

# / LEGAL GUIDELINE

*Digital  
Influencers*

BAP  
TISTA  
LUZ  
ADVOGADOS



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# INTRODUCTION

Over the past years digital influencers have been increasingly more relevant and essential to trademarks as a means of advertising products or services, a strategy known today as “influence marketing”.

In 2016, for instance, 65% of brands adopted such a strategy <sup>1</sup> and it was found that 20% of consumers were willing to pay a higher price for a product endorsed by such influencers.

It was also found that year that this was already the third most boosted sales strategy over the Internet corresponding to 31% of the market, only below purchase websites (56%) and official branded websites (36%). <sup>2</sup>

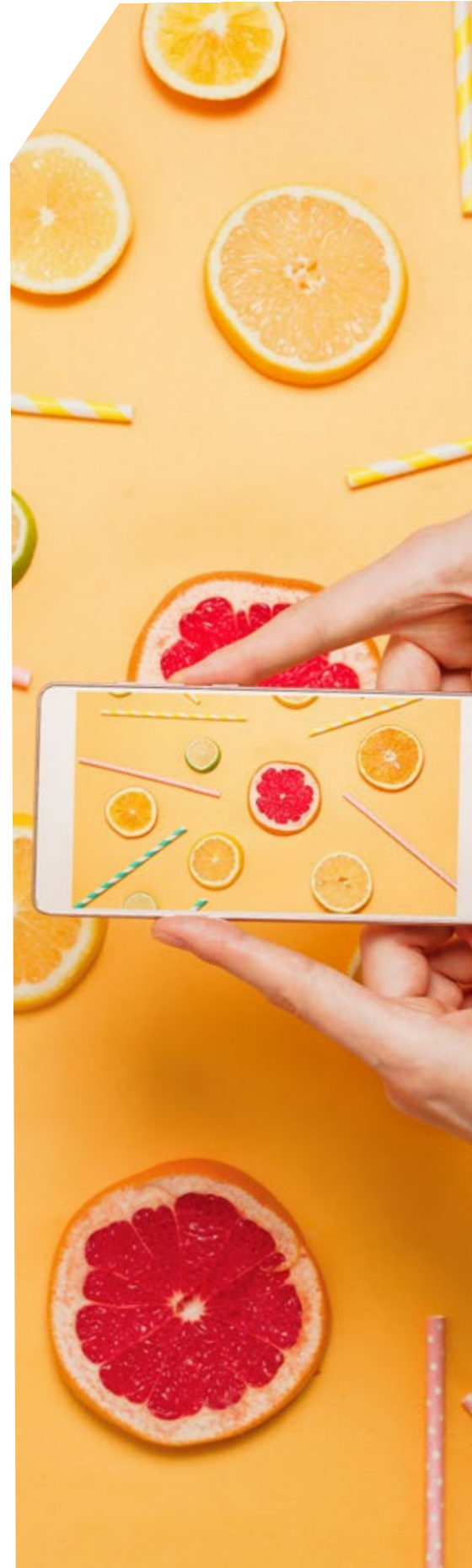
One of the main challenges for brands to define relies on whether it is ideal for any given product or service to hire a celebrity, an authority, a connector, an analyst, an activist, an expert, an insider or a journalist, among the many types of digital influencers around. From the legal perspective there are also some considerations that can make the experience of hiring the services of a digital influencer more satisfactory as they ensure the effective return of investment.

Such is the reason this manual looks to point out as well as clarify some labor, contractual and tax issues involving the hiring of one or more digital influencers for any given advertising campaign of a brand, which can be advised by an advertising agency usually mediating between influencers and brands.



1. IAB. Digital Influencers. Available at: [goo.gl/HNSF3P](https://goo.gl/HNSF3P). Accessed on 08.01.2018.

2. IAB. Digital Influencers. Available at: [goo.gl/HNSF3P](https://goo.gl/HNSF3P). Accessed on 08.01.2018.





# LABOR ASPECTS

**Digital influencing is a new profession that has yet to be specifically regulated in Brazil.**

There are at least two bills regulating the blogging profession: PLs 4289/2016 and 8569/2017, which are under process in the House of Representatives



In this context, hiring digital influencers becomes quite sensitive as in principle the relationship would not be a proper employment bond as governed by the CLT rules, but a **service provision**, particularly while a specific legislation has not been approved, which is subject to the service provision rules set forth in the Civil Code, the Copyright Law, the Consumer Defense Code, the CONAR norms and in the Marco Civil of Internet as well as in other norms generally applicable to contractual relationships, as the case may be, or even in the advertising policies and terms of use of the digital platforms.

The main concern in establishing a contract that governs this relationship between a Contractee and a Digital Influencer is the avoidance of the institutionalizing obligations that constitute employment bonds.

There are some requirements which as a matter of fact can be part of both an employment bond and the service provision of a digital influencer, such as **personality, salary payment, subordination** and **labor routine**. However, service provision by a Digital Influencer, with a few exceptions, is not exclusive. Such then reduces the risk of its characterization as an employment bond. Digital Influencers are usually not restricted to promoting a single brand. Even if the exclusivity factor is present in the service agreement (as an impediment to contracting with a competitor for a certain period of time, for instance), an employment bond could not be determined merely with the presence of such a factor.

**// Hence the importance of making it clear that there is no legal subordination, i.e. no power of command by the Contractee in relation to the activity conducted by the Digital Influencer in the course of the agreement. Without legal subordination (as in the work conducted by self-employed individuals) the risks that the Judiciary acknowledge a relationship as an employment bond are minimized.**



Legal subordination will be effectively determined in the practice by the manner the service is conducted: autonomously by the Digital Influencer without submission to orders and/or control by the Contractee.

Our recommendation is therefore that clauses related to the parties' independence and autonomy, as well as the exemption of any labor liability be inserted in the service agreement the Contractee enters into with a Digital Influencer, either through a legal entity or directly with the individual.



# CONTRACTUAL ASPECTS

**Digital Influencers are knowingly a very recent phenomenon, ergo there is currently no specific legislation. What we find most in the practice is the fact that such a relationship is treated in an absolutely informal manner.**

Oftentimes, we find that the companies owning a brand or the advertising agencies choose to make service agreements with Digital Influencers in a personal manner over telephone conversations, emails or social networks.





