

# Moonlighting Quiz

written by vickyp | July 6, 2020



## QUESTION

Is there any legislation or blanket prohibition at common law that restricts or prevents an employee from “moonlighting” (ie) having a second job or business?

## ANSWER

There is no specific legislation regulating moonlighting; it is simply a contractual issue. For example, where a contract of employment prohibits an employee from working for another employer, a failure to abide by the contractual term may amount to misconduct that can be dealt with as a disciplinary matter.

In circumstances where there is no express contractual term concerning outside work, there may be an implied term not to compete with an employer. However, there is no general duty on employees, outside contract law, not to undertake other work when not working for the employer.

## PREAMBLE

**Employers often have the ability to restrict employees from working a second job or starting a side business.**

Are you a moonlighter? If you work a second job, the answer is yes—even if you don’t technically do that work at night. Plenty of employees work second or even third jobs to make ends meet or explore other career options. Even if you don’t work for another employer, you might be moonlighting if you have your own side business, such as freelance writing or consulting work.

Working as much as you can to earn as much money as possible might seem like the epitome of classic capitalism. There’s a good chance your employer can fire you for working a second job or even an occasional side hustle.

## WHY IS IT RIGHT

### EMPLOYERS HAVE A VESTED INTEREST IN MOONLIGHTING

It makes no sense to get rid of workers who are doing a good job, and it costs time and money to hire and train replacements. So why would an employer want to fire you for moonlighting? Employer concerns about moonlighting generally fall into these categories:

- **Conflict of interest.** If you have another job in the same field, your employer might be concerned that you are sharing trade secrets with a competitor or competing with the employer for business. If, for example, you work for a test

preparation company during the day and run your own side business providing individual test coaching, your employer might think that you're taking customers away from the company—and using your job with the company to build a client list.

- **Performance and productivity.** There are only so many hours in the day, and some employers worry that an employee who is working 60 or 70 hours a week simply won't have the energy and focus the job requires. If you are showing up for work tired, late, or unprepared, then your second job might be affecting your first.
- **Use of company resources.** Employers won't want you using your work computer, phone, company car, or other company property for your second job, or spending work hours on other projects.

## **Moonlighting Policies**

Some companies have adopted policies about moonlighting. For example, a company might prohibit moonlighting altogether. Or, a company might require employees to report any outside work to their manager or the human resources department, so the company can decide whether to allow the second job. Some companies take a more limited approach by prohibiting only outside work that poses a conflict of interest or competes with the company.

## **FACTORS THAT EMPLOYERS CONSIDER WHETHER TO FIRE OR NOT TO FIRE**

### **1 Fired for having a second job**

Some people decide to work at two jobs, either because one job won't cover all of their bills or for other reasons. This is also known as **moonlighting**.

What if your employer doesn't like the fact that you work at two jobs? Can you be fired?

Often, the issue is not as straightforward as it seems. There could be a lot of factors that decide whether your boss has a right to fire you for your second job.

### **2. Second job impact on performance of a daytime job**

There is nothing specific in the law that forbids a person from working at two jobs. However, things become more problematic if a second job affects the job performance of a worker at their first job.

Employers have the [right to terminate their employee](#) if the employee's conduct and performance is not up to par. In other words, if the employee is frequently absent, late or the employee's productivity suffers then the employer has grounds for dismissal. Normally warnings will precede the termination, so that the employee has a chance to correct their behaviour.

### **3. Daytime job and second job in the same industry**

This could be highly problematic in terms of your second job. If you work for a competitor in your second job, then it's likely there will be a conflict and your employer may terminate you.

Some [employment contracts](#) can restrict an employee in terms of a second job and some may not. However, many employment contracts contain a [non-competition clause](#), which preclude an employee from working for their the competition.

If the employee works for their employer's competitor while being employed, then it's likely the employer will have more of a case against the employee.

#### **4. Second job – what kind**

If the second job is not in a highly-competitive environment and is actually in a different industry that should make things less problematic.

But that depends on what it is you do in your second job. If you work in a profession in which image and/or maintaining the honour and dignity of the profession is extremely important, then it's likely that a side-job, such as an exotic dancer, will not go over well with your employer.

