

## Publications

### 10 Mistakes to Avoid When Engaging in Endorsement, Collaboration, and Influencer Marketing Activities

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Despite being just a little over a month into the New Year, brands have come out blazing with announcements of new endorsement relationships, collaborations, and influencer marketing campaigns covering numerous industries. As an increasing number of brands incorporate influencers, athletes, and celebrities into their marketing strategies, we see crucial nuances developing to be mindful of to prevent issues and optimize brand protection.

Whether your brand is in the process of planning or already involved in such activity, we recommend you watch out for these 10 common mistakes:

**1. Careless Use of Template Agreements.** Using the “one-size-fits-all” template is a practice that is not without significant legal risk in today’s brand endorsement and collaboration-heavy environment. Brands should pay considerable attention to whether an engagement involves a minor, collegiate athlete, professional athlete, celebrity, member of an agency, or ordinary individual and what laws or rules the parties may be subject to in their respective situations. Brands that utilize template agreements should implement processes and protocols that protect against agreements that may subject themselves or their partners to risk.

**2. Inexplicit Scope of Work (SOW) Provisions.** Vague and ambiguous SOW provisions are among the main reasons brands might receive unsatisfactory or untimely deliverables. If you are thinking about justifying the use of a less detailed SOW provision in the name of encouraging “creativity,” you may wind up having to implement additional measures to ensure the deliverable received serves its intended purpose. The absence of a clear and concise description of the work you expect to be performed and the format and timeframe you expect to receive it can lead to an unpleasant experience for all involved. Consider utilizing SOW provisions as one of your brand’s quality control mechanisms by providing guardrails in the form of details and specific instructions where practicable.

**3. Overlooking Intellectual Property (IP).** Overlooking IP is a common mistake that often proves costly for brands and can lead to losing control of valuable IP assets and their attributable revenue. Clearly establishing who owns or will own what IP before, during, and after an engagement is critical. Equally as important is establishing a protocol or policy regarding which of your brand's IP assets are available for use as part of an engagement and how the other party can and cannot use that IP.

**4. Overlooking Agreement Duration.** Providing certainty concerning the duration of the agreement is essential for brands and their partners. Failing to give details regarding the duration can cast doubt on when duties and obligations become effective, force irregular payment cadences, and cause difficulty managing renewals and extensions. Particularly when working with minors and collegiate athletes, brands should pay attention to the duration of an agreement to avoid violating applicable laws and rules and undertaking unwanted risks due to changes in circumstances (e.g., reaching the age of majority or the end of athletic eligibility).

**5. Failing to Review Content Before It's Posted.** Brands should include provisions allowing them to review and approve content before publication to ensure it aligns with applicable law, campaign goals and brand standards. This gives a brand more control over content before it goes live and can prevent the embarrassment of having to remove an undesirable post after it has already been seen by thousands of followers.

**6. Use of Vague Morals Clauses.** Given the unending list of things a brand may view as undesirable, the scope of the morals clause should receive considerable attention. While it may seem ideal to use a catch-all clause to address behavior warranting separation, such provisions tend to be vague and expose brands to unwanted and sometimes public disputes. Specifying the types of behaviors that will trigger rights under the morals clause can be the difference between a brand's ability to address a situation timely and being burdened by another's actions for a prolonged period of time.

**7. Forgetting About Disclosures.** Disclosures are a key part of influencer marketing. Influencer marketing campaigns must follow Federal Trade Commission (FTC) guidelines and any posts must clearly disclose material connections between the influencer and brand or else any representations they make may be seen as false or deceptive advertising. It's easy to forget that disclosures are necessary for *all* relationships – not just for influencers who directly receive payment for posts, but also for individuals who receive free products or commissions. Always include clear and conspicuous disclosures in all sponsored content, regardless of platform or influencer. Consider what hashtags, labels, or other disclosures are needed to comply with applicable regulations.

**8. Assuming Disclosure Rules are Always the Same.** Brands should not assume the disclosure rules are the same for different types of content. The FTC has different disclosure guidelines for various content formats like videos, live streams, stories, etc. For static picture posts, a hashtag may be sufficient. In a video post, it may not be. Brands must understand the specific rules for different types of posts. When creating a marketing campaign that involves endorsements, collaborations, or influencers, research the specific disclosure rules for each platform and content type (e.g., images, videos, live streams) used in your campaign. Tailor your disclosures accordingly and update them as regulations evolve.

**9. Forgetting about Agency Fees.** More and more often, influencers (or their agents) are shifting agency fees or SAG-AFTRA fees onto the brand. When working with influencers associated with an agency or union, there may be commission fees or union payments required on top of the influencer's fees. Unforeseen agent fees can blow a brands' marketing budget and create friction with the influencer. Not clarifying expectations can lead to confusion and payment delays. Before engaging, remember to confirm whether an agent represents your potential partner and clarify all associated fees in the contract. Be clear about who is responsible for paying those fees or whether those fees are included in the payment to the influencer.

**10. Ignoring Social Media Platform Rules.** Brands should regularly review the rules of social media platforms with respect to influencer marketing. Violating platform rules can lead to account restrictions and in some instances, terminations. Platforms like Instagram, YouTube, and TikTok have their own influencer marketing policies and terms that brands should review to ensure compliance. Additionally, brands should thoroughly review the platform's community guidelines and advertising policies before launching campaigns and ensure all activities, including disclosures, comply with the platform's terms of service.

For further information about engaging in endorsement, collaboration, and influencer marketing activities, please contact Jabari Shaw, Gretchen Rutz Leist, or your Vorys attorney.