



Job Descriptions Are Not "Exemption Descriptions"

Insights

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Famous last words in the wage-hour Hall of Infamy include, "Let's write the job descriptions to make them exempt." The problem is, job descriptions do not "make" employees exempt.

It is essential that employers steer clear of this misconception as they evaluate what to do in light of the coming changes in the compensation requirements for the federal Fair Labor Standards Act's "white collar" exemptions.

The Exemptions Are Reality-Driven

The amount and method of an employee's pay are not the only requirements for these exemptions. Instead, the exemptions apply (if at all) only on an employee-by-employee basis according to the nature of each individual's actual work as judged against specific and detailed requirements.

Moreover, in any U.S. Labor Department investigation or in a lawsuit, the legal burden of establishing that a person is exempt rests with the *employer*, who must prove that each exemption requirement is met as to every individual whose exempt status has been challenged. USDOL and the courts construe FLSA exemptions very narrowly, and doubt is often resolved against the employer.

So no job description, irrespective of what it says, will bring about exempt status for an employee whose actual duties and responsibilities do not meet the legal tests. Does this mean that job descriptions are irrelevant to FLSA exemptions? Absolutely not!

Does The Description Reflect Reality?

Job descriptions that are vague, ambiguous, jargonized, misdescriptive, out-of-date, and/or poorly-written can lead management to ill-considered and incorrect decisions about who is or is not exempt. Those that are puffed-up for ego purposes, or to justify a compensation decision, or to trigger benefits-eligibility, or that are unrealistic or inaccurate in other ways, can have a similar impact. Flawed job descriptions (whether too favorable or too unfavorable) can also seriously undercut efforts to defend against legal challenges to an individual's having been treated as exempt.

On the other hand, job descriptions that are *accurate, specific, realistic, clear, well-crafted*, and *current* can contribute appreciably to the employer's proper analysis of whether one or more of these exemptions may legally be applied to an employee. And while descriptions of this kind are unlikely to defeat an FLSA claim in themselves, they can play a significant role in defending against an allegation that management should not have deemed an employee to be exempt.

For example, one requirement for the FLSA's executive exemption is that an employee who has no authority to hire or fire must at least make suggestions and recommendations about those actions (or about other status changes) that carry "particular weight". 29 C.F.R. 541.100(a)(4). The fact that making these suggestions and recommendations is truly part of an employee's job helps to show that they are indeed given "particular weight", and listing these responsibilities in the job description is at least some evidence that they really are part of the individual's work. 29 C.F.R. 541.105; 69 Fed.Reg. 22135 (April 23, 2004).

The Bottom Line

Many employers are currently reconsidering how confident they are that certain employees satisfy the "white collar" exemptions' other standards even if the new compensation thresholds are or will be met. This assessment is best carried out by delving into the specifics of what those employees actually do, rather than by merely reviewing job descriptions.

Some employers will decide to improve the prospects for defending an employee's exempt status by modifying or expanding his or her duties and responsibilities. Whether and to what extent this will turn out to have been successful when it matters will depend largely upon whether, how, and to what extent the nature of the employees' work has really been changed. Simply re-wording or re-writing a job description is unlikely to accomplish much.