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How To Strengthen Your Limousine Company's Affiliate Network Agreements in a Post-Pandemic World¹

For limousine and executive transportation providers, affiliate agreements are essential to providing customer service - no matter the destination – and are a conduit to increased profits. One of the fastest ways to expand your service network is through signing up Network Partners around the globe to join your service provider network (“Affiliate Network”). A strong Affiliate Agreement can facilitate and protect such growth after the long and awful effects of the pandemic. The Affiliate Agreement dictates your company’s – and the Network Partner’s – rights and remedies against each other and the applicable standards of performance. Major markets are lifting international travel restrictions, and your company should be ready to perform in the new normal, post-pandemic world.

The pandemic itself revealed the inadequacies of many affiliation agreements in the industry. The level of detail in such agreements varies widely, with some companies simply signing up other limousine operators by email or entering their information into a dispatch system, others with simplified one-page forms with little legal detail and sparse terms (tantamount to an invoice), and yet others as more extensive agreements with too much detail and unrealistic legalese. Finding the right balance between too little and too much is like the story of the three little bears and Goldilocks – we want the porridge to be not too hot, not too cold, but just right! In terms of working with others in the industry, no agreements or unsophisticated documents send the wrong message and convey an unprofessional approach. Agreements that are too detailed and cumbersome, may scare potential affiliate partners away.

The pandemic gave rise to the most obvious issue – what happens if my company gets sued for the transmission of COVID-19 to a passenger due to the negligence of an affiliated company and driver for failure to adhere to health and safety protocols? This issue and concern caused many of my law firm’s clients to take a fresh look during the downtime of the pandemic at the stale affiliation agreements out there. A host of issues presented themselves as we dug deeper, and the pandemic was a better time than ever before to strengthen these agreements on many levels, including customer service levels, risk mitigation and indemnity and on prices and terms. The experiences of our firm’s transportation practice group throughout this process are contained in this article, which intends to provide your limousine company with a sampling or with general principles for how these agreements can be strengthened. It is not too late, so as we open-up, there is still time to hit the Affiliate Agreement re-set button!

Establish Adequate Terms and Conditions

The Terms and Conditions control the relationship between your company – the Network Provider – and Network Partner and its drivers, so striking a balance between your interests and those of the Network Partner in the Terms and Conditions is key. The Terms and Conditions should be easy to read by the average person. Disclaimers against illegal activity and use of the “Affiliate

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Network” should be obvious, and require an acknowledgment prior to accessing the Affiliate Network.

As the pandemic accelerated reliance on digital platforms and more passengers utilize transportation networks, Affiliate Networks can become more vulnerable to bad actors who aim to use the Affiliate Network for nefarious purposes, potentially leaving you responsible for someone else’s civil or criminal liability. Having adequate Terms and Conditions will allow your Network Partner to perform, while protecting your company, and its assets, from liability. Liability in the digital age is more than just bodily injuries and property damage. The unwanted side of insurance disclaimers and litigation can present itself in unique ways through a Network Partner or affiliated driver transporting unaccompanied minors, facilitating underage drinking, permitting human trafficking, being vulnerable to data breaches and ransomware attacks, failing to guard against insurance or bank fraud, allowing money laundering, distributing narcotics, or unknowingly engaging other illegal activity.

In particular, compliance with local laws and regulations should be contained in your Network Partners’ agreements with drivers, which can be an express material condition of performance. For example, a state or city may have specific requirements for the transport of unaccompanied minors. If not adequately disclaimed, the associated liability can reach you. Having tailored disclaimers for local jurisdictions will protect your company from the unanticipated liability arising from an unknown foreign locality. After securing adequate Terms and Conditions, getting the most out of your Affiliate Agreement requires having precise business terms that lay out the standards of performance to further protect against the civil and criminal liabilities disclaimed in the Terms and Conditions.

Business Terms: Precise and Simple

Your Affiliate Agreement may be airtight from a legal perspective, making you immune to suit or giving you certain powers in the event of default, but without precise business terms, you may have nothing to enforce because of loopholes or poorly drafted business terms that can be used against you. Precise business terms will make your Affiliate Agreement more predictable, and predictability guards against risk.

