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JOB DESCRIPTIONS: LEGAL ISSUES/RISK MANAGEMENT CHECKLIST

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Applicable Law/Risk Management

- **Not required:** Job descriptions are not required by any law.
- **Maybe Not Desired:** Inaccurate, incomplete or outdated job descriptions are worse than none at all.
 - Often such job descriptions are used in court against the company to defeat summary judgment. Ignoring a good job description, likewise, often defeats summary judgment.
 - If the company does not have the time or resources to do job descriptions right and keep them right or follow them once they are prepared, it may be better served (from a risk management standpoint only) not to prepare them at all.
- **Potential Legal Traps:** Although no law requires an employer to have job descriptions, the following laws should be considered when preparing them.
 - **Americans with Disabilities Act (ADA)/Rehab Act**, 42 U.S.C. § 12101 and 29 U.S.C. § 701 (see Tab A (ADA Overview))
 - Job descriptions expressly setting forth mental/physical requirements pose many traps:
 - If the company voluntarily assumes the responsibility for including these requirements, inadvertent omissions from the list of mental/physical requirements impair opportunities for summary judgment.
 - On the other hand, including requirements that are not job-related and consistent with business necessity, as those terms are defined by law, or failing to make reasonable accommodations in connection with these requirements, as may be required by the ADA/Rehab Act, likewise exposes the company to liability. To minimize exposure here, the focus should be on the goal or purpose of the job (result to be accomplished) -- not on how it customarily is performed.

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Describing a function by how it customarily is performed rather than focusing on the job's purpose increases exposure to ADA liability because how a job customarily is done is subject to modification under the ADA and, in most cases, will not be a lawful basis for making selection decisions. See Tab B (ADA Essential Function Regulation, Interpretive Guidance, Tech. Asst. Manual provisions).

- Hiring supervisors who make selection decisions based on these requirements or how the job customarily is done without considering possible reasonable accommodations will be making costly mistakes.
 - As part of the VEVRAA/Rehab Act AAP obligations, all mental/physical qualifications must be scheduled for review for job-relatedness/business necessity. Many employers satisfy this requirement by reviewing these requirements upon initial inclusion in the job and upon any changes in the duties, environment, etc.
- Essential v. Non-essential Functions: Many consultants recommend expressly identifying "essential" job functions in the job descriptions. We advise against this practice for 4 reasons:
1. It is not realistic to assume that the job description preparer will include all functions that some day the supervisor/manager may contend are essential. Omissions from a list of expressly identified essential functions will be devastating in subsequent litigation.
 2. Under the criteria used to determine what functions are essential, what is not essential one day can become essential the next day (e.g., changes in staffing levels, special projects, etc. can turn a non-essential function into an essential one). It is not realistic to expect supervisor/managers to revise the job description each time this occurs.
 3. As a practical matter, the company can get the same legal benefit sought to be gained from including a list of expressly identified "Essential Functions" simply by making sure that the job description includes all qualifications and duties that might be determinative in deciding to hire or retain an individual without expressly designating them as such. See Two Basic Principles set forth below.

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4. Labeling some functions "essential" and others "non-essential" can mislead employees. If the company nonetheless decides to identify essential functions, we recommend using the guidance at Tabs A and B (ADA Overview, pp. 5-7, 18-19; ADA Regulations, 29 C.F.R. 1630.2(n); ADA TAM II-13 through 21) to ensure that the preparer understands the basic principles.

□ **Fair Labor Standards Act (FLSA), 29 U.S.C. § 201**

- Under the FLSA, all jobs must be classified as either exempt or non-exempt.
- Under the FLSA, exempt employees are not entitled to overtime. Consequently, FLSA investigations and audits tend to scrutinize the employer's classification of exempt jobs. Erroneous classification of a job as exempt when it, in fact, does not meet the exempt requirements can be costly.
- To qualify for exempt status, the job must come within one of four exemptions: Executive, Administrative, Professional or Outside Sales. Each has its own requirements.
- During FLSA complaint investigations and compliance audits, job descriptions are reviewed to evaluate the employer's classification of positions as exempt or non-exempt. Well-drafted job descriptions for positions which the employer contends are exempt should contain the information necessary to establish that the position has been correctly classified.
- Checklists of the requirements for the Executive, Administrative and Professional exemptions and applicable regulations are attached at Tab C. These checklists should be used to ensure that the job descriptions for the exempt positions contain the appropriate information.