Informality is reckless as it comes with insecurity for both parties; without a contract it is difficult to define the obligations of the Digital Influencer as well as the terms and the compensation to be paid by the Contractee.

If there is a problem in the execution of an agreement and the matter needs to be legally analyzed, the Contractee may have a hard time trying to prove rights or even the Digital Influencer's defaulting.

It is essential to be aware that the hiring of a Digital Influencer should not be based on internal documents of the agency or company, such as the issuance of an Insertion Order<sup>3</sup> or a Production Order<sup>4</sup>.

Before selecting a Digital Influencer, it is very important that the Contractee be careful in observing the **terms of advertising and the use of social networks** that will be the vehicles for the service provision, in order to understand the limits set forth in the promotion of the brand through these channels. In **Annex I** we point out in a more detailed manner all the conditions currently existing in the terms of advertising and use of the main social networks:

### **Facebook/Instagram**

### **YouTube**

### **Twitter**

### **Snapchat**

## **/ Best practices**

Once the restrictions of the advertising terms and use are overcome, it is also necessary to be aware of the recurring practices endorsed by the advertising market.

Regarding the hiring of Digital Influencers by advertising agencies, the Brazilian Association of Digital Agents (ABRADi) published in July 2017 the "Code of Conduct for Digital Agencies

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3. An Insertion Order is a document sent to the media authorizing the beginning of an approved campaign. The document usually contains information on vehicle, place, insertion, dates, amounts and data for earnings, also known as AI – Autorização de Inserção or AV – Autorização de Veiculação. Get to know more: [goo.gl/3aLWJ](https://goo.gl/3aLWJ). Accessed on 12.01.2018.

4. A Production Order is a document sent to suppliers authorizing the beginning of production of some material. Get to know more: [goo.gl/Vbjziw](https://goo.gl/Vbjziw). Accessed on 12.01.2018.



upon Hiring Influencers”<sup>5</sup>, recommending a high level of transparency in the relationship. That is, to inform the target audience that what is being promoted by the Digital Influencer stems from a commercial agreement with the brand as a paid advertising strategy and not just a personal opinion of the Influencer.

To comply with this recommendation, ABRADi also proposes the use of words such as “promo”, “publi”, “ad” or “gift”, which may be presented as #hashtags.

Invisible or hidden advertising, from the perspective of the Consumer Protection Code, is considered an unfair consumer practice, as the “protection against misleading and abusive advertising, coercive or unfair commercial methods ...”<sup>6</sup> is a basic right, since “advertising must be conveyed in such a way that the consumer can easily and immediately identify as such”<sup>7</sup>.

An interesting international initiative regarding the subject is the guidelines<sup>8</sup> of the Federal Trade Commission (FTC), the American agency responsible for protecting consumers and fostering free competition in the country. The agency’s initiative to raise awareness of the market occurred upon assessment, after which penalties were imposed on several Digital Influencers whose ads were not transparent to the public.

At the same time, in Brazil, although in a non-coercive manner, i.e. without the application of financial penalties, it is the National Council for Self-Regulatory Publicity (CONAR), the supervising entity which since 2012<sup>9</sup> has been analyzing complaints against this practice by Brazilian companies.

The penalties applied by CONAR<sup>10</sup>, when violations of its code of conduct<sup>11</sup> are evidenced range from warnings to requests for withdrawal of aired content.

Regardless of the severity of the decision adopted by CONAR, the finding of losses to con-

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5. Available: [goo.gl/u7w4i8](http://goo.gl/u7w4i8), page. 4. Accessed on 09.01.2018.

6. Art. 6º, IV of Consumer Code.

7. Art. 36 of Consumer Code.

8. Available: [goo.gl/EuRMmN](http://goo.gl/EuRMmN). Accessed on 05.01.2018.

9. Available: [goo.gl/mjxwuh](http://goo.gl/mjxwuh). Accessed on 16.02.2018.

10. Trials/Representations nº: “221/12” - “222/12” - “223/12” de 09.12; 211/15 de 02.16; 257/16 of 12.16; 129A/16 - 129B/16 - 129C/16 de 02.17, 129/17 de 09.17. Available: [goo.gl/EwF3Et](http://goo.gl/EwF3Et). Accessed 16.02.2017.

11. The Código Brasileiro de Autorregulamentação Publicitária. Available: [goo.gl/EwF3Et](http://goo.gl/EwF3Et). Accessed 16.02.2017.



sumer always generates negative repercussions to companies and Digital Influencers involved. The Brazilian Code of Advertising Self-Regulation determines, for example, that “every advertisement must be respectful and conform to the laws of the country; besides being honest and truthful.”<sup>12</sup> And that “every advertisement must bring to mind the responsibility of the Advertiser, the Advertising Agency and the Vehicle of Publicity toward the Consumer.”<sup>13</sup> These articles are usually used in the assessment of advertising actions, especially when the advertising character in the Influencers’ activity is not evident.

### **/ Service agreement and license of rights**

ABRADI’s Code of Conduct also points out that this type of hiring cannot be confused with a simple operation of purchasing media space or with an authorization to use image, even if the influencer is only given gifts or other types of courtesy.<sup>14</sup>

The hiring of Digital Influencers usually occurs for service contracts and license of rights between the company, the advertising agency and the Digital Influencers.

The brand or advertising agency should be reflected on the particularities of the business relationship with the Influencer and the campaign to be carried out, and it is recommended that what follows be provided for in the contract:



12. Art. 1º of the Código Brasileiro de Autorregulamentação Publicitária. Available: [goo.gl/EwF3Et](http://goo.gl/EwF3Et). Accessed 16.02.2017.

13. Art. 6 Art. 1º of the Código Brasileiro de Autorregulamentação Publicitária. Available: [goo.gl/EwF3Et](http://goo.gl/EwF3Et). Accessed 16.02.2017.

