

Insights

MOONLIGHTING OR TWO-TIMING? HOW SHOULD EMPLOYERS DEAL WITH SIDE-HUSTLES?

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SUMMARY

If you are an active user of social media, you are likely to have encountered the concept of a “side-hustle”. Popularised and promoted by many “influencers”, the side-hustle can take different forms.

Traditionally, a side-hustle would be simply working a second job to earn additional income, for example working during the day in an office and then pulling pints in the local pub a few nights a week. However, particularly through social media influencers, the term has now taken on a new dimension, typically starting as a small side-income with the aim of it becoming a primary source of income, allowing the individual to step back from their day to day role and, according to influencers, live the life they only dreamed of.

With its growing popularity, this blog looks at how employers can respond to the trend, with it likely to become more prevalent as we progress through 2023 and the cost of living crisis continues.

CAN AN EMPLOYEE HAVE A SIDE-HUSTLE?

There are three preliminary points that anyone contemplating a side-hustle would have to take into account. First, if a person has a full-time “professional” job, sometimes with long hours, it might be physically and mentally very difficult for them to take on a second role. Secondly, whatever the side-hustle is, it cannot affect their ability to carry out their normal job. Thirdly, and possibly most importantly, a side-hustle cannot be damaging to the employer by, for example, being in a business that is competitive to that of the employer or of such a nature that it causes reputational concerns.

Subject to the above, and the express/implied terms discussed below, there is very little from a legal perspective that would prohibit an employee from having a side-hustle. However, there are

protections for employers, most of which are contained in the contract of employment. These can be summarised as follows:

- For senior employees, contracts of employment will typically state that they must devote the whole of their time, attention and abilities to their employer's business. Such wording would likely prohibit the employee from having a side-hustle and we set out below the steps an employer can take if this kind of provision is breached;
- Contracts of employment often state that the employee must first seek permission from the employer before undertaking any form of second role or other work. Employers should be careful when considering this permission, as failing to act reasonably could in itself constitute a breach of contract. The following scenarios demonstrate where a refusal is likely to be either reasonable or unreasonable:
 - An employee works 4 days a week in the legal team at a large international bank. The employee is a keen photographer and asks for permission to carry out work as a freelance photographer on their non-working day. Refusing permission for this request is likely to be unreasonable. It is unlikely this role will interfere with their main role, there are no reputational issues and there are no evident conflicts of interest.
 - An employee works full time as a fund manager at a large international bank and seeks permission to work 15 hours a week for his friend's new crypto-trading platform as an adviser. Refusing permission in this scenario is likely to be reasonable, as the additional hours will likely diminish the employee's performance in their current role and working for such a start-up poses additional risks such as the protection of confidential information and the reputation of the bank.

If the contract of employment is silent as to second jobs and other activities, employees cannot simply do as they please. First, all contracts of employment contain an implied duty of fidelity, which means that employees must act in the best interests of their employer. This includes not competing with their employer, for example by soliciting clients or secretly profiting from their position. A side-hustle that competes with the employer or looks to solicit clients would be very likely to breach the implied duty of fidelity, irrespective of the wording of any contract. However, as above, each case would need to be considered on its facts.

Employers should also note that, even if permission is given to undertake a side-hustle, it can be revoked in the future if there is good reason to do so. For example, if the role starts off well but over time begins to have a detrimental impact on the employee's primary job then permission can (and probably should) be withdrawn.

WHAT STEPS CAN BE TAKEN IF AN EMPLOYEE HAS A SIDE-HUSTLE WITHOUT PERMISSION?

Due to the nature of a side-hustle it is likely employees will attempt to keep it to themselves and not inform their employer. This is especially true in the current climate, where employees can set up online businesses (such as online tutoring, a popular side-hustle), which make identifying and tracking them very difficult. In the past a second job would likely involve working in “real life”, such as in a local shop or pub, which is more difficult to keep secret.

Should it be discovered that an employee has a side-hustle which they do not have permission for, they may be in breach of their express contractual obligations/implied duty of fidelity. If this is the case and depending on the nature of the role, disciplinary action could be taken. The outcome of any disciplinary procedure will be governed by the nature of the side-hustle and the employee’s conduct, but the following examples are indicative of what you might expect to see:

- An employee who works as a trader for a large international bank sets up (secretly) a crypto-currency exchange, which allows individuals to trade crypto-currency using a mobile app. In this scenario, dismissal may be an option, as arguably a crypto-currency exchange is a competing business so, provided the employee is contractually restricted from working for a competitor during their employment, it is likely a decision to dismiss would be justified. There may also be a risk of the employee using confidential business information from their normal job in the crypto-business. Even if there are no express restrictions, this kind of secret activity is highly likely to constitute a breach of the implied duty of fidelity;
- An employee who works as an administrative assistant at a technology firm sets up a photography business, working at weddings at weekends. The employee’s contract of employment states that they must seek permission from their current employer to work a second job. In this scenario, it is unlikely it would be justifiable to dismiss the employee. A written warning for breaching the terms of their contract would be more reasonable. However, in the current economic climate, with a cost of living crisis, we anticipate most employers would decide to permit the role without any further action.

As the above examples illustrate, the level of action to be taken will be governed by the nature of the side-hustle, the employee’s conduct and the relevant contractual obligations in place. A one-size-fits all approach should be avoided, and each individual case should be assessed on its own merits.

OTHER CONSIDERATIONS

Employers should also be aware of the following:

- Has the employee opted out of the Working Time Regulations? By law, employees and workers must not work more than 48 hours per week on average. This is usually averaged out over a 17-week reference period. An employee working a second job role may fall foul of this requirement, so it is good practice to consider this when granting permission. If there is a risk that the Working Time Regulations are going to be breached, the employee should be asked to sign an opt-out from the regulations;

- If an employee asks permission to take up a second role, it is good practice to have an open discussion with them about it. For example, it may be discovered that the employee is suffering financial troubles which have led to them taking this step. Open conversations may help facilitate an alternative arrangement, and also highlight issues within the organisation such as lower than average levels of remuneration which may increase the prevalence of side-hustles.
- Are the employment contract templates up to date? With a cost of living crisis coupled with a rise of social media discussion regarding side-hustles, it would be sensible for the employer to review employment contracts to ensure adequate protections are in place.

Whatever the case may be, it is likely that a side-hustle will be way less glamorous or lucrative than the “get rich quick/be a millionaire” dream roles promoted by social media influencers. Ironically, the only group of “employees” with lucrative side-hustles seem to be members of parliament, with several MP’s holding a variety of roles such as presenting radio shows, acting as consultants for corporations and writing their memoirs.

RELATED PRACTICE AREAS

- Employment & Labor

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