

# SAG-AFTRA's Influencer Agreement and Waiver to the Commercials Contract

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In early 2021, two new developments arose in the world of influencer marketing and talent unions. First, in February 2021, the Screen Actors Guild-American Federation of Television and Radio Artists (SAG-AFTRA) announced that it would begin welcoming online influencers into the union under its "Influencer Agreement." Shortly thereafter, SAG-AFTRA and the Joint Policy Committee representing advertisers and agencies (JPC) announced the introduction of a new "Influencer Waiver" to the SAG-AFTRA Commercials Contract.

Below are some common questions and answers regarding this development and what it means for advertisers and their agencies.

**Q: What is the SAG-AFTRA Influencer Agreement?**

A: The SAG-AFTRA Influencer Agreement (Influencer Agreement) is a contract intended to enable social media influencers who self-produce branded content for advertisers and meet certain additional criteria to be treated as members of the union in connection with their qualifying services.

**Q: What are the requirements for influencers to produce content under the SAG-AFTRA Influencer Agreement?**

A: In order for an influencer to be eligible to sign on to and produce qualifying content under the Influencer Agreement, they must meet the following criteria:

- Influencers must self-produce original on-camera video or voiceover content that features an advertiser's product or service. This means they must be the only performer appearing in the content and they must also independently write, film and produce all elements of the content. The content cannot be written or produced by a third party, such as a production company or an advertising agency.
- Distribution of the content must be limited to the advertiser's and the influencer's own social media channels (including YouTube, Facebook, Instagram, TikTok, Twitter, etc.).

- Influencers must incorporate as an LLC or corporation in order to sign on to the Influencer Agreement.
- Influencers must contract directly with an advertiser or an advertiser's agency. They cannot be procured or contracted through an influencer procurement network or other third-party intermediary.
- Influencers may not perform hazardous stunts, gratuitous nudity and sexual content under the Influencer Agreement.
- There are no follower-count requirements for an influencer to qualify to produce sponsored content covered by the Influencer Agreement.

**Q: Who is considered to be the influencer's "employer" (and why does it matter)?**

A: Influencers that want to perform union-covered services under the Influencer Agreement must do so through a business entity that is deemed to be their "employer." Influencers working under the Influencer Agreement must first incorporate themselves or establish an LLC. The entity they create then signs on to the Influencer Agreement and is considered the influencer's "employer" for purposes of their union-covered services. The influencer's entity as the SAG-AFTRA signatory is also responsible for paying the influencer's pension and health (P&H) contributions to the union from the influencer's compensation earned from their union-covered services.



**Q: How can my agency/brand hire an influencer who has joined SAG-AFTRA under the Influencer Agreement?**

A: Advertisers and agencies that are not signatories to the SAG-AFTRA Commercials Contract may freely hire influencers who have become union members under the Influencer Agreement and will not be subject to any union obligations. In such a case, the influencer (through his or her entity) would be solely responsible for complying with all union requirements, including calculating and contributing P&H payments to the union. The advertiser or agency will not need to modify their usual course of action in order to hire this influencer – and in fact may not even know whether the influencers are providing services under the union or not.

For advertisers and agencies that are signatories to the SAG-AFTRA Commercials Contract, influencers cannot be engaged under the Influencer Agreement. Instead, these signatories can utilize the Influencer Waiver to the Commercials Contract, discussed in more detail below.

**Q: What is the Influencer Waiver to the Commercials Contract?**

A: Advertisers and agencies that are signatories to the SAG-AFTRA Commercials Contract are required to abide by certain minimum requirements and standards when engaging performers to appear in commercials. With the rise in influencer-produced sponsored content in recent years, it has not always been clear whether certain influencer content could be deemed a commercial. The Influencer Waiver to the Commercials Contract (Waiver) offers a solution to this murky question by providing a safe harbor to signatory agencies and advertisers who seek to utilize influencer-produced sponsored content, while giving influencers treatment similar to what they would receive if they produced qualifying content under the aforementioned Influencer Agreement.

By utilizing the Waiver to engage influencers to self-produce sponsored content, signatory advertisers and agencies may freely negotiate the fee to be paid to the influencer, with no union-required minimum rates, and may utilize the

influencer-produced content for up to one year. In exchange, the signatory advertiser or agency must make the P&H contribution to the union on the influencer's behalf, based upon the influencer's union covered services. As long as the contract clearly states the influencer's gross compensation amount as well as the total amount to be contributed to the union's P&H funds, the parties can freely negotiate as to whether the P&H contribution should be deducted from, or paid in addition to, the influencer's fee.

If the advertiser or agency wishes to expand its use of the influencer content outside of social media (such as to television) or beyond a one-year period, then notice to the influencer and further negotiation is required. Any expanded use of the influencer's content in other media or for a longer duration will trigger the need to pay the influencer additional usage fees in accordance with the Commercials Contract.

**Q: If my agency/brand is a signatory to the Commercials Contract, does that mean we can only hire influencers who become SAG-AFTRA members?**

A: A signatory advertiser or agency is free to hire any influencer, whether or not they are a member of the union. As long as the individual is providing influencer-produced sponsored content, then the advertiser or agency can engage the individual utilizing the Influencer Waiver regardless of the individual's union membership status. By utilizing the Waiver and giving the influencers benefits similar to those they would receive under the Influencer Agreement, signatory advertisers and agencies can avoid potential challenges from the union if the influencer-produced content might be considered a commercial.

**Q: Will it become more expensive or complicated for my agency/brand to hire influencers now?**

A: Because influencers who create qualifying content as SAG-AFTRA members are now obligated to make contributions to the union's P&H fund, they may be incentivized to charge higher rates. However, these developments are unlikely to have a significant impact on the usual process for engaging influencers.

Agencies and advertisers who are not signatories to the Commercials Contract are unlikely to see any changes or have any increased obligations due to the influencers they hire. Agencies and advertisers who are signatories will need to engage in some additional negotiation regarding how the influencer's P&H contribution will be paid, but otherwise will not be required to undertake any increased obligations.