



## GUEST ESSAYS

### Outside In: The Risks Inherent in Moonlighting

Eric L. Singer

**Wildman, Harrold, Allen & Dixon**

2300 Cabot Drive, Suite 455

Lisle, Illinois 60532

(630) 955-0555 (main) | (630) 955-5826 (direct) | (630) 955-0662 (fax)

[singer@wildmanharrold.com](mailto:singer@wildmanharrold.com)

You might as well face it, employees will eventually be asked to provide a/e services outside of their employment relationships. It may be an in-law asking for plans of a small house addition, or a side job performed with a dream of developing an independent practice. In either event, moonlighting exposes both the employee and the firm to uninsured liability. Clear and unwavering policies against moonlighting are critical to avoiding vicarious liability arising from the moonlighting activities. Employers recognizing these risks will provide incentives to employees to avoid the risks inherent in moonlighting.

**Respondeat Superior.** From a liability perspective, an employer is responsible for an employee's actions taken within the scope of employment under the doctrine of *respondeat superior*. Whether particular acts of an employee are within the scope of his or her employment is a frequently litigated issue. If the employee is otherwise uninsured, you can expect a plaintiff's attorney to aggressively seek to implicate the firm's professional liability insurance. The use of firm resources may be just the ammunition the plaintiff's attorney needs. Meetings in the office, faxes to or from the office, use of firm materials, computers or velum may be construed as a direct client relationship or tacit approval by the firm. The fact that the court finds a connection sufficient to implicate the firm does not necessarily mean that the firm's coverage will apply. The firm's insurance may not cover work outside of the employment relationship. The firm could end up in the middle of litigation without insurance coverage and with crippling expenses, or with insurance subject to a large deductible.

**Precautions Inferior.** Claims may be more likely to arise in moonlighting projects than in your practice. Quality control is never as strict when an employee moonlights. No one will be checking plans or calculations. Site observation and review of submittals will have to be done only when time is available. Corner cutting is inherent in moonlighting.

With perhaps one exception, strategies to allow moonlighting and still avoid liability are doomed to fail. You cannot hide the name or identity of the firm. One phone call, one fax, one meeting in the office may be enough to implicate the firm. Even if you obtain indemnities or releases from the clients, third parties will not be bound by such agreements. An injured worker, neighbor or bystander can still sue, regardless of private agreements to limit liability. You can require employees to buy individual insurance policies, but the expense can be prohibitive and you are faced with the need to verify that continuous coverage remains in place.

**Capital Punishment or Nurturing Rewards.** The only real protection against vicarious liability for moonlighting employees is an absolute prohibition, treating moonlighting like theft of firm materials and resources. Distribute a written policy prohibiting it with the understanding that violators are subject to immediate termination. No exceptions. No excuses. This practice might seem harsh and it might cause employees to hide their activities. Remember, though, moonlighting creates a risk for your firm without any possible reward.



## GUEST ESSAYS

Consider an alternative that may be more likely to foster a positive environment, bolster morale and maintain employee longevity. Assume that your employees will be presented with opportunities to bring in work and use those opportunities to train employees. You might want to foster an entrepreneurial environment by rewarding new business with a percentage of collections. This can be an effective way to encourage employees to bring work into the firm, rather than keep work outside of it.

Employees need to remember that there are risks inherent in the work that they do and that the firm needs to control the quality and quantity of work produced. However you decide to approach moonlighting, your method must be clearly communicated, consistently applied and realistic for your firm.

---

About the Author: Eric L. Singer is with Wildman, Harrold, Allen & Dixon, Lisle, Illinois. His practice concentrates in construction law and in the representation of design professionals in all aspects of construction claims and dispute resolution.

---

*NOTE: This article is intended for general discussion of the subject, and should not be mistaken for legal advice. Readers are cautioned to consult appropriate advisors for advice applicable to their individual circumstances.*