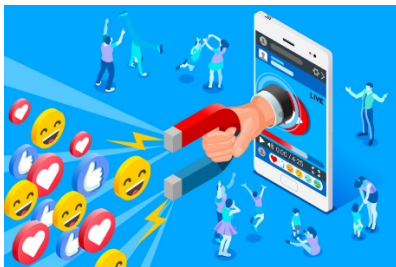


## On My Mind Blog

### How to Decrease Your Influencer Marketing Legal Risk

By [Kyle-Beth Hilfer](#)

December 19, 2019



Influencer marketing may bring your brand viral attention, but the strategy also may expose you to legal risk. Now is the time to implement best practices for influencer marketing programs.

#### **New York and FTC Settlements**

In 2019, consumer protection regulators showed a keen interest in targeting deceptive influencer practices.

The year began with the New York State Attorney General Letitia James announcing a groundbreaking settlement with Devumi LLC over Devumi's peddling of "fake followers" to influencers, celebrities, and brands. The case was the first to declare that selling fake social media influence is illegal.

Devumi's troubles continued into the autumn. The FTC announced its own settlement with the company and its CEO in October 2019. As part of the settlement, the FTC imposed a partially suspended \$2.5 million judgment against the company's owner and CEO.

In addition, the FTC settled charges against Sunday Riley Modern Skincare and its CEO. The cosmetics firm allegedly posted fake reviews of its products, hoping to boost product sales on the Sephora website. In particular, the FTC cited evidence that the company's CEO had directed the company's employees to draft and disseminate the fake reviews. The FTC alleged that the company's actions constituted false advertising and violated the FTC's *Endorsement & Testimonial Guidelines*. While there were no financial ramifications of the settlement, Sunday Riley's reputation suffered. In addition, some of the FTC's commissioners publicly voiced support for enhanced penalties in future cases.

#### **FTC "Disclosures 101"**

On the heels of these settlements, in November 2019, the FTC issued its updated guidance *Disclosures 101 for Social Media Influencers*. The publication reasserts the fundamental tenet of the FTC's *Endorsement & Testimonial Guidelines*: influencers must reveal when they have a "material connection" to a brand.

The FTC's *Disclosures 101* publication comes in the wake of the agency's highly publicized investigation of influencers and brands that did not comply with the agency's *Endorsement & Testimonial Guidelines*. In 2017, the FTC disseminated over ninety warning letters to companies, celebrities, and influencers.

While the new guide speaks to influencers rather than brands, brands cannot escape liability or shift full responsibility to the influencers. Indeed, case law makes it clear that a brand and its agencies have a duty to mandate disclosure best practices. The brand and its agencies must also monitor influencer activities and disclosures. Finally, it is incumbent on the agency to make changes to agency and influencer relationships that are not in compliance.

### **FTC Guidelines on the Influencer Disclosures**

In 2017, the FTC offered three suggestions for clear and conspicuous influencer disclosures, using Instagram as a case study:

1. Instagram posts are typically up to three lines long, followed by the clickable link "more." Since many consumers do not click through to additional content, the FTC suggested that any disclosure be placed before the "more" button.
2. If the post contains multiple hashtags, links, or tags, marketers should separate the legal disclosures to make sure they are clear and conspicuous.
3. The FTC opined that notations such as "Thanks [Brand]" or #sp or #partner may not clearly indicate to the consumer that the post is sponsored.

Two years later, the FTC's *Disclosures 101* guidance reflects the agency's ongoing concern that consumers are often confused about the underlying motivations for influencer endorsements and testimonials. Once again, the agency is underscoring that any material connection between the brand and the influencer needs disclosure. Merely tagging a brand or receiving a sweepstakes entry may be a triggering endorsement for disclosures. Certainly, free products or other perks constitute a material connection. In addition, working for the brand, whether as an employee or independent contractor, is also a material connection that requires disclosure.

While the FTC has been clear that there are many acceptable ways to make disclosures, it has promulgated certain standards. Disclosures should be prominent. The influencer should avoid abbreviations that consumers may misinterpret. Unfortunately, social media platform tools for disclosure may be insufficient to pass legal muster. Of course, any testimonial must be accurate, truthful, and capable of substantiation.

### **Actions a Brand Should Take**

What action steps should a brand take to mitigate risk related to influencer marketing? How can a brand ensure that its influencer campaigns do not create legal liability for the brand? How can a company protect itself from an influencer peddling influence that is not real?

- **Create a formal process for vetting influencers.** Even if collaborating with influencers is not a significant part of your marketing plan, it is likely that you are interacting with influencers in some way. You should consider what kinds of legal and publicity protections your brand needs before working with an influencer.
- **Create uniform contractual obligations.** Using the influencer's contract is not preferred. Instead, your brand should develop its own template contract. Any contract should include tangible benchmarks for performance, strong warranties and indemnities clauses, and favorable termination rights. To accompany the contract, the brand might provide the influencer with a copy of the FTC's new *Disclosures 101* publication.

- **Disseminate your own legal guidelines concerning influencer and employee disclosures in social media.** These guidelines should be platform specific. In instances where there is no contract in place, such guidelines are crucial for brand protection.
- **Remember you are responsible for what the influencer says about your products and services.** Provide guidance about what kinds of claims are appropriate and have substantiation. Warn clearly about the kinds of claims that may be problematic.
- **Consider training programs.** These can be in-person seminars or an onboarding training video that all influencers who work with the brand must watch.
- **Monitor your vendors; their actions create legal liability for you.** Review the brand's advertising, marketing, and public relations agency agreements. You will want to ensure that your agencies are aligned on their responsibilities in recruiting influencers and discussing the brand in social media.
- **Remember, your employees are influencers too.** Create and disseminate procedures and guidelines for all internal stakeholders who post on social media. These documents might be an addendum to your employee manual.
- **Develop active monitoring programs.** The FTC has made it clear that you have the responsibility not only to make policies, but to ensure that your brand guidelines are being followed. Brands who engage in active monitoring have been able to mitigate legal risk.
- **Develop best practices for managing non-compliant influencers and vendors.** Work with your legal team to develop a plan for warning and ultimately separating from influencers, employees, and agencies who are not adhering to legal requirements and brand standards.

Whether your brand has *ad hoc* relationships with influencers or formal programs, influencer marketing can create legal risk. Strategic legal planning and evaluation of your processes will allow you to reap the full benefits of influencer marketing.

For more information, contact [Kyle-Beth Hilfer](#) or your CLL attorney.

#### [Kyle-Beth Hilfer](#)



#### Counsel

[kbh@cll.com](mailto:kbh@cll.com) | 212-790-9200

Kyle-Beth Hilfer has over thirty years' experience providing legal counsel to advertising, marketing, promotions, intellectual property, and new media clients.