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Preparing Useful and Legally Compliant Job Descriptions

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I. Introduction

Employers often overlook the importance of current and accurate job descriptions. If prepared properly, these documents can assist in many day-to-day human resources functions and be powerful tools in employment litigation. Inaccurate or outdated job descriptions, however, can create myriad legal issues for the unwary employer. In this paper, we will briefly discuss why it is important to maintain accurate job descriptions and best practices for doing so.

II. Why Current and Accurate Job Descriptions are Important

Accurate and current job descriptions can be an employer's best friend for many important reasons throughout the employment life cycle:

Hiring. Accurate job descriptions are critical to establishing the minimum requirements for the position before and during the recruiting process. Identifying the essential duties of a position before interviewing is an important exercise that helps focus the recruiting process on those skills that are most essential and weed out unqualified applicants, which in turn increases the likelihood that the correct person will be hired for the job. The hope is that this will increase the chances of hiring a productive, long term employee and reduce the risk of an involuntary termination down the road.

FLSA Classification Analysis. Similarly, accurate job descriptions are useful for clarifying whether an employee is exempt or non-exempt from overtime requirements under the Fair Labor Standards Act ("FLSA") and state wage and hour laws. Although job descriptions are not dispositive, and courts will also look to the actual duties of employees, a job description may be an important factor considered in determining whether an employee is properly classified as exempt from overtime. *See, e.g., Huggins v. U.S.*, No. 95-285-C, 2005 WL 6112625 (U.S. Ct. Fed. Claims Aug. 16, 2005) (explaining that job descriptions are non-dispositive evidence of an employee's duties in an FLSA classification analysis); *In re Food Lion, Inc.*, 151 F.3d 1029 (4th Cir. 1998) (considering job description, in addition to affidavits and deposition testimony, when evaluating whether employees fell under the executive overtime exemption).

NLRA Issues. Job descriptions may also be used as evidence to establish that an employee is a “supervisor” for purposes of the National Labor Relations Act (“NLRA”) and thus not governed by the NLRA. An accurate list of job functions may be used as evidence that the employee performs one or more functions needed to qualify as a supervisor under the Act. *See* 29 U.S.C. §152 (11) (The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.)

Workflow Issues. Another practical benefit of job descriptions is that they make clear which employee is responsible for which job duties. This has the immediate benefit of ensuring that all work gets done as needed, while avoiding potential arguments among employees over who is responsible for what work.

Performance Assessment. Accurate job descriptions provide employers with a clear description of job functions against which employees can be held accountable in connection with annual performance assessments. (Indeed, job descriptions and performance evaluation forms should synch up with each other).

ADA Accommodations. An accurate job description – including especially an accurate list of minimum qualifications and essential job functions – is critical in determining whether an employee or job applicant with a disability is “qualified” under the ADA and what type of accommodation may be required. To be “qualified,” an individual must have the requisite skills, experience, education, and licenses for the job, and must also be able to perform the essential functions of the job, with or without reasonable accommodation.

Under the ADA, an employer is never required to eliminate an employee’s essential job functions as part of a reasonable accommodation. An employee’s written job description is given deference by the EEOC and the Courts when there is a dispute about whether a skill is required and whether a particular function is essential. *See, e.g.,* 29 C.F.R. 1630.2(n)(3)(i)-(vii); *Bagwell v. Morgan Cty. Comm.*, No. 15-15274, -- Fed. Appx. ---, 2017 WL 192694 (11th Cir. Jan. 18, 2017) (deferring to employer’s judgment in ADA case that all functions in job description were essential); *Medearis v. CVS Pharmacy, Inc.* (11th Cir. 2016) (function found essential in large part on "substantial weight" court gave job description); *Newell v. Alden Village Health Facility for Children and Young Adults* (7th Cir. 2016) (unpublished) (function was essential based in part on job description signed by employee listing that function); *EEOC v. Autozone, Inc.* (7th Cir. 2016) (lifting found essential based on job description’s expressly discussing lifting requirements); *Jordan v. City of Union City* (11th Cir. 2016) (unpublished); and *Lang v. Wal-Mart* (1st Cir. 2016) (finding function essential based on factors including clear job description and plaintiff’s admission she frequently performed the function).

