

Potential Pitfalls Associated with Influencer Marketing Deals and Strategies To Mitigate Risk

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During the last decade, consumers' increasing appetite for social media has triggered a shift in marketing strategies and caused brands to allocate substantial portions of their budgets to "influencer marketing." According to [TechCrunch](#), last year domestic marketers spent more than four and a half billion dollars on influencer marketing across Facebook, Instagram, Tik Tok and YouTube¹. Moreover, brands will likely increase their spending in the space as American teens and tweens spend even more time glued to social media. According to [The New York Times](#), overall screen use among teens and tween increased by seventeen percent from 2019 and 2021².

As talent and their representatives evaluate a wealth of potential partnerships, they need to be aware of the possible liabilities associated with certain deals. These include pitfalls that arise from unexpected places. Fortunately, there are steps they can take to mitigate these risks.

First to consider is indemnification. For example, talent should insist that the brand indemnify him or her and any related entities from any and all losses and costs associated with breaches of the talent agreement, or the brand's negligence or misconduct. Essentially, talent needs to ensure that the brand will pay for the any defense costs and/or damages that may arise from liability caused by the brand. For example, if a security guard, hired by brand or its vendor, slips on the site of a photoshoot and names the talent in the lawsuit, talent would want to an indemnity clause to shield them from having to pay for any costs or fees associated with the claim.

Secondly, talent needs to ensure the brand represents and warrants that it shall comply with all applicable federal, state and local laws. This is a key term because talent may otherwise find themselves jointly liable for matters they have no control over. Notably, the implementation of California Senate Bill 62, known as the Garment Worker Protection Act, at the start of the year created additional liability for influencers selling garments through their social platforms. Section 2673.1 of the California Labor Code states that a "garment manufacturer, contract or **brand guarantor**" who contracts with another person for the performance of garment manufacturing operations shall be "jointly and severally liable" with any manufacturer for wage violations, attorneys' fees and civil penalties. Cal. Lab. Code § 2673.1(a)(1). Significantly, the bill broadened the definition of "brand guarantor" to include "any person contracting for the performance of garment manufacturing regardless of whether the person with whom they contract performs the manufacturing operations or hires contractors or subcontractors to perform the manufacturing operations." Cal. Lab. Code § 2671(d). Therefore, an influencer could inadvertently expose him or herself to civil liability for promoting a garment that was originally manufactured by an organization that failed to properly compensate the sewers at a particular factory.

Third, talent should ensure that their promotions comply with the guidelines set forth by the Federal Trade Commission (the "[FTC](#)"). Notably, section 255 of the Code of Federal

¹ <https://techcrunch.com/2022/08/02/tiktok-to-overtake-facebook-in-influencer-marketing-spend-this-year-youtube-by-2024-forecast-claims/>

² [https://www.nytimes.com/2022/03/24/well/family/child-social-media-use.html#:~:text=On%20average%2C%20daily%20screen%20use,\(ages%2013%20to%2018\).](https://www.nytimes.com/2022/03/24/well/family/child-social-media-use.html#:~:text=On%20average%2C%20daily%20screen%20use,(ages%2013%20to%2018).)

Regulations mandates that an individual who discloses a product must fully disclose any connection the product, including a financial, employment or personal relationship with the brand. 16 CFR § 255.5. Additionally, according to the FTC’s “Disclosures 101 for Social Media Influencers,” the disclosures must be conspicuous and placed “with the endorsement.” Specifically, if the endorsement is an Instagram Story, then the disclosure must be superimposed on the picture. If the endorsement is in the form of a YouTube video, then the disclosure must be in the video as well as in the caption under the video. Federal law provides the FTC with broad investigative and enforcement powers.

Moreover, if a talent is promoting a cryptocurrency or an investment opportunity, the talent must adhere to stricter disclosure requirements. For example, on October 3, 2022, the Securities and Exchange Commission (the “SEC”) charged social media personality Kimberly Kardashian (“Kardashian”) with an SEC violation for failing to properly disclose her promotion of EMAX tokens, even though she published “#ad” over the Instagram story. The SEC alleged that Kardashian violated Section 17(b) of the Securities Act by failing to disclose that a branding agency paid her \$250,000 for the promotion³. Thus, talent needs to consider what products or services they are promoting and have legal counsel review any relevant laws or statutes that may require compliance.

Overall, influencer marketing has become a permanent strategy for brands and consequently a reliable revenue stream for talent. However, talent and their legal counsel should first and foremost carefully evaluate potential brand partners. Even after deciding to partner with a well-run company that reflects their respective values, talent should consider the potential legal consequences and work with their team to ensure that their agreements include terms that mitigates their downside risks.

³ <https://www.sec.gov/litigation/admin/2022/33-11116.pdf>