



Job Descriptions That Withstand Scrutiny Under Legal Fire

By Wesley Eby Johnson

Even the most well written job description cannot guarantee that an employer will not find itself defending its position in the courtroom, an administrative law hearing or in a federal or state level investigation such as one initiated by a complaint to the Equal Employment Opportunity Commission (“EEOC”) or an equa. However, some job descriptions will certainly help the employer’ position better than others. The majority of the legal issues involving job descriptions stem mainly from two particular scenarios: the need for the employer to accurately communicate their expectations and the generally unaccepted attempt to use the job description to "describe away" particular rights from an employee. Therefore, changing a job description "after the fact" is not a great legal strategy nor is creating a job description that does not accurately describe the circumstances as they really exist. Understanding problem areas is key to the timely and appropriate drafting of job descriptions that are better suited to withstand legal challenges.

(1) Americans With Disabilities Act ("ADA") - Saddling a Camel or Removing its Hump?

One of the most common situations in which an employee's job description is key to a legal analysis is in jobs implicating the Americans With Disabilities Act ("ADA").¹ Why? The Americans With Disabilities Amendments Act of 2009 has resulted in an increase in the number of individuals who will be found eligible under the ADA as a person with a disability. The importance of a well written job description that includes the real "essential elements" of a job is crucial to the "reasonable accommodation" analysis. The essential functions are those functions that the individual who holds the position must be able to perform unaided or with the assistance of a reasonable accommodation.² The determination of which functions are essential may be critical to the determination of whether or not the individual with a disability is, in fact, a "qualified individual." Specifically, the regulatory definition lists a written job description prepared in advance as providing evidence of whether a particular job function is "essential."³

¹ 42 U.S.C. § 12101, et seq.

² Title 29, Code of Federal Regulations, Part 1630; Appendix to Part 1630- Interpretive Guidance

³ 29 CFR § 1630.2(n) *Essential functions*—(1) *In general*. The term *essential functions* means the fundamental job duties of the employment position the individual with a disability holds or desires. The term “essential functions” does not include the marginal functions of the position. (2) A job function may be considered essential for any of several reasons, including but not limited to the following: (i) The function may be essential because the reason the

Courts have distinguished between restructuring a particular job by altering or eliminating some of its marginal functions versus completely transforming the position into a different position by eliminating functions that are essential to the nature of the job as it exists.⁴ The difference between the accommodation that is *required* by the ADA and the transformation that is not required was analogized ten years ago by the Eleventh Circuit as the difference between "saddling a camel and removing its hump."⁵

The written job description that is in existence before a job is even advertised or applicants are even interviewed will typically be afforded great weight in a court inquiry. Although the Appendix to the federal regulations states that greater weight will not be granted to any particular types of evidence included on the list and the ADA does not require employers to develop or maintain job descriptions, written job descriptions prepared before advertising or interviewing applicants for the job are specifically listed as "relevant evidence to be considered in determining whether a particular function is essential." Ultimately, determining whether a particular job duty is an essential function involves a factual inquiry to be conducted on a case by case basis.⁶ An accommodation is considered reasonable and necessary in an ADA analysis only if it enables the employee to perform the essential functions of the job. Eliminating the guesswork from an analysis regarding whether a particular function is or is not essential to a job can end a legal inquiry early in the litigation.

In *Lucas W.W. v. Grainger*, the essential functions of the position at issue were actually described on the Job Description Form that the employer Grainger sent to the employee's physician Dr. Clare. The Job Description Form stated that the position's "essential job functions" include sorting items from a cart and placing them on racks as well as "occasionally"--meaning from 1 to 3 hours per shift--lifting or carrying items that weigh up to 40 to 50 pounds, as well as squatting or kneeling, and "frequently"--meaning from 4 to 6 hours per shift--lifting or carrying items that weigh up to 10 to 25 pounds. Dr. Clare struck squatting, kneeling, lifting, and carrying from the list of job functions or activities on the Job Description Form because he felt that the employee Lucas' disability (a back impairment) precluded him

position exists is to perform that function; (ii) The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed; and/or (iii) The function may be highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function. (3) Evidence of whether a particular function is essential includes, but is not limited to: (i) The employer's judgment as to which functions are essential; (ii) Written job descriptions prepared before advertising or interviewing applicants for the job; (iii) The amount of time spent on the job performing the function; (iv) The consequences of not requiring the incumbent to perform the function; (v) The terms of a collective bargaining agreement; (vi) The work experience of past incumbents in the job; and/or (vii) The current work experience of incumbents in similar jobs.

⁴ See *Wells v. Shalala*, 228 F.3d 1137, 1145 (10th Cir. 2000); *Donahue v. Consolidated Rail Corp.*, 224 F.3d 226, 232 (3d Cir. 2000); *Lloyd v. Hardin County*, 207 F.3d 1080, 1084 (8th Cir. 2000); *Robertson v. Neuromedical Ctr.*, 161 F.3d 292, 295-96 (5th Cir. 1998, cert. den.); *Gilbert v. Frank*, 949 F.2d 637, 642 (2d Cir. 1991).

⁵ *Lucas v. W.W. Grainger Inc.*, 257 F.3d 1249, 1260 (11th Cir. 2001)

⁶ *Lucas v. W.W. Grainger Inc.*, 257 F.3d 1249, 1258 (11th Cir. 2001)

from doing these things. This type of clarity in a job description can assist the court in finding for the employer on summary judgment as the 11th Circuit was able to do in *Grainger*.⁷

More recently, the First Circuit made a similar analysis, but offered up a sensible gift to the employer in the process by explaining that a thorough job description cannot "be properly read as an exhaustive list of all the tasks required of an employee in that role."⁸ In *Jones*, a 2012 case out of the First Circuit, the employee was offered a Store Manager position, but argued that her inability to perform numerous manual functions such as lifting, bending, stooping, and squatting due to a disabling knee injury required accommodation in accordance with the ADA. The Court focused on the fact that these types of activities were essential to the role of Store Manager despite the fact that the job description for the position was somewhat abstract and did not specifically list "lifting, bending, stooping, and squatting" instead providing twenty-nine distinct primary responsibilities. Of these, were two that the Court felt outlined the contours of the routine physical tasks that were expected of the position: (1) improving and maintaining store condition, maintenance, and appearance for the safety, health and well-being of customers and employees as well as (2) implementing corporate plans and merchandising guidelines, to include properly using endstands, promotional space, and display tables.⁹ The Court held that the job description could not be properly read as an exhaustive list of all the tasks required of an employee in that role and, citing a disclaimer at the end of the job description, establishes that the job is, "in indispensable part, an on-your-feet post requiring routine physical activity." The disclaimer read: "This job description is to be used as a guide for accomplishing [c]ompany and department objectives and only covers the primary functions and responsibilities of the position. It is in no way to be construed as an all encompassing list of duties." Deposition testimony from the employee as well as other store managers supported the fact that physical activity was essential to handling the responsibilities of store manager.¹⁰

In the manufacturing context, a job might be physically dangerous as well as demanding. In a 2012 case from the Northern Dist. of Alabama, the employee's job description appropriately defined primary duties as being dangerous, thereby supporting the employer's contention that the employee's disability, requiring methadone, could not be accommodated because of safety issues.¹¹

⁷ The *Grainger* case involved other issues as well; however, for purposes of this paper, only the issue relevant to the job description in inquiry is discussed.

⁸ *Jones v. Walgreen Co.*, 679 F.3d 9 (1st Cir. 2012)

⁹ *Id.* at 14-15.

¹⁰ *Id.* at 16

¹¹ *Morris v. Precoat Metals*, 2012 U.S. Dist. LEXIS 139139 (N.D. Ala. 2012)

Regular Attendance - "Just how essential is showing up for work on a predictable basis?"¹²

More and more employees who suffer from disabilities that prevent them from regularly attending at work are requesting accommodations in the form of flexible work schedules and relaxed leave policies. This creates obvious and immediate problems in many work settings where an employee's physical presence at a specific time is essential. Courts faced with this situation have routinely supported the employer when the facts support the need for the physical presence of the employee at the work site at a scheduled time: "In addition to possessing the skills necessary to perform the job in question, an employee must be willing and able to demonstrate these skills by coming to work on a regular basis."¹³ However, the prudent employer should not automatically assume that physical presence is always necessary. There are distinct differences between some jobs, such as teaching, and others that might allow for a more flexible work schedule. "While we are sympathetic to [the employee's] health problems, teaching does not allow for the same accommodations as other professions, where sometimes employees may be allowed or be able to work from home or change their hours....[i]nstead, teaching requires that employees be present in the classroom at set times and on a daily basis in order to provide consistency and continuity for pupils."¹⁴ The job description has been held to be summary judgment evidence that punctuality and regular attendance are essential functions of a particular job.¹⁵

Reallocation of Specialized Job Duties

Many employees perform unique or specialized functions that cannot be performed by just any other employee. The fact that an employee holds a particular certification required for a particular function is always important to an analysis of whether regular attendance is an essential element of a particular job. Although not required, specifically noting on the job description that delegation of particular job duties is not possible can be an effective way to alleviate the need for future analysis regarding whether reallocation of certain job duties is reasonable.

A 2011 Georgia case, *Salser v. Clarke County Sch. District*, is a prime example. Salser, a Speech Language Pathologist ("SLP") was diagnosed with rheumatoid arthritis and a compromised immune system.¹⁶ She had difficulty walking and during two-three days of each

¹² *Samper v. Providence St. Vincent Medical Center*, 675 F.3d 1233 (9th Cir. 2012)

¹³ *Tyndall v. Nat'l Educ. Centers*, 31 F.3d 209, 213 (4th Cir. 1994) But see *Hansen v. Jerome Joint Sch. Dist. #261*, 2012 US Dist. LEXIS 64538, *27 (Dist. Id. 2012) "While the Court agrees with [the school district's] assertion that, in general, a teacher's regular attendance is a job requirement, [the school district] has not provided the Court with any information concerning its attendance policy." "In contrast, the court in *Samper* had at its disposal the written job description requiring 'strict adherence' to the attendance policy [and other related documents]."