However, when the employee’s job description does not include a function that the employer argues is essential, a court may find that the issue is disputed and must be resolved by a jury. *See EEOC v. The Kroger Co. of Michigan*, No. 2:14-cv-13757 (E.D. Mich. 2016) (denying motion for summary judgment on ADA claims where allegedly essential functions

were not listed in a job description.); *Stephenson v. Pfizer, Inc.*, 641 Fed. Appx. 214 (4th Cir. 2016) (unpublished), the court concluded that driving might not be an essential function of a pharmaceutical sale rep's job, noting among other things that it was not listed in the job description and there was a legitimate dispute as to whether "driving" or "traveling" was the essential function). Likewise, where a job description is inaccurate or conflicts with other forms describing essential job functions, a court may find there is a genuine issue of material fact and decline to grant summary judgment on a failure-to-accommodate claim. *See, e.g., Cowing v. Lockheed Martin Corp.*, No. 5:15-129-KKC, 2017 WL 216702 (E.D. Ky. Jan. 18, 2017) (denying summary judgment in ADA case and holding that where employer produced three forms, each describing the essential functions of a job differently, there existed a genuine issue of material fact).

Return from Leave Issues. Additionally, job descriptions may be provided to health care providers when determining whether an employee is fit to return to work after taking medical leave under the Family Medical Leave Act ("FMLA") or ADA. This provides the medical professional with a convenient means of evaluating the employee's job functions and his or her ability to perform them with or without accommodations.

Equal Pay Analysis. Job descriptions also may help reduce potential liability in cases involving compensation and equal pay issues. This is because differing job descriptions may be evidence that different jobs are not functionally equivalent and therefore need not be paid the same. *See, e.g., Campana v. City of Greenfield*, 164 F. Supp. 2d 1078, 1090 at n. 7 (E.D. Wisc. 2001) (holding that, although job descriptions of two positions cannot provide definitive proof of their equality for purposes of an equal pay analysis, job descriptions are nevertheless evidence).

RIFs/Succession Planning. Job descriptions also can assist management when planning reductions in force, right sizing, and succession planning. In these situations, management can review accurate job descriptions to determine what jobs are still needed under circumstances where it could be uncomfortable, inappropriate, or inconvenient to interview the employees themselves about their job functions.

Defending Wrongful Termination Claims. When called upon to defend an employee's termination in a discrimination or other wrongful termination lawsuit, being able to point to the employee's job description as evidence of the employer's legitimate expectations can be powerful evidence to rebut an allegation of discrimination. *See, e.g., Lynch v. ITT Educ. Servs., Inc.*, 571 Fed. Appx. 440 (6th Cir. July 8, 2014) (finding that employer had articulated a legitimate nondiscriminatory reason for employee's termination where job description demonstrated that employee lacked the mandatory educational background for the position). This is also true for employees who are not at-will and can be fired only for cause. Demonstrating that an employee cannot perform an essential job function as described in a job description can be convincing evidence that there is cause for discipline or termination. *See, e.g., Soong v. Idaho Dept. of Health and Welfare*, 968 P.2d 261 (Idaho App. 1998) (finding cause for employee's termination where employee failed to comply with clinical expectations that were based on employee's job description).