□ **Equal Pay Act (EPA), 29 U.S.C. § 206(d)**

Prohibits paying employees of one sex at a rate less than it pays employees of the opposite sex at the same establishment for equal work on jobs performed under similar working conditions that require equal skill, effort and responsibility unless the pay differential is due to a seniority or merit system, quantity or quality of production or a differential based on a factor other than sex.

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- Consider any emerging EPA enforcement trends. See also OFCCP/Dubray issues below.
- **Title VII/E.O. 11246/Age Discrimination in Employment Act**, 42 U.S.C. 2000e-1 (Title VII) and 29 U.S.C. § 621 (ADEA)
 - Prohibits discrimination on the basis of race, color, religion, national origin, sex.
 - Use age, gender and disability neutral terms (e.g., a disability neutral term is "communicate" as opposed to "speak," etc.)
 - Consider emerging OFCCP/Dubray Issues. See Tab G (OFCCP Compensation Analysis Information).
- **Occupational Safety and Health Act (OSHA)**, 29 U.S.C. § 651, imposes regulatory standards on many workplace activities (e.g., fall protection, personal protective equipment, confined spaces, lock-out/tag-out). Consideration should be given to whether, and if so to what extent, job descriptions for positions impacted by these standards should be crafted with the standards in mind.
- **Two basic principles** to follow in preparing job descriptions:
 - **No. 1:** Identify the purposes for which the job descriptions will be used and ensure that the information necessary to serve those purposes is adequately addressed.

Examples of common job description purposes and corresponding focus or key elements include:

<u>Purpose</u>	□ <u>Focus/Key Elements</u>
□ Hiring (Internal/External) Process/Job Interviewing	□ Minimum/preferred qualifications -- Results to Be Accomplished -- Duties to Accomplish Results

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- Compensation/Job Value/Pay Equity
 - Health/Physical Ability Screening
 - ADA Compliance
 - Workforce (Re)structuring
 - Career Development (Progression/Orientation/Training)
 - FLSA Compliance
 - Performance Evaluation
 - Determined by the features of the specific compensation analyses used by the company
 - Required health/fitness qualifications; duties requiring these qualifications
 - Inclusion of all duties that could be considered essential without designating them as "essential"
 - Business needs (work to be done) -- span of control -- matrix relationships
 - Qualifications, duties requiring training, consideration of upstream/downstream jobs
 - Exempt worker classification requirements
 - Bears appropriate relationship with appraisal accountabilities, expectations, etc.
- **No. 2:** If the failure to possess a particular qualification or the inability to perform a particular duty would result in not hiring the individual or in terminating his/her employment, then this qualification or duty should be listed on the job description.
- **Essential Contents:**
- Catch-all provision: "Any other duties and/or tasks that may be assigned."
 - Disclaimer: "This job description is intended to provide general information about the position. It is not an employment contract. As with all positions, the responsibilities and duties of this position may change. The company, in its discretion, may alter this job description at any time with or without notice."

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Note: In South Carolina, failure to include this disclaimer could lead to breach of implied contract claims.

- **Avoiding Disaster:** Assign responsibility for job description preparation and update, and include a system for ensuring periodic job description review and update (e.g., tied to hiring approval, salary review, place a sundown provision on them, assign this responsibility as an accountability on which supervisors/managers are evaluated, etc.)