The following is a non-exhaustive list of key business terms: duration, pricing, payments, expenses, insurance, non-solicitation, confidentiality, termination, performance obligations during force majeure events, choice of law and venue and limitations on liability. Each of these business terms should be drafted with precision. The more precise these terms are, the more predictable your Affiliate Agreement will be, allowing you to plan accordingly as your business grows or contracts.

For example, the duration of your Affiliate Agreement is known as the “Term” of the agreement. There are many questions that must be answered before drafting the “Term” clause. For example, would you prefer a one-year term? What happens after that? Are you seeking an automatic renewal? If so, then how long would you prefer for each renewal term? Are renewal Terms subject to termination in the same manner as the initial Term? So, having precise language in the Term section of the Affiliate Agreement will answer all of these questions by providing a

clear and predictable framework for expiration and renewal. An example of precise sample Term language can be:

The initial term of this agreement shall commence on the date hereof and shall continue for a period of one (1) year, unless terminated prior thereto as provided in this agreement (the “Initial Term”); provided that, this agreement will be automatically extended for additional one (1) year terms (each, a “Renewal Term”) unless terminated prior thereto as provided in this agreement, or if either Party gives written notice to the other at least thirty (30) days’ prior to the end of the Initial Term or any Renewal Term that such Party does not wish to extend the agreement (the Initial Term and the Renewal Term, collectively, the “Term”).

As drafted above, this Term language provides for flexibility by automatic renewal, while also limiting early termination and requiring the parties to perform through the Initial Term and each Renewal Term.

Force Majeure Clauses

The pandemic highlighted the paradox where local operators were contractually obligated to perform despite public health shutdowns, resulting in automatic cancellation or removal from the Affiliate Network for not meeting performance standards. If your agreements provide for minimums, and your local provider is unable to perform, should there be recourse or an excuse from performance? A precise Force Majeure clause can resolve this issue.

A Force Majeure event is generally defined as an unforeseeable circumstance that prevents a party from fulfilling a contract. Prior to the COVID-19 pandemic, Force Majeure clauses were routinely overlooked as insignificant and contained boilerplate, untailed language. Upon reopening, it is unlikely that local operators booted from Affiliate Networks will return to the same Network Provider, creating a self-imposed retention problem. To avoid that, having a tailored force majeure clause may allow affected local operators to suspend performance without losing retention as everyone adapts to the “new normal.”

Post-pandemic, Force Majeure clauses should include as qualifying events pandemics, epidemics, or any other public health crisis as trigger events, and strike a balance by requiring performance when able, or allowing the parties to terminate the Contract without penalty if the Force Majeure event continues for a specified period of time. Based on our law firm’s experiences with revising Affiliation Agreements, we have typically seen thirty (30) days as the period of time for the Force Majeure clauses.

More complex and serious issues can arise if other business terms are ambiguous or fail to anticipate future circumstances, such as the obligation of the Network Partner to collect and remit applicable taxes, surcharges, and fees or a Network Partner violating a confidentiality provisions by disclosing competitive pricing. All of the business terms discussed in this article are equally deserving of precision, and, to the extent that your Affiliate Agreement contains precise business

terms, you will avoid pitfalls and the associated frustration of competing interpretations of key contract provisions.

Health and Safety Requirements

Based on the lessons learned from the pandemic, it is paramount that transportation companies implement health and safety requirements at all levels. The first line of defense against the non-compliance of a Network Partner or affiliated driver is the Affiliate Agreement. Strengthening the Affiliate Agreement in this regard will take specific references to cleaning and disinfecting protocols, and “baking-in” protections to the Affiliate Agreement that require Network Partners and their affiliated drivers to follow the applicable standards.

