Moonlighting Madness

by Quenda Behler Story

To most contractors, the following scenario is all too familiar: The homeowner takes one of your carpenters aside and says, "Let's work out a deal on these cabinets. If you install them for me this weekend, I'll pay you under the table." The carpenter earns a little extra income and the homeowner avoids paying you your employee overhead.

The best way to handle this kind of situation is to avoid it in the first place. First, you should explain to your employees that the reason you're able to pay their wages, health insurance, vacation days and whatever other benefits you offer is because you have a consistent supply of new work for them. One main source of that work is referrals from past customers — work that isn't available, however, if the employees are picking it up on the side. Make it clear that a few extra dollars over the weekend is not worth risking a work shortage that could affect their long-term employment. It also helps if you have an anti-moonlighting policy in your company manual, and if the penalty for moonlighting is immediate termination.

It won't hurt to explain your position on moonlighting to your clients as well. Point out the value of having a licensed and insured contractor doing the work instead of somebody with a pickup truck and a hammer. If that doesn't work, however, you might find some relief by addressing the moonlighting issue in your construction contract.

Breach of Contract

You can't tell your employees what they can and can't do on their own time. That means that if a homeowner hires one of your employees to perform work you have contracted to do, you can't directly prevent the employee from accepting the work. In most states, however, you can make accepting such work grounds for termination in your employee handbook. That's where the moonlighting policy mentioned above comes into play.

In this tight labor market, though, you might be reluctant to fire skilled labor, so you might be better off going after the homeowner. One option is to sue the homeowner for breach of contract. What you get when you win a breach of contract lawsuit are lost profits plus consequential damages. Lost profit is exactly that: You will not win the full contract amount for the work, because you did not do the work, so you didn't incur the cost of doing the job. For example, if your $6,000 contract included $3,000 for labor and $2,000 for materials, the remaining $1,000 profit is what you will win if you didn't do the work.

You can also win consequential damages, if you can prove them. Consequential damages are the actual out-of-pocket costs you suffered because of the breach of contract. For example, suppose you had put a $200 deposit on the rental of a Super-Duper Nail Gun to be used specifically on the job in question. After the homeowner hires your carpenter to do the work on his own time, you no longer need the nail gun but the rental company won't give your deposit back. The loss of your deposit money is a direct consequence of the contract breach. It's an expense you would not have had if the contract had not been breached.

Non-Contract Work

More often, however, the moonlighting involves additional work that was not a part of your original contract. After you have completed the new kitchen, for example, the homeowner decides to build a new deck. But instead of calling you for an estimate, he or she calls one of your employees.

While it's conceivable that you could write a contract that would require the homeowner to call you for future work, that would be a contract with an option in it, and you need three things to make such an option enforceable. First, you have to offer the homeowners some consideration for their promise; second, the homeowners would have to accept the offer; and third, the option must be specific. In other words, to make the option stick, you must offer and the homeowner must accept some kind of payment in exchange for the promise to make you the exclusive contractor for a particular kind of work over a specific time period. Otherwise, I could promise to call you when I'm ready to do my deck, but if I don't you can't sue me because it was just a promise. And it won't do to ask someone to promise to give you "all future work," because that's too open-ended. However, if you had paid me a certain amount of money or given me some other tangible consideration (a $1,000 discount on my kitchen, for example) in exchange for my promise to hire you for a specific job — when I was ready to add a deck, for example — then that's not just a promise, it's part of the contract.

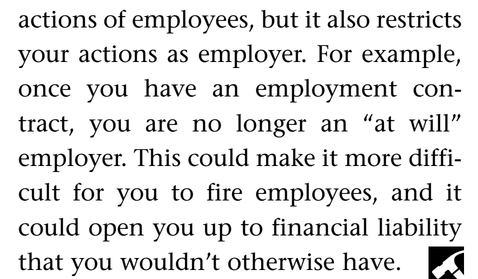
Covenants Not To Compete

Here's another scenario: Suppose one of your employees decided to start his own company and used the job your customer offered him as his first piece of business. Indeed, the employee may have been actively soliciting business from your customers for months, because he had intended to start his business for some time. Is there anything you can do about that?

Not really, unless you had a "covenant not to compete" in your employment contract with your employee, and maybe not even then. Enforcing a covenant not to compete against an employee can be difficult. Courts tend to cast a suspicious eye on arrangements like these, because a covenant like that could seriously interfere with an ex-employee's right to earn a living.

Given the difficulty of enforcing a covenant not to compete, it's best to have your lawyer draw it up for you as part of an employment contract. At a minimum, such a covenant has to be specific as to time and location. In other words, you might be able to ask an employee not to compete for two years in your county, but it would be almost impossible to enforce a covenant not to compete for five years anywhere in your state. The court will balance the potential damage such competition could reasonably do to your business against the rights of your employee to earn a living.

Also, a covenant not to compete must be specific to the individual employee, so putting a clause in your employee handbook isn't specific enough — you need an employment contract. Keep in mind, however, that an employment contract cuts both ways; it restricts the actions of employees, but it also restricts your actions as employer. For example, once you have an employment contract, you are no longer an "at will" employer. This could make it more difficult for you to fire employees, and it could open you up to financial liability that you wouldn't otherwise have.



---

*Attorney **Quenda Behler Story** runs a remodeling business with her husband in Okemos, Mich. She is author of a book on job-site safety,* An Ounce of Prevention *(Home Builder Press; 800/223-2665).*