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Moonlighting in the Age of Employee Entitlement

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No, this piece isn't about the 80s comedy-drama featuring a detective dynamic duo's snappy dialogue. This moonlighting refers to an employee working an extra job or two while simultaneously holding down a full-time job, typically one that provides benefits. The National Labor Relations Board's General Counsel recently released an advisory suggesting that employer bans on moonlighting – preventing employees from holding other jobs during employment, and especially those that compete with the employer – may be next in her regulatory sights.

The NLRB GC (who helps enforce the National Labor Relations Act, or the NLRA) reasoned in the advisory that preventing an employee from accepting work elsewhere during employment negatively impacts an employee from engaging in union organizing activities (and therefore might chill NLRA Section 7 activity). Non-union employers should not dismiss this development because the NLRA, a Federal statute, applies to all American workplaces and we've written before about the growing impact of the NLRB on non-union workplaces. But the latest activity touches a very sensitive area, especially in light of the post-pandemic workplace landscape featuring quiet quitting, an ultra-competitive recruiting landscape, and the rise of next-gen workers (X, Ys and Alphas) who have vastly different expectations of their employer when it comes to work rules, habits and expectations.

The pandemic also brought a host of workplace-related conflicts to light, including the inability of some employers to regulate the activities of a distributed workforce. After all, if the only tether to the office is electronic (video, email, cell), then there really is no way to know where your employee is, what they are doing, whether they are actually working, or frankly, who they are really working for.

Many employers manage these concerns by adopting policies banning moonlighting or any activities that conflict with an employer's business. While one could debate whether these policies are truly effective because they are hard to enforce, the legal basis for them - an employee's legal obligation to serve the employer's interests and only the employer's interest - has never really been in legal doubt. At least until now.

The NLRB GC's intent to regulate, punish or charge moonlighting bans as unfair labor practices stems in part from her well-publicized stance on post-employment covenants, which she believes limit the labor market and chill employee organizing rights. But the NLRB is not the sole source of attack on these well-established principles. The State of California recently amended its well-known ban on non-competes to provide new remedies to employees subject to banned restrictive covenants. We previously wrote about the passing legislative comment regarding the law's intent that

suggested moonlighting may be California's next statutory target. Stay tuned for those developments - which could radically impact a basic premise underlying the employment relationship, which is the duty of unfettered loyalty to the employer.

So what does this all mean? Whether or not next-gen employees expect to work one or multiple jobs simultaneously, employers are still entitled to expect an employee to devote their full time and efforts to the employer's enterprise. That is what the employer gets in exchange for paying the employee and that is what employees gives up for that payment. It is neither unreasonable nor unlawful to prevent an employee from engaging in unauthorized work, especially if that work might cause conflicts with the employer or inadvertently (or intentionally) result in the disclose of sensitive or confidential information. But employers need to be cognizant of legal developments that could impact these policies - regardless of the phases of the moon or the latest trend in employee expectations.

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