14. ABRADI Code of Conduct for Digital Agencies upon hiring Influencers, page 5.



Recommended Clauses
1. the number of Digital Influencers to be contracted for a given campaign that, depending on its complexity, requires a specific Influencer Agreement;
2. the amount of activities to be performed by the Influencer: whether creating, producing, streaming videos, posting or attending events, live videos, photoshoots, etc.;
3. the schedule of the activities to be performed by the Digital Influencer, providing for the posting deadlines and the time along which the content will be in the air, for instance.
4. the penalties and fines to be imposed in case of delay or failure to comply with the predetermined schedule;
5. the consent and prior orientation of the brand in relation to the content to be produced by the Influencer, who cannot fail to allude to the brand;
6. the negotiation for the re-execution of services with new deadlines upon the company judging that the service provided by the Influencer is inadequate;
7. the strengthening of the campaign transparency in relation to the public;
8. the licensing and transfer of trademark rights, on a temporary basis, to the Digital Influencer;
9. the financial compensation to the Digital Influencer for the provision of services and the granting of contents.

In addition to the particularities mentioned above, it is important to bear in mind that even for a short period of time, the Digital Influencer will be representing the brand; therefore, it is important to provide contractually for the submission to compliance and confidentiality practices already adopted by the Contractee.

## **/ Measure results**

After the execution of a contract by a Digital Influencer, it is possible to obtain the results of the investments made in such a campaign by means of quantitative and qualitative digital metrics of the Influencer. At this point, ABRADi recommends that the metrics presented be certified by entities recognized in the market.



## **/// The social networks themselves offer metrics of results which can show the scope of the publicity action carried out in partnership with Influencers (see details in **Annex I**).**

Early-stage Digital Influencers often introduce their clients to the metrics offered by their own social networks, but it is also possible to seek specialized SEO<sup>15</sup> and SEM<sup>16</sup> consultancies that serve the purpose of optimizing Internet marketing strategies.

Thus, the insertion of a clause providing for measurement tools that are more suitable for the analysis of the Contractee can be discussed in the negotiation of the contract to be entered into with the Digital Influencer.

### **/ Confidentiality**

Finally, the ABRADi Code of Conduct also recommends the adoption of confidentiality clauses in the Service Agreement or a non-disclosure agreement (NDA), intended to protect the intellectual property of the brand and that of the Influencer, strategic plans, formulas and customer lists, which often represent advantages over competitors. This is the contractual instrument that seeks to preserve such information, through the application of contractual fines and other penalties as provided by law, in case of violation.



15. SEO (Search Engine Optimization) is a site optimization process, from specific key words to become more attractive for search engines such as Google. Such optimizations result in better positioning for organic search. Know more: [goo.gl/JtUWEp](https://goo.gl/JtUWEp). Accessed 22.02.2018.

16. SEM (Searching Engine Marketing, in Portuguese: Marketing de Mecanismos de Buscas) is a set of techniques looking to make use of the search mechanisms to promote over the Internet. Know more: [goo.gl/NK5eWY](https://goo.gl/NK5eWY).



# TAX ASPECTS

**The relationship to be established between Digital Influencers and a Contractee may imply a variety of services that may be provided by means of a contract, the production of content, merchandising, posting content in channels of promotion, acting, among others.**

In view of this plurality, we point out the taxes that deserve high attention: the Tax on Services of Any Nature (ISS) and the Tax on Income of any Nature (IR).



Furthermore, the way in which the Digital Influencer provides services, as an individual or a legal entity, presents important differences in the calculation of such taxes.

We have limited our analysis to cases in which Digital Influencers provide services: 1) as self-employed individuals or 2) through legal entities within the regime of the Simples Nacional (the “SIMPLES” tax regime).

### **/ Tax on Services of Any Nature (ISS)**

The Tax on Services of Any Nature (ISS) is levied upon the services listed in [Complementary Law 116/2003 \(LC 116/03\)](#). As a matter of fact, ISS’s Complementary Law was amended through [LC 157/2016](#), which among other changes included the new services that can be subject to ISS.

In addition, collecting this tax is a **municipal responsibility**, i.e. it is necessary that each of the municipalities create their own specific law to establish such a levy.

**Several capital cities**, such as São Paulo, Rio de Janeiro and Porto Alegre **have included** in their municipal laws services equivalent to those provided by Digital Influencers, nevertheless, it is necessary to be aware of the laws of the other municipalities, particularly because services will be rendered elsewhere.

Since it is the taxpayer who actually provides the service, it will then be the Digital Influencers themselves who hold the responsibility of paying the ISS and issuing the invoice. However, in some cases, service contractors pursuant to the municipal laws are given the responsibility for such levy.

The services that can be rendered by Digital Influencers as per the list of services provided for in Municipal Law 13.701/2003 in the city of **São Paulo**. The Tax on Services of Any Nature (ISS) is required upon provision of services as per the list of Complementary Law 116/2003 (LC 116/03). As a matter of fact, ISS’s Complementary Law was amended through LC 157/2016, including some new services to be ISS taxed, among other changes.



Services in São Paulo	Alíquota
<p>1 - Services of Information Technology and related</p> <p>1.09 - Provision, without a definitive assignment, of audio, video, image and text content through the Internet, respecting the immunity of books, journals and newspapers.</p>	<p><b>2,9%</b></p>
<p>13 – Services related to phonography, photography, cinematography and reprography.</p> <p>13.01 - Phonography or sound recording, including retouching, dubbing, mixing and related.</p> <p>13.02 - Photography and cinematography, including development, enlarging, copying, retouching and related.</p>	<p><b>5%</b></p>
<p>17 – Technical support services, administrative, legal, accounting, commercial and related.</p> <p>17.24 - Insertion of text, drawings and other advertising and publicity material through any kind of media, except books, journals, newspapers and free radio broadcast of sound and image.</p>	<p><b>2,9%</b></p>
<p>37 – Services of artists, models and mannequins.</p> <p>37.01 - Services of artists, athletes, models and mannequins.</p>	<p><b>5%</b></p>





## / Digital Influencers rendering services as self-employed individuals

In the city of São Paulo a self-employed<sup>17</sup> individual is exempt<sup>18</sup> from ISS provided that they are enrolled in the Taxpayers' Registry - CCM standing for "Cadastro de Contribuintes Mobiliários". Nonetheless, bear in mind that such fact does not exempt them from their ancillary obligations, such as the issuance of a receipt.