Defending Retaliation Claims. Job descriptions may also be used to clarify when an employee is engaging in protected activity versus merely performing his/her job functions. For

example, a Human Resources employee cannot claim she is engaging in protected activity when assisting with an investigation as part of her job duties. *See, e.g., Lund v. Leprino Co.*, 2007 WL 1775474 at *8 (E.D. Cal. 2007) (safety supervisor could not support a claim for wrongful termination in violation of public policy because he did not engage in protected activity when he prepared accident report); *Claudio-Gotay v. Becton Dickinson Caribe, Ltd.*, 375 F.3d 99, 101-03 (1st Cir. 2004) (safety engineer who, as part of his job duties, reported potential violations did not engage in protected activity); *Correa v. Mana Products, Inc.*, 550 F. Supp. 2d 319, 330-31 (E.D.N.Y. 2008) (human resources manager who investigated discrimination complaints as part of her job duties did not engage in protected activity).

III. Best Practices for Elements to Include in a Job Description

Given the importance of job descriptions, employers should take care to draft them as carefully and accurately as possible. Below is a discussion of the major components of a proper job description. Although job descriptions may be prepared with variations of these components, or with additional components, these elements are generally viewed as best practice.

A. Job Summary

The job summary should provide a brief narrative that captures the essence of the job and a high-level overview of the most essential of the position's essential job functions. This section gives readers a good idea of what the employee does without going into significant detail. It is intended to give an introduction and background framework against which the rest of the job description can be interpreted.

B. Minimum Required Qualifications

In this section, employers should list all minimum required qualifications (sometimes called "Knowledge, Skills, Abilities") for the position, including the basic knowledge, skills, abilities, physical abilities, experience, licenses, training, educational requirements, etc. required for the position. Note that "qualifications" are not "functions," i.e., qualifications are not tasks or actions the employee is required to do or perform. Instead, they are "attributes" that an individual must already possess at the time of hire in order to be qualified for the position. Minimum required qualifications could include, for example, a 4 year college degree, 2 years of experience in a similar position, possession of a valid driver's license, or the ability to regularly lift 25 lbs and occasionally lift 50 lbs.

Care must be taken that the qualifications are in fact necessary for the employee to successfully perform in the position. This is because exclusion of applicants based on qualifications that are not actually needed for successful performance of the job may expose an employer to a disparate impact discrimination claim. For example, a requirement that applicants be able to lift 100 lbs when the job in fact only requires an ability to lift 50 lbs may have an unlawful disparate impact on female applicants and result in legal liability.

C. Essential Job Functions

This section of the job description should be evaluated carefully for accuracy. It is critical to list only truly essential job functions in this section, and not marginal job functions. Note that this analysis may take time and may require a full job analysis to ensure that job descriptions actually match the employee's duties. This may include observing employees, interviewing employees and their supervisors, reviewing any work logs created by the employees, or having employees complete questionnaires.

The following are a few drafting tips for employers tasked with creating a list of essential job functions:

1. Begin each line with an action verb (*e.g.*, "Prepare expense reports as per department guidelines").
2. Be succinct. (*e.g.*, "Process check requests" rather than "Receive daily department check requests and then fill out all necessary paperwork in order to process those check requests").
3. When appropriate, describe the outcome rather than the means used. (*e.g.*, "Record notes during meetings" rather than "Type up notes during meetings"). This will provide some flexibility if the employer later decides to change the method of performing the function and may assist when conducting an ADA reasonable accommodation analysis.
4. List functions in some coherent and consistent order. Depending on the employer's preference, this may involve listing functions in order of importance, in order of frequency, or in order of chronology.
5. Identify where work should be performed, and specifically if it must be performed at the employer's worksite. This will help to head off later confusion surrounding telecommuting and flexible work environments.

Additionally, employers always should include certain positive or expected behaviors in the essential job functions section for ADA and employee relations purposes. This is because courts are sometimes willing to treat these behaviors as essential job functions (even though they are not technically tasks the employee is hired to perform and are quasi "abilities") when identified as essential job functions in a job description. Examples include:

1. "Maintain regular and punctual attendance."
2. "Work overtime as assigned."
3. "Travel overnight as required."
4. "Work cooperatively with others."

