inception in March 2019 (meaning that the insurance company that sold the prior year's policy would have to pay). Second, Lloyd's contended that Moya was not "Permanently and Totally Disabled" pursuant to the terms of the Policy. Specifically, Lloyd's asserted that a player's ability to play "professional baseball" of any sort (i.e., to be paid any amount of money to play baseball at any level) means that he is not "disabled," and that RockFence was entitled to nothing under the Policy because Moya returned to the field for the Barnstormers in the summer of 2021. Not surprisingly, RockFence disagreed, contending that the whole point of the arrangement was to insure the risk that Moya could possibly pitch in the major leagues, noting that the Policy specifically mentioned the Minnesota Twins as the "professional sports team for which the Insured is contractually obligated to play."

The dis-alignment of the parties' interests at this point could not be more stark. RockFence clearly had lost its gamble on Moya's baseball career, as there was zero chance that he would ever earn enough money on the mound to repay his $4,000,000 debt. Because Moya had suffered an injury for which RockFence purchased insurance, RockFence's focus was on the insurance recovery. For its part, Lloyd's focus was on the fine print of its insurance policy – looking for whatever excuse it could muster to save on a $4,000,000 claim payment. And there was Moya, dreaming of a miracle comeback while playing in front of a few hundred spectators in the Amish country of Southeastern Pennsylvania. Millions of dollars and big league dreams all up in the air like a swirl of characters from varying Springsteen songs.[xx]

On February 12, 2023, RockFence sued Lloyd's in the Superior Court of California in Los Angeles. Lloyd's filed a motion seeking to have the case resolve via a mediation outside the reach of the court's

The Court determined that the arbitration provision is triggered when Defendants disagree with the conclusion



jurisdiction, pursuant to an arbitration clause in the Policy. In deciding that motion, the Court agreed to send the matter to arbitration, but made several important rulings that will frame the consideration and resolution of the parties' dispute in that forum.

The Court granted the motion to compel arbitration but narrowly circumscribed the scope of the arbitration.[xxi] The Court noted that it is undisputed that Moya is capable of playing for teams outside of the MLB umbrella, and that "professional" at least includes any MLB or MiLB team. Thus, the Court held that the arbitrators could decide whether Moya was capable of playing for a MLB or MiLB team despite his injury, in which case he would not be deemed "disabled" under the Policy. If the arbitrators determine that Moya was incapable of playing on an MLB roster, then the case will return to the Court, where the judge will determine the meaning of "professional baseball" and whether Moya's appearances for the Barnstormers let Lloyd's off the hook for the amount owed under the Policy.[xxii]

So the question of what constitutes "professional baseball" in this case will remain unanswered for the time being. Certainly, there is zero doubt in the minds of the folks at RockFence – who specifically bought insurance against the risk that injury would block Moya's path to a big league-sized payday. As a matter of contract law and fair business practices, that is the correct analysis. And yet, there are thousands of guys from Lancaster to Spokane spinning tales of their "cup of coffee" in the bigs that might beg to differ. So who pays for the most expensive cups of coffee in "professional" sports? Stay tuned.

Footnotes

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[xvii] https://www.milb.com/player/fernando-tatis-jr-665487
[xviii] Sheryl Ring, "CEO of Big League Advance Makes his Case" Fangraphs, April 23, 2018. https://blogs.fangraphs.com/the-ceo-of-big-league-advance-makes-his-case/
[xix] RockFence Baseball, LLC v. Certain Interested Underwriters at Lloyds, et al 23-cv-01211
[xx] Compare Bruce Springsteen, "Glory Days" (Columbia 1984) ("I had this friend, was a big baseball player, back in high school. He could throw that speed ball by you; make you look like a fool. Saw him the other night in this roadside bar; he was walkin in I was walking out. We went back inside and had a few drinks, but all we kept talkin about was glory days.") with Bruce Springsteen, "Atlantic City" (Columbia 1982) ("Well I've been looking for a job but it's hard to find. Down here there's just winners and losers but don't get caught on the wrong side of that line.").
[xxi] Notice of Motion and Motion to Compel, ECF Dkt. 12 at 14.
[xxii] Id at 12.

