

A Look At SAG-AFTRA's New Commercials Contract

Law360, New York (May 31, 2016, 4:17 PM ET) --

The Screen Actors Guild-American Federation of Television and Radio Artists commercials contract, which governs wages and benefits for talent appearing in commercial advertising productions, was renegotiated in early 2016, resulting in a new 2016 memorandum of agreement that was unanimously approved by SAG-AFTRA and, on May 9, 2016, ratified by SAG-AFTRA's membership. The 2016 memorandum of agreement is effective retroactive to April 1, 2016 and will be operative for three years, through March 31, 2019.



Howard R. Weingrad

Front and center in this year's negotiations was a keen awareness by the Joint Policy Committee (which negotiates on behalf of the advertising industry) of the concerns voiced by a multitude of signatory advertising agencies and advertisers that they cannot compete with their nonsignatory counterparts from a talent cost standpoint. Of particular concern is the comparatively high talent cost tied to an increased demand for digital content, and, to a lesser extent, the use of real people in commercials.

Rate Increases for Talent

As expected, the 2016 memorandum of agreement increases rates for talent — to an overall increase of 7 percent in wages, with additional increases in residual payments of 2 percent for national network broadcast commercials and 6 percent for national cable use, as well as a 1.2 percent increase in employer pension and health contributions. SAG-AFTRA leadership is touting these gains as amounting to more than \$200 million in pay hikes for its member performers. The Joint Policy Committee, on the other hand, will no doubt highlight new "waivers" and certain other provisions it will contend may help to reduce talent costs in the areas of concern for the advertising industry — digital content production and "reality" nonscripted commercials.

New Waivers Address Digital Content and Use of Real People

One new waiver is the "Experimental Social Media Waiver," which allows for, among other things, the engagement and use of talent at reduced cost for commercials produced for limited time periods on social media platforms such as Facebook, Instagram, Vine, Snapchat, Tumblr, Twitter and LinkedIn. Under this waiver, a signatory producer may create multiple commercials for a single session fee, and the talent fee per commercial for each 30-day cycle of use on these platforms is 15 percent of a session fee. A related new provision intended to reflect the shorter time periods that advertisers post digital content is a new four-week rate for general Internet use of commercials, at 125 percent of a session fee.

Another new waiver is the "Experimental Coverage Waiver for Non-Professional Endorsers," which waives the application of the SAG-AFTRA commercials contract to real people giving verifiable testimonials in commercials. Both waivers terminate upon expiration of the 2016 memorandum of agreement, suggesting that SAG-AFTRA may have been concerned that, despite the overall increase in wages, the impact of these waivers in practice may nonetheless be detrimental to its member performers.

Also beneficial to signatory agencies and advertisers is the expansion to all media of an existing internet-only waiver that allows for the hiring of real people in commercials filmed at live events, or with hidden cameras and/or interacting in public with a "man on the street" interviewer, without their being covered under the SAG-AFTRA commercials contract.

Other New Provisions

Other notable new provisions in the 2016 memorandum of agreement involve:

- The inclusion of "stock footage" within the existing "Still Photograph" provision — which in practice may exempt from coverage under the SAG-AFTRA commercials contract the use of people in commercials appearing in stock footage that was not made for an advertising purpose, with the exception of "featured players" in licensed sports footage (also a new provision);
- A concession from SAG-AFTRA allowing for a commercial to be streamed on the internet and/or new media at no additional cost at the same time as a paid television use of the commercial; and
- An expansion of a signatory agency's right of self-promotion requiring no use payments to talent for the use of commercials in digital trade publications, award shows and case studies or for historical/archival purposes.

Practical Concerns

It remains to be seen whether and to what extent the changes in the 2016 memorandum of agreement will help to level the playing field to allow signatory agencies and advertisers to compete on the digital front with their nonunion counterparts. Indeed, the concern in that regard caused signatory agencies and advertisers over the past three years to pay particular attention to whether proposed digital content would be deemed a "commercial" made for the internet under the SAG-AFTRA commercials contract, thereby triggering SAG-AFTRA talent payments. The new 2016 memorandum of agreement maintains the requirement that for something shown on the internet and/or new media to be considered a "commercial," it must be "capable of being used on television in the same form as on the Internet." However, the 2016 memorandum of agreement makes clear that whether a commercial that otherwise qualifies as such is "capable of being used on television" in the same form as on the Internet is one of several factors to be considered when determining whether something is a "commercial" — so that, for example, the sole reason something is not a "commercial" cannot be because of its nontraditional length (e.g., :37 seconds) or that it may contain a "click to play" button.

Bottom Line

The newly renegotiated SAG-AFTRA commercials contract increases talent rates overall, but also addresses in some fashion the concerns of signatory advertising agencies and advertisers that they are at a competitive disadvantage when paying SAG-AFTRA commercials contract rates to talent for digital content work and to “real” people in nonscripted commercials. That the 2016 memorandum of agreement also clarifies and tightens up a key aspect of the definition of a “commercial” for digital use may, however, telegraph concern by SAG-AFTRA that signatory agencies and advertisers will continue to strive to find ways to produce those “commercials” in a manner or format that is not covered under the SAG-AFTRA commercials contract. It also suggests that more work may need to be done by both the Joint Policy Committee and SAG-AFTRA in arriving at a talent payment model that adequately reflects the increased demand from marketers for digital content, which shows no signs of slowing down.

—By Howard R. Weingrad, Davis & Gilbert LLP

Howard R. Weingrad is a partner in the Advertising, Marketing & Promotions Practice Group of Davis & Gilbert. He counsels leading advertising and media companies in all aspects inherent in the creation, production and distribution of regional, national and global advertising campaigns. He can be reached at 212.468.4829 or hweingrad@dglaw.com

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

All Content © 2003-2016, Portfolio Media, Inc.