

Trail Magic: Social Media and Employment Agreement Live Action Role-Playing

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Three Ward and Smith attorneys shared insights on the legal implications businesses should consider when entering into a promotional contract with a social media influencer.

During the discussion, the attorneys covered topics such as independent contractor/employee classifications, drug screening in the workplace, permissible and impermissible actions with student-athlete endorsements, and the legal ramifications of posting on social media.

The session — Trail Magic: Social Media and Employment Agreement LARP — used the firm’s signature live-action role-playing (LARPing) technique to guide participants through the nuances of a hypothetical social media and employment agreement with Rylee, a fictional influencer with Instagram followers totaling more than 36,000, all of whom follow her journey around the nation while living in a van and posting under #vanlife.

The discussion was led by labor and employment attorney Avery Locklear and featured insights from Erica Rogers, an intellectual property attorney who leads the firm’s Name, Image and Likeness Practice Group, and Hayley Wells, an employment and litigation attorney, who also leads the firm’s alcoholic beverage law practice group.

Locklear initiated the talk by introducing Rylee, who has been living and traveling in a converted transit van for the past ten months. Rylee made a name for herself on the Internet as a social media influencer creating sponsored content for clothing companies, self-care products, camping products, breweries, and health food brands.

One company interested in working with Rylee was Pinnacle Outdoor Equipment (POE), a North Carolina-based retail company preparing to launch an induction cooktop designed for van living. After searching #vanlife, POE’s marketing team found Rylee.

After conducting a few interviews and phone calls, POE engaged Rylee to produce three Instagram posts, two TikToks, and ten Instagram stories each month. The marketing team sought assistance from human resources

and the legal department prior to getting started.

Locklear asked seminar participants to describe potential issues that could arise from this hypothetical agreement between POE and Rylee. Respondents identified employee and independent contractor misclassification, contractor oversight, and jurisdictional implications due to Rylee's travel as potential issues.

"At this point, we simply don't have enough information about what this arrangement is going to look like," said Wells. She then asked participants to discuss what information the marketing department should consider before formalizing the agreement.

A few of the questions audience members felt the marketing team should determine the following:

- How many hours per week will Rylee need to work?
- Does Rylee have liability insurance for the van?
- How will Rylee be managed, and who will she report to?
- How will Rylee's time be tracked?
- Does Rylee have other clients?
- Will Rylee's posts require prior approval?
- Did anyone run a background check on Rylee?

"If Rylee is going to be an independent contractor, then there should be an insurance requirement, and POE should have proof of that," noted Wells. "Also, we should find out if Rylee will be paid through an LLC or in an individual capacity."

Finding out whether Rylee is planning to do all the work herself or outsource some of it would also be critical, as outsourcing the work would be permissible in an independent contractor agreement but typically not permissible in an employee/employer relationship.

Contractor/Employee Classifications

The factors associated with classifying an individual as either an employee or an independent contractor can vary. To help participants make a determination about Rylee's classification, Locklear shared more details about the work agreement. Participants were asked to classify Rylee's position based on the assumption that POE:

- Retains approval over post content;
- Tells Rylee where to go and when to create the content;
- Pays Rylee's mileage for travel and campground fees;
- Asks Rylee to agree to abide by the policies and procedures set forth in the employee handbook;
- Wants Rylee to perform the services indefinitely;
- Pays Rylee a salary;
- Provides a few paid weeks off per year; and,
- Requires Rylee to work exclusively for POE and sign a 12-month non-compete agreement.

"The additional facts make it clear that Rylee ought to be classified as an employee, if POE is going to be exerting that much control over her and requiring a non-compete," Wells explained.

The Department of Labor recently published a new proposed rule for determining whether a worker is an independent contractor or employee. "This would rescind the 2021 rule, which was challenged in federal court. The 2021 rule articulated that two factors should carry greater weight in determining whether a worker is an employee or independent contractor, and those two factors are the employer's control over the work and the

opportunity for profit or loss,” noted Wells.

Under the new proposed rule, the Department of Labor is going to adopt a totality of the circumstances analysis, in which the factors do not have a predetermined weight. It’s expected that the new rule will be adopted, and when it is, four additional factors will need to be considered, including the:

- Amount of skill required for the work;
- Degree of permanence of the working relationship;
- Worker’s investment in equipment and materials required for the task; and,
- Extent the services rendered are an integral part of the employer’s business

The public comment period on the new proposed rule was extended through December 13. The comment period allowed anyone who wanted to comment to do so through the Department of Labor's website.

Trademarks and Cross-Promotions

“It’s now July, and Rylee has set up camp at a national park. There is a large community of fellow travelers, and Rylee has made lots of friends, including Zoey, a 20-year-old collegiate cross-country runner,” said Locklear.

One night at a bonfire, Rylee posted an Instagram story that featured:

- Rylee’s van with the Ford logo showing;
- Zoey in her university sweatshirt;
- POE-branded induction cooktop; and
- A six-pack of California’s best IPA

“This story pulled in a lot of different entities and people,” noted Rogers. “From a trademark perspective, there are a number of brands that may be concerned about this video.”

