

NEWSSTAND

Moonlighting Employees: How to Avoid the Legal Risks

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In this unpredictable economic climate, many employees are looking for additional sources of income. This may mean working a second or third job or starting a business "on the side." While most employers prefer not to intrude needlessly on employees' private lives, "moonlighting" has the potential to create serious problems for employers.

For example, moonlighting employees may not have the energy to perform at their full capacity, which in turn may pose a safety hazard. In addition, moonlighting may hinder an employee's ability to work overtime, there is an increased risk that confidential information will be divulged when an employee works more than one job and moonlighting may create a conflict of interest if the employee works for a competitor. Employers should take the following steps to lawfully address employee moonlighting.

STEP 1: Identify business-related concerns related to moonlighting.

The best way for an employer to craft a moonlighting policy is to first evaluate the specific employment setting and identify business-related concerns. Only then can an employer develop policies that address those specific business-related concerns, and, most importantly, apply those policies in a uniform and consistent manner.

Any policy should deal only with business-related criteria and should avoid restrictions on employee conduct that is not tied to the employer's legitimate business interest. Common business-related concerns include:

- prohibiting any employment that creates conflicts of interest, including working for a competitor;
- maintaining trade secrets or confidential or proprietary business information;
- prohibiting any act or behavior that adversely affects the primary employer's image or reputation;
- prohibiting outside work during normally scheduled work hours;
- prohibiting employees from representing the primary employer while performing outside work;
- prohibiting solicitation for outside employment, including sales or pyramid marketing;
- prohibiting use of work resources, equipment, or benefits (including negotiated discounts or other company perks) for outside employment; and
- prohibiting any outside work that interferes with the employee's job performance.

This list is not exhaustive and an employer may have additional business-related concerns depending upon the industry, size of the employer, or nature of its employee relationships. That said, it is critical that employers identify the specific aspects of moonlighting that pose a real or potential threat to its business interests, rather than simply operating from an assumption that all moonlighting is prohibited.

STEP 2: Develop business-related policies and apply them consistently.

A blanket policy which categorically prohibits moonlighting may create employee retention problems or poor employee relations, and it may not be legal. Some states, such as California, Colorado, New York and North Dakota, have enacted broad statutes which protect employees from adverse employment action when they engage in lawful conduct while off duty and away from the worksite. These are referred to as "lawful conduct" statutes, "off duty protection" statutes, or "lifestyle discrimination" statutes.

Because most “lawful conduct” statutes have an exception for business-related concerns, employers should tie their moonlighting policy to the business-specific concerns, such as those identified in Step 1 above. Alternatively, instead of implementing a policy directly addressing moonlighting, an employer may choose to address employee moonlighting as it relates to each particular business-related concern. For example, an employer may address potential moonlighting problems by developing a conflict of interest policy, an overtime policy, and a policy regarding confidential information. A general conflict of interest policy is often a good way to ensure that an employee’s primary responsibility is to his or her full-time employer.

An employer may also establish an approval process for employees to follow before accepting or engaging in outside work that may pose a conflict of interest. For example, an employee may be required to notify the human resources department and obtain approval in writing before accepting outside employment in a competing industry. Whether an employer should adopt a specific moonlighting policy or address moonlighting concerns in a non-moonlighting specific policy depends on the employer’s individual circumstances.

No matter how an employer chooses to deal with moonlighting employees, it is important to have a set policy and, if applicable, set procedures for giving or withholding approval for outside employment. If policies are not applied consistently, and a protected employee is adversely impacted, an employer may find itself the subject of a discrimination claim. An employer should take extra care to document legitimate, business-related bases for denying an employee’s request to partake in outside employment or for taking adverse employment action against an employee as a result of moonlighting activities.