

What Is An Inclusion Rider?

Legal View

By Jeff Kelley, Esq.

If you watched the Oscars recently, you would have heard best actress winner Frances McDormand, end her acceptance speech with two words of advice: “inclusion rider.” Now, as an attorney, that was perplexing to me as I know what a “rider” is but an “inclusion rider?” Mostly I was surprised because I had expected her to say something like “me too,” or “time’s up,” not a suggestion on technical legal drafting. Ultimately, this sent me directly to Google to find out what she was talking about. Apparently, I was not alone as these two words, not commonly paired together, caused a big spike in Google searches across the world. One definition in an article posted by NPR stated, “It’s a stipulation that actors and actresses can ask (or demand) to have inserted into their contracts, which would require a certain level of diversity amount in a film’s cast and crew.” Seems simple enough, but of course, it may have farther reaching implications I will point out below.

Apparently the phrase came from a 2014 column by Stacy L. Smith, published by the *Hollywood Reporter*, that asserted an A-list actor negotiating to join a film could use the inclusion rider to insist that “tertiary speaking characters should match the gender distribution of the setting for the film, as long as it’s sensible for the plot.” In other words, even the non-central characters must be fairly (and perhaps more accurately) represented by gender and race as may be called for or represented in a film. Smith, as interviewed by NPR, claims she had no idea that McDormand would mention these words in the final moments of the Oscars, but having pushed for years for diverse representation in film, was “elated and thrilled” to have those words broadcast around the world.

According to *E Online* and *ABC News*, McDormand, who won the award for her role in *Three Billboards Outside Ebbing, Missouri*, told reporters backstage that she had just found out about inclusion the week prior and claimed the term means “you can ask for and/or demand at least 50 percent diversity in not only the casting, but also the crew.” Smith went on to tell the New York Times that an inclusion rider might require the cast to be 50 percent female, 40 percent underrepresented ethnic groups, 20 percent people with disabilities and 5 percent LGBT people.

Smith worked with civil rights attorney Kalpana Kotagal, a partner with Cohen Milstein’s civil rights and employment practice group, to develop the language for inclusion riders. They were introduced by Anita Hill, who is of counsel at Cohen Milstein, and they began promoting the concept to talent agencies in the fall of 2017. Kotagal stressed that the inclusion rider is not a quota. “We certainly set guideposts and targets, but we definitely don’t dictate an outcome that would do anything but make the film more diverse,” she said. The intent and hope is that it encourages those who are engaged in hiring and casting to in fact hire and cast in a way consistent with a demographic. The American Bar Association also interviewed Smith, requesting a copy of the sample contract language, which was declined stating it was “work product.” An ABA “fact sheet” says the rider “sets clear goals for inclusion. It specifies the underrepresented groups to be included, defines a process for auditioning and interviewing, and sets objectives for casting and hiring.” The goal of the rider is to create financial consequences for studios that don’t engage in good-faith efforts to interview and hire qualified individuals, according to the fact sheet.

It is unknown if inclusion riders are being used in any other industry. But, according to Kotagal, the closest example may be the National Football League’s “Rooney Rule,” which requires that at least one person of color be interviewed for head coaching jobs. Apparently, some law firms have also embraced a version of the rule when considering lawyers for leadership roles. Kotagal believes the inclusion rider could be used in other industries where someone in a position of power

is engaged in contract negotiations. Another example might be a high-profile person in the news media who seeks inclusion during contract negotiations.

How may this impact our everyday world of equal employment and laws prohibiting discrimination of protected classes? Will there now be a “contractual” aspect to the hiring of A-listers for your business? Might the next GM or CEO of your company insist on an inclusion rider to ensure the company work force is more accurately represented, based on the demographic statistics of the area in which you do business? Probably not yet, but inclusion riders are certainly better known now than before this year’s Oscars, and may become more common place in more industries than the film industry.

Do you have a legal question? Send your question to Gilpin County attorney Jeff Kelley (Jeff@klfpc.com). Appointments for in person legal counsel are available in both Black Hawk and Denver offices.

Note: All legal claims are different and require full analysis by an attorney.