#### **5. Secondary Employment (Moonlighting)**

Secondary employment can be problematic. Bosses take issue with the risk of conflict of interest in working for a supplier or competitor, of reduced capacity to work safely, of reduced availability for overtime or damaging the employer's reputation depending on the nature of the moonlighting.

Employees risk their health through sleep deprivation and work life balance by spending too much time away from family or personal obligations.

#### **6. Spread too thin!!!**

The ultimate risk for workers is not being able to do their primary jobs well and jeopardizing their principal employment.

The impact is especially felt by employers when moonlighting employees routinely arrive late or leave early, when absenteeism results or when there is a hit to productivity.

Moonlighting policies are OK, but broader conflict of interest guidelines are a better option. They outline specific concerns such as competitive activity, confidentiality or availability for work. This of course must be done within what is legal and by respecting an employee's privacy.

The overriding principle for employers is straightforward. If the employee's secondary employment does not harm the employee's job performance, outside employment should be fair ball.

For employees, however, it is likely a good idea to have a conversation with their primary employer regardless of whether formal policies exist or not regarding moonlighting. Not all employers function on a strictly need to know basis.

#### **Takeaway**

##### **Moonlighting can be problematic for your day job**

Moonlighting has changed. Holding down several jobs has quadrupled in a generation according to Statistics Canada and the reasons are predictable. Many will cite the difficulties of making ends meet as the reason they began moonlighting but the reasons do shift over time.

What begins as a way to meet day to day needs, or pay off heavy debt loads morphs into a way to save should their primary employment dry up. Planning for retirement, major purchases or the niceties of an additional vacation are also often cited.

Many recent graduates began their careers with a string of seasonal, contractual and part-time jobs before ever landing full time employment.

#### **WHY IS EVERYTHING ELSE WRONG**

## CASE STUDIES

### 1. ROSS V IBM CANADA LIMITED, 2015 AB QB 563

Can an employee keep his or her full-time job, while operating a personal business on the side (also known as moonlighting)? This issue was considered in [Ross v IBM Canada Limited, 2015 ABQB 563](#) [Ross], where a senior salesman was terminated by IBM Canada Limited (IBM) on the basis that he was also regularly working for his own personal company during the office hours of IBM (IBM time).

IBM had clear conduct guidelines and Mr. Ross signed off on them multiple times, confirming his understanding of them, and agreement to them. One particular guideline expressly prohibited using company time to perform non-IBM work, or use IBM assets for any outside work. It was clear that a violation of IBM guidelines could result in dismissal.

While it can be difficult for an employer to show just cause for termination, the court in *Ross* held that termination of the employee in this case was justified, and stated that it was clear to the employee that the role was a full-time job, paid a substantial salary, and required all of his work energy to be devoted to the interests of IBM. The court accepted the evidence that the employee spent, on average, three to four hours per week conducting private businesses while on IBM time, and concluded that this amounted to a significant breach of the employment relationship, given the clear guidelines against doing so.

It is of note that the situation in *Ross* was not an isolated incident where the employee occasionally attended to his personal business during company hours. It was the case that the employee regularly engaged in personal business, to the point that it was a breakdown in the employment relationship with IBM.

While there is no blanket prohibition at common law that restricts an employee from moonlighting, given the decision in *Ross* employers may impose a contractual restriction within an employment contract or within policies of the organization. **Depending on how explicit the prohibition against moonlighting is, an employer may have support for the termination of a moonlighting employee with just cause.**

### 2. BC PROVINCIAL COURT

The British Columbia Provincial Court recently found that an employer could terminate an employee for just because that employee had a second job and refused to quit when asked by the employer.

Why? Even though the employee had other second jobs before she was promoted to bank supervisor (unrelated jobs like selling party candles), her job as supervisor involved indirect sales responsibilities, where she was expected to suggest certain services and refer the customer to the appropriate person in the branch.

Her second job as real estate agent put her in potential conflict of interest situations and in potential competition with the bank, given that selling real estate was directly related to what the bank did, that is, lending money to clients so they could buy real estate. In her capacity as real estate agent, the employee had the opportunity to solicit bank customers, use confidential information for her benefit and use the bank premises for her real estate work.

It must be said that the employee's real estate agency business was brought to the attention of the employer because she was giving out real estate business cards right in the bank.

