

Moonlighting: The Indian Legal Perspective

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Moonlighting Legal Perspective

The COVID-19 pandemic presented numerous difficulties for both employers and employees, for instance, moonlighting, which is the practice of accepting a second job, project, or assignment while working full-time for another company. Moonlighting has emerged as a frequent challenge for work-from-home employers in light of the nationwide lockdown, following an urgent need to ensure workplace safety.

The debate around moonlighting has further intensified following the mass termination of employees by Wipro for moonlighting. Some employers are reverting to work-from-office to ensure that their employees work exclusively for them. That is a point to mull over, seeing as how the Hon'ble Prime Minister of India recently emphasized the need for flexible work practices. Recent changes to labour legislation also highlight how gig workers are specifically recognized under the New Labour Codes (yet to be brought into force).

Each employer may have a different view and approach to moonlighting. For example, as per the moonlighting policy of Swiggy, the employer's consent is required if the additional project is highly sensitive and leverages professional know-how. However, it is different if an employee is pursuing their interest or hobby [1]. The members of All India Services are specifically restricted inter alia from engaging in certain activities but are allowed to undertake honorary work of a social or charitable nature, occasional work of a literary, artistic, or scientific character, or participate in sports activities as an amateur without the permission of the government. However, the government may ask the member(s) to discontinue such activities at any time.

Given the diversified views amongst employers, it is relevant to understand what Indian laws, both old and new, say about moonlighting.

Moonlighting Under Existing Indian Laws And New Labour Codes

Indian laws do not define moonlighting. However, the laws mentioned below regulate dual or double employment to a certain extent.

The Factories Act, 1948 inter alia restricts an employer from requiring or allowing an adult worker to work in the factory on any day on which they have already been working in any other factory. The restriction under the OSH Code is broadly similar to the one prescribed under the Factories Act and is

limited to the dual employment of workers working in a mine or factory. The model standing orders under Industrial Employment (Standing Orders) Rules, 1946 prescribes additional items applicable to all industries, which provides that a workman shall not at any time work against the interest of the industrial establishment in which they are employed and shall not take any employment in addition to their job in the establishment which may adversely affect the interest of their employer. The draft model standing orders under the IR Code contain a similar restriction; however, the employer may, at their discretion, permit the worker to take up an additional job or an assignment with or without conditions following the prior permission of the employer.

The above laws have limited application as certain establishments and categories of employees are not covered under the same.

Employees working inter alia in retail stores, restaurants, theatres, and other public amusement or entertainment facilities, information technology, and information technology-enabled services are governed by the Shops and Establishments Act. The Shops and Establishments Act is different in each state. For example, dual employment is prohibited by the Delhi Shops and Establishments Act, 1954.

Indian Courts On Dual Employment

The Hon'ble Supreme Court of India, while deciding the eligibility of an employee of LIC from being a member of a local authority, observed that the effect of such a restriction is not on the candidature for election but on the nature of employment itself. The court further observed that if the employee participates in local administration or other elections, it may well be that they might have to forfeit their position as a government servant or employment if handling two positions is destructive of their efficiency as an employee. They might also be subject to disciplinary action [2]. The High Court of Punjab and Haryana upheld the termination of employment of a driver who had engaged in dual employment [3].

Other Issues Associated With Moonlighting

Moonlighting may also be coupled with various other issues, such as a conflict of interest, a breach of confidentiality/proprietary information, competition, solicitation of co-employees or vendors, compromise of intellectual properties, and attrition.

These issues expose businesses to higher risks, and the appropriate process to protect the business interests should be in place. Regarding the legality of these concerns, Indian courts have recognized non-compete restrictions during the employment period. Also, the confidentiality of the information and intellectual property of an employer is protected under Indian laws. Non-solicitation covenants are enforceable to the extent they are reasonable.

Looking Forward

Against the said background, companies must identify the activities of the employees that they intend to allow/permit beyond their work hours. If the job is exclusive, the same should be mentioned in the employment contract. The companies should also consider having robust employment contracts and HR policies that clearly define the terms of employment, including the obligations and restrictions on the employees and what would constitute 'misconduct' by the employee, necessitating disciplinary action. However, any action by the employer should be fair and reasonable to ensure that the same is upheld by the courts.

Furthermore, moonlighting may be considered unethical if an employee's contract includes non-compete clauses and exclusive employment, as is the case with the vast majority of traditional employment contracts. If employment contracts do not include this clause or provide exceptions, it may not be considered a breach of confidence or trust by the employees.

[1]

<https://indianexpress.com/article/explained/explained-economics/explained-swiggy-moonlighting-policy-gigs-beyond-regular-job-8108919/>

[2] Manohar Nathurao Samarth vs. Marotrao and Ors., AIR 1979 SC 1084.

[3] Gulbahar vs Presiding Officer Industrial, CWP No.15088 of 2015.

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