

NINE BEST PRACTICES FOR INFLUENCER MARKETING AGREEMENTS

October 2018 | by Michael C. Lasky and Paavana L. Kumar

Influencer marketing has become one of the most popular ways for marketers and their PR agencies to engage consumers—and also one of the most cost-effective.

As marketers continue to invest more in influencers, they expect more in return. This dynamic is changing the process of contracting with influencer talent.

It's easier than ever for marketers and their agencies to get caught up in the social media whirlwind. However, it is critical for all involved parties to take a step back and understand the regulatory framework at play, as well as the importance of having robust contracting processes in place.

In light of recent Federal Trade Commission (“FTC”) developments, all involved parties should keep the following 9 best practices in mind:

1. DEFINE THE INFLUENCER CONTENT.

According to the most recent batch of FTC warning letters and updated FAQs to its Endorsement Guides, certain hashtags, such as #partner, #ambassador, and #thanks [brand] without further context are not sufficient. Hashtags such as #paid, #ad, and #sponsored are likely to be sufficient, as well as organic disclosures that clearly describe the nature of the material connection.

2. KEEP DISCLOSURES “ABOVE THE FOLD.”

Make sure disclosures are not buried at the bottom of a text box or in hyperlinks. In particular, disclosures on Instagram must be included in the first three lines of the post, above the “more” button. Disclosures on Instagram or Snapchat Stories may be clearly superimposed on the post. Further, don't allow influencers to rely on built-in platform disclosure tools. The FTC has advised that it does not believe the Instagram, Facebook, or YouTube built-in disclosures to be sufficient.

3. CONSULT WITH LEGAL COUNSEL TO CREATE A WRITTEN POLICY FOR ENDORSERS TO DISCLOSE THEIR RELATIONSHIP WITH YOU.

Work with experienced legal counsel to develop a written policy that clearly instructs endorsers to disclose their relationship when speaking about a marketer's products. The policy should also require the influencer to provide their honest opinion of the products and the marketers, only make factual statements that can be substantiated and respect third-party intellectual property rights.

In addition, influencer agreements must now address unique issues—from regulatory compliance to a wide range of content and associated production and ownership rights.

4. UNDERSTAND WHO IS SIGNING THE AGREEMENT.

Increasingly, agreements are not negotiated with individual influencers, but rather with influencer networks on behalf of many influencers. Be aware that networks frequently try to avoid direct responsibility for influencer content. Influencers are the new celebrities (and often act as their own production houses), and negotiating these deals may require as much detail as a traditional celebrity talent or production agreement, including SAG-AFTRA issues and other considerations.

5. CREATE AND IMPLEMENT A SOCIAL MEDIA POLICY.

Provide as much detail as possible on the content the influencer is going to create, including format and length, and how the influencer is expected to promote it. PR agencies entering into these agreements on a marketer's behalf should be sure to provide influencers with detailed brand guidelines or a program brief establishing key messaging requirements for the content.

6. ESTABLISH SPECIFIC GUIDELINES REGARDING EXCLUSIVITY.

When content is being produced solely for one marketer, be sure to create specific guidelines about exclusivity. For example, is the influencer allowed to provide his or her services for other brands, including related or competing ones, or to include or mention multiple brands in one video? If not, be clear about the nature and time limitation of the restrictions.

7. ENSURE THAT THE MARKETER HAS THE ABILITY TO REVIEW AND APPROVE INFLUENCER CONTENT (AND REQUEST REVISIONS).

Further, consider whether the marketer wishes to own the content. For one-off social posts, a broad usage license may be acceptable (and is increasingly industry standard). However, for a broader production campaign, ownership of the assets may be more critical. Don't assume that the influencers of today will agree to work-for-hire.

8. CONTRACTS SHOULD REQUIRE INFLUENCERS TO REPRESENT AND WARRANT THAT THEY WILL COMPLY WITH ALL APPLICABLE LAWS.

Your contract should specify that influencers must comply with applicable laws, including the FTC guides, and further that the content they provide will not infringe upon any third party rights, including copyright and rights of publicity.

Well-drafted agreements should include terms that impose consequences for breach of these obligations that incentivize the influencer's compliance (without prompting them to walk away from the deal).

9. MAKE SURE TO BUILD IN LEGAL/REGULATORY COMPLIANCE.

Morals clauses and related provisions in influencer agreements are mission critical. Celebrity influencers with strong bargaining power often resist agreeing to robust morals clauses. However, it is more important than ever to push back.

While the previous industry standard was that a marketer could terminate a relationship only if the influencer's offensive activity occurred during the term of the engagement, marketers and their agencies should consider negotiating for the right to terminate an influencer agreement if revelations emerge about violations the influencer committed even prior into entering this influencer agreement.

At the end of the day, marketers and agencies must develop a detailed plan for monitoring influencers, along with an action plan if they go rogue so that marketers and agencies can act quickly.

Regulators are watching the entire influencer ecosystem—from marketers to publishers, PR agencies, and the influencers themselves. PR agencies are on-notice and must act accordingly. Preparation is key.

Originally published on <http://www.convinceandconvert.com>. All rights reserved.

ABOUT THE AUTHORS



Michael C. Lasky is Co-Chair of the Litigation Practice Group and Chair of the Public Relations Law Practice Group of Davis & Gilbert. He may be reached at 212.468.4849 or mlasky@dglaw.com.



Paavana L. Kumar is an associate in the Advertising, Marketing & Promotions Practice Group. She may be reached at 212.468.4988 or pkumar@dglaw.com.