¹⁴ *Jordan v. Sch.. Dist. of Philadelphia*, 2012 U.S. Dist. LEXIS 74034, *19 (E.D. Pa. 2012)

¹⁵ *Samper v. Providence St. Vincent Medical Center*, 2012 US App LEXIS 7278, *1238 (9th Cir. 2012)

¹⁶ *Salser v. Clarke County Sch. Dist.*, 802 F.Supp.2d 1339 (M.D. Ga. 2011)

work week had difficulty performing any day-to-day activities whatsoever. In her ADA case against the District, Salser's Job Description stated essential functions of an SLP that included: communicating with building principals and the SLP Coordinator in order to ensure program efficacy; maintaining accurate, complete and correct records as required by law, district policy, and administrative regulation; and attending staff meetings. The Job Description also required the SLP to develop therapy schedules which were to be disseminated to classroom teachers. Salser argued that a reasonable accommodation would have been to reallocate her therapy and evaluation responsibilities as well as record-keeping responsibilities. However, in finding for the employer school district, the District Court in the Middle District of Georgia distinguished between a job description detailing job functions that could be redistributed versus highly specialized duties that could only be performed by a uniquely certified or credentialed individual. "Importantly, evaluation and therapy services cannot be delegated to anyone other than a certified or licensed SLP."¹⁷

Ability to Read

Is an ability to read and/or write needed for a particular position? In *EEOC v. Randstad North American*, 685 F.3d 443 (4th Cir. 2012), the company maintained an *unwritten* policy against hiring people who cannot read because virtually all of the assignments required reading and/or writing skills. The employee at issue, who sought a warehouse position, had an intellectual disability and could not read or write. Although the court's decision in the cited case relates primarily to a statute of limitations issue, its primary importance in a job description analysis discussion is that the district court ultimately enforced subpoenas for information regarding all non-administrative positions made by the company's offices during a five year period including job descriptions and copies of applications for each position. Employers are cautioned that if literacy is reasonably an essential element of a particular position within the job setting, such a requirement should be set forth within the body of the job description itself in the event that such a requirement is challenged. On the opposite side of that analysis, positions that do not reasonably require reading and writing as an essential element should not include such requirements in the job description.

¹⁷ *Id.* at 1344 . In addition to the job description, it was important to the court's decision (as well as to any independent analysis that a school might make) that the fact that any therapy sessions missed by students receiving special education services had to be "made up" to remain in compliance with federal special education laws was another relevant factor in the court's decision. *Id.* at 1344. Additionally, the school district Defendant presented testimony that speech therapy must be consistent in order to be effective as well as testimony that it is important for strict adherence to a speech therapy schedule. But see *McDaniel v. Piedmont Indep. Sch. Dist. No. 22*, 2012 US Dist. LEXIS 51069, *11 (W.D. Ok 2012) in which the court held that the actual lack of specific information regarding a job description did not support a requested accommodation for a change in worksite.

Good Verbal Communication Skills

Depending on the job within the work setting, good verbal communication skills may be absolutely essential to a particular position. On the other hand, verbal communication is not essential to every position. In some cases, a careful analysis in advance can prevent legal complications later. In *EEOC v. The Picture People*, 684 F.3d 981 (10th Cir. 2012), the employee at issue was congenitally and profoundly deaf and communicated by writing notes, gesturing, pointing and miming. She could type, text and use body language and also used basic American Sign Language that, according to the facts presented in the case, most people can understand. Her communication limitations were that she could not read lips or speak except for a few words and the written communication skills that she did have were poor. She was hired by a photography company to be a "performer" with four designated areas of responsibility: (1) customer intake, (2) sales, (3) portrait photography, and (4) laboratory duties. After her hire, she requested that the company provide her with an ASL sign language interpreter as an accommodation.

In a detailed analysis regarding whether this request was reasonable, and determining that it was not, the 10th Circuit distinguished this particular situation between others involving deaf or hard of hearing employees who needed interpreters at specific (and isolated) work-related events such as staff meetings and training sessions.¹⁸ The 10th Circuit distinguished a photographer position from a position involving more physical job duties that did not involve constant customer communication such as a position sorting, scanning and stacking packages.¹⁹ The need for an interpreter during a mandatory training session or staff meeting versus the need to restructure an entire job that requires particular communication skills is a key difference in this reasonable accommodation analysis. Always consider the distinct job requirements of the position at issue. Every position does not mandate that an employee communicate verbally and regularly with others.

Recommendations:

_____ Remove cookie cutter language that is not accurate or irrelevant in order to lend greater validity to the job description.

_____ Do not overlook essential elements of a job that might otherwise be "assumed."

¹⁸ *Picture People*, *supra*, at 987, citing *EEOC v. UPS Supply Chain Solutions*, 620 F.3d 1103, 1111-13 (9th Cir. 2010); *EEOC v. Federal Express Corp.*, 513 F.3d 360, 365, 373-74 (4th Cir. 2008, cert. den.); *EEOC v. Wal-Mart Stores*, 187 F.3d 1241, 1243-44 (10th Cir. 1999)

¹⁹ *EEOC v. Federal Express Corp.*, 513 F.3d 360, 365 (4th Cir. 2008, cert. den.) See also *EEOC v. UPS Supply Chain Solutions*, 620 F.3d 1103, 1111-13 (9th Cir. 2010); *EEOC v. Wal-Mart Stores*, 187 F.3d 1241, 1243-44 (10th Cir. 1999)

_____ Consider including disclaimer language at the end of the job description.

(2) Family Medical Leave Act ("FMLA")

The Family and Medical Leave Act (FMLA) is another area in which the "essential functions" of a job are particularly relevant. The FMLA entitles eligible employees with up to 12 weeks of unpaid, job-protected leave per year because of the birth of a child or because of a "serious health condition" that makes the employee unable to perform the functions of his or her position.²⁰ Following such leave, the employee is entitled to return to his or her position or its equivalent unless he or she is unable to perform an essential function of the position because of a physical or mental condition, including the continuation of a serious health condition.²¹ Federal FMLA regulations define "essential function" as a fundamental job dut[y] of the employment position as evidenced by the employer's judgment, written job descriptions, the amount of time spent performing the function, and the consequences of allowing the plaintiff not to perform the function.²²

Fitness For Duty Certification

Information set forth in the job description is important to a court's analysis of whether an employee is able to return to his or her position or its equivalent. Nevertheless, there is no federal mandate that an employer provide the employee with a list of essential job functions. Instead, the FMLA regulations clarify that an employer *may* provide the employee with a list of essential job duties together with the eligibility notice advising the employee of the necessity for a fitness for duty certification and that the employer *may* require the health care provider to certify that the employee can perform these duties.²³ Despite the fact that a list of essential job functions or a job description containing the essential job functions is not mandatory, the employer is "strongly encouraged" to provide a list of essential functions of the job at the same time that it requests medical certification. The fact that such a certificate will be required upon an employee's return from FMLA leave should also be provided in the FMLA Designation Notice prior to the employee's taking FMLA leave.

A recent 11th Circuit case is a perfect example of why employers should heed this advice. In *Grace v. Adtran, Inc.*, 470 Fed. Appx. 812 (11th Cir. 2012), the employer was able to establish through the job description that an employee was required to lift up to 35 pounds. After taking FMLA leave for childbirth, the employee/plaintiff was subject to a 10 pound lifting restriction and was told that no available jobs existed that would accommodate this requirement. Because

²⁰ 29 USC § 2612(a)(1)(A)

²¹ 29 CFR §§ 825.214, 825.216(c)

²² *Grace v. Adtran, Inc.*, 470 Fed. Appx. 812, 815-816 (11th Cir. 2012) aff'd citing 29 CFR § 1630.2(n)(1), (3)

²³ Family Medical Leave Act of 1993; 29 C.F.R. §§ 825.214; 825.216(c); 825.312; 1630.2(n)(1), (3)

the record itself was able to establish the fact that a lifting requirement existed with respect to the job at issue, the court granted summary judgment for the employer in the employee's FMLA lawsuit.

Serious Health Condition - Eligibility for Leave

Whether a condition qualifies as a "serious health condition" is also predicated on whether the employee can perform the essential functions of his or her job. Therefore, when attendance at work is impossible due to the health condition at issue, it typically is sufficient for the employee to qualify for FMLA leave. In an interesting 5th Circuit case, the employee, a flight crew equipment processor, had chronic laryngitis for which she was prescribed voice rest and a recommendation to stay out of contact with chemicals because of their tendency to cause respiratory tract disorders in some individuals.²⁴ The court held that the employee did not have a serious health condition for purposes of FMLA reasoning that she was able to perform the essential functions of her job (which did not require talking) at all times and that she had, in fact, worked for ten months with the same condition.²⁵ Verbal communication skills may be an obvious necessity, or not, on a job description for certain types of employment; however, other employees may be able to perform their responsibilities despite certain physical limitations.