For the sake of exemplification here is a case of how the tax should be calculated if there were no exemption in the municipality of São Paulo.

### Examples of ISS Calculation

The discrimination, in the contract, of the amounts charged for each of the services rendered (1) or the determination of a unique amount encompassing all services rendered (2).

#### Case (1)

Some Digital Influencer is hired for R\$10,000.00 to perform in a video which shall be posted into five Instagram stories, one per week.

Such Digital Influencer has a price list for their publications upon which each Instagram story goes for R\$ 500.00.

The R\$ 10,000.00 story can be divided into two amounts, R\$ 2,500.00 for Instagram story-posting and R\$ 7,500.00 for their performance in the video.

Upon issuing the service provision invoice, the Digital Influencer will inform that their performance in the video falls under item "37.01 - Services of artists, athletes, models and mannequins", whose rate is 5%, and the fact that the post is included in item "17.24 - Insertion of texts, images and other advertising and publicity material in any media", at the rate of 2.9%.

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17. The electronic portal of the City of São Paulo presents the following definition: "A free or autonomous professional is one who, having certain technical, manual or intellectual abilities, provides services personally and on his own account, without employment or hierarchical subordination. The service may be provided, routinely or occasionally, in the establishment or domicile of the provider or in the establishment or domicile of the service taker. The following basic assumptions are emphasized in this type of service provision: a) Personality; b) lack of hierarchical subordination."

Available at: <https://goo.gl/yw1Eyf>. Accessed on 02.02.2018

18. Complementary Law 157/2016, in its art. 8, paragraph 1 prohibits the granting of exemptions, incentives or tax benefits over the ISS. However, many municipal laws still provide for such instruments, creating legal uncertainty on the issue.



Therefore, 5% out of R\$ 7,500.00 must be levied, in addition to 2.9% out of R\$ 2,500.00, that is, R\$ 447.50 for the ISS tax.

**Conclusion:** Whenever possible, it is essential to detail the amounts of each of the services provided under a contract in order to reduce the ISS to be levied, if applicable.

## Case (2)

Some Digital Influencer is hired for R\$ 10,000 to perform in an advertising video and post it on their Facebook page.

Such Influencer has no price list as the amount of the contract involves a single, non-discriminated price for the execution of all services provided.

Upon declaring ISS, the Influencer realizes that their performance in the video falls under “37.01 - Services of artists, athletes, models and mannequins”, whose rate is 5%; video production falls under item 13.02 - Photography and cinematography, including development, enlargement, copy, reproduction, retouch and the like”, whose rate is 5%; and posting in item “17.24 - Insertion of texts, image and other materials of advertising and publicity, through any media”, which rate is 2.9%.

Since the Influencer does not have any criteria or tool that allows for the discrimination of the amounts for each service in the contract, they must observe all applicable rates and adopt the higher amount. In the example above, an invoice should be issued for item 37.01 or 13.02, as it is the higher-rate item which applies.

Therefore, such Digital Influencer must levy 5% out of R\$ 10,000.00, i.e. R\$ 500,00 for ISS.

The higher-rate application is a common practice, mainly because it does not present any damage to the Treasury. By this means the risk of assessment by the Treasury is reduced in the event of an inspection.

**Conclusion:** whenever it is not possible to discriminate the amounts for each service provided as per a contract, the higher rate should be applied.

As stated earlier, ISS is a municipal tax, therefore each municipality can establish the parti-



cularities regarding the responsibility for their levy as well as the instances for exemption<sup>19</sup>.

In the city of **São Paulo**, for example, the responsibility for ISS levy and its ancillary obligations, as a rule, is not attributed to the Employer. It is the autonomous service provider who must issue a receipt, since an invoice is not required, **with the following information:**

- / name of taxpayer,
- / taxpayer's registration number at the Cadastro de Contribuintes Mobiliários - CCM,
- / address and description of service rendered,
- / taxpayer's CPF or CNPJ
- / price of service.

If a Digital Influencer does not provide such document, the Contractee is allowed to withhold ISS.

Hence the importance of paying attention to the municipal legislation where Digital Influencers effectively execute their services.

In the city of São Paulo, Digital Influencers should levy ISS only if they are not registered at the CCM, on the other hand, the Contractee shall levy ISS only a Digital Influencer is not exempted by the respective municipal law and Contractee issues no receipt with the information as detailed above.

### **/ digital influencers that provide services through a legal entity under the SIMPLES regime**

If a Digital Influencer provides services as a legal entity, the tax modality is to be observed. In this material we will deal with companies that opt for the SIMPLES regime.

The SIMPLES regime consists of a special tax provided for by [Complementary Law 123/2006](#), through which it is possible to pay several taxes (IRPJ, IPI, CSLL, Cofins, PIS / Pasep, CPP, ICMS



19. A case of a tax exemption in São Paulo occurs when the service is provided by autonomous professionals registered with the CCM and/or Individual Microentrepreneurs (MEI) located in the municipality. On the other hand, in the city of Porto Alegre, the self-employed who are university-level free professionals with specific professions are not exempt.



and ISS)<sup>20</sup> in a single payment on a monthly basis. Note that ISS is included in this regime.

A **legal entity** is required to be incorporated as a company in order to be included under the SIMPLES special regime as a simple company, an individual limited liability company or an individual entrepreneur and then invoice a maximum amount of R\$ 4,800.00 per year.

The rates applicable to companies providing services related to the Digital Influencer activities fall within the following SIMPLES table:

Receita anual em R\$	Alíquota
Até 180.000,00	<b>15,5%</b>
De 180.000,01 a 360.000,00	<b>18%</b>
De 360.000,01 a 720.000,00	<b>19,5%</b>
De 720.000,01 a 1.800.000,00	<b>20,5%</b>
De 1.800.000,01 a 3.600.000,00	<b>23,5%</b>
De 3.600.000,01 a 4.800.000,00	<b>30,5%</b>

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20. The initials correspond to the following taxes, respectively: IRPJ - Legal Person Income Tax, IPI - Industrialized Products Tax, CSLL - Social Contribution on Net Income, Cofins - Contribution to Social Security Financing, Contribution to PIS/Pasep, CPP - Employers' Social Security Contribution, ICMS - Tax on Operations Related to the Circulation of Goods and Services of Interstate and Intermunicipal Transportation and Communication and ISS - Tax on Services of any Nature.

