

Employment

Moonlighting: Important considerations for organizations and employees

Recently, the issue of "moonlighting" has sparked a debate in the information technology industry in India and has led to discussions over the legality of this practice. "Moonlighting", though not statutorily defined under the Indian law, is generally understood as taking up additional work (during or after working hours and/or on holidays) outside of one's normal employment. This is usually done either through taking up secondary employment or through freelancing projects on a contractual basis.

While there is no specific law that deals with moonlighting in India, certain laws like the Factories Act, 1948 and few state Shops and Establishment Acts (such as in Delhi, Punjab, Telangana) prohibit employees (or in some cases employers) from "being employed" (or from "employing" individuals) for more than the statutorily prescribed working hours in another factory or establishment. Such provisions wouldn't cover individuals taking up multiple part-time jobs or freelancing projects but restrict the total number of hours worked within the maximum statutory working hours.

Moonlighting by employees leads to the likelihood of an employee disclosing confidential and other sensitive information to a competitor and gives rise to the possibility of unauthorized use of the employer's resources by the employee. Further, it can deprive the employer from procuring best services as employees engaging in multiple jobs may get over-worked and become less efficient.

While presently most companies do not permit moonlighting by their employees, in recent times some companies are choosing to regulate moonlighting rather than prohibiting it outrightly, in a bid to attract more talent from competitors. In case employers intend to permit moonlighting, a common approach adopted by employers is to allow moonlighting on the basis of written approvals from employees as then the permission can be withdrawn at any time if the moonlighting impacts work. Other measures are to restrict working for a competitor / client, or undertaking any activity which adversely impacts the employer or employee productivity, or leads to conflict of interest or misuse of confidential information, etc.

Should employers intend to prohibit/regulate moonlighting, employment contracts and company policies will need to



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be revised to include provisions prohibiting or restricting this practice and giving them the right to take disciplinary action against employees for moonlighting. However, any disciplinary action must be proportional to the impact of moonlighting by the employee. On one occasion, the Bombay High Court held that where the moonlighting did not result in any adverse consequence to the employer, termination of employment would be considered excessive. Accordingly, all disciplinary action must follow due process and be ascertained based on facts and circumstances of each case.

In the event an employee's employment is terminated due to moonlighting, the employee can raise an industrial dispute against the employer for wrongful termination, provided moonlighting was not prohibited under the terms of the employment contract and/or company policies. Even if moonlighting was prohibited under the contractual terms or company policies, the employee can also raise a claim that termination was not proportional if the employee's act did not adversely impact the employer or the primary employment. Another ground on which employees can challenge the termination is if a fair opportunity to explain one's conduct was not provided prior to the termination.



Practice Area News

CA Nitesh Parashar v Institute of Chartered Accountants (W.P.(C) 88/2023. The Delhi High Court on January 5th, 2023 observed that a complaint of sexual harassment and the inquiry proceedings emanating therefrom cannot be quashed merely because the Internal Committee failed to complete the inquiry within the timeline stipulated under law. Court emphasized that allegations of sexual harassment deserved to be treated and inquired into with seriousness and responsibility and logically concluded in the interest of the complainant and accused.

Employees' Provident Fund Organisation v Sunil Kumar & Ors Writ Petition (C) No.318 of 2022. The Supreme Court on November 4th, 2022 upheld the **Employees' Pension (Amendment) Scheme, 2014.** In respect of Employees' Pension Scheme-1995 (EPS), the Employees Provident Fund Organisation has now given eligible employees the option to contribute towards EPS at 8.33% of their actual basic salary (above the wage ceiling prescribed under law). Deadline for existing members of EPS to opt-in to contribute on their higher salary is extended till 3 May 2023.

Haryana government revises conditions for employing women in night shifts. The Haryana Government via notification dated February 21st, 2023 has revised the conditions for employing women in night shifts. The changes include revising the time of commencement of night shift from 7:00 PM to 8:00 PM to align with Shops Act; removing the requirement to share copies of consent form from each woman to the Labour Commissioner. Now it's sufficient to give a declaration that the employer has obtained consent.

Threshold for professional tax increased in Karnataka. The Karnataka Government issued a notification on March 14th, 2023 enhancing the threshold for coverage under the Karnataka Tax on Profession, Trades, Callings and Employments Act, 1976 from INR 15,000 to INR 25,000. Via this amendment, professional tax will not have to be remitted in relation to individuals earning salary up till INR 25,000 per month.

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