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Exploring Various Funding Methods for Film and Television Projects

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The production of film and television projects is capital-intensive. It requires substantial financial resources to cover costs such as pre-production costs, cast and crew salaries, equipment leases, post-production preparations, marketing, and other expenses. Decades of filmmaking have seen the development of a variety of funding methods to create and execute these film projects. In this article, we explore the primary methods of film funding, combining traditional and modern approaches available to filmmakers and producers.

Studio Financing

Studio financing is one of the oldest and most traditional methods of funding film and television projects. Major studios like Warner Bros., Universal, and Disney often fund projects internally. These studios have extensive financial resources and can fully finance a project from start to finish. In return, they typically retain significant control over the production and distribution processes. The projects generally start as inhouse projects and go through an internally structure development to final concept. Occasionally a major studio will take on a project initiated by an external source. Other times, a studio may partner with other studios to fund a project.

One great advantage to studio financing is access to substantial capital and a huge well of comprehensive support. This support includes marketing, distribution networks, and experienced personnel. Clearly there are economies of scale with this type of financing. The disadvantages are that studios often demand significant creative input and control, which can limit the creative freedom of filmmakers. Studios also take a large share of the profits, leaving less for the creatives and everyone else.

Independent Film Financing

Independent financing involves raising funds from private investors, production companies, or other entities outside of the major studios. This method is especially popular among independent filmmakers who seek more creative control over their projects. These fundraising methodologies dovetail with corporate finance and exempt securities offerings. They consist of debt, equity or some combination of both. Creatives often seek structured arrangements for various phases of a project. Successful projects could offer exponential returns.

The greater the risk, the greater the reward. Producers and artists who seek these types of funding tools are willing to take on more risk. They are usually those who either believe they have solid projects or a great name.

The advantages of independent financing techniques are creative freedom and flexibility. Filmmakers are able maintain greater control over their projects without studio interference and can seek funding from multiple sources, tailoring their approach to the project's specific needs. The disadvantages are that Independent financiers may demand substantial returns on their investments as well (increasing the financial risk for filmmakers) and that independent productions may lack the resources and distribution networks available to compete with studio-backed projects.

Studios also take a large share of the profits, leaving less for the creatives and everyone else.

Crowdfunding

In recent years, crowdfunding has emerged as a popular method for funding film and television projects, particularly for smaller, independent productions. Platforms like Kickstarter, Indiegogo, and GoFundMe allow filmmakers to raise funds directly from the public. In addition to these platforms, there is Regulation Crowdfunding ("Reg CF"). Regulation CF is a section of the United States Code of Federal Regulations (17 CFR § 227) that deals with equity crowdfunding. Under Reg CF, eligible parties can offer and sell securities for all sorts of projects (including film projects) through crowdfunding. All Reg CF transactions must take place online through an SEC-registered intermediary, either a broker-dealer or a funding portal. Companies can raise a maximum aggregate amount of $5 million through crowdfunding offerings in a 12-month period.

An advantage of crowdfunding is access to a broad audience, as crowdfunding platforms enable filmmakers to reach a global audiences, potentially raising significant funds. Crowdfunding campaigns can build a dedicated fan base and generate early buzz for the project. However, there is no guarantee that a crowdfunding campaign will reach its funding goal, leaving projects in limbo. Also, running a successful crowdfunding campaign requires substantial time and effort for marketing.

Government Grants and Tax Incentives

Many state governments offer grants and tax incentives to support the local film and television industry. Certain states like Georgia and Louisiana have traditionally been known for offering significant tax credits and have attracted thousands of filmmakers to their states. States like Michigan have also offered substantial incentives for filmmaking These programs aim to promote cultural awareness, create state jobs, and attract foreign investment into the state.

Some grants provide funding which does not have to be repaid, reducing the financial burdens and stresses on filmmakers to perform. The incentives can significantly reduce production costs, making it more feasible to complete a project.

One the other hand, some government grants are often highly competitive, with stringent eligibility criteria. There can also be bureaucratic hurdles which make it difficult to navigate the application process for grants and tax incentives. This method can be time-consuming. Some state programs dictate the requirements for a production to receive credit, which requirements may be onerous and somewhat inhibit options and creativity.

Pre-Sales and Distribution Deals

Pre-sales involve selling distribution rights to a film or TV project before it is completed. This method allows producers to secure funding based on the project's potential marketability. Distribution deals can also be made post-production, securing a distributor who will handle the film or show's release. Pre-sales are good in that they provide early capital that can be used to finance production. Also, securing distribution deals can validate the project's commercial potential. On the downside, distributors may take a larger share of the profits, which can reduce the filmmakers' earnings and pre-sales agreements often come with deadlines and performance expectations, adding pressure to the production process.