In such case, the contractees of Digital Influencers do not have an ISS obligation, which is exclusively incumbent upon the Digital Influencer company.



## Relevant Matters

### **If the Digital Influencer does not levy the due tax, can the contractee be held liable by the Treasury?**

**A:** As a rule, in case the Digital Influencer does not collect the taxes, the Contractee cannot be held responsible for this. The contractee may only be liable in the following cases: (i) if it does not withhold IR in case of contracting self-employed individuals or, occasionally from companies under the presumed profit, the actual profit or the arbitrated profit regimes; (ii) withholding ISS if it does not request from the self-employed a receipt with all the requirements as provided for in the municipal legislation, as we described in the manual (rule provided in the city of São Paulo).

### **The ISS tax depends on municipal law, but is it the law of the municipality of the provision of the service which applies, that of the residence of the Digital Influencer or that of the service taker?**

**A:** It will be necessary to check both the legislation of the municipality in which the Digital Influencer is established, and that of the service-taker. In general, it is where the content is produced.

### **Is it true that Complementary Law 157 has put the ISS exemptions to an end?**

**A:** Complementary Law 157 requires municipalities to adopt the minimum rate of 2% in the collection of ISS. There is, however, a debate over the application of this obligation, since it undermines the autonomy of municipalities. In this way, as long as the existing municipal laws still provide for the possibility of exemption, it is still possible to benefit from such.



## / Income Tax (IR)

Income Tax (IR) is required when a natural or legal person generates income, capital gain or earnings of any nature.

For the purpose of income tax levy, **the name of the income is irrelevant** as it is its location, legal status, nationality of the source, origin or form of payment.

It is very important though that the contracting companies be aware of the cases in which they have the obligation of withholding income tax as will be discussed afterwards.

To clarify the matter in view of contracts with Digital Influencers, we will separately approach the taxpayers as individuals and legal entities.

## / Digital influencers who provide services as self-employed - Personal Income Tax (IRPF)

Individuals must declare their income and pay IR, if applicable, as a rule, annually. The declaration and levy must be based on the income of the previous year, better known as calendar year. So, in the year 2018 the income for the calendar year of 2017 should be declared.

The Income tax rates applicable range from 7.5% to 27.5% according to the monthly and yearly amount acquired.

One of the exceptions to the annual payment rule occurs when income comes from outside sources. In which case a Digital Influencer should generate a “carne-leão” and pay the applicable income tax in the month they acquire the amount with **rates ranging from 7.5% to 27.5% out of the amount in question**. The taxpayer must declare such income and the respective payments in their Annual Income Tax Return.

## / Digital influencers that provide services as a legal entity - Company Income Tax (IRPJ)

The federal legislation provides four distinct IRPJ taxation regimes for legal entities: the SIMPLES, the Presumed Profit, the Real Profit and the Arbitrated Profit. Our analysis is limited to legal entities under the SIMPLES regime.

Under the Simples Nacional regime companies levy all taxes in a single monthly payment.



The rates applicable to a company under the SIMPLES regime upon services rendered by Digital Influencers range from 15.5% to 30.5%, according to the company's annual gross revenue.

### Withheld Income Tax - Service Taker. i.e. Contractee

Companies hiring Digital Influencers that operate through a legal entity opting for the SIMPLES regime are not required to withhold income tax.

On the other hand, contracting companies of Digital Influencers that act by means of natural persons/self-employed should withhold income tax.

The rates and amounts to withhold are periodically updated, hence the importance of a follow-up.

Base de Cálculo mensal em R\$	Alíquota	Dedução em R\$
De 1.903,99 até 2.826,65	7,5%	142,80
De 2.826,65 até 3.751,05	15%	354,80
De 3.751,05 até 4.664,68	22,5%	636,13
Acima de 4.664,68	27,5%	869,36

To better understand the table, consider the example:

**Example:** A digital influencer as a natural person is hired for R\$ 10,000.00.

As the amount is above R\$ 4,664.68, the rate applied on the calculation basis of R\$ 10,000.00 will be 27.5% and the deduction R\$ 869.36:

$$\text{R\$ } 10,000.00 \times 27.5\% = \text{R\$ } 2.750,00$$

From the amount calculated there is a deduction of R\$ 869.36, i.e.

$$\text{R\$ } 2,750.00 - \text{R\$ } 869.36 = \text{R\$ } 1,880.64.$$

Accordingly, R\$ 1,880.64 shall be deducted from the amount of the contract and levied by the company as withheld income tax.

It is important to bear in mind that the INSS contribution may change the calculation basis of the tax to withhold.



## Relevant Matters

**If the Digital Influencer performs their activity as self-employed, should the Contractee withhold the IR?**

**A:** Yes. The contracting company should withhold IR in case the Digital Influencer exercises their activities as a self-employed individual.

**If the Digital Influencer exercises their activity by means of PJ within the SIMPLES regime, should the Contractee withhold?**

**A:** No. The legislation exempts withholding tax on the amounts paid to companies opting for the Simples.<sup>21</sup>

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21.Pursuant to art. 32, item III, of Law 10.833/2003 and Normative Instruction RFB 765/2007.





## Annex I

# ADVERTISING POLICIES AND TERMS OF USE

It should initially be clarified that all the cases described below were extracted from the terms of use and advertising of their respective social networks quite literally, so some concepts that seem broad and comprehensive, which would therefore consent interpretation and uncertain definitions have been pointed out below:



What would for instance be involved in “adult” content? What is regarded as “sensationalist”? What would be an “unexpected or improbable result”, “poor quality” or “disturbing”?

**The premise to adopt is the observation that that which is not expressly forbidden is therefore allowed.**

In the tables below, we present the different advertising policies in force as of January 2018 in some social networks<sup>22</sup>:

## Facebook / Instagram<sup>23</sup>

The content of the brand is defined by Facebook as “content of editor or creator which presents or is influenced by a business partner for compensation, can be published only through profiles and pages with access to the “content of brand”; such access must be requested and Facebook is limited to granting the Pages only.

