Is ‘Moonlighting’ Legitimate Grounds for Termination?



Moonlighting, or working second jobs, is a common practice that many employees must engage in to make ends meet. But while employees have the right do what’s necessary to support their families, the fact of the matter is that moonlighting can impair performance and productivity and create other problems for employers. Here’s a look at the problem and what the law allows you to do to protect your organization.

Don’t Ignore Moonlighting

Statistics show that more and more employees are taking on second jobs to earn extra income. Part of the reason for this increase is the ease in which employees can form their own businesses with the help of computers and the internet.

Moonlighting isn’t necessarily harmful to the original employer. In some cases, it can actually benefit the company by improving the employee’s skills and training at the other employer’s expense. But, more often than not, when your employees moonlight, it hurts your company more than it helps. For one thing, employees who moonlight are more likely to show up to work fatigued. In addition to reducing productivity, fatigue makes employees careless and more prone to make mistakes that endanger themselves and their co-workers. Moonlighting may also create conflicts of interest, especially if the employee’s second job is with a competing company.

What to Do About Moonlighting

Consequently, employers have an interest in imposing certain restrictions on moonlighting by their employees. The problem is that most companies don’t know that their employees are working 2 jobs until it’s too late to prevent them from taking the second job. And to the extent that you didn’t ban the practice before they took the second job, it may be unfair to change the rules after the fact and then try to discipline employees for moonlighting.

Example: A newspaper advertising sales representative decided to form a professional bass fisherman’s association. To attract new members, he created a 16-page brochure containing information about the association and general fishing articles. It also contained advertisements to cover the cost of printing. The problem was that some of the advertisers in the brochure were businesses with advertising contracts the sales rep serviced for the newspaper. When his boss saw the brochure and its advertisements, he fired the sales rep. Even though the sales rep had gotten the

contact information out of the phone book, contacting the newspaper's advertisers for his own publication clearly conflicted with his job duties. At least that's what the employer claimed.

But an Ontario court disagreed. The sales rep sued the company for wrongful dismissal. And he won. The court ordered the employer to pay the sales rep more than $12,000 in damages. The sales rep didn't use company time or resources to solicit advertisers. And the company didn't have a policy against moonlighting. So the employer was wrong to fire the sales rep, the court said [*Atkins v. Windsor Star*, [1994] O.J. No. 623].

Use Policy to Control Moonlighting

For some employers, the answer to moonlighting is banning it outright. Strictly speaking, there's no law that says you have to let your employees moonlight. But as a practical matter, experts say that the policy of a blanket ban on moonlighting is likely to backfire. Some employees may feel like they have no choice but to take on extra work because it's financially necessary. 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.

Although it may not be a good idea to ban the practice altogether, experts agree that you should create a policy to control moonlighting. 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.

What to Say in Your Moonlighting Policy

We've created a Model Policy on page x to help you establish appropriate ground rules for moonlighting—or make improvements to your current policy. As usual, we need to caution you that no single policy will work for all employers and all situations. So you'll need to adapt the Model to fit your own situation. Still, referring to our Model Policy can give you a sense of the parameters of an effective policy. Like our Model Policy, your policy should:

- Discourage but not ban moonlighting as long as employees abide by the rules of your Policy [para. 1];
- Define "moonlighting" as outside *paid* employment and not volunteer, community, political, public and other unpaid work [para. 3];
- State that you expect all employees to treat their jobs with you as their primary employment and not allow moonlighting to interfere with their capacity to do it as well as they can [para. 4];
- Require employees to notify and get approval of moonlighting jobs before those jobs take effect [para. 5];
- List a procedure for employees to use to provide such notification and apply for approval [para. 6];
- List the criteria you'll use to evaluate whether to approve proposed moonlighting arrangements, including verifying that the second job won't create conflicts of interest, limit the employee's availability or subject the employee to debilitating exertion or fatigue [para. 7]; and

- Reserve the right to discipline employees, up to and including termination, for violating the Policy, e.g., failing to notify or get approval of moonlighting jobs [para. 10].

Conclusion

Banning moonlighting isn’t illegal. But there’s more to employment relationships than law. Moonlighting is above all a social and an economic phenomenon. Employers who fail to accommodate themselves to the practice run the risk of alienating employees and putting themselves at a serious disadvantage in the competition to recruit and retain quality people. By the same token, you have every right to protect your interests in the employee and ensure that moonlighting arrangements don’t compromise their performance or create problems for you. Adapting the Moonlighting Model Policy for your own circumstances will go a long way in striking the proper balance.