Termination During Leave

The FMLA makes it unlawful for an employer to interfere with, restrain, or deny the exercise of the rights provided by the FMLA or to discriminate against any individual for opposing such practice.²⁶ Additionally, many states have statutes that prohibit termination of an employee who is absent for work-related injuries or who file or "might file" a worker's compensation claim.²⁷ A recent 10th Circuit opinion addresses the issue of employees who sustain job related injuries by virtue of their prohibited violation of company safety policies.²⁸ In finding for the Defendant employer on the issue of whether a legitimate reason existed for the Plaintiff employee's termination in order to contest his prima facie FMLA retaliation case, the *Peterson* court took note of Plaintiff's job description.²⁹ It stated in capital letters, "FAILURE TO PERFORM MATERIAL HANDLING DUTIES IN A SAFE, EFFICIENT MANNER COULD SUBJECT THE EMPLOYEE TO LAYOFF AND POSSIBLE TERMINATION."³⁰

²⁴ *Ford-Evans v. United Space Alliance, LLC*, 329 Fed. Appx. 519 (5th Cir. 2009).

²⁵ *Id.*

²⁶ 29 USC § 2612(a)

²⁷ See *Peterson v. Exide Technologies*, 2012 US App. LEXIS 7139, *6 (10th Cir. 2012)

²⁸ *Id.*

²⁹ *Id.* at *2

³⁰ *But See* Section entitled At-Will Employment citing *Ford v. Nation's Capital Southern Maryland Area Local*, 2005 U.S. Dist. LEXIS 33973 (D.D.C. 2005) "[A] lack of specificity is consistent with at-will employment." *Id.* at *14 citing *Domen v. National Rehabilitation Hosp.*, 925 F. Supp. 830, 834 (D.D.C. 1996)

Equivalent Position

Following FMLA leave, the employee is entitled to return to his or her position or its equivalent unless he or she is unable to perform an essential function of the position because of a physical or mental condition, including the continuation of a serious health condition.³¹ To be equivalent, an employee's new position must be "virtually identical to the employee's former position in terms of pay, benefits and working conditions, including privileges, perquisites and status."³² It must involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority." It must also have similar opportunities for promotion and salary increase.³³ *De minimis*, intangible changes in the employee's position do not, however, violate the FMLA.³⁴ When making an equivalent position analysis, a review of the actual job description can assist in an argument that positions are (or are not) equivalent.³⁵

Revised Job Description

In two recent cases from U.S. District Courts in Illinois and Ohio, one sees that it is not advisable to modify a job description *after* the employee takes FMLA leave. In *Ryan v. Pace*, the employee's job description was modified between the time that he took FMLA leave and the time that he tried to return to work, requiring him to "clear a more substantial [physical] exertion hurdle to accomplish the necessary tasks."³⁶ This created a material dispute with respect to whether the employer interfered with the employee's right to be reinstated to an equivalent position preventing the employer from winning its motion for summary judgment.³⁷ In *Vancoppenolle*, a chemist took FMLA leave in the wake of severe emotional distress and stress, but not before an investigation had begun regarding allegations that the chemist herself had made regarding illegal activity within the company.³⁸ In the course of the investigation, deficiencies in the chemist's job performance were found and she was given revised job responsibilities when she returned from FMLA leave. She was provided with a revised job description, but in the FMLA lawsuit the employer claimed that the job was "equivalent" for

³¹ 29 CFR §§ 825.214, 825.216(c)

³² 29 CFR § 825.215(a)

³³ *Darby v. Bratch*, 287 F.3d 673, 679 (8th Cir. 2002)

³⁴ 29 C.F.R. § 825.215(f); *Mitchell v. Dutchmen Mfg., Inc.*, 389 F.3d 746, 749 (7th Cir. 2004) (requiring employee to use new hand tools in production of recreational vehicles is a *de minimis* change).

³⁵ *Adler v. South Orangetown Central Sch. Dist.*, 2008 U.S. Dist. LEXIS 4971 (S.D. New York 2008) (whether advanced placement classes are equivalent to non-advanced placement classes); *Smith v. East Baton Rouge Parish School Board*, 453 F.3d 650 (5th Cir. 2006) (whether a traveling position in which the employee moves from campus to campus is equivalent to a non-traveling position)

³⁶ *Ryan v. Pace Suburban Bus Division of the Regional Transportation Authority*, 2012 U.S. Dist. LEXIS 149572 (N.D. Ill. 2012)

³⁷ *Id.*

³⁸ *Vancoppenolle v. Sun Pharmaceutical Industries*, 2013 U.S. Dist. LEXIS 45555 (N.D. Ohio 2013)

purposes of FMLA. The alteration of the job description created a material fact eliminating summary judgment on the FMLA issue.³⁹

Recommendations:

- _____ Provide job description together with Fitness for Duty Certificate (not really part of the job description legal review, but a good recommendation to make to clients).
- _____ Distinguish between "essential" functions and non-essential functions within the body of the job description.
- _____ Avoid altering a job description while an employee is on FMLA leave unless absolutely necessary.

(3) Employee Drug Testing

"Citizens have the right to be free from unreasonable searches and seizures" and a drug test is considered a search and seizure under the Fourth Amendment to the U.S. Constitution.⁴⁰ Although probable cause is the general requirement under the Constitution for a warrantless search, over the years, exceptions have developed that allow the government to conduct searches without the requirement of probable cause (and a warrant). Along these lines, the United States Supreme Court has recognized at least three special needs it feels are sufficiently compelling to justify a search of public employees: maintaining workplace integrity; enhancing public safety; and protecting truly sensitive information.⁴¹

Courts in different circuits have begun to uphold random drug testing in many situations that would have been considered very questionable since the last Supreme Court decision on the subject. In a future employee drug testing case, the U.S. Supreme Court will likely look for the presence of the "special needs" factors. Therefore, if a public employer proceeds with a testing regime, it should, at a minimum designate the position as "safety sensitive" and give notice to employees that the position is subject to random drug testing.⁴² The job description is the obvious location where these designations should take place.

³⁹ *Vancoppenolle v. Sun Pharmaceutical Industries*, 2013 U.S. Dist. LEXIS 45555 (N.D. Ohio 2013)

⁴⁰ U.S. Constitution Fourth Amendment as well as many state constitutions, Texas Constitution, Article 1, Section 9; *Skinner v. Railway Labor Executives Ass'n.*, 109 S.Ct. 1402, 1411 (1989)

⁴¹ *O'Connor v. Ortega*, 107 S.Ct. 1492 (1987)

⁴² Ensure that testing is performed in a minimally intrusive manner; Enact a specific drug testing policy, which includes periodic drug awareness presentations for the designated employees; and articulate a valid reason why individual suspicion is insufficient in this situation, i.e. engaging in potentially dangerous tasks around students.

Safety Sensitive Positions

Courts have indicated that a showing that a position is "safety sensitive" is supported if the public employer can present evidence of factors that include a specific designation of the position as "safety sensitive," with notice that the position is subject to random drug testing. However, merely including this language in a job description does not automatically turn a particular position into a "safety sensitive" position. The analysis is bolstered by a further review of the job in order to find an indication that a concrete danger actually exists that justifies a departure from the general rule against warrantless searches. And, in fact, drug testing of public employees has been upheld in some Circuits when a determination that the job in question is a "safety-sensitive" position, without the presence of the other so-called "special needs" factors normally associated with the U.S. Supreme Court's decisions.⁴³

Avoid Creating "A Solution In Search of a Problem."

Although there appears to be a trend in support of drug testing employees in safety-sensitive positions, simply including the words "safety sensitive" in a job description is strongly discouraged by court decisions.⁴⁴ In a 2012 decision, the District of Columbia Circuit Court held that designating all Forest Service Job Corps Center employees as being safety sensitive and then requiring random drug testing for all of them does not fit within the closely guarded category of constitutionally permissible suspicionless searches.⁴⁵ Additionally, the ideal, "integrity of the workforce" is not sufficient to overcome this burden either. The Forest Service Job Corps Center involved employees who served as "teacher/counselors" to students. The Circuit court held that the general governmental interest in the students' abstention from drug use and in their physical safety was not enough to support suspicionless testing among all employees. Additionally, the court held that the government offered no real foundation for concluding that there is a serious drug problem among staff that threatens these interests thus rendering the requirement for individualized suspicion impractical.⁴⁶

Although there is no limitation regarding what specific positions can be designated as "safety sensitive," some particular positions have been considered in the context of litigation. Individuals who operate commercial vehicles as well as school bus drivers are subject to the

⁴³ *Aubrey v. School Board of Lafayette Parish*, 148 F.3d 559 (5th Cir. 1998) (drug testing policy outweighed privacy interest of school custodian)

⁴⁴ Board enacted a policy that allowed for drug testing of anyone one that applied for a job, transfer, or was promoted to a "safety sensitive" position, which included principals, assistant principals, teachers, teacher aides, substitute teachers, school secretaries and school bus drivers. *Knox County Education Association v. Knox County Board of Education*, 158 F.3d 361 (6th Cir. 1998), cert. denied, 528 U.S. 812, 120 S. Ct. 46 (1999) But see *AFT - W. Va. v. Kanawha County Bd. of Educ.*, 592 F. Supp. 2d 883 (S.D. W. Va. 2009) (court enjoined random drug testing)

⁴⁵ *National Federation of Federal Employees v. Vilsack*, 681 F.3d 483, 486 (D.C. Cir. 2012)

⁴⁶ *AFT-W.Va, supra. at 898*

federal drug testing procedures that currently require pre-employment, post-accident, random, reasonable suspicion and follow-up drug testing for drug and alcohol substances. In addition, operators of commercial motor vehicles are mandated by law to undergo drug/alcohol testing consistent with federal regulations.⁴⁷ However, in order for a public employer to enact a drug testing policy for the drivers of non-commercial motor vehicles, the public employer must be able to show a special need.⁴⁸ Random suspicionless drug testing for custodial employees has been upheld even in the absence of evidence of a drug problem amongst the custodial employees.⁴⁹ In *Aubrey*, the custodial employee's position was designated as "safety sensitive" in the job description because of the fact that custodians routinely handled potentially dangerous machinery and hazardous substances in an environment containing a large number of children. The Fifth Circuit analyzed that the employee had prior notice that his position was being designated as "safety sensitive" and that he would be subjected to random drug testing after he attended an in-service program on the issue.

