

## **INFLUENCERS AND THE LAW MADE EASY**

Influencer reach is soaring and regulators around the world are paying close attention. In 2020 the Advertising Standards Authority (ASA) scrutinised 24,000 Instagram stories and found that only 35% of advertising was clearly labelled. The ASA put the non-compliant influencers and a number of brands on notice. Iona Silverman, Intellectual Property & Media Partner at Freeths, shared practical advice on the law and working with influencers in a webinar on 5 May 2022.

### **An influencer by any other name**

Anyone who posts content online advertising a product or service is an influencer. It doesn't matter what you call them (brand ambassador, affiliate, partner), whether they are a full-time influencer or not, or how many followers they have. Anyone who posts content advertising a product or service is an influencer in the eyes of the law. If you have paid them, or gifted products as giveaways or freebies, given discount codes or affiliate links, they are an influencer. If you exert control over their post's content, messaging or timing, or have a right to review content before it's posted (even if you never do), they are an influencer and the following tips apply.

#### **1. Hashtag up front**

It must be obvious to the person reading the social media post that what they are viewing is an ad before they interact with it. The hashtag needs to be visible, not hidden at the bottom of text or below the line.

#### **2. Use #ad #advert**

Avoid #gifted, #sp, #spon, #aff, #affiliate and phrases such as 'I'm so grateful to', 'with thanks to', 'supported by' – these may mislead the consumer. #ad and #advert are clear, ASA approved and could protect you internationally.

#### **3. #ad or #advert on every post**

Your brand ambassador flagged that they were representing your brand at the beginning of the relationship but that is not sufficient. The ASA needs to see #ad or #advert on every post that is advertising.

#### **4. Ask for #ad**

Many brands send product to possible influencers hoping they'll post about it. This is gifted product and, if the recipient does post, they are an influencer. Include a note with the product asking the recipient to use #ad or #advert.

#### **5. Educate your influencers**

Make sure that they know the relevant rules, for example on competitions, promotions and filters (they probably don't). The ASA recently ruled that one influencer's giveaway had not been administered fairly and that two further influencers had misled consumers by using beauty filters which altered their skin tone when promoting tanning products.

#### **6. Draw up an influencer agreement**

This could allow you to terminate the contract if an influencer does something that brings your brand into disrepute. An agreement could include: reviewing content, deliverables, exclusivity, termination rights, indemnity for breach of contract, payment in instalments. Writing a clear agreement is tricky – we're always happy to look over any if that's helpful.

## **7. Beware influencer fraud**

Influencers may pretend to have a greater following than they actually do. Look at followers to see if they look fake and for massive spikes and drops in numbers. We're also seeing more fake-sponsored content where an influencer posts as if they are sponsored by a brand. From a legal perspective there are things you can do: consider suing for passing off or, if the influencer has made an untrue statement which has induced someone else to enter into a contract or buy something, they could be liable for misrepresentation.

## **8. Satisfy the consumer**

97% of complaints made to the ASA last year were from the public. Follow the tips above and reduce the risk.

## **9. Look to the future**

The ASA is scouring the net for non-compliant content. The Competition and Markets Authority can report you to Trading Standards if you break the CAP code (influencers not clearly flagging that a post is an ad). Have an eye on the Online Safety Bill - it aims to get online technology platforms (Facebook, Instagram etc) to take responsibility for the content posted on their platforms. Expect them to pass some of that liability down, probably in their terms and conditions.

Call Iona for help working with influencers on 0345 030 5781 <https://www.freeths.co.uk/people/iona-silverman/>

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