

## **The ADA, FMLA and FLSA: Why Employers Need Job Descriptions**

**By Trish K. Murphy**

Do your clients maintain written job descriptions for their employees? Although the law generally does not require them, accurate and up-to-date job descriptions can serve as a critical tool for employers in preventing and defending employment claims under the ADA, FMLA and FLSA.

### **ADA: The Americans with Disabilities Act**

The Americans with Disabilities Act<sup>1</sup> requires covered employers to provide reasonable accommodation to qualified employees with disabilities, unless doing so would cause undue hardship for the employer. The ADA obligates an employer to reasonably accommodate a worker with respect to a job's essential functions, which are the basic job duties and requirements that an employee must be able to perform. Nonessential functions need not be accommodated; consequently a frequent issue in ADA litigation concerns whether a function was essential.

Evidence that a function is essential includes an employer's written job description prepared before advertising or interviewing applicants for the job,<sup>2</sup> and a court may give the employer's job description substantial weight. For example, in *Richardson v. Friendly Ice Cream Corp.*,<sup>3</sup> the court relied heavily on the job description in holding that a number of manual tasks were essential functions for a restaurant assistant manager, who could not perform those tasks even with reasonable accommodation.

Just as a job description can constitute compelling evidence in the employer's favor, an inaccurate or incomplete job description can undermine an employer's defense. Courts have held that a function might not be essential when it is not included in the job description. In *Turner v. Hershey Chocolate USA*,<sup>4</sup> the court analyzed whether rotating among assembly lines to reduce the risk of repetitive stress injury was an essential function of a chocolate inspector's job.

Among the factors used by the court in holding that such rotation might not be an essential function was the fact that it was omitted from the job description. Therefore, even though Turner sought a partial exemption from rotation to avoid working at the most demanding station, there was a question of fact as to whether rotation was an essential function that she was required to perform, with or without accommodation.

### **FMLA: The Family and Medical Leave Act**

The Family and Medical Leave Act grants covered employees the right to take protected leave for a serious health condition. When an employee seeks such leave, the job

description setting forth the essential functions becomes critical in assessing the employee's leave and return-to-work requests.

After receiving an FMLA leave request, the employer may require the employee's health care provider to identify in a medical certification form the essential functions the employee cannot perform. Similarly, prior to the employee's return to work, the employer may require the health care provider to indicate whether the employee now is able to perform all essential job functions.

When an accurate and complete job description accompanies certification and return-to-work forms, it helps the provider make an informed assessment of the employee's ability to perform the job requirements. Without correct information, the provider may unknowingly make erroneous assessments, impacting the determination of whether the employee properly qualifies for protected leave and/or whether the employee is truly able to return to work.

Without a job description or list of essential functions provided to the health care provider, the only source of information for the provider to rely on is the employee's characterization of the work. This can prove problematic where - for whatever reason - the employee offers an inaccurate representation.

By illustration, in *Budhun v. Reading Hosp. & Med. Ctr.*,<sup>5</sup> after the employer neglected to provide a job description for the physician's review, the physician based the fitness-for-duty certification on the employee's description only and certified her to return to work with no restrictions. While the employee's position required her to type 60 percent of the time, she told her physician she could return to full duty despite wearing a splint on her hand.

The employer questioned her ability to perform at her previous capacity, refused to allow her to return to work, and later sought dismissal of the suit because the employee could not perform an essential function of the job. But the court held the employee submitted sufficient evidence to show the employer did not properly follow the FMLA to restore her to her previous position.

A key takeaway from the *Budhun* case is that the employer may have avoided the litigation and the preceding chain of events if only the employer had provided a job description for the physician to review at the time of certification.

### **FLSA: The Fair Labor Standards Act**

The Fair Labor Standards Act and its state counterpart, the Washington Minimum Wage Act, provide that employees who work 40 or more hours in a workweek must be paid overtime at a rate of one-and-one-half times their regular rate of pay. While the FLSA provides broad coverage for employers of all sizes, the statute carves out exemptions for certain categories of workers, such as executives and certain other white-collar employees.

Thorough, accurate job descriptions can support an employer's proper analysis of whether an exemption is appropriate for a particular position. Job descriptions also may contribute significantly to defending against a claim that an employee was improperly classified as exempt.

A court may rely in part on the job description content in assessing whether a position was exempt from the FLSA. For example, one consideration for the executive exemption is whether the individual has authority to hire or fire or the employer gives "particular weight" to the individual's recommendations as to the hiring, firing or any other change of status of other employees. In making such a determination, courts evaluate the exempt employee's job description listing responsibilities in this area.<sup>6</sup>

Another consideration for the executive exemption involves examining the relative importance of the exempt duties as compared with other types of duties. Here, too, the court must consider, among other things, the employee's job description. For instance, in *Cort v. Kum & Go, L.C.*,<sup>7</sup> the court held the employee was properly classified as an exempt executive employee. Among the factors the court emphasized was the fact that the employee's job description almost exclusively focused on functions that were all related to management.

### **Best Practices**

To mitigate risk and give employees clear notice of what is expected, employers should be proactive in devoting the necessary time and resources to develop and maintain well-written job descriptions. Employers should:

1. Establish written job descriptions for each position in the organization.
2. Ensure the descriptions are thorough, detailed and accurate. Where elements of the job are believed essential, include them. If the job involves responsibilities relevant to an FLSA-exempt status, incorporate them.
3. Keep descriptions current by updating them as duties change. A scheduled periodic review (e.g., at the beginning of each calendar year or at the time of annual employee evaluations) can help ensure updating occurs routinely.
4. When providing an employee with notice that s/he is eligible for FMLA, include an accurate job description that the employee's health care provider must consider for certification.

Although a job description alone is unlikely to be dispositive in an employment case, implementing and maintaining effective job descriptions is an opportunity employers cannot afford to overlook.

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*offers a brief overview of complex areas of law and should not be relied upon for any purpose.*

1 Local and state laws such as the Washington Law Against Discrimination, RCW Ch. 49.60, contain similar provisions and cover smaller employers.

2 29 C.F.R. 1630.2(n)(3).

3 594 F.3d 69 (1st Cir. 2010).

4 440 F.3d 604 (3d Cir. 2006).

5 765 F.3d 245 (3d Cir. 2014).

6 See, e.g., *Johnson v. Big Lots Stores, Inc.*, 604 F. Supp. 2d 903 (E.D. La. 2009).

7 923 F. Supp. 2d 1173 (W.D. Mo. 2013).