



let's get STRATEGIC

LINDA POPHAL

Working With Influencers in 2022

What do Richard Simmons, Ron Popeil, George Foreman, and Kim Kardashian have in common? Many readers may not have even heard of the first three names, but they do share something in common with Kim Kardashian: They are early examples of influencers.

INFLUENCER MARKETING IS BIG BUSINESS

While influencer marketing often seems to be a factor of the digital age, it's a concept that has been around for decades—ever since people began selling products and looking for ways to spread the word. In the digital environment, influencer marketing can be both more challenging and riskier. Marketers have only to do a search for “influencer marketing lawsuits” to learn about thousands of lawsuits that have been filed against influencers—and the companies that have used them.

“By 2022, U.S. companies are expected to spend up to \$15 billion on influencer marketing,” Nathalie Bougenies writes in an article for Above the Law. Furthermore, the article points to research from Washington State University's Carson College of Business, which indicates that “for every dollar spent on an influencer marketing campaign, brands earn \$6.50.” Not a bad investment, but a potentially risky one. In recent years, the FTC has taken a strong interest in the practice of regulating how influencers are being used by brands.

THE FTC AND INFLUENCER LAWSUITS

In a February 2020 statement, then-FTC commissioner Rohit Chopra laid down the law about brands relying on influencers to help pitch their wares, saying, “When companies launder advertising by paying an influencer to pretend that their endorsement or review is untainted by a financial relationship, this is illegal payola.” The FTC, added Chopra, “will need to take bold steps to safeguard our digital economy from lies, distortions, and disinformation.”

Those bold steps have led to high-profile and highly expensive lawsuits against both brands and influencers. The failed 2017 Fyre Festival is one well-known example. It was supposed to be a huge luxury event in a tropical locale—the island of Great Exuma in the Bahamas. Following a disastrous inaugural weekend that led to the festival being postponed and then canceled, those associated with it paid a significant price.

Columbia Business Law Review reports, “The CEO of Fyre Media, Billy McFarland, was sentenced to six years in prison on multiple charges of wire fraud and making false statements. ...” He also paid the U.S. Securities and Exchange Commission \$27.4 million. The primary strategy for promoting the event was through influencers such as “some of the world's most famous supermodels—including Bella Hadid, Hailey Bieber, and Emily Ratajkowski” (and Kendall Jenner, who agreed to a \$90,000 settlement).

THE BASICS

As with many aspects of life, the devil is in the details. The basics of the FTC's Guides Concerning the Use of Endorsements and Testimonials in Advertising are as follows:

- Influencers must clearly and conspicuously disclose their material connections with any brand—person, company, product, or service—they are posting positively about. If there's some value for them, whether money or goods and services, they need to let others know.
- Any testimonial endorsement must be true and not misleading; this includes the requirement that influencers have actually used the product.

But think about your experiences online as you come across various celebrities and influencers posting about brands, products, and services they love. How often do you see a clear and conspicuous disclosure of their relationship with the brand? That's a slippery slope.

David Aylor, CEO of David Aylor Law Offices and a practicing attorney, says that marketers need to be sure they're “adhering to FTC rules about false advertising.” These rules, he says, “apply to each individual social media post, not just the overall relationship with an influencer.” Aylor adds, “Even if an influencer genuinely loves a product, each post should show an advertisement disclosure in clear language and reflect authenticity.”

There are other risks not related to FTC rules. As Dara Busch, CEO of 5WPR, points out, “It's important that companies choose influencers that align with their own values, ideas, and messaging—and that they cover topics that are interesting to

their target audiences.” These influencers have the potential to positively—or negatively—impact your brand. Also consider that “consumers don’t want to engage with influencers who have controversial opinions or opinions that are contrary to what a brand stands for, which is why companies should [vet] influencers before creating promotional campaigns with them,” she advises.

BEST PRACTICES

How to avoid potential risk? Aylor recommends talking to an attorney about the relevant laws that may impact your marketing actions. For example, he says, “It is important to ensure that each post adheres to FTC rules while still providing the influencer with [the] autonomy required for an independent contractor relationship.” There are also laws related to libel and privacy, Aylor notes, that must be considered.

Having a contract with any influencers who are promoting your brand, products, or services is a must-do. Jared Stern, founder of Uplift Legal Funding, shares the following best practices:

- When collaborating with an influencer, ensure that disclosure guidelines are well-explained and agreed upon with clarity.
- Be honest about the kind of post you are putting out. If it is a sponsored post or a paid partnership, be sure you mention that. “The public needs to have access to this information,” says Stern. “It helps to announce the same for video content apart from writing it. Ensure hashtags mention that it is an ad. The upside to such disclosure is that it increases credibility for your business and the influencer.”
- Protect your content by registering intellectual property (IP). “Registration is a good way for content creators to protect their privacy,” Stern says. “IP encompasses sub-aspects like copyrights and trademarks. Copyright can be acquired for photos, written text, audio, videos, and artwork. Trademarks can be secured for domain names, hashtags, and logos.” In addition, he notes, “Content creators must ensure they get appropriate permissions before using others’ content [so that they] avoid infringement.”

Finally, says Luke Lee, CEO of the fashion company Pala Leather, make sure to commit the details of the relationship

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David Aylor Law Offices
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5WPR
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and expectations to writing. “Since influencer marketing has just started becoming a sustainable career for [digital] influencers, most of them start out by engaging brands or marketers even without a written agreement,” Lee says. “This is quite risky because both parties will have no basis as to whether the agreement is fulfilled or otherwise. As influencers go about their journey in social media, they must make it a practice to have everything written down so they can operate within the bounds of best practices and the law.” Your brand—and your bottom line—depends on your understanding of the rules, regulations, and best practices of influencer marketing.



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