

# SAG-AFTRA's New Letter of Adherence Shakes up Advertising Industry

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## 7th Edition: Trends in Marketing Communications Law

As commercial productions resume after being on pause due to COVID-19 shutdowns, advertising agencies that are not signatories to the Screen Actors Guild-American Federation of Television and Radio Artists (SAG-AFTRA) Commercials Contract (Commercials Contract) should keep in mind recent changes made by SAG-AFTRA at the beginning of the year, which impose new obligations and restrictions when working with third-party signatory entities to engage union talent.

Historically, non-signatory agencies have been able to hire third-party signatory entities on an ad-hoc basis to act as co-producer and employer of record for any union talent performing services in connection with a commercial production. However, last year SAG-AFTRA began cracking down on this practice in an effort to promote the interests of its members by beefing up the employer functions of the third-party signatories, while at the same time reducing the employer and production role of any non-union advertising agency connected to the commercial production. This was done in part to incentivize those non-union agencies to sign on to the Commercials Contract directly.

SAG-AFTRA sent a strong message to the industry in May 2019 when it revoked the signatory status of six leading third-party signatories, claiming they were not “bona fide employers” of the union talent performing services in connection with commercials produced by non-signatory agencies. After some negotiation, the union and those six third-party signatories reached a new “Letter of Adherence” (LOA) to the Commercials Contract which would permit them to retain their signatory status.

The LOA, which had been set to take effect on January 1, 2020, mandated compliance by the third-party signatories with a wide range of obligations characteristic of a bona fide employer. Of note, the LOA outlined ten “employer functions” that must be performed by the third-party signatory but cannot be performed by any non-signatory advertising agency attached to the production.

Those functions included, among other things, having third-party signatory personnel on-set for every U.S. production and negotiating union talent agreements with performer representatives in collaboration with the advertiser client. Further, under the LOA, third-party signatories would only be able to serve as such for the advertisers themselves, and not the advertising agency hired by an advertiser to execute the production.

From the standpoint of the non-union agencies, the industry’s response to the LOA was that it was deeply flawed. To them, the new obligations and restrictions relegated the non-union advertising agencies to a creative consultant role, while at the same time imposing production and other agency functions on the third-party signatories, whom the agencies contended were not equipped to handle those functions. In response to the industry backlash, the union provided for a 60-day non-enforcement window in order to allow talks with relevant stakeholders to continue, leading to SAG-AFTRA issuing an addendum to the LOA, which loosened (or undid) some of the more onerous requirements, including the restraint by the non-union agencies to engage the third-party signatories directly and the previous requirement that kept them off the set of their own commercial productions.

The amended LOA, which went into effect as of April 1, 2020, while still requiring the third-party signatories to perform the ten employer functions as originally drafted, is more reflective of how an ad agency must

function within an integrated commercial production ecosystem, including allowing agency personnel on the set, so long as such personnel do not supervise talent — an employer function to be handled by third-party signatory personnel.

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## **Key Takeaways**

- The new LOA increases the employer functions of third-party signatories, including requiring third-party signatories to have involvement in the talent casting and production process, although not at the exclusion of the non-union advertising agency involved in the production.
  - After concerns raised by the industry, the third-party signatories can continue to be engaged by non-union ad agencies and agency personnel can attend the shoots, provided they do not direct or supervise the talent on set.
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