

PROTECTING YOUR POSSIBILITIES PODCAST WITH LUKE FEDLAM

Episode Understanding Marketing Contracts and Endorsement Deals: Title | March 10, 2021

The following is a transcription of the audio podcast recording. It is largely accurate but in some cases it is incomplete or inaccurate due to inaudible passages or transcription errors.

Luke: I'm sports attorney Luke Fedlam, and welcome to the Protecting Your Possibilities podcast. Each conversation we focus on sharing information and having conversations around how athletes can best educate and protect themselves or their life outside of their sports.

Thank you so much for tuning into the protecting your possibilities podcast. I'm your host, Luke Fedlam. And I am just thankful today for you, thank you for taking the time to check out this podcast. Thank you to our regular listeners and subscribers who constantly share this content to leave reviews and rankings, I really appreciate you because this podcast, it means a lot to me because it creates the opportunity to be able to help protect others, other athletes, professional athletes, student athletes, entrepreneurs, this podcast is really about providing just good unbiased qualified information about various topics that affect athletes, and how ultimately athletes can look to protect themselves.

And so this episode is no different. And we're gonna get into a little bit more of a substantive conversation on the topic of endorsement deals. Now, whether you call them endorsement deals or marketing agreements, or an activation agreement, the bottom line is it's the opportunity where someone, in this case, an athlete, has the ability to lend their name, image and likeness to a brand, for their product services to ultimately promote that particular company. And so that's what we're talking about.

It's the endorsement deals, right? It's the marketing opportunities that professional athletes have to lend their name to various companies, so their products and services. But what makes this topic so interesting is that, up until this point, this is where I've really spent a lot of my time of working with professional athletes, and reviewing endorsement deals. There's a previous episode that we did on the marketing representation agreements. So the agreements with agents who want to do the marketing for athletes, this topic is when you specifically have a deal that's brought to you as that athlete. And so oftentimes, it could either come directly to you, or it might come through your agent.

But let's talk about something real quick, at the baseline, right? At its base level, most athletes, and most agents care really deeply about two things when it comes to endorsement deals, they care about how much does the athlete get paid? And what does the athlete have to do? In terms of what services do they have to do? And these are two very valid, very important aspects of any endorsement deal or marketing contract, right? I mean, this is straightforward. That's what people care most about. And that's usually listed on the first page have these agreements.

And then you have multiple other pages that contain other provisions that critically impact the athlete in terms of what rights they might be giving up, what duties and obligations they have.

And so that's why I want to spend some time today is going through some endorsement deals or marketing contracts, just to share a little bit more and help people understand these contracts.

Now, oftentimes, when I'm working with professional athletes, when they are transitioning from college into the pros, they've never seen a marketing contract or an endorsement contract. And so oftentimes, the first time going through this is really trying to educate them on what it is that this agreement is attempting to achieve, and what impact that actually has on the athlete. Now, let me leave this disclaimer here, which is that all of these agreements with different companies, different brands can be different. So there's not just a particular standard form, endorsement deal or marketing contract. They are oftentimes as thorough or as technical as either the brand is or their lawyers are. All right. And you'll find out times that if you have the opportunity to do enough endorsement deals, you'll see that some are drafted very technically and professionally and others look like they were just downloaded off the internet and misspellings of names and that kind of thing. So let's just start under the premise that we're going to talk about some of the general provisions that are included in most, if not all, marketing contracts. Okay. So when thinking about this, I mentioned it earlier, most people care about two things, how much do I get paid? And what do I have to do? So let's start there.

The "What do I have to do" really comes down to the services, what services are required by the athlete. Now, what we've seen a lot of lately are social media influencing, social media stories, tweets, IG stories, TikTok posts, what have you, where the athlete is somehow promoting a particular brand, and their products, their services, what have you, and it's done on social media. Now, these can be very simple, or they can become quite technical. And what I mean by that is, they can be simple in the fact that, let's say the deal is with an apparel line, a clothing line. In those instances, they might ask for you to post a photo or a video just talking about the brand, why you like it, and the fact that you wear it, or you really love the brand itself. And you talk about why. And that is more on the simple side, right? That is simply taking the time to say, Hey, maybe posting a picture of myself wearing these particular clothes. And in doing that, I'm just going to share with the world on social media that I support this brand.

If we slide down the scale of a little bit more of a technical situation, you may have instances where you are recording more complex videos, maybe the brand is helping you in providing a camera crew to record particular professional videos for you to then post on social media. The other thing that we've seen quite a bit of lately is that brands want to be seen as authentic, they want your endorsement as an athlete to be much more authentic than simply, "Hey, I'm Luke Fedlam and I'm here to promote this particular brand." And everybody can see through that because it's like, well, yeah, you're getting paid to do that. So we don't know if you really like that brand or not. But I take it from you as alright, maybe, maybe if I really am a fan of yours, I'm going to say, hey, maybe I'll check out that particular brand. But a lot of times people can just see through that. So we'll see more things like, a family photo where you're taking a family picture out at an event, and you happen to be wearing those brands. And in doing that you're showing an authentic situation, an authentic event with your family. But because you're wearing that particular brand, there's a following by your fans, your followers on social media that says hey, wow, if he's just wearing that in his normal life, or if she's just promoting that, or using that particular brand in normal life, then if that's something they really do, that's more authentic to me, and maybe I'm more prone to go purchase that that particular product. So services is important.