Recommendations:

- _____ If the position is designated as safety sensitive in order to support random suspicionless drug testing of a particular employee group, is the designation truly accurate and appropriate?

- _____ Does supporting documentation for the designation exist elsewhere such as separate listings, data analyses of local issues and concerns, and written job-related concerns detailing the school district's reasoning for designating an employee group as falling within a safety-sensitive position?

- _____ Are employees in safety-sensitive positions specifically notified (in a document other than the job description) of the drug testing requirements that accompany the "safety-sensitive" position designation?

(4) Fair Labor Standards Act ("FLSA")

Most recently in the FLSA context, is the inaccurate designation of individuals as "independent contractors." Employees who are classified as "Independent Contractors" are often overlooked for many statutorily required employment benefits. Job descriptions that designate an employee as an Independent Contractor should be carefully reviewed to ensure that the job description

⁴⁷ Drug/Alcohol testing shall be in accordance with federal regulations, of commercial motor vehicle operators for use of alcohol or a controlled substance that violates law or federal regulation. *49 U.S.C. 2717; 49 CFR Part 382.*

⁴⁸ The government's compelling interest in ensuring that employees directly involved in drug interdiction or required to carry firearms were physically fit and had unimpeachable integrity and judgment outweighed those employees' privacy interests has also been upheld. *Nat. Treasury Employees v. Von Raab*, 489 U.S. 656, 103 L.Ed. 2d 685, 109 S.Ct. 1384 (1989); *Chandler v. Miller*, 520 U.S. 305; 117 S.Ct. 1295 (1997)

⁴⁹ *Aubrey, supra, at 564*

will pass probable scrutiny if challenged. In fact, the United State Department of Labor has initiated a "Misclassification Initiative" designed to identify and properly classify employees who have been improperly classified as "independent contractors."⁵⁰

Other FLSA issues related to job descriptions relate to nonexempt employees and overtime issues. The FLSA establishes minimum wage, overtime pay, recordkeeping, and youth employment standards affecting employees in the private sector and in federal, state, and local governments. Covered nonexempt workers are entitled to a minimum wage of not less than \$7.25 per hour effective July 24, 2009, and overtime pay at a rate not less than one and one-half times the regular rate of pay is required after 40 hours of work in a workweek.⁵¹ However, federal law provides an exemption from both minimum wage and overtime pay for employees employed in certain capacities.⁵² To qualify for exemption, employees generally must meet certain tests regarding their job duties and be paid over a certain salary basis.⁵³ Job titles do not determine exempt status. In order for an exemption to apply, an employee's specific job duties and salary must meet all the requirements of the Department's regulations.⁵⁴ An analysis of some job positions is sometimes easier than others. At least one Circuit Court has analyzed, and confirmed, that a principal of an elementary school qualifies as exempt for purposes of overtime

⁵⁰ Memorandum of Understanding (MOU) between the Department and the Internal Revenue Service (IRS); Additionally, the United States Department of Labor has entered into Memorandums of Understanding with the following states: Louisiana, California, Colorado, Washington, Montana, Utah, Missouri, Illinois, Minnesota, Maryland, Connecticut, Massachusetts, and Hawaii that follow class action lawsuits promulgated by the Department of Labor in these states.

⁵¹ Department of Labor Website; <http://www.dol.gov/whd/flsa/index.htm>

⁵² Bona fide executive, administrative, professional, outside sales employees, and certain computer employees; Section 13(a)(1) of the FLSA

⁵³ The exemptions provided by FLSA Section 13(a)(1) apply only to "white collar" employees who meet the salary and duties tests set forth in the Part 541 regulations. Statutory Exemptions include: the Executive Exemption; Administrative Exemption; Learned Professional Exemption; Creative Professional; Computer Employee Exemption; Outside Sales Exemptions. The exemptions do not apply to manual laborers or other "blue collar" workers who perform work involving repetitive operations with their hands, physical skill and energy. FLSA-covered, non-management employees in production, maintenance, construction and similar occupations such as carpenters, electricians, mechanics, plumbers, iron workers, craftsmen, operating engineers, longshoremen, construction workers and laborers are entitled to minimum wage and overtime premium pay under the FLSA, and are not exempt under the Part 541 regulations no matter how highly paid they might be. The exemptions also do not apply to police officers, detectives, deputy sheriffs, state troopers, highway patrol officers, investigators, inspectors, correctional officers, parole or probation officers, park rangers, fire fighters, paramedics, emergency medical technicians, ambulance personnel, rescue workers, hazardous materials workers and similar employees, regardless of rank or pay level, who perform work such as preventing, controlling or extinguishing fires of any type; rescuing fire, crime or accident victims; preventing or detecting crimes; conducting investigations or inspections for violations of law; performing surveillance; pursuing, restraining and apprehending suspects; detaining or supervising suspected and convicted criminals, including those on probation or parole; interviewing witnesses; interrogating and fingerprinting suspects; preparing investigative reports; or other similar work.

⁵⁴ *Schaefer- LaRose v. Eli-Lilly & Co.*, 679 F.3d 560 (7th Cir. 2012), *Raines v. Seattle Sch. Dist. No. 1*, 2012 US Dist. LEXIS 19414 (W.D. Wash. 2012).

pay.⁵⁵ However, overtime issues concerning the type of work that an individual performs routinely involve a job description analysis.⁵⁶

Overtime issues related to the job description also arise in the context of volunteers in the school setting. Plenty of school secretaries and bus drivers who are traditionally nonexempt employees have children in the same school system, or even the same school, in which they work. These individuals often volunteer to serve in capacities that are similar to their own day-to-day job description. Of course it makes sense that an individual would use his or her special expertise in a volunteer capacity; however, potential overtime issues can arise in these situations. While the FLSA allows individuals who are truly performing volunteer services for units of state and local government to do so and not be considered “employees” for purposes of being concerned with overtime, they must meet certain criteria.⁵⁷ The FLSA permits an individual to perform hours of volunteer service for a public agency when such service does not involve the same type of services that the individual is employed to perform for the same public agency.⁵⁸ The phrase “same type of services” means “similar or identical services.” Considerations include the duties and other factors contained in the definitions of the 3-digit categories of occupations in the *Dictionary of Occupational Titles* in addition to other facts and circumstances in a particular case such as whether the volunteer service is closely related to the actual duties performed by or responsibilities assigned to the employee.”⁵⁹

Therefore, when nonexempt employees volunteer for the same employer, a close review of the actual duties and responsibilities of the employee in his or her actual employment assignment is warranted to determine whether these are closely related to the duties and responsibilities of the volunteer service.⁶⁰ FLSA regulations use the example of a city police officer volunteering as a part-time referee in a basketball league sponsored by the city as an example of a volunteer service that does not constitute the “same type of service.”⁶¹ The Department of Labor (“DOL”) has analyzed a very similar situation in which a classified employee of a school system (bus driver, maintenance worker, etc.) wishes to volunteer to coach an extra-curricular

⁵⁵ *Coleman-Edwards v. Simpson*, 330 Fed. Appx. 218 (2d Cir. 2009)

⁵⁶ *Webster v. Pub. Sch. Emples. of Wash., Inc.*, 247 F.3d 910 (9th Cir. 2001) (Union Field Representatives); *Owsley v. San Antonio Indep. Sch. Dist.*, 187 F.3d 521 (5th Cir. 1999) (negative treatment due to a statutory revision of the FLSA); *Hancock v. Woodson, Inc.*, 2012 U.S. Dist. LEXIS 32297 (S.D. Miss. 2012)

⁵⁷ 29 U.S.C. § 203(e)(4); 29 CFR § 553.100

⁵⁸ 29 CFR § 553.102; Additionally, the individual must perform the hours of service for civic, charitable, or humanitarian reasons, without promise, expectation, or receipt of compensation for services rendered. A volunteer may be paid expenses, reasonable benefits, a nominal fee, or any combination thereof, for their services without losing their status as a volunteer; however, an analysis of the expenses or fees paid may occur if a complaint is lodged against the employer. Lastly, the employee must offer their services freely and without coercion, direct or implied, from the employer.

⁵⁹ 29 CFR § 553.103(a)

⁶⁰ *See id.*

⁶¹ 29 CFR § 553.103(c)

activity.⁶² In that opinion, the DOL held that such an arrangement was permissible and that these activities were not providing the “same type of services.”⁶³ Nevertheless, when asked whether “teacher’s assistants” could permissibly serve as volunteer coaches, the DOL answered in the negative.⁶⁴ The DOL contrasted the position of a teacher assistant with the position of a school employee such as a custodian, bus driver, building maintenance or food service workers.⁶⁵ In yet another opinion, the DOL held that it would not be a violation of the overtime pay provisions of the FLSA for a security assistant at a school district to also serve as an assistant football coach because the duties of the two roles did not constitute “the same type of services.”⁶⁶

In three recent opinions from California and Illinois, courts looked at the contents of the job descriptions compared to the actual work. In *Rosenberg*, Registered Dietitians (RDs) were classified as exempt from overtime for purposes of the FLSA. The job description was provided as proof regarding the issue of whether the RDs used "independent judgment" or that the occupation is a "learned profession", two terms of art within the FLSA's professional exemption. The court held that although the job description provided seven categories of essential job responsibilities, it did not provide the necessary proof required to satisfy the professional exemption threshold because the descriptions were broad. The court held that an examination of the actual work of the employees would be required.⁶⁷ Similar or identical job descriptions assist Plaintiff employees in establishing classes in cases involving allegations of FLSA violations by employers’ inappropriate classification of employees as "independent contractors."⁶⁸

Recommendations:

- _____ Are designations of "Independent Contractor" properly reserved for individuals who are accurately described as not being "employees" of the district?

