

SAG-AFTRA welcomes the influencer

By Howard R. Weingrad, Esq., Samantha G. Rothaus, Esq., and Jordan M. Thompson, Esq., *Davis+Gilbert LLP**

APRIL 30, 2021

After spending a decade carving out space in the industry, influencers are now being welcomed into the SAG-AFTRA union, which is recognizing them as a unique class of “multi-talented performers whose performances should be covered by a SAG-AFTRA contract.”

Social media content creators, commonly known as “influencers,” have become increasingly sought after by advertisers looking to tap into the influencer’s internet-based following.

While “influencer” is officially an industry recognized job title, membership into the Screen Actors Guild-American Federation of Television and Radio Artists (SAG-AFTRA), the premier labor union for professional performers, had previously been largely unattainable.

SAG-AFTRA is essentially treating the influencer as a mini production company or creative agency.

Desiring traditional labor union protections and health and pension benefits, influencers had taken steps in recent years to unionize themselves.

SAG-AFTRA has announced two new developments to its union contracts, aimed at covering audio and video advertising content produced by social media influencers for both union and non-union advertisers.

THE SAG-AFTRA INFLUENCER AGREEMENT

The SAG-AFTRA Influencer Agreement (Influencer Agreement) applies primarily to influencer content produced for non-union advertisers, and will serve two primary functions:

- (1) To create a pathway of entry for influencers to become members of the union, and
 - (2) To generate additional pension and health contributions for the union.
- An influencer’s on-camera (audio and/or video) performances in the content they create for an advertiser under the Influencer

Agreement will now be considered union-covered services (provided other requirements are satisfied), as to which pension and health contributions can be made.

Most notably, the intended signatories to the Influencer Agreement are the influencers themselves. Influencers looking to become union members through this avenue will be required to incorporate as a business entity and then sign on to the Influencer Agreement through their corporation or LLC.

In creating such a requirement, SAG-AFTRA is essentially treating the influencer as a mini production company or creative agency. As such, the influencer’s entity, which becomes the signatory to the Influencer Agreement, will be directly responsible for making pension and health payments to the union’s pension and health fund.

Additional components of the Influencer Agreement include:

- The influencer must have a direct contractual relationship with the advertiser.
- The influencer must produce their content themselves with no involvement by any third party production entity.
- Distribution of the content is limited to the influencer’s or advertiser’s websites and social media channels.
- No minimum rate; fees paid to the influencer are freely negotiable.
- No minimum social media follower count for an influencer to qualify.

These various requirements, including that the influencer must contract with the advertiser directly, make clear that the scope of the Influencer Agreement is limited in nature and does not cover projects where a traditional production company or third-party creative agency is involved.

THE 2021 INFLUENCER WAIVER TO THE COMMERCIALS CONTRACT

Advertising content produced for advertisers or agencies who are signatories to the SAG-AFTRA Commercials Contract

(Commercials Contract) is typically covered by the Commercials Contract.

In order to clarify how and to what extent union advertisers and agencies should handle contracts with influencers who produce their own content, SAG-AFTRA and the Joint Policy Committee (JPC) crafted the Influencer Waiver to the Commercials Contract (Waiver). The JPC represents advertisers and agencies who have authorized the JPC to bargain with SAG-AFTRA on their behalf.

The Waiver allows union agencies and advertisers to hire influencers (including influencers who have not signed on to the new Influencer Agreement) under the Commercials Contract, while applying the more favorable terms and conditions provided in the Influencer Agreement.

As a result, influencers hired by union agencies and advertisers can receive similar treatment as they would under the Influencer Agreement working with non-union agencies and advertisers. There are two exceptions to this Waiver:

- If the advertiser or agency wishes to expand its use of the influencer content into media other than the influencer's or advertiser's website and social media channels (such as television), then notice to the influencer and, in some cases, their permission, is required. Further, any expanded use of the influencer's content in other media will trigger the need to pay the influencer additional usage fees as set forth in the Commercials Contract; and
- The advertiser or agency, rather than the influencer, makes the SAG-AFTRA pension and health contributions in connection with the influencer's covered services.

Under the Waiver, so long as the advertiser's or agency's services agreement with an influencer clearly states what

portion of the total compensation is allocable to pension and health contributions, the advertiser and agency can choose to deduct the pension and health due to SAG-AFTRA from the influencer's fee (subject to agreement by the influencer), rather than making such pension and health payments as an additional expense on top of the influencer's fee.

WHAT DOES THIS MEAN FOR ADVERTISERS?

With respect to the Influencer Agreement, this means very little to advertisers. It appears that the primary focus of the agreement is to bring those influencers who meet SAG-AFTRA's checklist of requirements into the union's fold, but without causing any increased obligation on the part of a non-signatory advertiser to act as the influencer's "employer."

As for the 2021 Influencer Waiver to the Commercials Contract, advertisers and agencies who are signatories to the Commercial Contract will continue to engage influencers under the Commercials Contract, but will have the benefit of more favorable terms available under the Waiver.

For qualifying influencer engagements, the Waiver will offer these union advertisers and agencies the benefits of the Influencer Agreement, including free bargaining as to influencer compensation and, to the extent agreed upon and set forth in the influencer's contract, deducting pension and health contributions from the influencer's gross compensation.

This article was published on Westlaw Today on April 30, 2021.

* © 2021 Howard R. Weingrad, Esq., Samantha G. Rothaus, Esq., and Jordan M. Thompson, Esq., Davis+Gilbert LLP

ABOUT THE AUTHORS



Howard R. Weingrad (L) is a partner at **Davis+Gilbert LLP** in New York City. He handles matters involving the provisions and industry implications of the SAG-AFTRA Commercials Contract, often negotiating with unions and guilds on behalf of agency and advertiser clients. His practice includes working on a wide range of intellectual property issues related to copyright, trademarks, unfair competition, rights of privacy and publicity, and music licensing, as well as

broadcast and digital advertising production matters. He can be reached at hweingrad@dglaw.com. **Samantha G. Rothaus** (C) is an associate at the firm, where she represents advertising, communications and public relations agencies, media companies, filmmakers and advertisers in connection with advertising, marketing, intellectual property, media and entertainment law. Rothaus routinely handles talent, production and other agreements in support of creative executions and branded promotions. She can be reached at srothaus@dglaw.com. **Jordan M. Thompson** (R), also an associate at the firm, represents advertising agencies and brands in connection with a variety of legal issues, including intellectual property, right of publicity, marketing and promotions issues related to branded content. She helps draft and negotiate advertising- and entertainment-related agreements, including for talent, influencer and production services, music licensing, and the development of original content. She can be reached at jthompson@dglaw.com. This article was originally published April 13, 2021, on the firm's website. Republished with permission.

Thomson Reuters develops and delivers intelligent information and solutions for professionals, connecting and empowering global markets. We enable professionals to make the decisions that matter most, all powered by the world's most trusted news organization.