The standards should be based on the guidelines provided by local, state, and federal government, or the World Health Organization for global partners. The standards can be attached to the Affiliate Agreement or incorporated by reference from another source. Examples of health and safety requirements are:

- Requiring complimentary surgical masks, hand sanitizer, gloves, and sanitizing wipes;
- Keeping bottled water in a separate compartment and available only on demand;
- Requiring Network Partners to disinfect the vehicle through an extensive non-toxic disinfecting process where all touch points are disinfected at regular intervals (*e.g.*, approved coronavirus cleaning products from the U.S. Environmental Protection Agency’s List N, or utilizing vehicle fogging devices²);
- Prohibiting shared items such as newspapers, magazines, tablets, or other items;
- Removing a vehicle from service for a specific period of time in the event of an infection traceable to the Network Partner’s vehicle;
- Instructing Drivers/Chauffeurs to utilize a new pair of Nitrile gloves prior to handling a customer’s luggage, carry-on bags, etc., or offer the customers the option of handling their own bags should they prefer their belongings to not be touched;
- Requiring Network Partners to use a minimum standard of a 3-layer high-efficiency particulate air (HEPA) filter, providing the cleanest air possible with a filtration efficiency of 99.97% at 0.3 microns; or
- Compliance with mandatory vaccine requirements, such as the United States’ vaccine mandate for employers with 100 or more employees or if a customer specifically requests a vaccinated driver.

The Affiliate Agreement can further indemnify the Network Provider from any liability arising out of the Network Partners’ deviation from the standards contained in the Affiliate Agreement. These standards should be updated periodically, or as new health and safety requirements are released by the applicable authorities and government regulators.

² <https://hyperfog.com/>

Affiliate Driver Demand and Anticipating the Current Market Dynamics

The short supply of drivers across the for-hire vehicle industry is putting pressure on Affiliate Networks to keep up with increasing demand, shifting leverage to drivers. This issue requires a ground-level solution for the benefit of your top-down business model. In order to retain drivers and foster high-level growth, reframing the relationship from “Independent Operator” to “Affiliate Driver” can strengthen the relationship and the underlying Affiliate Agreement.

An Affiliate Agreement using the title “Affiliate Driver” creates a different dynamic than the old-school relationship of owner and independent operator. Changing the title to Affiliate Driver acknowledges that the Affiliate Driver is an asset to the Affiliate Network and working together to generate income. Network Providers should see an increase in Affiliate Driver retention and growth if Network Providers can offer the Affiliate Driver a support network of a steady source of work for a reliable driver.³ Network Affiliates can be incentivized to provide an exclusive, steady supply of drivers to your network if you included milestone and performance based bonuses, profit sharing, or other benefits.

Next Steps?

The current business environment was not foreseeable 18 months ago, but through the course of the pandemic we have learned to expect the unexpected. Anticipating the current market dynamics, and drafting a strong Affiliate Agreement with precise business terms governing the performance of the respective parties can protect against future shutdowns triggered by variations or mutations, while also facilitating controlled growth as major markets re-open, especially as Asian and Oceania countries are stopping COVID19-zero strategies in favor of re-entering the global economy. Strengthening your Affiliate Agreement will provide your company with the confidence necessary to scale and grow your Affiliate Network.

Following these guidelines will strengthen your Affiliate Agreement as a tool to achieve growth and stability through precision and predictability. Expanding your Affiliate Network as global transportation reopens will require engaging new Network Partners and their affiliated drivers. Having a strong Affiliate Agreement from the outset will pay dividends down the road as a shield against the foreseeable. Now is a good time to review your existing contracts and rewrite key provisions or consider starting from scratch. For assistance, please call us at 212-237-1106 or contact us by email at mdaus@windelsmarx.com. We can help ensure that you are getting the most out of your Affiliate Agreement.

***Disclaimer:** The foregoing is provided solely as general information, is not intended as legal advice, and may not be applicable within your jurisdiction or to your specific situation. You are advised to consult with your attorneys for guidance before relying upon any of the information presented herein.*

³ As seen in the trucking industry, fleets are seeing greater driver retention by investing in driver-friendly equipment and providing programs for bonuses based on “safety and fuel mileage.”
<https://www.truckinginfo.com/10156087/private-fleets-investing-in-growth-safety-drivers>

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