

Questions—And Answers

Conducting Thorough Job Analyses and Drafting Lawful Job Descriptions

Kevin J. Smith

In today's world of ever increasing scrutiny of management's employment decisions, thorough accurate employee job descriptions are pivotal to establishing whether an employee can perform some or all of the functions of his or her job. The job description must be as accurate as possible throughout the term of the employee's employment; if an employee's job responsibilities progress or change, the job description must reflect this. Imprecise job descriptions that fail to accurately describe the employee's duties and responsibilities could subject employers to significant legal risks. This column addresses a number of items concerning the preparation of job descriptions.

WHAT IS THE FIRST STEP IN PREPARING A JOB DESCRIPTION?

Employers should conduct a job analysis before even preparing the job description. A job analysis is the method of gathering and analyzing information concerning all aspects of an employee's position. This expedites the preparation of an accurate job description, which should summarize the duties, tasks, and responsibilities of each job.¹ Furthermore, a job analysis is an effective method to determine essential functions² of a job as required by the Americans with Disabilities Act (ADA), as well as exemption-status determinations under the Fair Labor Standards Act (FLSA).

The focus of the job analysis should be on the objective of the job and the actual job functions that achieve that objective, in light of how frequently a function is executed, the bulk of time dedicated to that function, and the ramifications if the function is not executed. It is crucial that the outcome of the job analysis highlight only what must be accomplished, as opposed to how it habitually is conducted.³

A job analysis should also include a study of the work behaviors that are crucial to accomplishment of the job and, if the behavior yields a work product, an analysis of the work product as well. If work behaviors are not measurable, the job analysis should record and scrutinize those aspects of the behaviors that can be measured and the resulting work products.⁴

Even though it is a time-consuming process for both management and employees, it is important to properly obtain the fundamental information to conclude job content, as well as essential and nonessential functions; requisite insight, skills, intelligence, expertise, and experience necessary to perform the job; and working conditions of the employee.⁵

WHAT IS THE PROCESS FOR PREPARING AN ACCURATE JOB ANALYSIS?

A job analysis should be a "neutral" process of determining the job obligations of current employees as well as a study of roles, functions, and duties that need to be carried out by whoever is chosen for the job. Prior to implementation of a job analysis, upper-level managers, executives, and owners need to educate their managers and employees of the need for accuracy and impartiality throughout the process. Employees should be contributing to this process from the formative planning stages to the concluding stages. It is crucial that the employees have a sense of ownership in the job analysis.⁶

Nonetheless, employees engaging in the job analysis may inadvertently mischaracterize their daily job tasks or responsibilities for a variety of reasons. On the opposite side, a manager may differ in how an employee characterizes his or her position, function, and tasks. Managers may also be concerned about potential findings from the analysis or its ultimate use, fearing that either could affect their management units or departments.⁷ In order to avoid these potential pitfalls and have a constructive process, it is imperative to have the support and cooperation of employees and managers throughout the job analysis.

HOW DOES A JOB ANALYSIS HELP DEFEND AGAINST RISK OF LEGAL CLAIMS?

A job analysis could be used as evidence for compliance with various employment laws such as demonstrating a position's essential functions of a job for purposes of compliance with the ADA or as good faith in challenged FLSA-exemption determinations, which may eradicate or lessen liability. A job analysis could also serve as the foundation for preparing consistent and complete job descriptions used in compensation determinations, training needs and programs, performance and expectation programs, and affirmative-action planning. Finally, the analysis could be used as a complete

assessment of staffing design and review of working conditions of employees whose positions are being analyzed.⁸

HOW DOES AN EMPLOYER DRAFT A USEFUL AND EFFECTIVE JOB DESCRIPTION?

Once data have been accumulated through a job analysis, the employer can start the next step of drafting a job description. The job description should (1) state the title and rank of the position within the organization, such as executive/upper-level management, administrative/secretarial, manual, and the like; (2) state important/essential job functions, in the following order: an operative verb, the duty, and the aspired event (e.g., "Records office conservation and restoration to assure business longevity"); (3) enumerate job requirements, notably education and experience requisites, but also mathematical acumen, eagerness to learn, interpersonal skills, ability to work in groups, and so on; (4) list likely physical exertions of the position (e.g., "must be fit to carry 50 pounds regularly in a nine-hour allotment" and supplement it with a notion that reasonable accommodations will be made for the disabled employee, if necessary); and (5) delineate nonessential tasks or responsibilities that can be executed intermittently or would not affect the fundamental reason for the job. Note that these tasks must be differentiated from essential job functions and certainly not be taken under consideration for hiring decisions under the ADA.