Private Equity and Venture Capital

Private equity and venture capital firms invest in film and television projects with the expectation of high returns. These investors typically seek out projects with strong commercial potential and experienced production teams. When these firms find projects they like, capital financing techniques are employed such as debt and equity strategies, or a combination of both. These can come with regulatory hoops as the firms must also comply with securities laws as investors in an enterprise. Their budgets are generally able to handle.

Private equity and venture capital can provide substantial funding for films, enabling large-scale productions. Investors in the niche market often bring valuable business acumen and industry connections to the project. The downside can be that sometimes investors expect significant returns, which can pressure filmmakers to prioritize commercial success over artistic vision. Filmmakers may have to relinquish a significant share of ownership in their project.

Debt Financing

Debt financing involves borrowing money to fund a film project, with the expectation of repaying the loan with interest. Common sources of debt financing include banks, financial institutions, and private lenders. This is a good funding technique but not available to all

Some state programs dictate the requirements for a production to receive credit

projects. Filmmakers retain full ownership of their project, without giving up equity. Loan terms are typically fixed, providing a clear understanding of repayment obligations. However, there is always repayment risk and interest rate risk. The filmmaker is obligated to repay the loan, regardless of the project's success.

Product Placement and Brand Sponsorship

Product placement involves featuring branded products within the film or TV show in exchange for funding or other support from the brand. Brand sponsorship can also involve broader partnerships, including co-marketing and promotional activities. We used to see this form of financing technique more often, but still see it occasionally (like James Bond driving primarily Aston Martin). Product placement and sponsorship can provide supplementary funding. Brands do offer marketing support and could enhance the project's visibility. Integrating branded products can limit creative freedom and disrupt the artistic flow. Also, excessive product placement may be perceived as distracting and limiting by audiences.

Filmmakers and producers must carefully consider the advantages and disadvantages of each funding method

Conclusion

There is a large landscape of film and television funding techniques. The techniques are limited only by the creativity of the industry itself, one known for its creativity. These financing techniques may be employed individually or together to create a broad realm of financing possibilities. Filmmakers and producers must carefully consider the advantages and disadvantages of each funding method, balancing financial needs with creative goals. By leveraging a combination of these funding techniques, industry professionals can navigate a complex world of project financing and bring their creative visions to life.

10 Things To Consider When Terminating an Employee

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Whether it is due to the economic consequences of the lingering effects of the pandemic, a horrendous job performance, a combination of both, or some other reason, employment lay-offs and terminations are an economic fact of life for employers in the Sports, Media & Entertainment sectors.

By way of example, Disney has laid off approximately 7,000 employees or 3% of their workforce. ESPN has let go of a large number of employees, including significant on-air personalities. *The Los Angeles Times* laid off 20% of its newsroom: NBC News MSNBC laid off around 75 employees in January. *Sports Illustrated* laid off most of its staff (around 100) in January. *Time* laid off 15% of its staff, and, in 2023, more than 21,400 media jobs were lost. And so on. That said, now is the time for employers to recall some key considerations before terminating an employee or employees.

1. CONSIDER THE REASON: POSITION ELIMINATION VS. PERFORMANCE ISSUES

As a fundamental proposition, the employer must be able to articulate the reason for terminating an employee. A good exercise for employers is to summarize the reason for the action in a paragraph.

Is the decision economically motivated as a position elimination or reduction in workforce, or is it based on the employee's poor performance? If based on the employee's less-than-acceptable performance, the employer hopefully can establish a paper trail in terms of performance evaluations and prior warnings to support the decision.

Will the employee be replaced? Generally speaking, position eliminations (i.e., no replacements) may be easier to defend. However, if there are multiple employees in the position, the employer should be prepared to justify the employee's termination, e.g., seniority, performance, etc.

2. CONSIDER WHETHER THE EMPLOYEE FALLS UNDER PROTECTED STATUS

The employer should consider whether the affected employee falls into a category that is protected by federal, state or local law. Employees may not be discriminated against on the basis of race, religion, age, citizenship, sex, sexual orientation, national origin, marital status, disability and certain other factors. Essentially, all employees except for white males under the age of 40 likely fall into some class that is protected by law.