The court found that, given the nature of its business, the employer's company guidelines and rules regarding conflicts of interests and competition were reasonable. The employer was able to demonstrate that the rules were in place, communicated to the employee, and consistently enforced. The employer's request to stop the real estate business was also clearly communicated and reasonable.

What's more, the employee's refusal to halt her outside activities constituted disobedience with respect to work rules and the employer's reasonable and lawful order to comply with company guidelines about outside employment. Refusing to accept her employer's reasonable construction of its own rules was inconsistent with the fulfilment of the express terms of her own contract of employment.

As a result, the court dismissed the employee's action against the employer.

## **"GROUND RULES"**

- Do I have to tell my employer about a second job?
- Some employers couldn't care less, as long as it's not interfering with job performance or in conflict with their values, and you're not working with a competitor. Some employers are okay with moonlighting but have policies that require the disclosure and approval of outside employment.
- Other employers strictly prohibit moonlighting. If you work for an employer that prohibits moonlighting, and you get a second job, you can get fired.
- So it's important to communicate with your employer and **read the employee handbook** so that you are familiar with company policy.
- If moonlighting isn't strictly prohibited, talk to your employer about your desire to get a second job.
- Strictly speaking, if moonlighting isn't prohibited, you don't *have* to tell your employer about a second job, provided that the policy doesn't require disclosure and/or approval.
- However, it's always best to be honest with your employer.
- It says a lot about not only your work ethic but your integrity, too. And who knows, if you are a valuable employee, and are just looking to make a little extra money, **you may even get offered a raise or given more hours.**
- While there isn't a specific law prohibiting moonlighting, it can be governed by the policies of your employer.
- Public employees may be subject to federal laws and agency regulations, depending on the position and classification.
- If your company has a policy prohibiting moonlighting, it should be well documented in the company handbook and/or your employment contract or agreement. If you are unsure of the company policy, ask.
- Can an employer prohibit moonlighting?
- Not only can they prohibit moonlighting, but they can fire you if they find out you are working a second job if you are violating any written policies or agreements.
- And if that 2nd job appears to violate the company's trust or propriety ideas, not only could you get fired, but you could get sued.
- So, not only can they prohibit moonlighting, but they can prohibit the use of company time and resources as it relates to secondary jobs and activities.

## **EMPLOYERS TAKEAWAYS**

Even though it is understandable for employees to need or want second jobs, when those jobs conflict with the employer's reasonable company rules, such as conflict of interest rules, the employer has the right to request that the employee quit that job. Of course, it is necessary to have evidence of the company rules, to clearly communicate the rules, and to document the employee's disobedience.

Employers should ensure that the employment contracts, policies and guidelines of the company clearly speak to any restrictions on moonlighting, or using company time for personal business. Moreover, these restrictions should be made known to the employees, to ensure that acknowledgment and acceptance of the restrictions are obtained on a regular basis.

Employees should be required to ask permission from their employers if they wish to perform other work for some other employer, or during work hours. Having a workplace policy dealing with the issue of moonlighting will help your employees understand if that is an acceptable activity while employed with your organization and the procedures to follow if it is.

**Useful provisions in your moonlighting policy should include:**

- A requirement to devote full-time and attention to the employer's business during working hours and not using the employee's equipment to perform work for others.
- An obligation to promote and protect the interests of the employer and to disclose to the employer any information relating to the wrongdoing of the employee or any other employee.
- A requirement that an employee seeks permission from the employer before accepting a second job and that a new employee disclose if they already work for another employer.
- For sickness policies, an express prohibition on undertaking other employment during any absences due to illness.
- The use of progressive discipline up to the point of termination if there is a violation of the policy.

It is important that employers not terminate an employee for cause without showing that there has been some use of progressive discipline so that the employee understands that engaging in the misconduct one more time could result in termination. You must also provide a reasonable opportunity for the employee to rectify the situation.

An employer should make sure the employee understands the warning and monitor the situation.

The burden of proving justification for dismissal of an employee rests upon the employer. The standard of proof is on a balance of probabilities. It is not sufficient for the employer to simply show misconduct. The determination of what constitutes misconduct that warrants or justifies dismissal without notice is a question of fact in each case.