I. INTRODUCTION

In today’s workplace, employers are increasingly subject to lawsuits involving multiple defendants. This trend is most often evidenced by routine discrimination lawsuits naming not only the corporate employer as defendant, but a myriad of managers, supervisors and co-workers as individual defendants as well. Such multi-party litigation in the workplace poses a number of complex ethical issues which this paper addresses, including:

- whether to provide representation and/or indemnification for individual employees;
- addressing conflicts of interest posed by joint representations;
- the impact of joint representations on the attorney-client privilege; and
- the propriety of joint defense agreements where individual defendants with similar interests have separate counsel.

The second area addressed by this paper concerns the handling of internal corporate investigations by attorneys and in-house counsel in particular. Such investigations, which are often conducted before litigation exists, possess their own ethical concerns, such as:

- ensuring that the attorney-client privilege and work product doctrine are not compromised; and
- protecting the investigating attorney from being called as a witness at trial.

Finally, this paper discusses the implications of Employment Practices Liability Insurance (EPLI) on the attorney-client relationship. The recent emergence and growing popularity of EPLI has given rise to several new ethical considerations within the attorney-client relationship such as:

- who controls the selection of counsel;
- whether an attorney hired by an insurance carrier represents the insured employer (with whom the attorney may enjoy a long-standing relationship), the insurer (who may be paying most of the costs of
litigation, including the attorney’s fees), or both; and

- the potential for waiver of the attorney-client privilege by disclosing confidential information to third parties.

II. JOINT EMPLOYER/EMPLOYEE REPRESENTATIONS

As noted above, employers are increasingly involved in multiple defendant employment litigation. In most such cases, in addition to naming the corporate employer as a defendant, plaintiffs also name one or many executives, line managers, direct supervisors, and/or co-workers involved in the underlying dispute. Before agreeing to represent more than one party in the same case, counsel should carefully consider the circumstances. The consequences of a hasty decision can be severe. Among other things, if the interests of seemingly aligned parties diverge, counsel may be disqualified from representing all or any of the parties.

A. Corporation’s Duty to Provide Representation

It is important to understand that an employer generally is under no legal obligation to provide representation or indemnification of legal expenses for an employee who has been sued, whether it be because of acts performed during the course of employment or otherwise. Exceptions to this general rule, however, do exist. For example, employer and employee may have entered into a contract obligating the employer to provide representation. Some states have statutory provisions which require or permit an employer to indemnify and provide representation for employees who are sued for acts performed in furtherance of the employer’s business. For example, Delaware General Corporation Law Section 145 permits indemnification of directors, officers, employees, and agents of the corporation. This provision, which also authorizes the corporation to advance litigation expenses to an officer or director prior to final disposition of a legal action, is non-exclusive and does not supplant any rights to indemnification which a party may have under a bylaw, resolution, or other contractual arrangement. Del. Code Ann. tit. 8, § 145.

Both Pennsylvania and New Jersey laws permit a corporation to indemnify any person who, as a result of performing his/her duties to the corporation, becomes, or is threatened to be made, a party to a civil, criminal, or investigative proceeding, unless:

- the individual acted in bad faith;
- he or she did not act in a manner reasonably believed to be in the best interests of the corporation; or
- in the case of a criminal proceeding, there is reason to believe the conduct in question was unlawful.


A company may not indemnify a corporate agent who is found liable unless a court deems

In any particular case, counsel should review corporate policy and bylaws with respect to employee indemnification.

B. The Decision to Defend

Even in the absence of any legal obligation, many employers choose to defend a supervisor or manager who has been sued. The employer may do so out of a sense of loyalty or to ensure an employee’s cooperation in the suit against the company. In deciding whether to engage in a joint defense, the employer must consider several factors:

- Can both parties be adequately and effectively represented in a joint defense?
- What effect might joint representation have on discovery or trial strategies?
- Are there issues unique to the defense of the employee that might better be handled by separate counsel?
- Will there be problems with consistency between testimony of the employee and non-party witnesses?
- To what extent might joint representation inhibit the company’s investigation of the matter or hinder possible settlement?

C. Supervisor and Manager Personal Liability Under Employment Discrimination Laws

In determining whether to provide representation to an employee, the employer should consider the extent to which the employee, usually a manager, or supervisor, may be held personally liable under the various employment discrimination laws. Individual liability depends largely on the definition of who is an “employer” under each of the statutes as well as the interpretation which the courts have given to the scope of liability under the various discrimination laws.

1. Title VII, the Americans with Disabilities Act, and the Age
Discrimination in Employment Act

Title VII of the Civil Rights Act of 1964 prohibits an "employer" from discriminating on the basis of race, color, religion, sex or national origin. 42 U.S.C. § 2000e-2(a)(1). Therefore, Title VII only provides for liability against those who qualify as an employer under the statute. Title VII defines an "employer" as "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person." Id. § 2000e(b). The definition of a "person" includes governmental agencies, labor unions, partnerships, associations, corporations, legal representatives and other organizations. Id. § 2000e(a).

The definition of an "employer" under Title VII includes both institutional and individual employers. Courts have held that for an individual to be an employer, "the individual must be an officer, director, or supervisor of a Title VII employer, or otherwise involved in managerial decisions." Hendrix v. Fleming Cos., 650 F. Supp. 301, 302 (W.D. Okla. 1986) (citing Jeter v. Boswell, 554 F. Supp. 946 (N.D.W. Va. 1983).


2. Family and Medical Leave Act

The Family and Medical Leave Act (FMLA) defines an "employer" as "any person engaged in commerce or in an industry or an activity affecting commerce for each working day during each 20 or more calendar work weeks in the current or preceding calendar year..." This includes "any person who acts, directly or indirectly, in the interest of an employer to any employees of such an employer..." 29 U.S.C. §§ 2611(4) (i) and (ii).

With respect to personal liability under the FMLA, the district courts are in disarray. Some courts have analogized the FMLA to Title VII, the ADEA and the ADA, holding that there is therefore no personal liability under the FMLA. See, e.g., Frizzell v. S.W. Motor Freight, Inc., 906 F. Supp. 441 (E.D. Tenn. 1995) (the term "employer" as used in the FMLA should be construed the same as the term "employer" is construed under Title VII). An increasing number of courts, however, have held that employees may be subject to individual liability under the FMLA. See, e.g., Morrow v. Putman, 142 F. Supp. 2d 1271, 1275 (D. Nev. 2001) ("the plain language of the FMLA clearly contemplates individual liability."); Evans v. Henderson, No. 99C8332, 2000 WL 1161075 (N.D. Ill. Aug. 16, 2000) (concluding employees may be subject to individual liability under FMLA); Kilvitis v. Lucerne, 52 F. Supp. 2d 403, 412 (M.D. Pa. 1999) (holding plain language of FMLA evidences and intent to provide for individual liability). Such courts have noted that the definition of "employer" in the
FMLA tracks the language used in the Fair Labor Standards Act, which is generally interpreted to impose liability on individual employees. See, e.g., Rupnow v. TRC, Inc., 999 F. Supp. 1047 (N.D. Ohio 1998) (in a gender discrimination and FMLA case, holding that the president of a company could not be held liable under Title VII, but could be held liable under the FMLA).

D. Ethical Issues for Counsel in the Joint Representation Context

When an employer provides representation for a client, either by choice or through legal obligation, the joint representation of employer and employee presents a myriad of issues for counsel. The attorney must keep in mind that his or her client is the corporation, and thus must identify any conflict of interests or other concerns which may arise between the parties to the joint representation.