Creators (Digital Influencers) and editors (advertising companies and the media) must tag their business partners (trademarks, advertisers, marketing professionals or sponsors) to their corresponding brand content posts whenever there is a business agreement between them.

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22. Advertising terms were directly transcribed.

23. Terms of use and advertising mentioned are available at: [goo.gl/cVzTb](https://goo.gl/cVzTb), [goo.gl/7RjwSD](https://goo.gl/7RjwSD), [goo.gl/pn2S7R](https://goo.gl/pn2S7R) e [goo.gl/QYDsKp](https://goo.gl/QYDsKp). Accessed 08.01.2018.



Ads promoting brand content must be tagged to business partners; third party's brand or products with the brand content tool. Upon promoting integration of brand content advertisers must use the brand content tool.

## ⊘ It is not allowed to:

- / include ads before, during and after a video or audio content;
- / include banner ads in videos or images;
- / include **title cards**<sup>24</sup> the first three seconds into a video. **Interstitial ad cards**<sup>25</sup> in the initial seconds into a video, as **cards in the middle or at the end**, which must not take longer than three consecutive seconds nor be included in Facebook Stories or Instagram Stories;
- / include brand content produced by the Digital Influencer in exhibits or videos of trailers to be published in the Pages;  
  
prevent the companies from accessing metrics of content access in publications of brand content posted by a Digital Influencer, who is obliged to tag the companies connected wherefore the metrics are automatically shared;
- / use the brand content tool to tag a Page, brand or business partner without prior consent;
- / address content looking to discriminate, threaten, provoke or insult users;
- / broadcast content:

////////

24. Static images, only with text.

25. Interstitials are advanced interactive ads for users of mobile apps. Such were projected for exhibition in between contents. Further information: [goo.gl/cVzTb](https://goo.gl/cVzTb), [goo.gl/7RjwSD](https://goo.gl/7RjwSD), [goo.gl/pn2S7R](https://goo.gl/pn2S7R) e [goo.gl/QYDsKp](https://goo.gl/QYDsKp). Accessed 08.01.2018.



- **adult**<sup>26</sup>;
- infringing or violating the rights of others;
- **sensationalist**<sup>27</sup>;
- declaring or suggesting personal attributes to the public, such as this app was created exclusively for you, single woman looking for love”, rather than appropriately “this app addresses single women looking for love”;
- false, deceitful or controversial;
- offensive in language and grammar;
- with destination pages that are not functional;
- cwith “before and after” images or with **unexpected/improbable results**<sup>28</sup>;
- low in quality or disturbing<sup>29</sup>;
- *spyware or malware*;
- automatic animations;
- connect the social network support to the brand.



26. This includes nudity, people in explicit or suggestive positions, or very suggestive or sexually provocative activities. Advertisements for movie trailers, TV shows, video game trailers and other similar adult-oriented content are permitted only with prior written authorization from Facebook and should be addressed to persons 18 years of age or older.

27. Ads must not contain shocking, sensational, disrespectful, or excessively violent content.

28. The content of the advertisement should not imply or attempt to misrepresent self-image in order to promote diets, weight loss or other health-related products. Ads for health, wellbeing and weight loss products should be targeted at people who are at least 18 years old.

29. Ads should not include content that leads to pages that provide a disturbing or unexpected experience. This includes misleading ads, such as hyphenated headers, and getting people to pages that contain minimal original content and a majority of unrelated or poor quality content.



## ✓ It is allowed to:

- / use logos and watermarks as well as include a logo the first three seconds into the video. If the objective is to generate logo messages during the early seconds, it is recommended that it be published as an unpublished ad;
- / use brand content tagging with the following publication and format types: Photos, Videos, Links, Text, Instant Articles, 360 Videos, Live, Multimedia Presentation, Canvas, Carrousel;
- / that all creators, editors, share the brand content on Facebook, as long as the restrictions above are not complied with and brand content tools of network are used for tagging business partners in the respective publications;
- / that business partners boost brand content produced by Digital Influencers;  
  
share brand content publications on the page of business partner, targeting a specific public, on a budget and a payment option in order to boost the publication;
- / photos of women engaged in awareness campaigns on breastfeeding or mastectomy;
- / art manifestations picturing nudes;
- / digital nude content and sexual activity for educational purposes, humor or satire as long as they are not images or explicit descriptions or with very vivid details;
- / humor, satire, or social comments related to hate speech, as long as related to a profile (keeping in mind that fake profiles are prohibited);  
  
share violence content in order to condemn it or raise awareness.



## Prohibited services or products

- / Illegal products or services;
- / discriminatory;
- / tobacco products or other recreational drugs;
- / prescribed drugs;
- / dangerous supplements;
- / weapons, ammunition or explosives;
- / surveillance equipment;
- / short-term loans or salary advanced payment;
- / low investment business models with quick return;
- / auctions or similar business models;
- / counterfeit documents;
- / unauthorized transmission devices;
- / sex services;
- / sex content involving minors;
- / encouragement to self-mutilation or other kinds or self-infliction.

## Services or products with restricted attachment<sup>1</sup>

- / Alcoholic beverages<sup>2</sup>;
- / online dates;
- / games of chance with real money;



1. Online dating service announcements that promote or facilitate online gambling, skill games or real money lotteries, including online casinos, sports betting, bingo or poker, online and offline pharmacies, movie trailers, TV shows, video game trailers and other similar adult-oriented content are only allowed with prior written permission. Real money gambling ads, movie student loans, TV shows, video game trailers, and other similar adult-oriented content that promote acceptable dietary and natural supplements should be targeted at people 18 years of age or older that are in jurisdictions allowing for such games.

2. They must comply with all applicable local laws. These ads are banned in some countries such as Afghanistan, Brunei, Bangladesh, Egypt, Gambia, Kuwait, Libya, Lithuania, Norway, Pakistan, Russia, Saudi Arabia, Turkey, the United Arab Emirates and Yemen.



