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Job Descriptions

Who, What, Why . . .

Who does it apply to: Every employer, but especially those subject to discrimination laws or who have employees classified as exempt from overtime.

Why should I have any: If done right, a job description can help avoid discrimination claims, make job listings and interviews a snap, provide the analysis for classifying employees as exempt or non-exempt, and set the standard for performance appraisals.

How does a description help with exemptions from overtime: As you know from my previous pieces on Overtime and Exemptions from Overtime, all employees are eligible for overtime – unless they meet one of certain limited exemptions. Job descriptions can be written with exemptions in mind. Then, when the Department of Labor arrives for an audit, you have the ammunition you will need to defend your decision to exempt those employees, and you will be less likely to have made a costly mistake in your initial determination of exempt status.

How does a description help with interviews and performance appraisals: A job description makes writing an ad for an employee very easy because you've already defined what you want and can easily transcribe it. Descriptions make interviewing more objective by setting the standard by which all applicants are evaluated. Finally, descriptions can be converted to evaluation points to objectively determine whether the employee has measured up to the job you've given them.

How does a description help avoid discrimination claims: As noted above, they can help make interviews and performance appraisals objective, avoiding arguments that you made subjective determinations based on race, sex, or some other protected characteristic. When written to include the essential functions of the position, including physical requirements like lifting, or reading and writing English, they will help avoid claims under the Americans with Disabilities Act (ADA), or discrimination claims based on national origin.

What problems might arise with old or inaccurate descriptions: Job descriptions pulled off the internet from or a form book are

like employee handbooks from the same sources. They do not really reflect your practices or requirements. If the Department of Labor arrives and questions employees about job descriptions and they don't match up, the work in creating them will be for naught. What is more, the position you designated as exempt based on an inaccurate description may be lost, and you could be responsible to the employee for overtime going back two or three years. Worse still, since you did not have the employee clock in or out, you have nothing to defend with when the employee suddenly remembers working 5 hours of overtime every week!

What should be in a job description: Job descriptions need to separately describe both the essential functions of the job and those additional requirements that might be added or occasionally fall within the responsibilities for the position. Essential functions should include not just the basic job duties, but employers must take consideration of what specific characteristics make up those functions. You shouldn't just assume that employees must read and write English. To protect you, even functions of this type need to be in the description in advance. Similarly, to protect against claims under the ADA, descriptions need to explain the physical requirements of the job such as lifting, carrying, and typing. Finally, employers should consider whether the position should be exempt from overtime and under which exception so that the description can be written consistently with the exception requirements.

What should not be in a job description: Employers should be careful not to write job descriptions that suggest discrimination. A policy that all employees read and write English might be alright for the hotel front desk clerk, but not for the housekeeping department and thus create discrimination based on national origin. Requiring a college degree for a job that does not need it might unnecessarily exclude certain protected classes. And, a policy that specifically calls for a protected characteristic such as sex or religion is only appropriate if it is a "bona fide occupational qualification" or "BFOQ."

When are BFOQs appropriate: Sometimes it is appropriate to intentionally discriminate against a protected class in hiring an employee. If you are hiring a new priest for your church, it is probably good that they have the right religion. If you are hiring an attendant for the women's restroom in your gym, it probably is best not to hire a man. That said, it is not appropriate to hire all men because you are a men's clothing company. This is a dangerous area. Courts are very particular about what is allowed under this exception. You should probably consult with a lawyer before characterizing a protected class as a BFOQ.

Common Situations:

Job description after the fact: Often, employers get caught with a Department of Labor audit and try to write job descriptions to justify exemptions after the fact. The DOL is wise to this idea and gives the after-thought job descriptions little weight. The same issue arises with job descriptions written after a discrimination claim is made. The description often is used by the claimant to their advantage to make it look like the employer is trying to cover up to avoid liability.

Some jobs just require a guy: BFOQs are dangerous, but having a requirement that you hire all men for your female-oriented shirtless hunk restaurant without writing down the requirement and explaining it in advance is a recipe for being sued. In a reverse circumstance, a little company called Hooters™ got sued because it wouldn't hire any men for its wait staff. If you are going to have a BFOQ, put it in writing in advance and include an explanation that a jury would believe because that is who will ultimately evaluate it. If a jury wouldn't buy it, you probably shouldn't be doing it.

Criminal background checks all around: If your job description says "no criminal history," it better be needed. Pepsi™ recently discovered that requiring no criminal history or even arrests for all positions can be considered discriminatory. According to the Equal Employment Opportunity Commission, who just took Pepsi™ for a \$3.1 million dollar settlement, not all jobs require a spotless criminal history. I don't necessarily agree with this position, but it makes a point. If you make a job description that unnecessarily has an adverse effect on a particular protected class, even if it isn't facially discriminatory, you could find yourself in a bad spot.

What should I do:

Good: Prepare job descriptions for all exempt employee positions and positions that require strenuous or specialized physical activity to protect against overtime claims and violations of the ADA. Remember to be careful with job descriptions in a union environment, there may be additional requirements under the collective bargaining agreement you should consider.

Better: Prepare job descriptions for all positions and use those job descriptions as the basis for your interviews of prospective employees and as a checklist for performance evaluations of existing employees. Be careful not to use sexist terms in your job descriptions like salesman or waitress.

Best: In addition to the items above, get employee buy-in for job descriptions. Have the employees presently in the position agree with the job description and what is included such that you could show the Department of Labor that the employee agreed to what is required.



Michael Kelsheimer focuses his practice on the employment law needs of Texas businesses and executive employees. He recognizes that the cost and expense of litigation make resolving employment disputes challenging. To help avoid these concerns, he utilizes his experience in and out of the courtroom to prevent or quickly resolve employment disputes through proactive employer planning and timely advice. When a dispute cannot be avoided, Michael relies upon his prior experience as a briefing attorney for the United States District Court and his extensive experience in employment and commercial lawsuits to secure favorable resolutions for his clients.

This guide is one in a series. For more information, or to receive the entire collection contact Michael Kelsheimer by email at mkelsheimer@grayreed.com or by phone at **469.320.6063**