



Moonlighting:

Should it be Allowed? What are the Issues?
How can Our Firm Address it?

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RLI Design Professionals
DPLE 202
July 17, 2019

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Course Description

When an employee works outside the scope of the traditional employer-employee relationship, it's known as moonlighting.

The practice of moonlighting is relatively common, and in some cases, it's known and accepted by the employer.

This presentation will:

- 1** highlight the issues related to moonlighting
- 2** consider whether or not the practice should be allowed
- 3** identify steps a firm can take so that the line between the employee and moonlighter is more clearly defined

Learning Objectives

Participants in this session will:

- 1 Consider the issues related to moonlighting;
- 2 Determine whether or not the practice should be allowed;
- 3 Identify steps that can be taken so that the line between employee and moonlighter is more clearly defined;
- 4 Evaluate insurance coverage considerations related to moonlighting.

The Forces Behind Moonlighting

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The Forces Behind Moonlighting

Financial

**Financial Planning,
Security, and Stability**

Entrepreneurism

**Benefits/
Family/Health
Concerns**

Flexibility

The Forces Behind Moonlighting

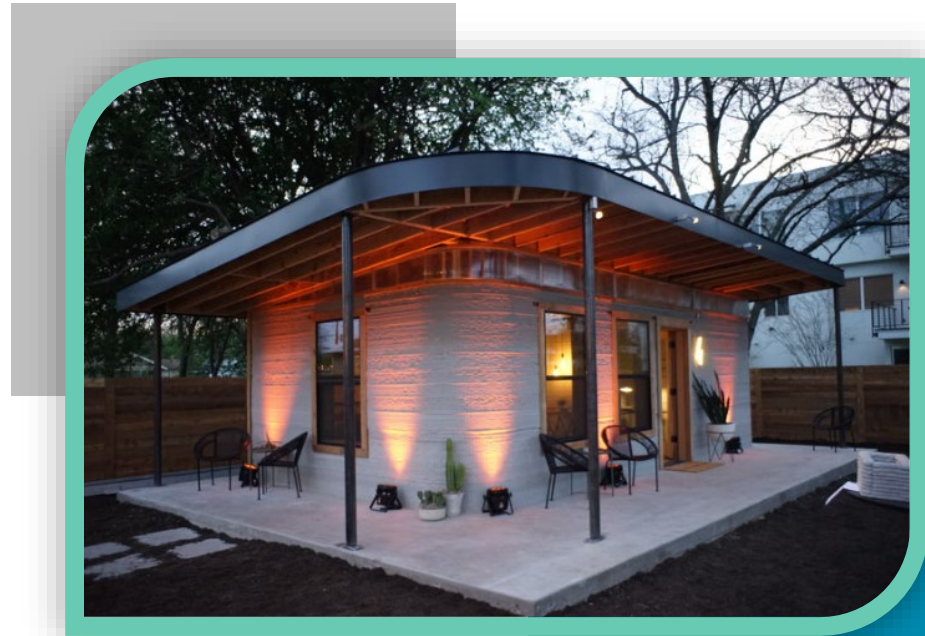
Exploring Alternatives

New project types

New skills

Building a new practice

Personal interests



Source: [ICONbuild.com/new-story](https://iconbuild.com/new-story)

The Forces Behind Moonlighting

Volunteerism



Pro bono services

Helping friends and family members



credit: christopher consultants, ltd.

Should Moonlighting be Allowed?

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Perhaps there's a different question...

...is there really a choice?

State of Washington House Bill 1450

NEW SECTION. Sec. 3. (1) Subject to section 11 of this act, a **noncompetition covenant is void and unenforceable** against an employee:

(a)(i) Unless the employer discloses the terms of the covenant in writing to the prospective employee no later than the time of the acceptance of the offer of employment and, if the agreement becomes enforceable only at a later date due to changes in the employee's compensation, the employer specifically discloses that the agreement may be enforceable against the employee in the future; or

(ii) If the covenant is entered into after the commencement of employment, unless the employer provides independent consideration for the covenant.



Moonlighting *Bans* May Not be Allowed

The issue:

In 2018, a NLRB administrative law judge **struck down** an employer's prohibition on workers taking a second job.

The policy:

“Employees are expected to devote their primary work efforts to the Company's business. Therefore, it is mandatory that they do not have another job that:

- Could be inconsistent with the Company's interests.
- Could have a detrimental impact on Company's image with customers or the public.
- Could require devoting such time and effort that the employee's work would be adversely affected.

Before obtaining any other employment, you must first get approval from the Company Treasurer. Any change in this additional job must also be reported to the Company Treasurer.”

The finding:

Prohibitions on moonlighting must be clear and focused.