Essential job functions are the duties and tasks that the employee is expected to perform in the position. An essential job function concerns the rudimentary tasks that an employee must be able to execute, with or without reasonable accommodation, and it bears more than a marginal relationship to the job at issue. Moreover, if the employer ends up in litigation, the essential-function inquiry is not conducted as of an individual's hire date, because the ADA does not wish to restrict the employer's ability to establish or change the content, nature, or functions of a job. Rather, a court may inquire whether a job function was essential at the time it was imposed on an employee. Courts may consider any employer-written description executed prior to advertising or interviewing job applicants as evidence of the essential functions of the job.⁹

In instances in which employers have challenged an employee's claim that he or she can carry out the essential functions of a job, some courts have required that employers present evidence establishing those functions.¹⁰ Factors that the courts will consider in establishing whether a job function is essential include¹¹:

- The employer's judgment
- Written job descriptions
- The amount of time spent on the job performing the function

- The consequences of not requiring the plaintiff to perform the function
- Mention of the function in any collective-bargaining agreement
- The work experience of past employees in the job
- The work experience of current employees in similar jobs
- The consequences of failing to require the employee to perform the function

Additionally, the Equal Employment Opportunity Commission (EEOC) regulations state the following as a nonexhaustive list of explanations of why a function may be essential¹²:

1. The job exists to perform that specific function.
2. Only a finite number of employees are available to perform this function ("an employer has only a few employees, the ability of each to perform a multitude of functions may be critical").¹³
3. The function is highly specialized, and the incumbent is hired for his or her expertise or ability to perform the function.

WHAT IS THE LEGAL SIGNIFICANCE OF A JOB DESCRIPTION?

An employee's job description (and job analysis underlying it) could have significant legal implications for an employer, and great care should be taken to prepare appropriate descriptions. Indeed, after the ADA was enacted in 1990, it greatly shaped the need for and the importance of job analyses and job descriptions.¹⁴ To the extent that the job description does not accurately describe the essential functions of an employee's job, the employer may, among other things, expose itself to legal liability for improper decision making related to accommodations for employees who may be disabled. Similarly, under the FLSA, job descriptions are crucial to determining whether an employee's position falls within any of the FLSA exemptions.

WHAT ARE BEST PRACTICES AN EMPLOYER SHOULD ADHERE TO?

In order to provide your company with the best chance of being compliant with the ADA, FLSA, and other similar state statutes, creating accurate and thorough job descriptions is a good start. Even if job descriptions already exist, job responsibilities often fluctuate over time and an antiquated description could be a detriment to an enterprise.

Finally, to make sure your company's job descriptions are as effective as possible, consider these additional steps:

1. Make sure that the effective date appears on every job description. If the job description was modernized, make sure that the revision date is on the job description.

2. Prior to advertising any vacant positions, ensure that the job description is up to date.
3. Routinely review job descriptions (and conduct job analyses) to ensure that a job description reflects what the employee actually does and sets out the job's essential functions.

NOTES

1. How to conduct job analysis, description and evaluation, 1995 WL 17809646.
2. Using job analysis to determine the essential functions of a job. 1 Emp. Discrim. Coord. Analysis of Federal Law § 6:56.
3. Job analysis to determine essential functions, 1 Guide to Employee Medical Leave § 5:30.
4. 41 C.F.R. § 60–3.14.
5. Id., see note 1.
6. Id.
7. Id.
8. Id.
9. 42 U.S.C.A. § 12111(8).
10. Cox v. Wal-Mart Stores Inc., 2011 WL 2632086 (9th Cir. 2011).
11. Price v. City of New York, 2008 WL 399757 (2d Cir. 2008).
12. 29 C.F.R. § 1630.2(n). The examples are from interpretative guidance published as an appendix to 29 C.F.R. Pt. 1630 and from the EEOC Technical Assistance Manual on the Employment Provisions (Title I) of the Americans with Disabilities Act.
13. Legal Guide to Human Resources § 2:9.
14. See ADA Section 101, Definitions (8).

Kevin J. Smith is special counsel at Sheppard, Mullin, Richter & Hampton LLP in the firm's Labor and Employment group. He has extensive experience in employment litigation, including trials and appeals in federal and state courts, and conducting arbitrations and administrative hearings. His employment law practice also includes counseling Fortune 500 companies in all types of employment and labor law matters. He may be contacted at kjsmith@sheppardmullin.com.