A trademark is any name, device, symbol, design, sound, or scent that identifies the source of a product or service and distinguishes those products and/or services in the marketplace. “There’s a lot of chaos here . . . the van is featured, the POE cooktop, the university logo . . . even the brewery’s logos potentially,” added Rogers. “Also, there are Name, Image and Likeness rights at play here, as these are related.”

The image of certain individuals has commercial value, and this is an intellectual property right that would apply to both Rylee and Zoey in this situation. “When we’re thinking about the issues with this post, particularly in light of the underage drinking, we are looking at the fact that Rylee associated all of these brands without their permission,” commented Rogers.

There are many possible negative outcomes from the video that could damage the reputation of the brands. These brands did not opt-in or consent to licensing their trademark. “You want Rylee to be able to use the POE trademark; that’s the whole reason she’s being paid,” Rogers explained. “But it’s essential to put some restrictions on the third-party trademarks and hashtags she’s using. Even the use of a hashtag can be trademark infringement, so you have to be careful.”

If a morals clause was included in Rylee's contract, then POE could potentially terminate the agreement due to Rylee promoting underage drinking.

Minimizing Reputational Damage

The leadership at POE should consider whether the video was actually promotional prior to responding. Taking

the video down may not be an option since Instagram stories only show for 24 hours. If Rylee also includes personal posts on the same page, there is a chance the story would not be considered promotional for POE.

Nonetheless, the Federal Trade Commission (FTC) requires companies to monitor influencer posts to ensure compliance with endorsement guidelines. Liability could result from false association or trademark infringement. "Issuing an apology may not be the right answer because things could look different for the brewery than they might for the university," said Rogers. "In my experience advising clients, sometimes reacting invites more of a response and makes things worse. It's important to identify what's best for the specific circumstances before you post something else."

Worker's Compensation

"Rylee made it to Colorado and, even though there have been some ups and downs, POE wants her to promote a new product, the Cocoon Hiking Hammock," commented Locklear. "When setting up the hammock, Rylee falls out of a tree, breaks her wrist, and suffers a mild brain injury."

This leaves Rylee with extensive medical and therapy bills. Also, she is now unable to participate in any outdoor activities or film content required for posts. Locklear asked the audience: "Is Rylee entitled to worker's compensation?"

The majority of respondents believed Rylee would be entitled to worker's compensation. "This underscores the importance of classifying the worker correctly," noted Wells. "Even if she had been misclassified as an independent contractor but should have been classified as an employee, she is likely entitled to worker's compensation."

Misclassification carries the risk of civil and criminal liability. A few of these risks include:

- Having to pay fines for not covering the misclassified worker under the worker's compensation policy;
- Having to pay medical fees and continuation of salary;
- Liability for unpaid taxes, including what the employee would have had withheld;
- Unpaid unemployment tax liability
- Fines and penalties for failing to complete employment forms (I-9); and
- Liability for excluding the worker from the group health plan.

"This can go on and on," Wells explained. "It's critical to figure out if an individual is a contractor from the outset because any agency investigating this issue will begin from the default position that the worker was an employee."

Drug Test Implications

"For the next question, let's assume Rylee is an employee, and a worker's compensation investigation is underway. The insurance carrier for POE requires a drug test, and it comes back positive for THC, which is legal in Colorado, where Rylee is," said Locklear.

Marijuana is not legal under Federal law or in North Carolina, where POE is based. Rylee denies using marijuana but says she uses CBD as a sleep aid. Seminar participants were asked to consider if Rylee's employment should be automatically terminated if POE had a policy against the use of marijuana.

"North Carolina has a lawful use of lawful products statute. It would not protect Rylee from using marijuana, even though it's legal in Colorado, because it's illegal under federal law," advised Wells. "It's also possible she tested positive for THC because of regular CBD use."

If Rylee was using CBD during non-working hours away from POE's place of business, then that conduct would be protected, and Rylee could not be discriminated against on the basis of such conduct. However, an employer can have a policy stating the use of one or more lawful products is incompatible with the job the employee is performing.

"It's also worth noting that employers that want to require drug screening have to comply with North Carolina's Controlled Substances Screening Act," commented Wells.

Name, Image, and Likeness

In the final scenario, Zoey approaches POE to see if the company would be willing to pay her to promote its new running shoes and whether her pay could be performance-based. "The NCAA now allows student athletes to exploit their name, image, and likeness rights," noted Rogers, "so there's been an explosion of these types of deals, providing students with compensation for promoting products and/or services."

A patchwork of laws now exists that govern the space. "This is generally being viewed as a good thing for the potential it has to level the playing field across different sports and genders, however companies that want to hire student athletes to promote their products on social media should understand that none of it can be tied to recruiting," concluded Rogers. While student-athlete endorsement deals are permissible, arrangements that induce an athlete to enroll at a particular institution or deals that pay an athlete based on the athlete's performance are prohibited.

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