Establishing Policies Instead of Bans

“

Taking a job with a competitor or related company is a common conflict of interest, and many employers, including the U.S. Government, require permission before an employee may take on any outside employment.

”

General Counsel's Answering Brief In Response To The Respondent's Exceptions To The Decision Of The Administrative Law Judge in Nicholson

Policies are not intended, and would not apply, to discourage employees from participating in any protected activity

What are the Issues?

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Risks to the Employer

- Inattention from Fatigue/Distracted
- Conflicts of Interest
- Confidentiality
- Lack of transparency
- Deeper Pockets of the employer
- Third party exposures
- Uncovered exposures
 - Lack of insurance in the event of a claim
 - Deductibles
 - Staff time to monitor claims
 - Reputational damage
- Paid claims impact insurability/future premiums



Risks to the Moonlighter

Inexperience

- With the project type
- Running a project
- Running a business

Limited

- Oversight or peer review
- Other resources
- Scopes and budgets may increase risk

Costs (e.g., licensing)

Nonpayment



Find our Project Risk Management Matrix:
<https://www.rlicorp.com/dp-risk-management>

Coverage under the firm's insurance



“**Insured Person**” means any person who was, now is, or shall become:

- a. a duly elected or appointed director, officer, principal, partner, member or employee of the **Named Insured**, but only while acting on behalf of the **Named Insured**;
- b. a duly elected manager, member of the board of managers or equivalent executive of the **Named Insured** if it is a limited liability company, but only while acting on behalf of the **Named Insured**;
- c. temporary, or leased personnel of the **Named Insured**, but only while acting under the direct supervision and on behalf of the **Named Insured**;
- d. any retired or former director, officer, principal, partner, member or employee (including former temporary or leased personnel) of the **Named Insured**, but only while acting on behalf of the **Named Insured**, and solely with respect to **Wrongful Acts** or acts giving rise to a **Pollution Incident** committed while serving in their capacity as a current director, officer, principal, partner, member, employee, temporary, or leased personnel of the **Named Insured**.





How can our firm address it?

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Considerations for a Firm Moonlighting *Policy*

Sample Firm Protections

Stipulate—If allowable by law, moonlighting:

- Occurs with employer's knowledge/permission
- Does not allow working for direct competitors
- Can not otherwise conflict with the firm's interests
- Must follow guidelines on leaves of absence (e.g., FMLA)

Direct—Use of the firm's resources, such as:

- Firm letterhead
- Email signature block
- Stamp/Seal
- Web posts
- Phone

Recommend—Resources for moonlighters:

- Require moonlighters to buy insurance
- Require moonlighters to use a written contract

Collect—Evidence of understanding:

- Signed employee acknowledgement of receipt/review of the policy
- Signed acknowledgement from the client of the contracting relationship/waiver of future claims

Considerations for a Firm Moonlighting *Policy*

Employment Issues to discuss

Clarify—Is your firm the “primary employer?”

Establish—Expectations:

Employees must meet the demands of the job

This *may* mean working 35-40 hours per week (or more)

Confirm—Licensing:

Do moonlighting activities need to be performed under a separate license?

Define—Disciplinary actions for failure to comply with the policy:

Up to and including termination

AIA Pro Bono Contract

AIA[®] Document B106[™] – 2010

Standard Form of Agreement Between Owner and Architect for Pro Bono Services

AGREEMENT made as of the _____ day of _____
in the year _____
(In words, indicate day, month and year.)

BETWEEN the Architect's client identified as the Owner:
(Name, legal status, address and other information)

and the Architect:
(Name, legal status, address and other information)

Helpful provisions
to address include:

- Scope of services
- Right to rely
- Copyright and licenses
- Limitation of liability

Available for free at <https://documentsondemand.aia.org/>

Related Issues

Work Hours

Flexible Work Arrangements

Volunteering

Safety

Conflicts of Interest

Confidentiality

Intellectual Property

Cyber Security

Company Auto Policies

Performance Reviews

Disciplinary Actions

Employee Assistance Program

Closing Thoughts for Employers



For firms that:

- have an outright ban against moonlighting, or
- treat it as a cause for termination,

now may be a good time to review your firm's policy

Closing Thoughts for Employees

If you're looking for more,
or a different experience, consider:

- Joining a committee
- Entering a design competition
- Seeking another job

Or consider moonlighting.
Just don't bite the hand that feeds you!

Golden Rule of Moonlighting:

You will never create competition, steal company resources, or lie to your employer. Your first responsibility and loyalty is always to your employer.

~ Michael Riscica AIA CSI
YoungArchitect.com

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Thank you for your time!

QUESTIONS?

This concludes The American Institute of Architects
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Barbara Sable, AVP, RLI Design Professionals
Barbara.Sable@rlicorp.com

Jennifer Walton, Operations Representative
Jennifer.Walton@rlicorp.com

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