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MAKING PENSION & HEALTH PLAN PAYMENTS UNDER THE SAG-AFTRA COMMERCIALS CONTRACT

The Allocation Guidelines established safe harbor contribution "allocations" for various services performed by talent

This is the third in a series of six articles examining recent developments and ongoing issues related to the Screen Actors Guild – American Federation of Television and Radio Artists (SAG-AFTRA) Commercials Contract. Within the last five years, there have been significant changes in the way pension and health contributions paid on behalf of talent hired under multi-service endorsement agreements are determined and made. In 2009, Guidelines for Allocations in Overscale Agreements (the Allocation Guidelines) were appended to the SAG-AFTRA Commercials Contract, establishing safe harbor contribution "allocations" for various scenarios of services being performed by talent. A streamlined arbitration procedure was also introduced for pension and health allocation contribution disputes. And in 2012, the total amount of compensation paid to talent during a contract year that is subject to pension and health contributions payments was capped at $1 million.

By way of background, the SAG-AFTRA Commercials Contract requires the payment by a SAG-AFTRA signatory of pension and health contributions with respect to that portion of the talent's total compensation in a "multi-service" endorsement agreement — *i.e.,* an endorsement agreement containing more than just television commercial production services, such as print, personal appearances, social media services, etc. — that is *allocable* to commercials, or so-called "covered services." Prior to 2009, unilateral standards were used by the union to determine whether multi-service contract pension and health allocations had been properly made. For example, the union would routinely argue that, absent extenuating circumstances, no less than 50 percent of the talent's compensation in any multi-service endorsement agreement could be allocable to covered services. This standard and others that apply to different types of endorsement deals were memorialized as the Allocation Guidelines in the 2009 SAG-AFTRA Commercials Contract to "assist" in determining proper allocations.

Thus, the Allocation Guidelines provide that for a multi-service contract that includes commercial production services and noncovered services, a 50 percent (or 40 percent for talent whose principal source of income in the entertainment industry is modeling) allocation of the compensation is recommended. This 50 percent allocation applies even if no commercials are actually produced or used, but where the advertiser has the right to do so and to hold a performer to exclusivity. Multi-service contracts with athletes, whether currently active or inactive, may need to be treated differently. The Allocation Guidelines provide for an allocation of 20 percent where an athlete endorses a product or brand with which he or she is strongly associated and where the athlete generally wears the brand's logo on his or her clothing or equipment. The 20 percent allocation guideline also applies to athletes who have product lines or other collateral merchandise associated with their endorsement, but does not apply to athletes who are endorsing products unrelated to their sport. The pension and health allocation for an athlete

performing services for a non-sport-related product would be 50 percent, in accordance with the guideline for multi-service contracts that include covered and non-covered services.

The union gives deference to the Allocation Guidelines, such that when an advertiser or advertising agency uses them to determine a pension and health payment amount, the allocation is presumed to have been done correctly. SAG-AFTRA would have to rebut the calculation of an amount determined using the Allocation Guidelines in a proceeding brought to challenge the allocation. The Allocation Guidelines provide further that a signatory employer may bring circumstances to the union's attention that may warrant a deviation from the specified allocations.

With the Allocation Guidelines firmly in place to influence how advertisers and advertising agencies allocate compensation in multiservice contracts to covered services, the industry negotiated a cap of $1 million on total compensation during a contract year that is subject to pension and health contributions. The cap went into effect on Jan. 1, 2012, but not without some ambiguity as to its application, particularly with respect to those endorsement agreements entered into prior to the effective date of the cap, but whose terms continued into 2012 and beyond. Can an advertiser take advantage of the cap for compensation paid during a "contract year" that began prior to Jan. 1, 2012 but continued for a period of time beyond the cap's effective date? Is the cap determined on a "cash basis," such that an advertiser can "front load" compensation into the first contract year, meet the cap, and make no more pension and health payments with respect to subsequent contract years? While in both of these instances arguments can be fashioned that may resonate in favor of the cap's application, it is enough to recognize that absent specific language requiring otherwise, the interpretation of the Allocation Guidelines and application of the cap is even-handed, such that the union's position may be challenged.

To be sure, when advertisers or advertising agencies receive a challenge by the union over a pension and health allocation, they should first recognize that SAG-AFTRA is not the final arbiter of whether pension and health calculations were made properly. It is always advisable to request that the union clarify or expound upon its basis for such a claim so the parties are sure the issues are being viewed accurately given the facts and circumstances of each talent contract. If a dispute cannot be resolved informally, pension and health-related challenges are eligible for the Industry-Union Standing Committee's streamlined arbitration process. Through this procedure, the producer and the union submit briefs rather than preparing and staging oral arguments and live testimony. The accelerated timeline and reduced costs can be beneficial to resolving what are increasingly frequent disputes over the increased pension and health rates. Remarkably, though in effect since 2009, there is little indication that the streamlined arbitration process for allocation disputes has been used by agencies or advertisers to defend their allocations.

This article was written with the help of Davis & Gilbert associate Anne DiGiovanni.

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