

## Moonlighting, Employment Agreement – Employer’s Liability

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### Summary

Employers are encouraged to recognize the professional liability implications of employees performing services for projects of their own outside of normal working hours, and should develop and enforce personnel policies to protect the practice from professional liability claims that could arise from employees undertaking outside work.

### Background

Many employees of architectural practices engage in part-time work outside of normal working hours, sometimes referred to as "moonlighting", usually from a desire to gain additional experience and to earn additional money. The projects are usually small and provided that the activity does not interfere with the employee's normal work, the employer is not usually concerned.

However, there have been cases where a practice has been held responsible for projects undertaken by employees on their own time, because of a perception by the employee's client that the work is being undertaken by the architectural practice, and it is therefore recommended that holders become aware of the issue and establish a personnel policy to protect themselves from claims or complaints which may arise from such services.

### Suggested Procedure

In the absence of an agreement between employer and employee expressly prohibiting the employee from engaging in "moonlighting" activities, the employee generally has a right to utilize his/her personal time in any manner he/she chooses, and the employers have a right to ensure that the employee's "moonlighting" activities do not create a conflict of interest or potential liability problems. Therefore, if a practice has established personnel policies, it should consider including ones which discourage the provision of services outside of the employment and lays down the rules to be observed if the employee does engage in "moonlighting".

The terms and conditions of employer/employee agreement could include that:

1. There is a requirement to notify the employer of the intention to engage in providing services outside of the employment.
2. The services must not be performed on office premises or with office facilities and equipment, either during or after regular office hours.
3. The office telephone, fax, e-mail, etc. must not be used for communication in regard to the employee's outside work.
4. There shall be no conflict with the requirements of the employee's duties, including any requirement for overtime work.
5. Personal clients must be informed that the services are being provided without any connection with or supervision by the employer practice.
6. The employee should be advised that the professional liability insurance carried by the practice does not cover the employee providing outside services. The employer should request proof of errors and omission

insurance from the employee in order to protect him/herself from claims which may arise out of these services.

7. In the absence of documented personnel policies, it is recommended that the foregoing or similar terms and conditions form part of an employment agreement.

Note: Employers utilizing support personnel under personal service agreements (independent contractor) may have similar concerns to those described above and therefore similar procedures are warranted.

Architects who are independent contractors or “consultants” in working for a holder of a certificate of practice are in fact offering services to the public, and to do so in compliance with the *Architects Act* must be certificate of practice holders with their own professional liability insurance.

## Definitions

**Employee:** one who works for and under the full direction of another individual or entity (employer); a person working either full time or part time for an employer and in a manner that satisfies Revenue Canada Agency’s criteria for determining employer-employee relationships.

**Independent Contractor:** an individual or entity that is not entirely dependent on a single source for business and is distinguished from an employee by having an opportunity for profit, risk of loss, and a degree of self-control and ownership of tools; a person or firm providing services who is not an employee under Canada Revenue Agency’s criteria for determining employer-employee relationships.

## References

Canadian Handbook of Practice for Architects (CHOP) Chapters 2.1.7 and 2.2

[Architects Act](#), R.S.O. 1990, c. A.26

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