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# Employers and workers should handle 'moonlighting' with care

It's not uncommon in these challenging times for people to take a second job on the side – or even spend time outside of work trying to create a new business venture of their own.

Employers' reactions to moonlighting run the gamut: Some couldn't care less, while others consider it a firing offense. Many employers have no problem with a second job as long as the employee's work performance remains solid, and as long as nothing the employee does for an outside company compromises the employer's business interests.

If you're thinking of moonlighting, it's certainly wise to review whether what you're planning to do violates any written policies of your employer, or your own employment agreements. Even if it doesn't violate a written policy, moonlighting can still be illegal (and can get you sued) if it violates a "duty of loyalty" to an employer – for instance, if you use an employer's ideas or customers to start your own business.

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If you're an employer, it's a good idea to have a written moonlighting policy. Such a policy can provide guidance to employees, and it can also make it easier to take disciplinary (or legal) action if an employee steps over the line.

Here are some things to consider:

An employer can absolutely ban moonlighting in many cases. But it's seldom a good idea. Prohibiting someone from pursuing their dreams or taking a second job to support a family, even where it doesn't actually harm the employer, can hurt morale and recruitment. In addition, if an employer fires someone for outside work that didn't harm the company, a jury might later suspect that the employer was actually motivated by some form of illegal discrimination.

On the other hand, employers have every right to object to moonlighting if the

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employee's performance at his or her primary job suffers.

Employers also have a good reason to object to moonlighting if it affects the employer's business interests. For instance, employers might certainly want to prohibit workers from moonlighting for a competitor, or even in a related business. And they might want to prohibit workers from using company time or resources to pursue side activities.

Employers might also want to require workers who moonlight to inform the employer of the fact that they're moonlighting, along with what sort of work they're doing and for whom they're doing it. This gives the employer a chance to figure out whether what the employee is doing is actually detrimental to the company.

And certainly, employees can be prohibited from stealing trade secrets or customers.

One of the more contentious issues involves what happens if a moonlighting employee invents something or develops a new process that is of value to the employer. Some employers specifically say that if an employee develops "intellectual property" on the side – a new invention, technique, process, software, etc. – the employer has the legal rights to it.

This is a very important issue for employees who are thinking of starting their own business while working for someone else. In fact, there are many instances where a start-up company was unable to obtain financing because there was a legal cloud over whether the company's ideas actually belonged to a founder's previous employer.

Whether you're an employee or an employer, it's a good idea to speak to an employment lawyer about any moonlighting concerns. Clarity about what your rights are now can prevent lawsuits and other problems down the road.

## 'Me too' evidence can be used at discrimination trial

A woman who sued her employer for sex harassment could have other employees testify at trial that they were harassed too – even though they didn't work with the woman and she only found out about the other incidents after she was fired, according to the California Court of Appeals.

In this case, a Latino-American woman claimed that her employer called her profanities on a regular basis, touched her inappropriately, referred to his employees as "my Mexicans," and fired her after calling her a "stupid bitch."

She sued for race and sex discrimination. She wanted to have other women who had worked for the employer testify that they had also experienced insults and sexually inappropriate touching and comments.

A judge initially said the other women couldn't testify because they worked for the employer at different times from the woman who brought the suit, and she wasn't aware of the other incidents at the time.

But the Court of Appeals said this was a mistake. It said that the other evidence was very useful, since it suggested that the owner had a propensity toward sexual harassment and a bias against women.

## Injuries at home may be covered by workers' comp

Workers who are hurt on the job can generally expect to have their injuries covered by workers' compensation. But in some cases, this benefit can extend even to workers who are injured at home, as long as the worker was hurt while engaging in a work-related activity.

For instance, an Oregon woman worked for J.C. Penney as a custom decorator. Though J.C. Penney provided her with an office that she shared with others, she usually worked from her van, traveling to and from appointments at customers' homes.

She suffered a broken wrist in her own garage when she stumbled over her dog while trying to move fabric samples into her van.

J.C. Penney argued that she wasn't entitled to workers' compensation because the injury didn't arise out of her employment.

But the Oregon Court of Appeals disagreed, ruling that because the employer didn't provide space for her to perform all her necessary work tasks, she was required to work in her home and her garage.

Therefore, the court said, those areas were part of her "work environment."

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## Workers who want to sue for age discrimination need to act quickly

Workers who suspect that their employer has discriminated against them because of their age must act quickly to protect their rights, or they may be unable to sue. This fact was illustrated by a recent case in Mississippi.

A 66-year-old accounts payable clerk lost her job in a consolidation of plants. She was told in June 2007 that she would be laid off effective July 30 of that year.

In early August, though, she was called back to work on a temporary basis to help with the consolidation. She stayed for five months.

Two months after her temporary position ended, she sued for age discrimination, claiming she was improperly terminated based on her age.

But a federal appeals court said it was too late to sue.

Generally, under the federal age discrimination law, an employee has to sue within six months of the illegal act, the court said.

In this case, the clock started running in June when the employee received notice of her termination – not on her final day of work. The court also ruled that her temporary position didn't stop the clock.

The court acknowledged that this puts employees like the clerk in a tough spot – if she filed her lawsuit in time, she would have given up any hope of regaining her position through temporary work. However, the court said it had to follow the law.


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## Older worker can sue for 'hostile environment' at work

A 65-year-old salesman at a Chevrolet dealership who claimed he quit his job because he was verbally abused and intimidated at work can sue for age discrimination, according to a federal appeals court in New Orleans.

Even though the employee wasn't fired or demoted, and didn't suffer any other sort of specific adverse job action, he can still sue if his employer allowed a "hostile environment" at work such that keeping his job was intolerable, the court said.

The man claimed he was repeatedly called "pops" and "old man," was the subject of profanities, and was treated with extreme disrespect because of his age.

While the dealership didn't actually fire the man because he was old, if it allowed him to be abused and mistreated in this way, it effectively fired him, according to the court.

The idea of a "hostile environment" lawsuit originated with sex harassment cases. Even after sex discrimination was outlawed in the 1960s, many people still believed that it was okay to engage in sexually inappropriate touching and comments at work, as long as the victim wasn't actually fired or demoted. It wasn't until the 1980s that the U.S. Supreme Court made clear that allowing a sexually hostile environment at work was a form of sex discrimination.

As to whether a "hostile environment" for older workers is a form of age discrimination, not every court thinks so, but a growing number of them are allowing this type of lawsuit.

A company that allowed a 65-year-old salesman to be verbally abused due to his age could be sued just as if it had actually fired him.

## Company could reject applicant who sued her previous employer

A federal law meant to protect employees who complain might not help them if they apply for a new job.

A company offered a woman a job pending a background check. But when the check revealed that she had filed a lawsuit against her previous employer for violating the federal minimum wage and overtime rules, the company withdrew the offer.

The woman then sued the new company as well.

The Fair Labor Standards Act is the federal law that governs minimum wages and overtime. The law protects workers from retaliation when they accuse their employers of wage-and-hour violations. So the woman claimed that the new company was illegally retaliating against her for pursuing her rights under the law against her old company.

But there was just one problem, according to a federal appeals court in Virginia that heard the case.

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The law says that a company cannot retaliate against an "employee" for filing a complaint about wages and hours. But the woman was not yet an "employee" of the new company, because the company had made her employment contingent on the results of the background check.

Because the woman wasn't yet an "employee," the new company could retaliate against her, the court said.

The court described this result as "problematic," because the law was meant to protect employees who complain, yet the decision meant that these employees would not be protected if they sought another job. Nevertheless, the court said the law was written the way it was written, and it had to be enforced.

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