- _____ Has the employee's classification as "exempt" or "non-exempt" for overtime purposes been cross referenced with the job description and does a legal analysis exist when in doubt?

- _____ Do job descriptions for volunteer positions exist so that a legal analysis can be made

⁶² Wage-Hour Opinion No. WH-1847, July 11, 1995

⁶³ See also Wage-Hour Opinion No. WH-2056, September 22, 1997

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ Wage-Hour Opinion No. WH-2164, June 9, 1999; See also WH-1656, May 7, 1986 (Custodian can volunteer as an assistant baseball coach.)

⁶⁷ *Rosenberg v. Renal Advantage, Inc.*, 2013 U.S. Dist. LEXIS 88468 (S.D. Cal. 2013)

⁶⁸ *Flores v. Velocity Express, Inc.*, 2013 U.S. Dist. LEXIS 77821 (N.D. Cal. 2013); *Cramer v. Bank of America*, 2013 U.S. Dist. LEXIS 75592 (N.D. Ill. 2013)

when non-exempt employees volunteer?

(5) Copyright Act of 1976

Issues involving copyright protected materials are beginning to arise more and more often in the workplace.⁶⁹ The general rule in a copyright infringement analysis is that the author is the first owner of copyright.⁷⁰ The main exception to this rule is when an employee creates a work as part of his or her job in which case the employer owns the copyright. This exception is referred to as the "Work for Hire" exception. "A work for hire" is defined as "a work prepared by an employee within the scope of his or her employment." Without a written agreement assigning ownership to either party, courts are left to analyze the issue using a three part test that first asks whether the work was the kind of work that the employee was employed to perform.⁷¹ A review of an individual's job description can assist the court in answering necessary questions regarding an employee's intended job functions with respect to creation of "work" for purposes of copyright infringement challenges at the summary judgment stage and help avoid the need for a complicated legal analysis.⁷² When there is no written description of an employee's responsibilities, courts must continue the analysis by looking at other factors such as the degree of control that the employer has over an employee's projects.⁷³

The computer age has led to a significant increase in the capability of employees to create more and more instructional and teaching resources. Although a legal analysis regarding whether created works are or are not "work for hire" will not necessarily *fail* if the job description does not list creation of such products, it is strongly recommended that employers place language in the job description that covers the creation of such materials if, in fact, there is an intent for any such works to remain the property of the employer. Perhaps most telling regarding the confusion factor surrounding this issue is the somewhat outdated 1988 quote from the Seventh Circuit that related to teachers, "high-school teachers normally are not expected to do writing as

⁶⁹ Copyright Act of 1976, 17 USC § 101, et seq.

⁷⁰ *Id.*

⁷¹ *Avtec Sys., Inc. v. Peiffer*, 21 F.3d 568, 571 (4th Cir. 1994) citing Restatement (2nd) of Agency § 228 (The second and third factors include occurring substantially within the authorized time and space limits of the job and whether the job was actuated, at least in part, to serve the employer; however, courts do not give the three factors equal weight and when the first factor is met, employees are generally not granted authorship rights solely based on the fact that the product was created off duty and at home) *See also Miller v. CP Chemicals, Inc.*, 808 F. Supp. 1238, 1244 n.7 (D.S.C. 1992); *Fleurimond v. New York University*, 2012 U.S. Dist. LEXIS 95379 (E.D. N.Y. 2012)

⁷² *Fleurimond v. New York University*, 2012 U.S. Dist. LEXIS 95379, *32 (E.D. NY 2012) citing *City of Newark v. Beasley*, 883 F.Supp. 3, 8 (D.N.J. 1995) "[c]ourts deciding whether an employee's project was the 'kind of work' the employee was hired to perform rely heavily on the employee's job description."

⁷³ *Fleurimond* at *32; *See also Le T. Le v. City of Wilmington*, 2012 US App LEXIS 8206 (3d Cir. 2012).

part of their employment duties,"⁷⁴ More recently, the Second Circuit court has stated "...the very nature of a teacher's duties involves a substantial amount of time outside of class devoted to preparing lessons, problem sets, and quizzes and tests - which is clearly within the scope of his employment."⁷⁵ Nevertheless, at least one District court has distinguished the situation in which a teacher prepares tests, quizzes, and homework problems for a particular class that he is teaching for a particular employer in an established class, from a situation in which that same teacher designs an entire set of materials not to be used directly in his classroom that he then sells for personal profit.⁷⁶ Regardless of one's opinion on the issue, there is no argument that looking ahead and clearly listing the creation of instructional materials as a job duty in a job description can alleviate potential legal arguments related to copyright.

Recommendation:

_____ Is language regarding the creation of particular materials included in the job description to alleviate copyright challenges?

(6) At Will Employment

Although employees may attempt to use the job description as evidence of an employment contract, courts will generally find the job description insufficient for such purposes if it fails to establish mutually expressed contractual intent and is merely a list of job duties and benefits.⁷⁷ Legal counsel reviewing a job description for the at will employee should ensure that it does not define the duration of employment or outline the particular terms of the employment, including whether the position was intended to be full-time or part-time in order to be consistent with at-will employment.⁷⁸

Recommendation:

_____ Is any language that can be argued as "terms" of the employment relationship removed to prevent legal arguments regarding contractual rights and obligations?

⁷⁴ *Hays v. Sony Corp. of America*, 847 F.2d 412 (7th Cir. 1988) (in an analysis regarding whether a word processor manual created by high school teachers for their students fell within the classification of "work-for hire.)

⁷⁵ *Shaul v. Cherry Valley-Springfield Cent. Sch. Dist.*, 363 F.3d 177 (2nd Cir. 2004) But see *Gilpin v. Siebert*, 419 F. Supp. 2d 1288(Dist. Oregon 2006) In which the question of whether counselor's published book, written outside of her work environment on a personal computer, was or was not a "work for hire."

⁷⁶ *Pavlica v. Behr*, 397 F. Supp. 2d 519, 525 (S.D. N. Y. 2005)

⁷⁷ *Ford v. Nation's Capital Southern Maryland Area Local*, 2005 U.S. Dist. LEXIS 33973 (D.D.C. 2005)

⁷⁸ "[A] lack of specificity is consistent with at-will employment." *Id* at *14 citing *Domen v. National Rehabilitation Hosp.*, 925 F. Supp. 830, 834 (D.D.C. 1996)

(7) National Labor Relations Board - What's in a Name?

Each individual state has the right to regulate collective bargaining in the public sector. All but five states currently allow some level of collective bargaining in school districts.⁷⁹ In states that allow collective bargaining, job description issues can range in terms of who is allowed to participate in a union to what exactly can be required of a particular employee. It is crucial that a school system's legal counsel consider the terms of any relevant collective bargaining agreement when reviewing a particular job description. The National Labor Relations Act ("NLRA") provides "employees" with certain rights; however individuals who are considered "supervisors" are exempt from the definition of "employee" rendering considerable litigation regarding who is or is not a "supervisor."⁸⁰ In a recent 7th Circuit case, the court held that despite the fact that a particular employee was called a "supervisor," an analysis of the employee's actual job functions led to a determination that, as defined by the NLRA, he was not.⁸¹

In *Rochelle*, an employee's job title "Landfill Supervisor" suggested that he was a supervisor and ineligible for inclusion in a bargaining unit being formed, but NLRB dispute resulted in determination that he was not actually a supervisor after facts were examined.⁸² In *Lakeland Health Care*, a job description contained the primary purpose of the job of an LPN as providing direct nursing care to residents and supervising day-to-day nursing activities performed by CNAs. The description then stated that LPNs were to interpret policies and procedures and make recommendations. This information, together with facts, supported the position that the LPNs served in a supervisory role.⁸³

Recommendation:

_____ If potential labor relations issues exist (potentially in 45 states), has the actual job description of a particular employee been cross referenced to alleviate issues such as who is or is not a "supervisor"?

⁷⁹ The states of Texas, Georgia, South Carolina, North Carolina, and Virginia have expressly prohibited collective bargaining in school districts. www.nctq.org

⁸⁰ National Labor Relations Act, 9 U.S.C. §§ 157-158; § 152(3) and (11)

⁸¹ *Rochelle Waste Disposal LLC v. NLRB*, 673 F.3d 587 (7th Cir. 2012); *NLRB v. Kentucky River Cmty Care, Inc.*, 532 U.S. 706, 121 S. Ct. 1861, 149 L. Ed. 2d 939 (2001); Paper accountability (accountability in name or job description only) is by itself insufficient to establish supervisory authority) citing *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006) citing *Training School at Vineland*, 332 NLRB 1412, 1416 (2000); *735 Putnam Pike Operations, LLC d/b/a Greenville Skilled Nursing and Rehabilitation Center v. NLRB*, 2012 U.S. App. LEXIS 6594 (Dist. D.C. 2012) See also *Frenchtown Acquisition Co. v. NLRB*, 683 F.3d 298, 310 (6th Cir. 2012) "[T]heoretical or paper power" such as job descriptions "does not a supervisor make."