5. “Driving long distances” or “Driving during the workday.”
6. “Work in cold/hot/dusty/loud environment.”
7. “Comply with all company policies and procedures.”

It is common for certain essential job functions to be carried out by multiple employees and therefore included in multiple job descriptions. When this occurs, employers should use consistent language to describe those functions and list them in a consistent order in all job descriptions in which they are used. This will avoid any argument the same duties somehow differed from employee to employee.

D. Additional Responsibilities

In this section, employers should list those job functions that are not essential but which are still part of the job (*e.g.*, marginal job functions). These functions should not be identified as “marginal” in the job description, since this incorrectly suggests that there would be no negative consequences if the employee failed to perform those job functions. As a general rule, the same guidelines for drafting essential job functions applies here.

E. Exempt versus Non-Exempt Classification

In this section the job description should indicate whether the position is exempt or non-exempt from the overtime requirements of federal and state wage and hour laws. This should not be in narrative format. Instead, the job description should simply state “Classification: Exempt” or “Classification: Non-Exempt.”

Determining whether a position is exempt or non-exempt is a fact-specific analysis that requires a thorough understanding of the duties of the position and the applicable exemption tests under federal and state wage and hour laws. This analysis should involve the same methods described above for determining an employee’s essential job functions.

Employers must confirm that the essential job functions listed in the job description support and are consistent with the classification decision. This is especially true for positions that are classified as exempt. For example, a position that is classified as exempt under the Administrative exemption should include essential job functions that support a finding that “the primary duty includes the exercise of discretion and independent judgment regarding matters of significance.” *See* 29 C.F.R. § 541.202. It is not sufficient to include as an essential job function a mere recitation of the statutory test for exemption.

F. Disclaimer

In this section, employers should explicitly make various disclaimers to preserve its legal rights. This section should make clear that the job description is not an exhaustive list of all functions that the employee may be required to perform, and the employee may be required to perform additional functions. Additionally, the company should reserve the right to revise the job description at any time and should remind the employee that employment with the company is

at-will, if applicable. Finally, the disclaimer should expressly state that the employee must be able to perform the essential functions of the position satisfactorily and that, if requested, reasonable accommodations may be made to enable employees with disabilities to perform the essential functions of their job, absent undue hardship.

G. Employee Sign Off

A job description should have an employee sign off section for the employee to acknowledge that he/she has reviewed and understands all elements of the job description. For example:

“I have read this job description (or had it read to me) and I fully understand all my job duties and responsibilities. I am able to perform the duties and responsibilities as outlined, with or without reasonable accommodation. I understand that my job duties and responsibilities may change on a temporary or regular basis according to the needs of my location or department and if so I will be required to perform such additional duties and responsibilities. If I have any questions about job duties not specified on this description that I am asked to perform, I should discuss them with my immediate supervisor or a member of the HR staff.”

IV. Best Practices for Preparing a Job Description

There is no single “right” way to prepare a job description. A suggested approach is as follows.

First, employers can seek input from the incumbent employee and his/her manager when drafting a list of essential and additional functions for the job description. This can be done in several ways. The employer could first conduct interviews and then draft the job description based on those interviews. Alternatively, the employer could have the incumbent employee and manager work together to create the first draft.

Once the initial draft is prepared, the job description should be reviewed by Human Resources. Human Resources should confirm that the job description is consistent, both internally and with other job descriptions involving similar or identical duties. Further, Human Resources should review the exemption status against essential duties and against other job descriptions for accuracy.

Another best practice is to conduct an annual review of job descriptions to ensure their continued accuracy. This will avoid a situation where the employee’s job description no longer matches his/her actual job duties, which can create disputes for example when conducting an ADA reasonable accommodation analysis or an FLSA classification analysis. . For the same reason, it makes sense to have employees sign or acknowledge their job descriptions, perhaps as part of an annual review process. It is difficult for an employee to claim his job description is inaccurate when he/she has recently signed his agreement with it.