Things to Consider Including/Excluding

- Job description content should be determined largely by the purpose for which it will be used. Job description model forms/how-to guides often recommend including a variety of information. Common items are listed below. The key, however, is to carefully consider whether these categories serve the identified purposes for the job description. Unless a compelling reason exists to include the information, we recommend omitting it.
 - **Qualifications** - Required and Preferred (including education, licenses/certifications, experience, skills).
 - **Description of Work Environment/Equipment** (e.g., indoor, outdoor, specific location, cold/hot, etc.).
 - **Equipment and Supplies** may be appropriate where completing maintenance and operational requirements, maintaining supplies/inventories and conserving resources are important parts of the job.
 - **Confidentiality and Legal Requirements** may be appropriate in jobs with duties related to the use of confidential, proprietary or trade secret information or those likely to involve legal or regulatory compliance.
 - **Education** may be appropriate where updating professional and technical knowledge and providing information and learning opportunities to others is an important part of the job.
 - **Management** [e.g., job description/performance appraisal preparation/review and update; affirmative action/EEO duties; employee coaching, counseling, development, training; cost control/financial objectives]

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- **Problem Solving** may be appropriate where collecting and analyzing information, evaluating optional courses of action and resolving problems is an important part of the job.
- **Quality Service** may be appropriate where special emphasis is placed on quality service.
- **Safety/Regulatory Compliance** [e.g., compliance with and promoting company and legal safety/regulatory requirements.]
- **Raising the Bar.** Depending on corporate culture (including ongoing or anticipated restructurings using staffing criteria such as flexibility, dependability, promotability, leadership, etc.), the following types of items may be appropriate:
 - welcoming new and different work requirements
 - exploring new opportunities to add value
 - helping others accomplish job results as needed
 - taking ownership for completing new and different projects enhancing job knowledge
- **Intangibles** such as attendance, punctuality, diligence, etc.

Note: Some courts require that for an employer to contend that attendance and punctuality are essential functions of the job, they should be mentioned in applicable company documents, such as attendance policies and/or job descriptions. We believe that, in North Carolina and South Carolina, it is sufficient if those topics are addressed in handbooks, policies, etc.

- **Good general guide for determining which duties to include.** Include duties that are:
 - the reason the job was created;
 - regularly performed; and
 - a significant percentage of the work performed.
- Recognize that some jobs escape definition or change frequently; draft the substance of the job description accordingly.
- Date of Preparation; signature of preparer; signature of incumbent (?).

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Miscellaneous Drafting Tips

1. Identify both **result** to be accomplished and **duties** to be performed to accomplish result. This approach tells employees why the work is important and focuses them on results, not just the motions. See Tab D (Excerpt from More Results-Oriented Job Descriptions).
2. Use specific/descriptive terms rather than vague ones (i.e., “contacts vendors and coordinates repairs” versus “responsible for repairs”). Note: These phrases used together could set forth the Result (responsible for repairs) and the Duties (contacts vendors and coordinates repairs).
3. Avoid lengthy narratives; organize the job description by broader functions subdivided into more specific activities.
4. Edit for "wordiness" (i.e., the fewer the words the better).

Data Collection

- Identify the responsibilities of the job to be described. Methods include:
 - Customizing generic job descriptions through job analyses, interviews (or written questionnaire) with supervisors, incumbents, customers, etc. See Tab E (sample questionnaire).
 - Appropriate job analyses depend on the purposes to be served (see e.g., E.O. 11246 test validation job analyses, 41 C.F.R. 60-3.14(c)(2), -3.15(c)(3) (Tab H); ADA essential job function analyses, TAM II-19 (Tab B)). In particular, setting equitable pay rates depends on appropriate job evaluation methodologies.
- Regardless of method chosen, information should be obtained and reviewed from the following sources:
 - Employees and supervisors as to the actual practice
 - Existing/Prior Job Descriptions
 - Job Postings/Personnel Requisitions
 - Performance Evaluation Accountabilities/Expectations
 - Corporate/Department Staffing Studies (e.g., restructuring-related documentation)
 - Corporate/Department Mission Statements

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- Regulatory Requirements
- Job description content should be cross checked against:
 - Line of progression jobs, feeder groups, pay bands (salary range), etc.
 - Performance appraisal expectations/accountabilities.