⁸² *Rochelle Waste Disposal, LLC v. NLBR*, 673 F.3d 587 (7th Cir. 2012)

⁸³ *Lakeland Health Care Associates, LLC v. NLRB*, 696 F.3d 1332 (11th Cir. 2012)

(8) Title VII Employment Discrimination

Title VII of the Civil Rights Act of 1964 makes it illegal to discriminate against someone on the basis of race, color, religion, national origin, or sex.⁸⁴ The various tests set forth by the United States Supreme Court's *McDonnell Douglas Corp. v. Green* is the test used to establish a prima facie case of discrimination in a Title VII case.⁸⁵ A plaintiff must offer evidence that: "(1) plaintiff is a member of a protected class; (2) plaintiff's performance met the employer's legitimate expectations; (3) . . . plaintiff was subjected to an adverse employment action; and (4) plaintiff's employer treated similarly situated employees outside of the protected class more favorably."⁸⁶ Therefore, the job description can be a vital component of a defense against a claim of discrimination on issues such as whether an employee is "qualified" for the position as well as whether the employee is "similarly situated" to other employees.⁸⁷ On the flip side of this, when an employee is clearly qualified for a particular position, a detailed job description may not always be sufficient to overcome a claim of discrimination.⁸⁸

Recommendation:

_____ Are listed job qualifications such as degrees and certifications as well as years of experience that are set forth in the job description accurate and realistic?

(9) Criminal Background Checks

The Equal Employment Opportunity Commission ("EEOC") has recently published guidance regarding an employer's use of an individual's criminal history.⁸⁹ The Guidance states that in some instances, the use of an individual's criminal history in making an employment decision will violate the prohibition against employment discrimination under Title VII of the Civil Rights Act of 1964, as amended. The gist of the EEOC Guidance is that an employer's neutral policy of excluding applicants from employment based on certain criminal conduct may disproportionately impact some individuals protected under Title VII, and may violate the law if

⁸⁴ 42 U.S.C. § 2000e

⁸⁵ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)

⁸⁶ *Eaton v. Ind. Dep't of Corr.*, 657 F.3d 551 (7th Cir. 2011)

⁸⁷ *Williams v. Ruskin Co.*, 2012 U.S. Dist. LEXIS 26840 (M.D. Ala. 2012)

⁸⁸ *Lynch v. ITT Technical Institute*, 2012 U.S. Dist. LEXIS 90506 (N.D. 2012) Job description was not sufficient to overcome plaintiff's demonstration that he was sufficiently qualified.

⁸⁹ *Enforcement Guidance on Consideration of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act of 1964*, April 5, 2012.

not, "job related and consistent with business necessity." Accurate information contained in a job description can assist the employer in making a valid connection between the criminal conduct and the essential functions of the position in question at the appropriate time.

Recommendation:

_____ Do job descriptions include language demonstrating particular duties and responsibilities warranting criminal history checks (when relevant)?

(10) First Amendment Issues

Recent First Amendment cases have arisen which spiraled from the United States Supreme Court case of *Garcetti v. Ceballos* decided in 2006.⁹⁰ Public employees do not speak as citizens for First Amendment purposes when they "make statements pursuant to their official duties."⁹¹ *Garcetti* expressly held that determining what responsibilities constitute a public employee's "official duties" is a practical inquiry, and not limited to the terms of the employee's job description.⁹² What is contained in the job description is relevant to such an inquiry.⁹³ Nevertheless, employers should not attempt to add artificial language to a job description in an attempt to circumvent a *Garcetti* argument because Courts appear very willing to look outside the job description when making a *Garcetti* analysis. Communications based on an employee's special knowledge and experience and written for the purpose of fulfilling that individual's responsibilities as an employee are obviously made in the context of the individual's role as a public employee despite what the job description might be missing.⁹⁴

Recommendation:

_____ Are reporting requirements and other notification responsibilities accurate?
(Remove artificial descriptors)

Conclusion

While there is no way to insulate an employer from legal claims, an accurate job description can assist the employer in defending itself against a myriad of allegations. Thorough and routine reviews of job descriptions and a company commitment to using the job description in a

⁹⁰ *Garcetti v. Ceballos*, 547 U.S. 410, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006)

⁹¹ *Id.* at 421

⁹² *Id.* at 424

⁹³ *Brown v. Sch. Bd.*, 459 Fed. Appx. 817 (11th Cir. 2012); *Abdur-Rahman v. Walker*, 567 F.3d 1278, 1283 (11th Cir. 2009) citing *Garcetti* at 421

⁹⁴ *Ankney v. Wakefield*, 2012 U.S. Dist. LEXIS 85041 (W.D. Pa. 2012); *Massaro v. New York Dept. of Educ.*, 2012 U.S. App. LEXIS 10911 (2nd Cir. 2012); *Jerram v. Cornwall Central Sch. Dist.*, 464 Fed. Appx. 13 (2nd Cir. 2012); *Morris v. Phila. Hous. Auth.*, 2012 U.S. App. LEXIS 13774 (3rd Cir. 2012)

consistently appropriately manner will assist the defense attorney (or EEOC investigator) in understanding the expectations involved. Employers who ensure that the language used within the job description is supported by the facts of the actual job requirements will have a document that not only communicates the description of the job to the employee, but also can be used in support of internal decision-making.

Recommendations:

- _____ Remove cookie cutter language that is not accurate or irrelevant in order to lend greater validity to the job description. (1)
- _____ Do not overlook essential elements of a job that might otherwise be "assumed." (1)
- _____ Consider including disclaimer language at the end of the job description. (1)
- _____ Provide job description together with Fitness for Duty Certificate (not really part of the job description legal review, but a good recommendation to make to clients). (2)
- _____ Distinguish between "essential" functions and non-essential functions within the body of the job description. (2)
- _____ Avoid altering a job description while an employee is on FMLA leave unless absolutely necessary. (2)
- _____ If the position is designated as safety sensitive in order to support random suspicionless drug testing of a particular employee group, is the designation truly accurate and appropriate? (3)
- _____ Does supporting documentation for the designation exist elsewhere such as separate listings, data analyses of local issues and concerns, and written job-related concerns detailing the school district's reasoning for designating an employee group as falling within a safety-sensitive position? (3)
- _____ Are employees in safety-sensitive positions specifically notified (in a document other than the job description) of the drug testing requirements that accompany the "safety-sensitive" position designation? (3)
- _____ Are designations of "Independent Contractor" properly reserved for individuals who are accurately described as not being "employees" of the district? (4)
- _____ Has the employee's classification as "exempt" or "non-exempt" for overtime purposes been cross referenced with the job description and does a legal analysis exist when in doubt? (4)
- _____ Do job descriptions for volunteer positions exist so that a legal analysis can be made when non-exempt employees volunteer? (4)

- _____ Is language regarding the creation of particular materials included in the job description to alleviate copyright challenges? (5)
- _____ Is any language that can be argued as "terms" of the employment relationship removed to prevent legal arguments regarding contractual rights and obligations? (6)
- _____ If potential labor relations issues exist (potentially in 45 states), has the actual job description of a particular employee been cross referenced to alleviate issues such as who is or is not a "supervisor"? (7)
- _____ Are listed job qualifications such as degrees and certifications as well as years of experience that are set forth in the job description accurate and realistic? (8)
- _____ Do job descriptions include language demonstrating particular duties and responsibilities warranting criminal history checks (when relevant)? (9)
- _____ Are reporting requirements and other notification responsibilities accurate? (Remove artificial descriptors) (10)

Legal Memorandum Regarding Analysis of ADA Accommodations & Interactive Process

First grade teacher has requested accommodation of being allowed to arrive 10-15 minutes later on random days. The employee's job description is very necessary in the interactive process.

EEOC states: An employer must consider each request for reasonable accommodation and determine: (1) whether the accommodation is needed, (2) if needed, whether the accommodation would be effective, and (3) if effective, whether providing the reasonable accommodation would impose an undue hardship. If a reasonable accommodation turns out to be ineffective and the employee with a disability remains unable to perform an essential function, the employer must consider whether there would be an alternative reasonable accommodation that would not pose an undue hardship. If there is no alternative accommodation, then the employer must attempt to reassign the employee to a vacant position for which s/he is qualified, unless to do so would cause an undue hardship.

From the documents that were attached, the teacher does not have reported cognitive issues. The accommodations that we know that have been requested include: allowed to have a 5-10 minute later arrival time on random days and for any time sensitive duties; use of an aide to walk students to activities outside the classroom; use of aide or volunteer to decorate, write on the chalkboard, make copies, physically organize and maintain the classroom such as to organize seating and centers; unable to monitor student's seatwork because of inability to travel around room and stoop to first grade seat level; unable to attend field trips with students unless it is to a place where she can sit down throughout the majority of the event; only occasionally lifting more than 5 pounds; never can bend or stoop; climb a ladder or stairs; only occasionally lifting above her shoulder or climbing a ramp; only can walk the length of the classroom; no more than 15 minutes of standing every 2 hours.

Americans With Disabilities Act (ADA) Request for Accommodations Interactive Process Interview

Good morning/afternoon. I have scheduled this meeting with you because you have made a request for accommodations and, at this time, I believe you may qualify as disabled under the Americans With Disabilities Act. Typically, when a request for accommodations that falls under the ADA is made, an attempt to provide what is requested is first made. If all or part of the requested accommodations cannot be provided to the requesting employee, then I schedule a meeting so that we can discuss other possible options. I am meeting with you today to schedule that meeting at the earliest mutually agreeable time and to ask that prior to that meeting, you consider other options that might work for you in lieu of the following requested accommodation:

5-10 minute later arrival on random days and for any time sensitive duties

It is my understanding that you have also requested many other accommodations and that all attempts are being made at the campus level to provide those requested accommodations. However, the request that you have made to be 10-15 minutes late on random days and for any time sensitive duties is burdensome on the campus and affects the essential nature of your job which is to teach your students which you cannot do if you are not present in the classroom. Being on time to work is job-related for a teacher and consistent with business necessity.

I am willing to consider other alternatives that will allow you to continue working; however, I need you to discuss this particular issue with me so that I can understand the nature of the problem and what other possible accommodations might assist you in arriving to work in a timely manner. I have asked the principal of your campus to provide me with information regarding how often and how long you are tardy to work and what is affected during that time period so that together we can assess exactly what problem we are attempting to accommodate.

