Create Policy to Control Overemployment and Moonlighting



Controlling moonlighting is more effective than seeking to ban it outright.

Even as HR directors get their arms around "quiet quitting," there's a new challenge on the rise: overemployment. It happens when employees covertly take on a second, third or even fourth full-time job without telling their employer. And it's actually become a movement complete with websites and a leader, a shady figure known as "Isaac." In a recent survey of 1,000 workers by the jobsite Monster:

- 37% said they had more than one full-time job; and
- 57% of those who said they had just one job said they're actively searching for another.

Overemployment is even more widespread among remote employees, with over 80% admitting to having multiple full-time jobs. **Key question:** What should you do about moonlighting and overemployment? Here's how to decide on a strategy and create an effective HR policy to implement it.

The Overemployment Challenge

Moonlighting and side hustles to pocket some extra cash are nothing new. But overemployment takes it to a whole new level. It's like moonlighting on steroids, with employees holding down multiple 9 to 5 jobs. It may sound crazy but it happens all the time. Doubters need only check out the countless accounts of employees sharing their overemployment "success stories" on the internet.

Rising inflation and the pandemic have made the problem worse in recent years, especially in the technology and services sectors. Remote, task-based jobs like software development are available in unprecedented numbers; and working from home makes it easy for employees to keep their various employers in the dark about how they spend their working hours.

But what's good for employees is a potential nightmare for employers, particularly at a time when labour is in scarce supply and optimizing productivity is the order of the day. There are only so many hours in the day and paying full-time wages for what are essentially part-time hours isn't exactly a formula for success. To make matters

worse, the fatigue that builds up when employees work 60 to 70 hours a week inevitably erodes employee performance and effectiveness.

Moonlighting is also likely to lead to conflicts of interest. Second jobs may be with companies in direct competition with your business. Sometimes, the second job is an individual employee's venture to create a new business of their own in the same market space. To carry out their outside employment, employees may be tempted to use your trade secrets, customer lists or other proprietary information, as well as work computers, vehicles, phones and other company resources.

The Law of Moonlighting

There's no employment standards or other law that bans employees from secretly working for multiple employers at the same time. However, the practice may become illegal when it violates an employee's contractual obligation or HR policy. This is particularly true when the outside job creates a conflict of interest.

The Law of Moonlighting

Example: IBM Canada fired a full-time senior sales rep earning $193,000 per year for secretly dedicating 3 to 4 hours of company time per week to his personal venture. The rep sued but the Alberta court found that IBM had just cause to terminate for conflict of interest. **Key factors:** IBM had clear and detailed guidelines for business conduct, including bans on using company time to advance personal interests. The rep knew he was violating the rules but decided to violate them anyway [*Ross v IBM Canada Limited,* 2015 ABQB 563 (CanLII)].

What to Do About Moonlighting

The takeaway from what we've discussed so far is that employers have both an interest in and the legal right to impose certain restrictions on moonlighting. The problem is that by the time you find out what your employees are up to, it may be too late to prevent them from taking the second job. Explanation: If you didn't ban the practice before they took the second job, it may be unfair to change the rules and impose discipline after the fact.

What to Do About Moonlighting

Example: A newspaper advertising sales rep persuaded company clients to place ads in a brochure he was creating to promote the professional bass fisherman's association he was seeking to create as a personal venture. When the company found out, it fired the rep for conflict of interest. But the Ontario court ruled that he was wrongfully dismissed and awarded him over $12,000 in damages, noting that the company didn't have a policy banning moonlighting [*Atkins v. Windsor Star*, 1994 CanLII 7529 (ON SC)].

One way to handle overemployment is to ban moonlighting outright. While you're legally allowed to do this, experts caution that a blanket ban is likely to backfire to the extent it puts your company at a significant recruitment and retention disadvantage. Employers need to understand the context and imperatives created by the labour shortage. That means recognizing that employees may feel like they have no choice but to take on extra work due to inflation and financially necessity. For some employees, moonlighting isn't just about money. Taking on second jobs is an opportunity to pursue personal interests such as teaching or writing about a hobby

that they don’t have time for during the day. Whatever their motives, telling employees they can’t moonlight is likely to breed resentment and be regarded as an imposition upon personal freedom.

> ## Are Your Employees Overemployed?
>
> There are some telltale signs you can look for to suggest that an employee might secretly be working full-time for themselves or one or more other employers. The more signs you spot, the higher your suspicion level should be:
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> - Making their LinkedIn profile private upon accepting a job offer, rather than updating it to reflect that they work at your company
> - Not signing up for employee benefits
> - Regularly turning their camera off in meetings
> - Slow response times on Slack and email
> - Sudden and unexplained reductions in Slack and email messages sent
> - Frequently late to or absent from meetings with no explanation
> - Unexplained declines in output or productivity
> - Increases in excused and unexcused absences

Use Policy to Control Moonlighting

While banning moonlighting altogether may not be advisable, implementing a policy to control it is essential. The employer who had to pay $12,000 to the moonlighting sales rep in the *Atkins* case above learned that lesson the hard way. “It was incumbent upon the employer to spell out, in language easily understood, exactly what its views and expectations were in relation to extracurricular activities and actual or potential conflicts,” the court said. Like the template moonlighting policy on the HR Insider site, your policy should include 8 items:

1. Policy Statement

State your company’s policy on whether employees can accept outside employment—whether you ban it or, like the HR Insider template, allow it conditionally.

2. Definition of Moonlighting

Many companies make the mistake of defining moonlighting as a taking on a second paying job or part-time employment. But as the *Atkins* case shows, that’s too narrow a definition because it doesn’t cover self-employment or hobbies that turn into revenue-generating businesses. So, define moonlighting more broadly as including any form of employment for pay. The phrase “for pay” isn’t just a throwaway. The last thing any company wants to do is ban its employees from engaging in volunteer work after hours. However, you should also include illegal or criminal activity in the definition, regardless of whether the employee gets paid for it.

3. Clarification of Covered Employees

Indicate whether your moonlighting restrictions apply to all or just full-time employees. You should also clarify that the policy doesn’t cover volunteer workers.

4. Notification Requirement

You don’t want employees to moonlight on the sly. In addition to protecting your business, knowing where and when employees are working a second job can help you make scheduling and other mutually beneficial accommodations. It can also help you determine if the second job poses a conflict of interest before any damage is done. So, establish a procedure employees must follow to notify their supervisor or HR of their desire to accept outside employment and do it before they accept the second job.

5. Approval Requirement

Make it clear that moonlighting is allowed only if the company is notified of and approves the outside job. Explain the approval process and criteria you’ll use to determine whether a proposed employment arrangement is acceptable, including whether it:

- Creates any potential conflicts of interest;
- Limits the employee’s hours of availability; and/or
- Can reasonably be expected to overextend, fatigue or otherwise impair the employee’s physical, mental, and emotional well-being and capacity to perform their primary job duties for you.

6. Bar on Conflicting Work

Restrict the kind of second jobs your employees can take. For example, bar employees from taking outside work that competes with or in any way interferes with your company’s business. Conflicting work obviously involves jobs in which the employee uses your company’s customer lists, vendor pricing schedules or other proprietary information. But it can also include working in a non-competitive business to the extent that it affects the employee’s availability and/or productivity with you.

7. Bar on Use of Company Resources

Bar employees from using any of your resources, such as your computers, e-mail, Internet access, photocopiers or other equipment, materials, supplies, customer lists or vendor information, in performing their second jobs.

8. Consequences for Violations

Warn employees that policy violations will result in the loss of moonlighting privileges and perhaps discipline up to and including termination.