... employment lay-offs and terminations are an economic fact of life for employers in the Sports, Media and Entertainment Sectors

Of course, this is not to suggest that such protected employees are insulated against employer action. Rather, the employer should be cognizant of a potential discrimination claim, underscoring the need to be able to articulate the legitimate business reason for taking action against an employee in a protected classification. Employers should also consider whether a termination or series of prior terminations has a disparate impact on a particular group.

3. CONSIDER ANY APPLICABLE COLLECTIVE BARGAINING OR INDIVIDUAL EMPLOYMENT AGREEMENTS

Most employees are employed "at will," meaning they are not guaranteed a job for any fixed period. They may be terminated at any time for a good reason, a bad reason, or no reason at all, as long as it is not an illegal reason, such as discrimination. Many employers have employment handbooks or other written policies that reiterate such employment-at-will status. Two very notable exceptions to "at will" employment status are collective bargaining and individual employment agreements. Union agreements typically limit a termination to a showing of "cause" or "misconduct." Economically motivated actions may be strictly limited on the basis of seniority and create "bumping" rights for affected employees. Individual employment contracts may limit terminations without a showing of "cause," and/or impose significant severance payments. Employers must always take into account the presence of a union or individual employment agreement before acting.

4. CONSIDER POSSIBLE RETALIATION ALLEGATIONS

Employers are often annoyed when an employee voices concerns or files a written complaint about discrimination, harassment, wage-hour violations, or requests an accommodation for a disability or religious belief and related issues. Their first instinct sometimes is to "get rid of" the problem employee. Be careful: A myriad of laws protect employees who have either "opposed" discrimination or "participated" in some sort of proceeding. Even where the underlying claim of discrimination or other employment violation lacks merit, the employee may indeed have a bona fide retaliation claim if terminated or subjected to other negative employment action soon after lodging a complaint. While such employees are not necessarily insulated from termination, employers should be aware that they may assume an additional burden to justify their decisions against a possible retaliation claim, especially if taken within approximately six months of an employee's complaint.

5. CONSIDER THE NEED FOR ADVANCE NOTICE OF GROUP ACTIONS

If the employer's action constitutes a plant closing or mass layoff under the Worker Adjustment and Retraining Notification (WARN) Act and parallel state mini-WARN laws, the employer should be aware of strict rules requiring advance written notice before the employment terminations can be implemented.

Under the federal WARN Act, 60 days advance written notice generally is required where the action affects 50 or more full-time employees. Limited exceptions may apply (e.g., natural disasters or unforeseen business circumstances). State laws may require longer advance notice (e.g., 90 days) or provide broader protections (e.g., actions affecting 25 or more employees.)

6. CONSIDER THE NEED TO PROTECT CONFIDENTIAL INFORMATION

Certain employees may have particular access to confidential and sensitive information about the employer and/or its clients. It may be harmful to the employer if the employee is able to remove or utilize such information post-employment. The employer should take care to ensure that the employee has returned all confidential information and company property, and has not downloaded confidential and sensitive information. Employers may, for example, wish to consider disabling the employee's access to its computer systems and other property just as the termination is being implemented.

7. CONSIDER THE COMPETITION AND THE NEED TO PROTECT CLIENTS

Employers are well advised to review and analyze any restrictions already in place to prevent the employee from soliciting clients (and employees), and/or from engaging in a competing business following employment termination. Such "restrictive covenants" typically are found in employment agreements, or separate confidentiality and non-competition agreements. These may have been created at the commencement of or during the employment relationship.

If such restrictions do exist, we believe it is advisable to write the employee a letter providing a gentle reminder of these post-employment restrictions on solicitation and/or competition. Alternatively, such a non-compete provision may be negotiated at the time of separation in exchange for a severance payment or other consideration.

8. CONSIDER FINAL COMPENSATION AND VACATION PAY DUE

As a general proposition, employees must receive payment for work performed through the termination date regardless of the reason for termination. Sometimes, employers may elect, for reasons of security or employee morale, to pay the employee "through the end of the month," although the employee will neither be expected nor required to report to work after the notice of termination is delivered. Employers also need to be mindful of whether the employee is owed any compensation for overtime worked. In California, for example, failing to provide for loss of accrued time is strictly forbidden.

final termination pay and accrued but unused vacation pay typically must be paid promptly

A release agreement usually stipulates that employees will not sue their employers for discrimination or any other claim

Similarly, employees are generally entitled, under the employer's policy and/or most state laws, to receive payment for accrued but unused vacation pay through termination date. Some states, such as New York, allow that employers may lawfully adopt "use it or lose it" vacation policies, which provide that unused vacation time is not payable upon termination. By contrast, in California, for example, a policy or practice providing for forfeiture of accrued time is strictly forbidden.