(Open your calendar and schedule a mutually agreeable time to come back together to consider the 10-15 minute late issue)

Sample Legal Memorandum FMLA - Job Description Not Provided

QUESTION PRESENTED:

Can the reassignment of the Chief Appraiser's executive secretary, who is on maternity leave/Family Medical Leave, to the position of executive secretary for one of the directors be considered an adverse employment action in violation of any laws?

ANSWER AND ANALYSIS:

Not necessarily, because the new position need only be equivalent to the former position and does not have to be the identical position. However, if challenged, specific facts regarding the job description could become relevant to an argument that the reassignment was in violation of the law. We recommend that if the position and job title are identical and salary is also identical, the reassignment can be made without an *immediate* concern that it be deemed in violation of any laws. In general, any eligible employee who takes leave in accordance with the Family Medical Leave Act is entitled upon their return to be restored by the employer to the position of employment held by the employee when the leave commenced; or to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment.⁹⁵ This right exists even if the employee has been replaced or his or her position has been restructured to accommodate the employee's absence.⁹⁶

The law states, and the Fifth Circuit has recognized, that to be equivalent, an employee's new position must be "virtually identical to the employee's former position in terms of pay, benefits, and working conditions, including privileges, perquisites, and status."⁹⁷ Additionally, "[i]t must involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority."⁹⁸ "The employee must be reinstated to the same or a geographically proximate worksite (i.e., one that does not involve a significant increase in commuting time or distance) from where the employee had previously been employed."⁹⁹ The employee is also generally entitled to return to the same shift or the

⁹⁵ 29 U.S.C. § 2614(a)(1)

⁹⁶ 29 C.F.R. § 825.214

⁹⁷ *Smith v. East Baton Rouge Parish Sch. Bd.*, 453 F.3d 650 (5th Cir. 2006) (American Heritage Online Dictionary defines the term "perquisites" as [a] payment or profit received in addition to a regular wage or salary, especially a benefit expected as one's due; A tip; a gratuity. The Fifth Circuit is the highest court of appeals for Texas, Louisiana and Mississippi, under only the United States Supreme Court. A legal analysis from the Fifth Circuit trumps all others with the exception of decisions made by the United States Supreme Court.

⁹⁸ *Id.* citing 29 ~~U.C.S.F.C.R.~~ § 825.215(a); 29 C.F.R. § 825.215(a)

⁹⁹ 29 C.F.R. § 825.215(e)(1)

same or equivalent work schedule.¹⁰⁰ ~~¶~~The new position must have similar opportunities for promotion and salary increase.¹⁰¹ Whether employees generally view the new and old positions as equally desirable is also relevant, but not conclusive, to the analysis of whether a new position is equivalent to a former position.¹⁰² All of these factors should be taken into consideration when making a determination regarding whether the executive secretary position for a director is equivalent to the position of executive director for the Chief Appraiser. Questions that should be asked include:

Will the employee be returning to the same job site? Was the employee promoted to her current position and, if so, will the employee who takes her place be considered to have been promoted? If so, it stands to reason that the employee currently on leave will arguably have been “demoted” for purposes of federal leave law. Do employees generally consider the executive secretary to the Chief Appraiser a more desirable position than executive secretary to one of the directors? Does that particular position carry more clout within the District? Are the work hours the same?¹⁰³

De minimis Changes

If, after all of these issues are considered, the only real change to the employee’s position is considered intangible or *de minimis*, the reassignment will not be considered a violation of the law.¹⁰⁴ The FMLA specifically states that the requirement that an employee be returned to the same or equivalent job with the same or equivalent pay does not extend to *de minimis*, intangible, or unmeasurable aspects of the job.¹⁰⁵ A relevant example of a *de minimis* change cited by the Fifth Circuit in *Smith v. East Baton Rouge Parish School Board*, 453 F.3d 650 (5th Cir. 2006) is a situation in which an administrative aide went on leave and, upon her return was reassigned to the position of secretary.¹⁰⁶ In support of her position that the positions were not equivalent, she argued that the former position was “truly administrative” while the new position consisted of simple and menial clerical functions such as answering the telephone, taking phone messages, and typing correspondence. Additionally she explained that her former position came with its own work area while the new position required her to share her room

¹⁰⁰ 29 C.F.R. § 825.215(e)(2)

¹⁰¹ *Id.* citing *Darby v. Bratch*, 287 F.3d 673, 679 (8th Cir. 2003)

¹⁰² *Id.* citing *Hunt v. Rapides Healthcare Sys., LLC*, 277 F.3d 757, 766 (5th Cir. 2001)

¹⁰³ The Department of Labor Guidelines set forth the fact that although an employee does not have a right to be returned to a shift that has been eliminated, different shifts are not equivalent for purposes of the law. In *Hunt*, a nurse with a day shift returned from leave and was offered a position on the night shift which she believed was not equivalent. The court agreed noting that in addition to the Department of Labor’s position on the issues of shift schedules, the shift supervisor had conceded that most employees found the day shift to be the more desirable position.

¹⁰⁴ *Smith* at 651 citing 29 C.F.R. § 825.215(f) and *Mitchell v. Dutchmen Mfg., Inc.*, 389 F.3d 746 (7th Cir. 2004).

¹⁰⁵ 29 C.F.R. § 825.215

¹⁰⁶ *Montgomery v. Maryland*, 266 F.3d 334 (4th Cir. 2001), *vacated on other grounds* by 535 U.S. 1075, 122 S. Ct. 1958, 152 L. Ed. 2d 1019 (2002)

with another employee. The 5th Circuit noted that these changes were considered *de minimis*.¹⁰⁷ In *Smith*, the employee also unsuccessfully argued that her new position was not equivalent because it no longer involved travel and required her to remain in the same worksite for the entire work day.¹⁰⁸ In finding the changes in the two positions to be *de minimis*, the 5th Circuit noted “[] Smith was offered the same salary in her new position as Assistant Supervisor of School Accounts. Both positions involved school accounting responsibilities, and Smith conceded that the job descriptions and title are very similar.”¹⁰⁹

CONCLUSION

Although it is quite likely that the current and former positions of executive secretary can be considered to be equivalent for purposes of FMLA, the distinction between whether a position is or is not equivalent to another is very fact intensive. Therefore, we recommend that a careful and realistic comparison between the former position and the new position be considered prior to reassigning the employee. This will require a review of the employee's former job description as well as the job description for the contemplated position. If evidence that the differences between the two positions is more than *de minimis* is found, that should be sufficient to survive summary judgment which will require the facts to then be analyzed by a court through the presentation of evidence such as testimony and documentation.¹¹⁰ This is undesirable for you because it would be a potentially costly and time-consuming endeavor, even if you are ultimately successful. If, after considering all relevant factors, you determine that the two positions should qualify as equivalent under the analysis provided herein, you can reassign the employee to the executive secretary position. If you are still unsure after considering the various aspects of the two positions or would like legal assistance with that analysis, please provide us with all of the relevant facts regarding the two positions, including job descriptions; job history with respect to the employee at issue and other employees; schedules; etc.

¹⁰⁷ *Id.* citing *Montgomery v. Maryland*, 266 F.3d 334 (4th Cir. 2001), vacated on other grounds by 535 U.S. 1075 (2002)

¹⁰⁹ *Id.* at 652

¹¹⁰ *Garza v. Mary Kay, Inc.*, 2010 U.S. Dist. LEXIS 84586 (N.D. Dallas 2010) The employee presented summary judgment evidence and successfully demonstrated that the new position had 60% less job duties and responsibilities. See also *Meadows v. Texar Fed. Credit Union*, 2007 U.S. Dist. LEXIS 4456 (E.D. Texarkana 2007) employee successfully demonstrated that the new position oversaw 9 employees while her former position oversaw between 29-33 employees.

From the desk of: Sample Legal Memorandum FLSA

Date

Dear Dr. _____,

Mrs. X works forty hours per week in her role as middle school secretary. She also serves in more than one coaching position with the District and receives a stipend for her coaching. You have asked whether this arrangement violates the Fair Labor Standards Act (“FLSA”) or any other law.

Our understanding is that Ms. X receives \$21,392 as a salary for her position as secretary. The following coaching positions are at issue:

- Head Volleyball Coach/High School – works on fundamental skills, practices drills, conditioning skills, and game situations -- \$3,000 stipend
- Head Girls’ Track Coach – works on individual and field events including long jump, triple jump, relay team, hurdles, and running workouts -- \$3,000 stipend
- Head Girls Basketball Coach/Jr. High - practices drills, conditioning skills, game situations, and works on fundamental skills -- \$ 2,250 stipend
- Assistant Girls’ Basketball Coach – fundamental skills, defense, and offense -- \$2,000 stipend

It is our opinion that Ms. X can continue to serve in the capacity of coach if she is truly serving in a volunteer capacity which means that she is not performing the same type of services which she is employed to perform; she receives only expenses, reasonable benefits, or a nominal fee or any combination thereof, for her services; and is not coerced, either directly or indirectly, to volunteer. Other employees who meet this criteria can also volunteer without fear of violating the FLSA; however, each situation must be analyzed on a case-by-case basis.

