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Penny's Notes on the Rising Influence of Influencers

Legal Update

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Industry professionals, Sarah Edwards, Bridget Jewell, Heather Leiferman, John Pickerill and Steven Helland, recently sat down together at Fredrikson & Byron to talk about influencers.

I, Penny Oleson, recently joined Fredrikson & Byron as an attorney, and here are my notes.

What is an influencer?

- Someone who has social media followers and shows passion and connection to a brand.
- An influencer is not a celebrity endorser who may or may not use the brand.
- An influencer is allowed to be authentic – there may be goals a brand wants to accomplish, but they would be in the influencer's own words/actions and not from a script.
- Influencers may tap into a specific demographic or niche market that is outside the traditional marketing of a brand.
- Influencers may be used short-term (i.e., one event) or longer periods (i.e., duration of a brand's campaign).

How do you find an influencer?

- It is best when the influencer finds the brand; that is, they post something complimentary, fun or exciting about the brand. The brand reaches out to the influencer and asks if they can send product for further reviews. If the relationship continues, a more formal (i.e., contractual) arrangement may occur.
- There are agents who represent influencers and respond to brands looking for a certain "type" of influencer.

Why use an influencer?

- The world of marketing a brand has changed from traditional (radio, TV, print) to social media and this could be a way to reach that audience.

- It is viewed as a more genuine connection to a brand. An influencer may have an “organic” connection to a brand – that is, they have posted about a brand and how it works for them.
- To heighten awareness of a brand for a specific event by showing it from the viewpoint of someone actually attending the event.
- It can be less expensive than hiring a celebrity endorser.

What legal concerns are there if one uses an influencer?

- Due to the type of media used by influencers, there may be age and experience issues. Is the influencer able to contract?
- What type of agreement is required? Is it simply an offer to send a product and request the influencer post about it to their followers? Is it a statement of work where the brand identifies speaking points? Is a full-blown contract required due to the services provided by the influencer?
- Be wary of paying up front – that is, pay per performance may be the better option unless a contract is executed.
- Conflicts of interest may arise. The influencer should be asked to disclose any conflicting relationship they have with competitive brands, political movements, etc. The brand should be clear on how they expect the influencer to address, or not address, other competitors.
- If the influencer received something of value from the brand, the influencer needs to disclose it in their post. While it can be as simple as “Thanks Brand X for this awesome product!”, the Federal Trade Commission prefers #ad.

Do influencers go “off message” and how is that handled?

- It is important to have a real connection between the influencer and the brand to mitigate the risk of going “off message.”
- Some brands require prior approval before postings. For example, an influencer would submit a posting to an agency to run it by the brand with the option of requesting content changes.
- Have a crisis communication plan in place! Set-up actions for handling a rogue post – should you post a response? Should you request the influencer's post come down?

Who owns the content and for how long?

- If a contract is not in place or is not clear, the post is the influencer's property.
- The brand may want to “reuse” a post in other marketing materials – this should be vetted with the influencer and carefully addressed in any agreement.
- An agreement may spell out when an influencer's posts will be requested to be pulled (i.e., end of a campaign, end of the relationship).

- Even if the relationship ends, a good post is valuable marketing to the brand.

What about a morals clause?

- This is a trickier concept because the main point of using an influencer is to utilize their edginess and authenticity. Having a morals clause may hinder that authenticity!
- Thoroughly reviewing prior posts should give a brand a better understanding of the influencer's own alignment with the brand's mission/vision.

For more details on this discussion, please visit “#CanWeSayThat? AdLaw Answers from Industry Pros.”