And, I've just talked about social media, but the services could also require you to make appearances. So showing up somewhere wearing particular brand or answering questions or

doing a Q&A or making some remarks. It could also require a photo shoot a video shoot commercial shoot, print digital media, there's the services are going to let you know what it is that you need to do for that brand, right? And that's going to help you understand like, how much time right, how much time am I spending doing this? Because now I need to go ahead and go over the fees, and look and see how much I'm being compensated? And does my compensation align with what they're asking me to do in terms of providing these services.

So talking about fees, a few things to think about. First, remember, and this really is going to go for student athletes who are about to engage in name, image and likeness opportunities. Professional athletes start to realize this quickly. But you have to remember that all of your compensation for a particular brand endorsement is going to pay you in gross, right? Gross. What that means is they're going to pay you the full lump sum that they say in the contract, they're going to pay you that's what you're going to receive. And you'll have to remember because there's going to be a provision in the agreement that talks about how you're an independent contractor which means you're not an employee of the brand, and so they're not withholding any taxes. When they send you your payment, now, you have to think about this where is your payment going. So based on what it says in your fees section, either they're gonna pay you directly and by you, I mean, either you, the athlete or your own LLC your own loan out company, or they're going to pay your agent. Now, it's important to understand how this is going to flow. Because if the payment comes to you, then you need to make sure that you send your payment to your agent of whatever you've agreed upon in terms of the percentage that they're getting paid off of deals. Now, if the payment is going directly to your agent, then your agents going to receive it, he or she will take their fee out, and then they'll send you the rest, but they're not withholding any taxes, they're not taking any taxes out. So that's something that when you receive your payment, you're gonna have to make sure that you do as well.

Another thing that is important when thinking about these types of agreements is intellectual property. And what you are actually licensing, what the license is that you are giving up to this brand, or this company. So name, image and likeness is simply that right, you are licensing your name, image and likeness to a company to be able to use. And for that you're getting compensated. So in the intellectual property provision, or the license provision, one of the two, it will talk about what you're giving up, and for how long and so it will say things like, you are hereby granting a perpetual license in your name, image and likeness to be used worldwide, in perpetuity, let's say.

And that's something you really want to understand. Because if you're licensing a company or a brand to use your name, image and likeness, the big key, and a lot of people don't think about this or realize it. But the key is that you need to make sure that the duration of your license aligns with the duration of how you're getting paid. Right. So I had an example a few years back with an athlete client where the brand was going to pay this athlete over 12 months, a certain amount each month for 12 months. And the services were that the athlete had to show up at six different events throughout the year. And in doing that they had to wear that particular brand's attire, and promote the brand. And what they talked about was that for these events, photos could be taken, etc. And in the intellectual property section, it talks about how the brand would be able to use these photos in perpetuity, which means forever. Now, think about that, right? They're going to pay you for 12 months, but they're going to have these photos of you doing their events, and they're gonna be able to use those in perpetuity for marketing purposes. That just doesn't align, right. And that's where we pushed back and said, hey, you can do this. But as soon as the payment period ends, then you have whatever it was, at the time, 30 days, 14 days to stop usage of all imagery of the athlete. So that's why it's important to understand what goes

in the license and what you're giving up in your license, or what you're giving up in your intellectual property.

The other piece is that you really want to understand is exclusivity. We talked a little bit about exclusivity when it came to marketing agent agreements. And that is whether you could only work with one marketing agent, or if you have the ability to work with as many as you like, in this instance, exclusivity really has to do with the particular category of the company. Perfect example is Nike is not going to allow you to also simultaneously do a deal with Adidas or deal with Under Armor or Reebok etc. They have category exclusivity, just like if you did a deal with Coca Cola, they're not going to want you to be able to do a deal with Pepsi etc, or any of their competitors. Now, that's pretty straightforward, right? But what you want to realize is how far does this category exclusivity extend? So with let's just use Coca Cola, for example. They're going to look for exclusivity in the entire beverage category. So they're not going to want you to then pick a local let's say water company or coffee company where you're promoting coffee or water or something that isn't even a soda right or caffeinated beverage or some type of carbonated beverage right? But they want to make sure that you're not doing any other beverage deals at all. So you really want to understand what type of exclusivity Are you giving up what is the category exclusivity here, because that is going to help you as you do your own analysis as to whether or not the deal is worth it for you.

Because that's something you're giving up. And anytime you're giving something up, you want to make sure that you're compensated for it. So if you're giving up the ability to do other deals in a particular category, apparel, beverage, those kinds of things, then you want to make sure that you're appropriately compensated for that. So that is the idea of exclusivity in these types of instances.

