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

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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
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
The Forces Behind Moonlighting

Volunteerism

- Pro bono services
- Helping friends and family members

credit: christopher consultants, ltd.
Should Moonlighting be Allowed?
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?
Risks to the Employer

Inattention from Fatigue/Distraction
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
“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?
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/
Certificate of insurance

Employee’s Moonlighting Entity
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
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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