



MOONLIGHTING Or SECONDARY EMPLOYMENT

For those who attended the recent series of RMS Spring Workshops, this session discussed the risks and potential liability exposures to municipalities who allow their employees to seek secondary employment outside their regular working hours. Presented here is a synopsis of this session.

Secondary employment, often referred to as “moonlighting”, most frequently involves police officers. These officers are off duty, but are earning wages with another employer, such as:

- Working as a security guard
- Directing traffic at an event, such as at a sports arena
- Watching for shoplifters
- Security officer for an apartment complex
- ...and many other activities

As a municipality, how do you control this off duty activity? There are several points you need to consider.

- The Municipality’s protection
- Your officer’s safety
- Overtime labor costs
- Increased insurance costs for Worker’s Compensation and Liability
- A uniformed off duty officer is very clearly representing the Municipality

Does your police department have an operations manual that addresses, among other things:

- Your policy regarding moonlighting, off duty or secondary employment?
- How you offer these options? There are 3 ways to do so:
 1. Your police officers always remain in the City’s employ.
 2. Your police officers are contracted by the secondary employer and paid on a 1099 basis.
 3. Your police officers become an employee of the secondary employer. **(This is what we recommend!)**

Ask yourself: Whose employee are they? Whose instructions are they following? Who are they benefiting? Who is directing the officer? Who is paying the officer? Who sets their time and work schedule?

Basically, in whose control are they while they are working for the secondary employer?

Let's review each of the three options:

1. Your officers always remain in your employ: The positives include the fact that you have total control of the officer. You know where they are at all times. This can be an incentive and morale booster for the officer.

Most municipalities do not follow this procedure because of the additional cost to the municipality and the increased exposure both as to liability and workers' compensation. The added costs include substantial overtime pay while working in the off duty position. You are continuing to pay for the officer's time, generally at time and one-half. If the officer is injured while working in the off duty position, the injury will be covered under the municipality's workers compensation insurance. That may result in higher premium costs because of the potential for higher incidence on injury.

2. Your employee is working as a 1099 employee: Some municipalities allow their employees to moonlight freely and consider that they would be an independent contractor to the secondary employer, working for that employer as a 1099 employee.

Risk factors to consider here include:

- Who assumes liability for the officer?
- Who assumes the work comp if the officer is injured or killed?
- What if he slips, trips, or falls or injures his back or is struck by a vehicle?
- What if the Municipality is sued due to the employee's activity while in secondary employment?

If the police officer is injured while moonlighting, generally, he will not be covered by worker's compensation unless the officer is acting under color of law. In that case, the secondary employment ends the instant the officer changes from acting as a security guard, for example, and has assumed his or her police powers. If the police officer affects an arrest for shoplifting while working as a security guard, then his role changes, as well as his employer. He has now reverted to being the municipality's employee.

If the officer slips, trips, or falls and is injured while moonlighting, the officer is not covered by you or the secondary employer. The officer would have to rely on his personal health insurance.

NCLM Risk Management Services recommends the following policy:

3. Officer is an employee of the secondary employer:

- No officer may accept off duty employment that could cause his/her police powers to be invoked unless that Employer has been approved by the Manager, City Finance Officer and Police Chief.
- To become an approved “Off-duty Employer”, the Employer must agree in writing (by contract) to specific requirements.
- Develop a contract for use in secondary employment. (See sample “Secondary Employment Request/Permit”, attached).
- Require secondary employer to agree to be liable for workers’ compensation for your employee.
- Require secondary employer to provide general liability insurance for your employee.
- Require the secondary employer to furnish a “Certificate of Insurance” that names your entity as an additional insured for workers’ compensation and general liability.
- The secondary employer further agrees to assume all liability and damages arising out of the employment of your officer.
- The secondary employer agrees to hold your entity harmless and to indemnify and defend your entity for any claims arising out of the employment of your officer.
- Any agreement is to be signed and notarized by the employer, your officer, and the Chief of Police, Finance Officer or Manager of your entity.

General comments:

Officers of your entity have liability protection for the on- and off-duty lawful performance of official duties, but there are some restrictions.

If the Officer is acting under color of law within their legal jurisdiction, then, regardless of what uniform he is wearing, and whether he is off duty or on duty, the Officer is covered by the workers’ compensation act. A Mutual Aid Agreement does not change this.

In order to promote safety and efficiency, your policy should regulate situations and locations within which a sworn member is permitted to make an arrest while off-duty. An officer should never attempt to enforce the law in a situation where he is deemed personally involved while off-duty. This would occur if the officer, a family member, or a friend became engaged in a dispute of incident involving a personal matter with the person to be arrested or any other person connected with the incident. This does not apply to situations where the police officer is a victim of a crime.

What about that small business that cannot afford to provide insurance and indemnify the entity?

There is still a need to hire an off-duty Officer to assist them. For example: The local non-profit symphony group is putting together a benefit at the local high school and they need an Officer to direct traffic. What do you do then? Do you really want your officer exposed in that kind of situation.

- No liability insurance
- No worker’s compensation
- Totally unprotected

You may consider, on a very limited, case by case basis, with the prior approval of the City Management to have that Secondary Employer pay the City direct.

In that situation, the City can determine the fair rate to charge the Secondary Employer and allow the Employee to remain in the City's employ and therefore, under the City's umbrella.

We would never recommend exposing your Officer to be employed without the protection of any agreement, workers' compensation or liability

The following checklist is a simple guide that you can use to help you prepare yourself for a potential off-duty encounter:

- ✓ **Are you readily identifiable as an officer?**
- ✓ **Does the situation demand your intervention?**
- ✓ **Are you at a tactical disadvantage?**
- ✓ **Is it more prudent for you to be a good witness?**
- ✓ **Can you or someone else call for on-duty back-up?**
- ✓ **Do you have your badge/identification ready?**
- ✓ **Do you have your weapon and handcuffs duty ready? Where are your reloads?**
- ✓ **Remember, there may be more suspects than you can see.**
- ✓ **Will responding officers, arriving at the scene, perceive you as a threat?**
- ✓ **When on-duty officers arrive, cooperate fully and follow their instructions.**
- ✓ **Is your family with you?**
- ✓ **Should you be involved in an off-duty incident, have you discussed a plan of action with your family members?**

For additional information contact risk management services at **1- 800-228-0986** and select **“safety and risk control”** from the available options.

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