ANALYSIS:

The Fair Labor Standards Act (“FLSA”), allows individuals who are truly performing volunteer services for units of state and local government to do so and not be considered “employees” for purposes of being concerned with overtime.¹¹¹ However, they must meet certain criteria. The FLSA permits an individual to perform hours of volunteer service for a public agency when such service does not involve the same type of services that the individual is employed to

¹¹¹ 29 U.S.C. § 203(e)(4); 29 CFR § 553.100

perform for the same public agency.¹¹² Additionally, the individual must perform the hours of service for civic, charitable, or humanitarian reasons, without promise, expectation, or receipt of compensation for services rendered.¹¹³ A volunteer may be paid expenses, reasonable benefits, a nominal fee, or any combination thereof, for their services without losing their status as a volunteer; however, an analysis of the expenses or fees paid may occur if a complaint is lodged against the employer.¹¹⁴ Lastly, the employee must offer their services freely and without coercion, direct or implied, from the employer.¹¹⁵

Same Type of Services

The Code of Federal Regulations provides an analysis of the “same type of services” as service by example.¹¹⁶ The actual duties and responsibilities of the employee in his or her actual employment assignment should be reviewed to determine whether these are closely related to the duties and responsibilities of the volunteer service.¹¹⁷ The regulations use the example of a city police officer volunteering as a part-time referee in a basketball league sponsored by the city as an example of a volunteer service that does not constitute the “same type of service.”¹¹⁸ Additionally, the Department of Labor (“DOL”) has analyzed a very similar situation in which a classified employee (bus driver, maintenance worker, etc.) wishes to volunteer to coach an extra-curricular activity.¹¹⁹ In that opinion, the DOL held that such an arrangement was permissible and that these activities were not providing the “same type of services.”¹²⁰ However, when asked whether “teacher’s assistants” could permissibly serve as volunteer coaches, the DOL answered in the negative.¹²¹ The DOL contrasted the position of a teacher assistant with the position of a school employee such as a custodian, bus driver, building maintenance or food service workers.¹²² In yet another opinion, the DOL held that it would not be a violation of the overtime pay provisions of the FLSA for a security assistant at a school district to also serve as an assistant football coach because the duties of the two roles did not constitute “the same type of services.”¹²³ In the immediate situation, it is our opinion that the job duties of a middle school secretary are sufficiently different from the duties of a coach such that the secretary could volunteer as a coach without violating the overtime pay provisions of

¹¹² 29 CFR § 553.102; An analysis of the definition of “same type of services” as defined in 29 CFR § 553.103 is provided herein.

¹¹³ 29 CFR § 553.101

¹¹⁴ 29 CFR § 553.106

¹¹⁵ 29 C.F.R. § 553.101(b)

¹¹⁶ 29 CFR § 553.103

¹¹⁷ *See id.*

¹¹⁸ 29 CFR § 553.103(c)

¹¹⁹ Wage-Hour Opinion No. WH-1847, July 11, 1995

¹²⁰ See also Wage-Hour Opinion No. WH-2056, September 22, 1997

¹²¹ *Id.*

¹²² *Id.*

¹²³ Wage-Hour Opinion No. WH-2164, June 9, 1999; See also WH-1656, May 7, 1986 (Custodian can volunteer as an assistant baseball coach.)

the FLSA. We recommend that you avoid volunteer opportunities that involve secretarial type services. Future decisions to allow non-exempt employees to volunteer their services in various ways should always include an analysis of whether the services being volunteered are the same type of service as those that the employee performs in his or her actual employment assignment.

Compensation

A volunteer must not be compensated for her services – the services must be offered freely and without coercion.¹²⁴ However, the regulations do allow a volunteer to receive payment for expenses.¹²⁵ Additionally, volunteers can be reimbursed for tuition to attend classes on how to perform the volunteer functions, transportation, meals, reasonable benefits, or nominal fees.¹²⁶ The only guidance provided in the federal regulations for what constitutes a “nominal fee” is that it should not be a substitute for compensation and must not be tied to productivity.¹²⁷ The factors that will be considered in whether a fee is nominal include: the distance traveled and the time and effort expended by the volunteer; whether the volunteer has agreed to be available around-the-clock or only during certain specified time periods; and whether the volunteer provides services as needed or throughout the year.¹²⁸ Nominal monthly or annual stipends or fees can be given to an individual who volunteers to provide periodic services on a year-round basis.¹²⁹ The DOL has provided some opinion guidance in the matter of what constitutes a “nominal fee.” In Letter Opinion WH-1847, the DOL references a stipend as a “fixed sum of money” and states, “...if the stipend, when divided by the hours spent in [a] coaching activity would yield the equivalent of \$4.25 an hour (current minimum wage) or greater to the employee, such payment would be considered more than nominal.”¹³⁰ Of course, the current minimum wage is currently much higher than this; however, the analysis is the same and this opinion does provide good guidance as to how an appropriate stipend for a volunteer coach should be determined.

In your immediate situation, we recommend that you perform an internal review of Ms. X's hours actually worked performing the various coaching duties and divide each stipend that she receives by the number of hours that are volunteered. You should ensure that she is not being compensated for the time spent volunteering at a minimum pay rate. For example, if Ms. X

¹²⁴ See 29 CFR 553.101; See also FLSA2006-40 (DOL letter)

¹²⁵ 29 CFR § 553.106(b)

¹²⁶ 29 CFR § 553.106(c)-(e)

¹²⁷ 29 CFR § 553.106(e)

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ Wage-Hour Opinion No. WH-1847, July 11, 1995; See also WH-2191, September 17, 1999 (Juvenile counselor can also work as a reserve sheriff, but not at a rate of \$11.60 per hour.); WH-2173, August 6, 1999 (DOL refused to answer whether payment of \$1,500.00 – 2,500.00 for officers of a volunteer fire protection was a “nominal fee” due to lack of sufficient information, presumably, the amount of time actually spent “on-duty” performing volunteer services.)

spends 100 hours in her role as head volleyball coach – planning for and attending practices and games, communicating with players and their parents as well as other coaches and teams and UIL, etc., then her stipend would not be problematic. \$3,000/100 is \$3.00/hour which is well below minimum wage and looks more like a nominal fee.¹³¹ Stipends for another volunteer situation may require further or additional analysis. At least one higher court has held that the fact that the employee is motivated by the stipend is irrelevant to this analysis. Therefore, the employee can still be pleased to receive a stipend and can even elect to volunteer because of the stipend without fear that the positive nature of a stipend will negate the fact that it is merely a nominal fee. The Fifth Circuit has held that consideration of who is a “volunteer” requires a common-sense approach that takes into account the totality of the circumstances surrounding the relationship between the individual providing services and the entity for which the services are provided.¹³²

No Coercion

It is important that any non-exempt employee who wishes to also volunteer with the District is doing so “freely and without pressure or coercion, direct or implied, from an employer.”¹³³ In your memorandum regarding the volunteer work that Ms. X performs, you stated that she has opted out of a few volunteer opportunities such as softball assistant coach and senior class sponsor. This indicates that she is free to elect to either volunteer or not volunteer for various coaching opportunities. However, your memorandum also indicated that she may believe that she “must coach.” You should make it clear to Ms. X and all other non-exempt employees who volunteer that volunteering is optional and not required. If this is not the case, then the District could potentially be found in violation of the FLSA. Having the opportunity to decline a volunteer opportunity without fear of any retribution or negative results is essential to this part of the volunteer analysis.

Conclusion

Ms. X’s volunteering as a coach does not violate the Fair Labor Standards Act overtime provisions if she is truly serving as a volunteer. An analysis to consider whether an individual who is also employed at a governmental entity is truly “volunteering” in another capacity, thereby negating any overtime pay obligations, should be made in each specific situation. In Ms. X’s situation, she is employed as a secretary and volunteers as a coach. In our opinion, the tasks that she performs in these two roles are significantly different to pass the “same services” portion of the analysis. It is likely that Ms. X works so many hours in her volunteer capacity as

¹³¹ The regulations provide that a nominal fee should (1) not be a substitute for compensation; (2) must not be tied to productivity; and (3) should be examined by the total amount of payments made...in the context of the economic realities of the particular situation. *Purdham v. Fairfax County Schl. Bd.*, 637 F.3d 421 (4th Cir. 2011) citing 29 C.F.R. § 553.106(e)-(f)

¹³² *Cleveland v. City of Elmendorf*, 388 F.3d 522, 528 (5th Cir. 2004)

¹³³ See 29 C.F.R. § 553.101(c)

coach that the stipends paid for each volunteer opportunity are nominal. In order to ensure that this is accurate, someone in the District should calculate the number of hours that Ms. X spends in each volunteer opportunity and divide the amount of the stipend by that number. The total dollar figure per hour that the stipend provides should be less than minimum wage for the stipend to be considered nominal. We can assist you with this analysis if desired. The fact that Ms. X likes receiving a stipend or is motivated to volunteer because she receives a stipend does not affect the analysis. The last part of the analysis considers whether the employee is coerced, either directly or indirectly, to volunteer. We are unable to ascertain by the statements made in your memorandum whether Ms. X has the complete autonomy to decline these volunteer opportunities. We recommend that this be clarified and, if possible, documented. We can also assist you with this if necessary.

We appreciate having the opportunity to assist you. Please do not hesitate to contact us if you have further legal questions.

[EMPLOYER LETTERHEAD] **VOLUNTEER AGREEMENT**

School Year: _____

I, _____, volunteer my time and service to participate as a
volunteer in the following capacity:

at the following schools:

My signature below indicates the following:

- My time and service in this volunteer capacity are given without promise, expectation or receipt of compensation, benefits or other remuneration for this service other than a nominal fee of \$_____ to be given to me by the District as reimbursement for my expenses associated with the volunteer work.
- I understand and agree that my volunteer participation is not being performed in the course and scope of my regular employment with the District and that my participation in this activity is not in any way required by the _____ Independent School District.
- I acknowledge and agree that my volunteer services do not involve the same or similar type of services I perform as an employee of the _____ Independent School District, nor are these volunteer services closely related to my duties and responsibilities as an employee.
- I understand that my participation as a volunteer may be terminated at any time, without cause, and that I may withdraw from participation at any time for any reason and that my withdrawal will not affect my continued employment with the _____ Independent School District.

This agreement will continue in force until terminated.

Signature Lines: Volunteer Signature & Date: _____

Authorized Administrator Signature & Date: _____