It also should be noted that final termination pay and accrued but unused vacation pay typically must be paid promptly, generally by the next regular payroll date.

9. CONSIDER UNEMPLOYMENT BENEFITS

In most states, terminated employees are eligible to receive unemployment insurance benefits for an extended period of time unless they (1) leave employment voluntarily or (2) are terminated for misconduct. Conversely, loss of employment due to layoff, lack of work or economic retrenchment typically qualifies the individual for benefits. If the termination is the result of misconduct, employers are encouraged to oppose the claim for unemployment benefits in order to control their "experience rating" and tax rate.

10. CONSIDER THE USE OF RELEASES

Because of the potential of liability and associated litigation costs to an employer associated with its termination of an employee in one of the protected classifications, employers should strongly consider requiring employees to sign releases in exchange for receiving severance pay and/or other benefits and consideration in connection with their termination. Although regulations take care to protect employees who agree to waive their rights (i.e., releases must be "knowing" and "voluntary"), when designed and executed carefully, release agreements can provide a valuable protection to employers. The cost can be more than offset by the avoidance of litigation.

What You Can Stipulate: A release agreement usually stipulates that employees will not sue their employers for discrimination or any other claim related to their employment and termination. In addition, employees are typically asked not to disclose confidential information about the employers, not to disparage the employers, or not to disclose the details of the release to anyone other than their spouse, attorney, and financial advisor.

The release agreement should also contain a clause that says the employer, by entering into the release agreement, has not conceded liability in any way. In addition, there should also be provisions whereby employees will forfeit the enhancements from the agreement if they breach it.

Consideration/Enhancement: To make the release agreement binding, employees must be offered some type of consideration. The typical consideration is severance pay over and above what may already be required. For example, if the employer has no severance policy, any severance should suffice; if the employer has a policy that pays one week's severance for each year any employee works, then the consideration for the release has to be in addition to that. Severance is typically paid out either as a lump sum or salary continuation. Other types of consideration could include directly paying or reimbursing the employee for COBRA (Consolidated Omnibus Budget Reconciliation Act) health care continuation coverage, outplacement counseling, an agreement not to contest unemployment benefits or allowing the employee to keep the company car.

THE OVER 40 CROWD

The Older Workers Benefit Protection Act (OWBPA) has added safeguards for workers over age 40 when it comes to release agreements. First and foremost, OWBPA requires that the release be "knowing and voluntary." In other words, the release has to be in clear language and has to spell out exactly what the employee is receiving. In addition, it must tell employees that they have the right to consult an attorney before they sign the agreement. Employees over 40 also have a minimum of 21 days to consider the release agreement, and even after signing it, they still have a seven-day revocation period.

Employees over 40 also have a minimum of 21 days to consider the release agreement

CONCLUSION

Overall, the most important thing employers in the sports, media and entertainment space can do to avoid liability and protect themselves when terminating an employee or employees is to plan ahead and be aware of the potential legal implications of their decision, particularly for legally protected employees. The key point to remember: terminations are not accidents, but planned events. Hopefully the ten considerations outlined above will help to guide employers and help to protect them from liability.

ANDERSON KILL

Anderson Kill practices law in the areas of Insurance Recovery, Commercial Litigation, Environmental Law, Corporate and Finance, Antitrust, Banking and Lending, Bankruptcy and Restructuring, Construction, Foreign Investment Recovery, Employment and Labor Law, Captive Insurance, Intellectual Property, Corporate Tax, Hospitality, and Health Reform. Recognized nationwide by Chambers USA, and best-known for its work in insurance recovery, the firm represents policyholders only in insurance coverage disputes – with no ties to insurance companies and has no conflicts of interest. Clients include Fortune 1000 companies, small and medium-sized businesses, governmental entities, and nonprofits as well as personal estates. The firm has offices in New York, NY; Boston, MA; Denver, CO; Los Angeles, CA; Newark, NJ, Philadelphia, PA; Stamford, CT; and Washington, D.C.

We invite you to contact the authors with any questions.