

# The basics of employed lawyers professional liability coverage



The potential legal malpractice exposure for in-house counsel (employed lawyers) arising out of their provision of professional legal services continues to grow. Legal malpractice claims can impact a company's own balance sheet and place in-house counsel's personal assets at risk. Claims against in-house counsel could include allegations arising out of purported misrepresentations to employers, advice given to other employees, regulatory reviews, and "moonlighting" activities, to name a few. To complicate things further, lawyers who are also company officers may be acting in two capacities: as officers and as in-house counsel. Claims alleging the latter may not be covered under a standard directors and officers liability (D&O) policy.

Because in-house legal departments (including paralegals and other support staff) do not typically carry lawyers professional/malpractice insurance as they would in private practice, their unique exposures must be addressed by alternative means. These include:

- Adding an employed lawyers endorsement to company's D&O policy.
- Purchasing a stand-alone employed lawyers policy.



Item	Endorsement to D&O	Standalone policy
<b>Limit</b>	Typically shared with D&O program and therefore can be eroded by D&O loss. *If a sublimit, consider adding wording that the coverage will not be construed to limit coverage otherwise available to an insured (meaning for individuals who are both officers and employed lawyers).	Dedicated limit.
<b>Premium</b>	Typically no or nominal additional premium.	Separate premium required.
<b>Retention</b>	May match D&O unless different level is negotiated.	Can choose desired level.
<b>Insured persons</b>	<ul style="list-style-type: none"> <li>Includes full- or part-time employees licensed to practice law.</li> <li>Insurer may consider expanding if desired by company.</li> </ul> *Consider removing any co-defendant requirement (meaning a claim must be made against an otherwise covered director or officer).	Includes full- or part-time employees licensed to practice law, plus: <ul style="list-style-type: none"> <li>Employees supporting lawyers in performing legal services.</li> <li>Licensed lawyers provided by employment contractors.</li> <li>Licensed lawyers as independent contractors.</li> </ul>
<b>Insured professional services</b>	Legal services performed by an employed lawyer in that capacity solely on behalf of the company.	Legal services performed by an employed lawyer in that capacity solely on behalf of the company, plus: <ul style="list-style-type: none"> <li>Pro bono work performed at the direction of the corporate employer. (Note: policy can also be restricted to cover pro bono work only if desired by company).</li> <li>Moonlighting activities.</li> <li>Notary activities.</li> </ul>
<b>Are amendments to exclusions to carve out coverage for the exposures of in-house counsel available?</b>	Generally no, but at a minimum, insurance buyers can amend the entity v. insured exclusion to provide full carve-back for employed lawyers.	Yes, amendments can possibly be made as follows: <ul style="list-style-type: none"> <li>Personal injury perils (most notably malicious prosecution and libel/slander) are covered on most standalone forms, but usually not where employed lawyers coverage is added by endorsement to the D&amp;O policy.</li> <li>Carve-back of coverage on the ERISA exclusion provides coverage to in-house counsel who advise ERISA fiduciaries.</li> <li>There are typically carve-backs for copyright, trademark, and patent exclusions, whereas exclusions remain on some employed lawyer D&amp;O endorsements.</li> <li>Carve-back coverage is available for defense costs to the wage and hour law exclusion.</li> <li>Carve-back coverage is available for claims involving employment practices of others for which the in-house attorney has provided advice and some policies may have carve-backs for defense cost coverage for claims involving the Consolidated Omnibus Budget Reconciliation Act (COBRA), the National Labor Relations Act (NLRA), and the Worker Adjustment and Retraining Notification Act (WARN Act).</li> <li>Defense costs coverage is available for claims made by the organization, including for Sarbanes-Oxley 307 actions (publicly traded companies).</li> </ul>
<b>Duty to defend</b>	Typically the insured.	Typically the insurer, which means that as long as one allegation in a claim is deemed covered, the insurer must defend the entire claim.



### What activities create exposure for employed lawyers?

- Rendering of formal or casual legal opinions.
- Assessment of new laws and regulations affecting a company.
- Misrepresentations made to regulatory agencies and outside third parties.
- Management of legal proceedings, including conduct during litigation.
- Review of shareholder communications and other publicly available documents released by the company.
- Failing to report violations.
- Mergers and acquisitions.
- IPOs and secondary offerings.
- Regulatory actions.
- Reports regarding licenses — the unauthorized practice of law (practicing without a license).
- Approval of contracts with vendors or clients.
- Legal review of literature published by the company.
- E-mail leaks of privileged information — attorney/client privilege violations.
- Intellectual property work.
- Opinion letters or comments related to a company's financials documents and representations.
- Human resources actions/participation in internal employee investigations.
- Executing collection letters for past-due account receivables.

### Who are the potential claimants against in-house counsel?

- Companies may file claims based on:
  - Whistleblower retaliation.
  - Due diligence for transactional work.
  - Incorrect legal opinions pertaining to such work.
  - Conflicts of interest.
  - Fraud.
- Employees or company executives may file claims based on representation or advice regarding:
  - Employment termination.
  - Employment benefits.
  - Tax advice.
- Third parties — including creditors, customers, vendors, and competitors — may file claims based on:
  - Opinion letter or comments related to a company's financial condition.
  - Conflicts of interest.
  - Transactional work.
- Shareholders may file claims based on securities class actions if they include allegations of legal malpractice. D&O policies may have professional services exclusions and also may not cover claims against non-officer attorneys and legal support staff.
- Regulatory bodies may file claims based on:
  - Sarbanes-Oxley Section 307.
  - SEC investigations.

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