- / state lotteries<sup>3</sup>;
- / online drugstores<sup>4</sup>;
- / Subscription services<sup>5</sup>;
- / financial services<sup>6</sup>;
- / student loans<sup>7</sup>;
- / films, TV programs, trailers of videogames and other similar content addressed to adult public;
- / registration ads<sup>8</sup>.



3. Ads will be placed only for people located in the jurisdiction in which the lottery is available.
4. Ads should not promote the sale of prescription drugs.
5. Know more: [goo.gl/p9FhiZ](https://goo.gl/p9FhiZ). Accessed 20.02.2018.
6. They must clearly provide sufficient warnings about the associated fees, including annual percentage transaction rates, on the ad's landing page. They should not directly request the input of a person's financial information, including credit card information.
7. Ads should not promote fraudulent or misleading services related to refinancing, pardoning, or consolidating student loans.
8. Advertisers should not create ad-listing questions to request, without prior authorization from the social network: number of accounts, criminal history; financial, health and insurance information; government-issued IDs; political affiliation; race or ethnicity; religion, sexual orientation, question models; affiliation to unions; users names or passwords.



YouTube defines “product paid placement” as content created for a third party for payment and/or in which the brand, the message and the product of such third party is directly integrated to the content.

Endorsement on the other hand are described as content created for an advertiser or marketing professional which seems to reflect the opinions, beliefs or experience of the content creator or endorser to viewers.

It is necessary to inform YouTube on such practice, checking the box “This video contains paid promotions” in the “Advanced settings” section. With that, YouTube takes ads off videos conflicting with the brand and substitutes them with other ads, besides removing the video from the YouTube Kids app.

Youtube offers a video campaign segmentation per demographic group, interest, channels and remarketing lists, if possible.

To reach niche or specific target audiences based on who they are, what their interests are, and which content they view.

## ⊘ Not allowed

- / controversial matters and touchy events;
- / dangerous drugs and products or substances;
- / dangerous or harmful behavior;

//////

9. Ad-Optimized Content Guidelines available at: [goo.gl/CpEdiS](https://goo.gl/CpEdiS), Google AdSense program policies at: [goo.gl/MccSYW](https://goo.gl/MccSYW), about video campaign targeting: [goo.gl/1VckW2](https://goo.gl/1VckW2), ad policies: [goo.gl/QXJrUk](https://goo.gl/QXJrUk) Accessed on 12.01.2018.





- / incitement hatred;
- / Improper language;
- / improper use of people in family entertainment;
- / Angered and demeaning content;
- / sexual connotation content;
- / violence;
- / Direct one's own ads in their own videos;
- / That influencers include promotions, sponsorships or other types of publicity from videos of third party advertisers or sponsors when YouTube offers a similar ad format;
- / use digital influencers on YouTube Kids.

## ✓ Recommended Practice

- / respect to others;
- / use of miniatures and precise metadata;
- / Make sure in regard to commercial use rights by the contracting trademark that the content is broadcast/produced by the digital influencer;
- / content appropriate for all persons above 13 years of age;
- / There is an additional resource informing viewers that "the video contains paid promotions";
- / It is possible to use title cards and final cards as logo of the brand in order to broadcast the connection to a brand.

## Prohibited Services or products

- / counterfeit;
- / adult content or pornography;
- / financial support;
- / help to succeed in a drug test;
- / anabolic steroids;
- / advocate against any organization, person or group;
- / automated click on ads;
- / mass marketing;
- / content protected by copyright;



- / affiliate data entry programs;
- / dialer programs;
- / tobacco products or other recreational drugs;
- / e-gold ads;
- / threatened or endangered species;
- / escort services, adult dating, prostitution;
- / fireworks and pyrotechnic devices;
- / counterfeit documents;
- / hacking and cracking services;
- / increased clicks or impressions on ads;
- / miracle cures;
- / traffic devices;
- / weapons, ammunition or explosives;

## Restricted services or products<sup>10</sup>

- / alcoholic beverages;
- / products for birth control<sup>11</sup>;
- / mobile content services<sup>12</sup>;
- / jogos de azar valendo dinheiro real;
- / pharmaceuticals and medicines<sup>13</sup>;



10. Campaigns for these products can target only countries where such ads are allowed under applicable laws and regulations, and all ads must comply with local restrictions. More information at: [goo.gl/2ukNBz](https://goo.gl/2ukNBz). Accessed on: 12.01.2018.

11. Ads for birth control products may contain product branding, but without adult images, themes, or contexts. If some of these elements describe the creative piece of the campaign, then it will be disapproved. Ads and landing pages cannot promote other sexual enhancements such as toys, lubricants and pills to improve sexual performance. Ads should focus only on product branding and may not contain any adult image, theme or context, such as implied sexual acts and intimate sexual content.

12. For all types of mobile content services, the promoted website needs to clearly and precisely display the prices of these services. In addition, all relevant site requirements listed below must be located prominently on the web page and should be easy to find, read, and understand.

13. Pharmaceutical ads will be accepted where there is no option for users to purchase the products of the ad or landing page provided that the ad is clearly marked with the manufacturer's name and complies with applicable legal guidelines for the advertiser. The ad cannot contain links to any site that provides the online sale of pharmaceuticals.



Twitter Ads are automatically submitted for approval, based on the status of the account advertiser in its Twitter timeline and other development factors.

Tweets, accounts and promoted topics are clearly identified with the “promoted” icon. Promoted Tweets are common Tweets purchased by advertisers who wish to reach a wider user group or encourage the engagement of their existing followers.

## ⊘ Not allowed

- / ads encouraging users to share their access information or post spam;
- / hate speech.
- / promote the sexual exploitation of minors;
- / publish or share intimate photos or videos of someone without the consent of such person;

## ✓ Recommended Practices

- / honesty and transparency with the public, also observing intellectual property matters



14. About Twitter Ads Approval: [goo.gl/uY54n8](https://goo.gl/uY54n8), Twitter Ads Policies: [goo.gl/VX7eTm](https://goo.gl/VX7eTm), The Twitter Rules: [goo.gl/YmS9si](https://goo.gl/YmS9si), Promotion Guidelines: [goo.gl/jmeuct](https://goo.gl/jmeuct). Accessed on: 12.01.2018.



