



The Moonlighting Survival Guide

By StartUpAdmin

August 5, 2011



If another entrepreneur tries to tell you that they haven't leaned back in their home office late at night after working a 16-hour day and asked themselves, "What was I thinking," they're lying. One of the hardest things about realizing your dream is the fact that nobody is going to do it for you.

There have been literally millions of men and women who, after a long day at work and putting the kids to bed, then sit down and start working on their own ideas. It could be a simple idea for a startup or a lofty master plan bred out of obsession. Either way, two things that those sitting late at night at their dining room table have in common are that (1) they're not the first and (2) they're not alone.

I am frequently asked by people who are thinking of pursuing a startup on the side – how do I do it? How do I not get fired from my current job? How do I make sure that I don't pollute my new company's IP with the IP of my current employer, thereby destroying or negating the value I am trying to create? Unfortunately, those questions don't necessarily have easy answers. However, there are guideposts on this road.



What is the Moonlighting Policy of My Employer?

First, if you are going to start a business on the side, you should see if your employer has a moonlighting policy.

More and more companies have formal moonlighting policies, typically found in employee handbooks or confidentiality/nondisclosure/invention assignment agreements that you may have been required to sign when you were hired. The ironic thing is that you will find many of these policies in companies where the founder moonlighted to start the company. They know the hours and incredible amount of energy it takes to start a company and they want all of their people to work towards the company's vision rather than their own. Of course, there are also companies who are fine with employees starting businesses on the side, as long it doesn't interfere with the employer's business.

But even if your employer does not have a specific moonlighting policy, there is a legal concept which applies to all employees called the "duty of loyalty." Because legally employees are "agents" of their employer, they are required to act in the best interests of the employer during their employment. The higher the level of the employee, the greater this duty of loyalty is.

Some common moonlighting policy points are:

- No second jobs at all
- A requirement to inform your employer of your intent to work after hours, and the nature of that work or who you will be working for
- No working for a competitor
- No self-employment
- All intellectual property is shared with or owned by the employer.
- All patents applied for are done through the employer and shared with the employer.



Startup Law Blog

Insights for founders of and investors in emerging and startup companies

Can I Be Fired for Moonlighting?

Yes. In Washington State and many other states, employment is “at will,” which means employers can terminate your employment at any time as long as it is not in violation of your civil rights or in breach of contract or other promises which have been made to you. (Of course, it also means that you can quit whenever you want to).

However, Washington State does have a law in place which limits an employer’s ability to require employees to sign over their rights to an invention developed by the employee on their own time which is not directly related to the employer’s business or anticipated R & D, does not result from your work for your employer, and which was not developed using the employer’s tools, equipment, facilities, or trade secrets. The Washington law is [RCW 49.44.140](#): *Requiring assignment of employee’s rights to inventions*.

How Do I Moonlight Properly?

Done properly, your ideas developed on your own time can be your own intellectual property. However, done improperly you can wind up getting fired, or worse, finding out your new company’s IP is tainted, or is subject to the claims of your former employer.

10 Tips To Moonlighting Properly:

1. **Gather and carefully review your hiring documents and all of your HR paperwork.** This includes your employment agreement, employee handbook, offer letter, and any confidentiality/nondisclosure agreement (NDA) you signed when you were hired. Be warned that the moonlighting policy may not be conveniently labeled. Know what your employer’s moonlighting policies actually are.
 2. **Consult a lawyer.** Legal counsel will be able to search your documents for seemingly innocuous legal terms which could impact your moonlighting. Also talk to your lawyer prior to applying for a business license or starting an LLC. Taking one of these steps could violate the terms of your employment agreement.
 3. **Never do work on your personal business project while on your employer’s time.** Keep your startup separate from your day job.
 4. **Do not use your employer’s equipment.** Be careful. The invention assignment agreement that you signed probably says that if you use the employer’s equipment, any invention you come up with must be assigned to your employer.
-



Startup Law Blog

Insights for founders of and investors in emerging and startup companies

5. **Carefully re-read your invention assignment agreement.** Many companies have very detailed invention assignment agreements. Legally these agreements can cover not only an employer's current products and next generation products, but also "reasonably demonstrable R&D."
6. **"Reasonably demonstrable R&D" of your employer is not your idea.** If your employer can demonstrate that they were working on the idea prior to you and that you merely improved upon it or made it work – then started your own company – they can take the idea back and all of your work will have been for nothing.
7. **You can't divert potential business opportunities from your current employer to yourself.** Period.
8. **Get your own equipment.** Using your employer's equipment, facilities, code, or materials can turn into big trouble for you. Get your own computer or tablet. Get your own printer, mobile number and business cards.
9. **Do unto your employer as you would want your employees to do unto you...when you get some.** In most cases it's best to take a policy of working WITH your employer during the process. Again, it is possible that you will discover that your employer is fine with what you are going to do. But if the policy prohibits what you plan to do, it doesn't mean you can't, at the appropriate time, disclose what you are doing in a general way and get their blessing to go ahead. If you do this, make sure these agreement is made with a C-level executive so that there is no dispute later as to whether the person you dealt with had the authority to make this agreement of that nature. Many high-level company executives will authorize you to work after hours on an unrelated idea. Of course get help documenting the executive's agreement, once you get it.
10. **Don't screw this up.** You don't want to wind up in the spot [Paul Graham](#) wrote about in one of his many great essays, *How To Start A Startup*.

"As we were in the middle of getting bought, we discovered that one of our people had, early on, been bound by an agreement that said all his ideas belonged to the giant company that was paying for him to go to grad school. In theory, that could have meant someone else owned big chunks of our software. So the acquisition came to a screeching halt while we tried to sort this out. The problem was, since we'd been about to be acquired, we'd allowed ourselves to run low on cash. Now we needed to raise more to keep going. But it's hard to raise money with an IP cloud over your head, because investors can't judge how serious it is."



Startup Law Blog

Insights for founders of and investors in emerging and startup companies

Have Fun!

Moonlighting and fear go hand in hand in the beginning, but done right, it can be fun and allow you to achieve what you would otherwise not be able to. So, don't be afraid. Have fun, and do it right.

This advisory is a publication of Davis Wright Tremaine LLP. Our purpose in publishing this advisory is to inform our clients and friends of recent legal developments. It is not intended, nor should it be used, as a substitute for specific legal advice as legal counsel may only be given in response to inquiries regarding particular situations.