The other thing that's really important to realize is morals clause or morality clause. And what this means is the ability to terminate the contract, based on what you may be have done in your personal life, or even professional life, right? It's this idea that, hey, if you are doing something that brings public disrepute or disgrace to the brand, if you are arrested, or if you are charged, or if you are convicted of a particular offense, then it gives the brand the right to terminate the contract immediately, and not have to continue in paying you for that contract. Now, this is really important, because you want to understand what the terms are of this section, is it that you have to be or if you're arrested, they could terminate or if you are convicted, right, those are very, very different things or understanding even better, what does it mean to bring public disrepute to a company.

On the flip side, something that we don't see that often, and not all companies or brands go for it, but some do, and especially if the athlete has the leverage they will, if they really want to work with that particular athlete, which is a reverse morals clause, in a reverse morals clause really gives the athlete the power to terminate the agreement. If there is something that brings public disrepute based on either the ownership of the company, the CEO, let's say the leadership of the company that come out and say or do something that really is against the values of the athlete, a good example could be something along the lines of black lives matter if Black Lives Matter is something that's important to the athlete. And the say that particular company comes out strongly against black lives matter, and maybe even comes out and says something that's racist, homophobic, xenophobic, or what have you, then the athletes should have the ability to get out of that contract so that their name isn't attached or associated with those particular comments, right. So that's, that's that reverse morals clause, it puts the power in the hands of the athlete when it comes to those types of situations.

Another thing to think about, and this is, this is minor, but it does come up. And it's important and that is indemnification. Right, and indemnification is this idea of who can you hold responsible for things. So if you're the celebrity endorser of a particular product, and that product ends up somehow hurting individuals, you want to make sure that you have the ability to be indemnified, where you're not held responsible for the product, and whether the product worked or didn't work, or if it harms someone or not. This is something that does come up quite a bit in the social media influencing space. Many people have heard and talked about the Fyre Festival and all that came with that and how there were celebrity endorsers that were being sued because they were lending their names to this party that was supposed to happen, this epic Island Caribbean party.

And obviously, when it ended up being a scam, then people wanted to go after the celebrity endorsers and, and what you want to think about is, , what is it that you're lending your name to, you don't always want to do opportunities or take on opportunities just because you're getting paid, you want to make sure that you have some belief in or at least understanding of what the underlying product service promotion, what that really is. And so, indemnification can ultimately provide that protection where if something were to go wrong, or is somehow harm, a consumer that you and your status as a celebrity endorser does not set you up for liability along with the company.

So these are all various provisions that you should find in any type of marketing or endorsement opportunity, there are going to be a lot more sections around potentially on confidentiality on your independent contractor aspect that we talked about earlier. And the fact that you're not an employee, that you're an independent contractor, and there's not agency created between you, it's those kinds of things that that you want to keep up with. And the other piece to that does come up and sometimes an athlete agreements is the idea that if you're no longer an athlete, if for some reason due to injury due to being cut, if there's any change in your celebrity status, that the brand has the rights if they so choose to terminate the agreement. And so you want to make sure that you understand that as well. The key to remembering all this is that they're negotiable, right, just because it's a multi-million, or even multi-billion dollar company that is providing this agreement to you, if they want you bad enough, and you are unique enough in what you do, and they want to work with you, then they'll work with you on these agreements, and there can be some negotiation.

Now, a lot of times people will say, well, Nike doesn't negotiate on their contracts. And, and that's one of those instances where they'll negotiate if you're that elite of an athlete, if you're an athlete, that is going to be doing a minimal type of deal with Nike. And maybe it's just a merchandise deal where you're getting merchandise, but not really compensation or not significant compensation. Yeah, they're not going to bend too much on their traditional forms.

But when you're the LeBron James, or any other ultra-elite athlete, then they're going to work with you to figure this out. Now, that's an extreme example, but I raise it because even if it's, let's say, a local pizza chain, or some type of local clothing line, or sunglasses line, or what have you, they're going to be more likely to negotiate with you because they want to get the deal done, and they want to have you representing their brand. And in that, you want to make sure that you get good, qualified counsel to review these agreements, before you sign them so that exactly what it is that you're giving up. And exactly what it is that you're going to get in return.

That's ultimately how you protect yourself. So there you have it. Hopefully this was helpful. Hopefully, this was informative. Definitely feel free to share this with other teammates, share this with friends, with colleagues, because this is the type of information that we really want to make

sure that athletes understand so that they can be protected. And when you think about college student athletes and the opportunities that are going to come with name, image and likeness, understanding these contracts is going to be critically important so that you're not taken advantage of, and that what you're giving up aligns with what you're getting in return in terms of compensation.

So again, I'm your host, Luke Fedlam. Thank you so much for tuning in to the protecting your possibilities podcast, always a joy when you can join in. Thank you so much. Please do feel free to leave some comments. Reach out to me at Luke Fedlam, and all the different social channels, and I look forward to hearing your comments, your feedback and other topics that you'd find interesting. Thanks again for tuning in. Have a great day.

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