- / some forms of explicit violence and/or adult content in Tweets if marked as sensitive media;
- / some forms of consensual nudity and adult content are allowed on Twitter;
- / not encourage the creation of multiple accounts;
- / not encourage the publication of the same Tweet repeatedly;

## Prohibited services or products

- / illegal;
- / potentially dangerous or misleading;
- / misleading or lying offers;
- / adult or sexual;
- / medicines and related materials;
- / threatened or endangered species;
- / tobacco or other recreational drugs;
- / spyware and piracy;
- / unauthorized sale of tickets;
- / weapons, ammunition or explosives.

## Services or products prohibited under the age of 18<sup>15</sup>

- / alcoholic beverages;
- / betting content;
- / fireworks;
- / aerosol paint or acid capable of deteriorating property;
- / substance/material containing Salvia divinorum or Salvinorin;
- / dietary supplements;



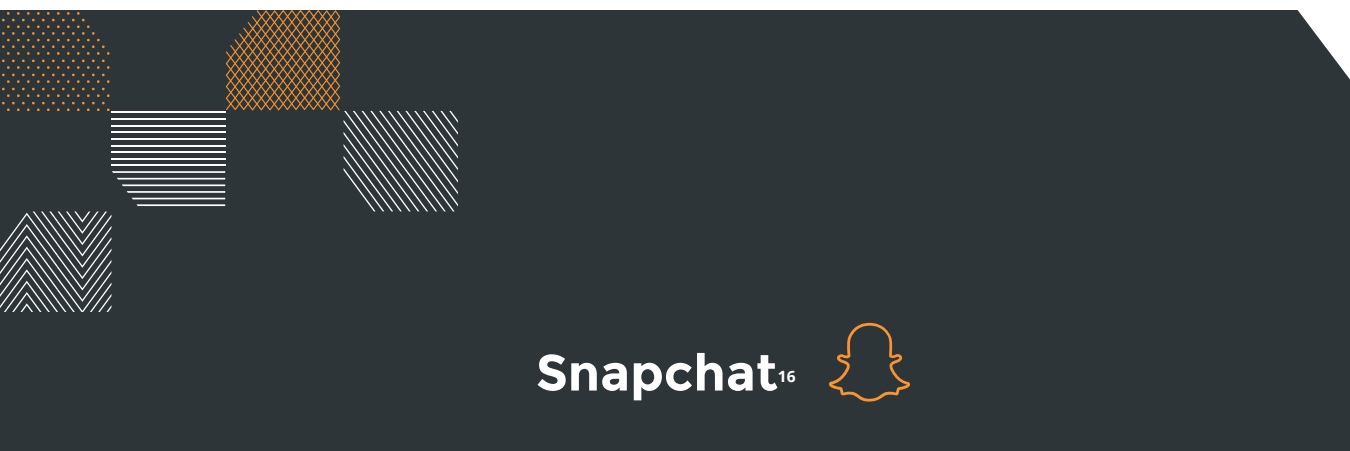
15. Campaigns on alcoholic beverages content of bets, fireworks, aerosol or acid paint capable of deteriorating properties, substance/material containing Salvia divinorum or Salvinorin A, dietary supplements, tanning in ultraviolet ray equipment, weapons, ammunition or training/certifications of weapons and body marks cannot be promoted to minors. See more and other specifications at: [goo.gl/VX7eTm](https://goo.gl/VX7eTm). Accessed on: 12.01.2018.



- / tanning in equipment with ultraviolet rays;
- / weapons, ammunition or training/certification of weapons;
- / body marks (e.g. tattoos, piercing or permanent cosmetics).

## **Other products / services with restrictions**

- / financial services;
- / health products and pharmaceuticals;
- / political propaganda;



Snapchat may rate, at its sole discretion, video ads, geographic filters, advertiser lenses, and any other advertising products or displays as “AD”, “Sponsored” or otherwise.

All ads shown in Snapchat should be published through full-screen videos in portrait orientation. All ads must have high image quality and meet high editing standards.

### ⊘ It is not allowed that Content:

- / promote snaps while driving or encouraging other dangerous behaviors;
- / that is degrading or prejudiced;
- / that exploits a certain individual in a state of intoxication or drunkenness;
- / portray nudity, sexual behavior, or obscene gestures;
- / which portray the use of drugs;
- / which portray excessive violence;
- / that is shocking, sensationalist or disrespectful;
- / deceitful, fake or doubtful;
- / which redirects users to phishing, malware and others;
- / which influences users to provide personal information without their consent and in bad faith;
- / infringe intellectual property rights.



16. Advertising Policies: [goo.gl/ogUGV7](https://goo.gl/ogUGV7). Accessed on: 12.01.2018.



## ✓ Best Practices

/ the digital influencer should be exempt from warranties if the results referred to a product or service were atypical or if there is financial compensation for the accomplishment of such a statement.

## Prohibited services or products

- / for adults;
- / cigarettes and other tobacco products;
- / do not comply with intellectual property laws;
- / piracy;
- / Pyramid schemes or offers of fraudulent or deceptive nature;
- / illegal drugs or related objects;
- / weapons, ammunition or related accessories;
- / promotion of market titles or market tips;
- / ads targeting countries subject to US economic sanctions and other US export control laws;
- / illegal.

## Restricted services or products<sup>17</sup>

- / alcoholic beverages;
- / online relationships;
- / games of chance and skill;
- / lotteries;
- / financial services;
- / contraceptive methods;
- / online pharmacies or for medicines;
- / Political announcements;
- / herbal supplements and food diets.



17. Restricted placement refers to the total ban on this type of content in some countries, but not in others (such as alcoholic beverages, for example, or requiring special authorization, such as online relationship services. Verify restrictions on: [goo.gl/ogUGV7](https://goo.gl/ogUGV7) Accessed on: 12.01.2018.



# About Baptista Luz Advogados

With over a decade of practice, our specialty is presenting effective solutions and innovative ideas towards legal matters for our clients, partners and entrepreneurs.

Combining professionalism and experience, our office offers high quality legal advice through personalized service in which the client is offered all necessary support with clarity and precision.

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