Job Descriptions That Withstand Scrutiny Under Legal Fire

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Recommendations:

- **Who actually drafts the job description?**
- **Attorney's role**
- **Review process**
- **Attorney-client privilege**
- **Federal Laws**
- **State At Will Employment Issues**

Ensure that the Job Description Contains the "Essential Elements"

- **Americans With Disabilities Act ("ADA")**
- **Family Medical Leave Act ("FMLA")**
- **Must already exist**
- **Eliminates (or greatly reduces) factual inquiry**
- **Physical and mental elements are important.**

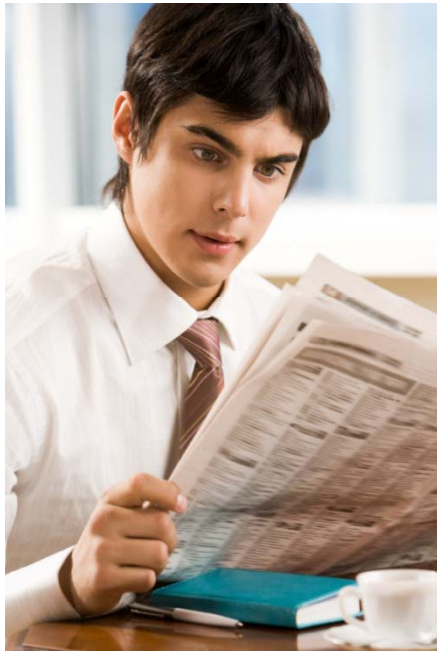
"Saddling the Camel v. Removing Its Hump"

- **Regular attendance**
- **Ability to Read**
- **Verbal Communication Skills**
- **Disclaimer Language**

From *Grainger* to *Jones*

- **Specific tasks on a Job Description Form versus general description of responsibilities**
- **Include concrete tasks that can be measured.**
- **Should Be in Addition to Job Description:**
  - Company objectives
  - Employee goals

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."**
- **Consider including disclaimer language at the end of the job description.**

Essential Functions / FMLA

- **Fitness for Duty Certificates**
- **Eligibility for Leave – Does Employee Have a Serious Health Condition?**
- **Other relevant Issues:**
  - Termination during Leave
  - Equivalent Position

Random Drug Testing – "A Solution in Search of a Problem"

- **Safety Sensitive Positions Can Require Drug Testing**
- **Drug testing government employees without probable cause is a search for purposes of the 4th Amendment.**
- **Special circumstances warrant justification.**
- **Avoid cookie cutter language that is not supported by the actual requirements of the job.**
- **Question positions that list "safety sensitive" without additional information to explain why**
- **"Integrity of the workforce" = insufficient to support suspicionless testing among employees**

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 district's reasoning for designating an employee group as falling within a safety-sensitive position?**
- **Are employees in safety-sensitive positions specifically notified of the drug testing requirements that accompany the "safety-sensitive" position designation?**

FLSA Job Description Issues

- **Does the job description state "independent contractor" but otherwise describe an employee?**
- **Another false sense of security**
- **Review these designations very carefully**
- **Ask questions**
- **Nonexempt employees volunteering – must have volunteer job descriptions**

Recommendations

- **Are designations of Independent Contractor properly reserved for individuals who are not "employees" of the district?**
- **Has the employee's classification as exempt or non-exempt for overtime purposes been cross referenced with the job description?**
- **Do job descriptions for volunteer positions exist so that cross-references can be made when non-exempt employees volunteer.**

Job Description & At Will Employee

- **Remove "terms" of the employment relationship to avoid contractual relationship**
- **Does evaluation "match up" with job description**

“Work For Hire”

- Copyright Act of 1976
- “Work prepared by an employee within the scope of his or her employment.”
- Is teacher hired to create teaching materials, tests, lesson plans, etc.
- Who creates artwork for logos, etc.?

What's In a Name? NLRB

- **Relevant in all but 5 states (TX, GA, SC, NC, and VA)**
- **In other 45 states: Cross reference job descriptions with collective bargaining agreements**
- **Employee v. Supervisor**
- **Prevent false belief that designation of a title is enough to overcome actual job functions that may not be supervisory.**

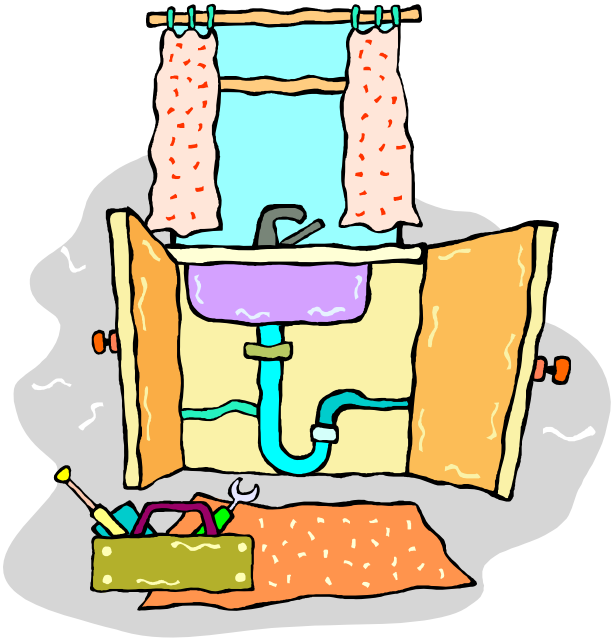
Title VII – Employment Discrimination

- **Who is a similarly situated employee?**
- **Is employee "qualified" for the position?**
- **Accurate information regarding degrees, certifications, and years of experience**

Criminal Background Checks - EEOC

- **If criminal history checks are used – review job description to ensure language supports need**
- **Treatment of criminal convictions and arrests should be "job related and consistent with business necessity"**
- **Conviction v. arrest**

First Amendment



- **Include anything obvious regarding reporting requirements or speaking obligations**
- **Do not have to include the "kitchen sink."**
- **Job description is relevant but not crucial to *Garcetti* analysis**

The End