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The Case of the Moonlighting Employee

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MOONLIGHT

noun moon·light \-ˌlīt\

Simple Definition: the light of the moon

Also an intransitive verb meaning to hold a second job in addition to a regular one

moon·lights, moon·light·ed, moon·light·ing

Example: She is a secretary who *moonlights* as a waitress on weekends.

First Known Use: 1957

MERRIAM-WEBSTER DICTIONARY

http://www.merriam-webster.com/dictionary/moonlighting

I. INTRODUCTION

Although the word moonlighting has been used for nearly 60 years to describe an employee working a second job during their off hours, the ramifications of these secondary employment situations have grown exponentially over the decades. Today, in the fast-paced, high-tech industry, a company's employees often take on consulting projects for other companies, work on their own passion projects and startup ideas both during and after their primary work hours, and even develop applications and programs for their employer's platform for which the employer allows the employee to retain the resulting intellectual property and much of the ensuing revenue, all with the employer's blessing.

Unfortunately for employers, not all employees undertake side work with the best of intentions. The past two decades have been fraught with litigation in the high tech world resulting from employees who unfairly compete with their prior employer, who breach their fiduciary duties, who disclose, consciously or unconsciously, protected proprietary and confidential information and who unlawfully claim that inventions and intellectual property developed by them actually belongs to them and not their employer despite the fact that they had contractually agreed otherwise.

This paper will present dilemmas taken from the ever-shifting landscape of supplemental employment in the technology field and how those situations implicate state and federal contractual and common law obligations for both employers and their moonlighting employees. This paper also provides up-to-date model agreement language designed for technology employers so that they can best protect their business should an employee (or employees) act in a manner that unfair competes with or unlawfully damages a company or diverts away corporate opportunities for that employee's benefit.

II. THE CASE SCENARIOS OF THE MOONLIGHTING EMPLOYEES

- ***The Off-Hours, Self-Taught Game Designers***

  Two employees work as artists for an online gaming website. They decide that they want to design their own games and to form their own startup. On their off-hours, they both learn how to code and how to game design using their own equipment and facilities. Neither employee informs their employer of this new endeavor despite the fact that they are both bound by a written contractual obligation to do so. The employees finally design a successful game of their own. The employer claims ownership of the game and intellectual property and informs the employees that it is entitled to all rights and revenue based on the inventions assignment provision in the would-be game designers' employment agreements. The employees, of course, disagree and claim ownership on the basis that it was created off-hours and with no assistance from the employer.

- ***The IT Professional Who Consults on the Sly***

  An IT manager's supervisor calls her in for an unscheduled meeting. The supervisor informs the manager that it has come to his attention from another employee that the IT manager is moonlighting as a consultant in addition to handling her full time duties as IT manager for their employer. The IT manager does not deny consulting on the side. She informs her supervisor that she began consulting for clients—some of whom she gained through her work as IT manager—two months ago and assures her boss that she only does this consulting before work, at lunch and after work. The IT manager is not bound by an exclusivity provision or other contractual arrangement that forbids her from moonlighting; however, the IT manager did sign a noncompetition agreement at the onset of her employment that forbids her from working for a competitor during her employment and for one year following the termination of her employment as well as prohibiting her from soliciting the company's customers. Her supervisor informs her that he is going to consult with the company president and the human resources manager about the situation as he does not believe she is capable of maintaining her current level of productivity as an IT manager while she also works her part-time consulting gig.

- ***The Group of Employees Who Decide to Start their Own Company, which Becomes a Direct Competitor with their Employer***

  Three software engineers each separately and independently inform their respective group leaders that they would like to pursue discrete side "passion" projects after hours. The company does not outright ban moonlighting, but each software engineer signed an employment agreement, which contains provisions for nondisclosure, non-solicitation of employees and customers and noncompetition. Additionally, the company's Code of Conduct contains a conflict of interest policy. When viewed individually, it does not appear to the employees that their after-work activities breach any contractual provision or common law duties. Around the same time as these employees start their separate moonlighting gigs, their division manager, who is also a corporate officer, discretely prepares to form a competing entity. He scouts new office space and looks into equipment leasing options. He also starts to notify the employer's vendors and customers of his intent to form a new startup. Ultimately, following the division manager's lead, each of the software engineers leave the company

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