The Importance of Drafting Effective and Accurate Employment Documents

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THE IMPORTANCE OF DRAFTING EFFECTIVE AND ACCURATE POSITION DESCRIPTIONS, PERFORMANCE EVALUATIONS AND OTHER EMPLOYMENT RELATED DOCUMENTS

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Agenda

1. Position Descriptions
2. Performance Evaluations
3. Employment Agreements & Independent Contractor Agreements
   • Arbitration Agreements in #MeToo Movement
   • Co/Joint Employer Issues
4. Legal Implications of Employment Related Documents
   • “A Shield and Sword”
Why Position Descriptions are Important

- A well drafted and accurate position description that is updated annually:
  - Will assist in the hiring process
  - Serves to place employees on notice of expectations
  - Will be helpful in addressing performance evaluations based upon objective criteria
  - Could be essential to defending against claims of all kinds by employees (Discrimination, Reasonable Accommodation, Wage/Hour/Overtime)

How Effective and Accurate Position Descriptions Help with Hiring

- Accurate Position Descriptions make it easier to conduct interviews
- When you interview, have the Position Description with you and use it
How Effective and Accurate Position Descriptions Help with Hiring

• This will ensure consistency in the interview process. It will also:
  ✓ Help candidates know whether they are qualified for/interested in the job
  ✓ Helps the interviewer assess (objectively) qualifications
  ✓ Helps employees (if hired) know the employer’s job expectations

How Effective and Accurate Position Descriptions Help with Evaluations

• Position Descriptions can serve as the foundation for performance evaluations, and can help not only to achieve optimal performance but also to reward and acknowledge past employee achievements
• When you conduct a performance review, have the Position Description with you and use it – this will help demonstrate objectivity in the evaluation process
How Effective and Accurate Position Descriptions Help with Evaluations

• Accurate and honest performance evaluations also serve to assist employees in knowing employer expectations, giving employees the opportunity to improve performance when necessary.

• Position Descriptions also provide an objective basis for the analysis of performance (did the employee meet the goals that are outlined in the Position Description), which may lessen the chance of any misunderstanding and minimize the risk of exposure to employment related claims.

The Importance of Accuracy and Updating

• In order for a Position Description to be effective in assisting with the hiring, evaluation or decision making process, it is essential that the Position Description be accurate and current.

• Position Descriptions should be reviewed annually and updated as necessary.
The Importance of Accuracy and Updating

- Consider incorporating review of Position Descriptions into the evaluation process by asking the employee if he/she believes that the Position Description accurately reflects actual duties performed.
- Consider seeking input from job incumbents who have actually performed in the job in question.

Elements of a Position Description

- Title
- Duties
  - Essential (Core)
  - Non-Essential/Additional
- Tasks
- Responsibilities
- Job Requirements
  - Education
  - Certification
  - Licensing
  - Experience
- Physical Requirements/Working Conditions/Work Location
- Reporting Structure – Up and Down the Chain of Command
Title

• Is the Title accurate/appropriate
• Does it reflect the level and responsibility associated with the position
• Important to defense of Wage/Hour/Overtime Claims

Responsibilities, Summary of Job Duties, and Physical Requirements

• Make sure to accurately define the skills that are needed to perform that job
• Does it provide a summary that describes the job’s purpose
• Does it clearly, accurately and concisely describe the key responsibilities related to the position in question
• Does it focus on the actual job expectations
Responsibilities, Summary of Job Duties, and Physical Requirements

• Define the actionable tasks you're looking for the potential employee to perform with objective goals listed:
  ✓ The new associate is expected to bill a minimum of X number of hours per week/annually
• Avoid the fluff
• Keep it simple and accurate
• Clarify reporting lines and working relationships

Responsibilities, Summary of Job Duties, and Physical Requirements

• Where appropriate specify location of work. Is telework an option? If not, say so
• If required to be in the office, say so
Responsibilities, Summary of Job Duties, and Physical Requirements

- Include any physical requirements or unique working conditions
  - Lifting/Sitting/Travel Requirements
  - Alter work hours based on needs (arrive early/leave late)
  - Important for ADA/Reasonable Accommodation issues

Job Requirements

- Does the Position Description set forth accurate minimum qualifications that are required for the job:
  - Education – High School Diploma/GED/College Degree
  - Certifications – Mandatory or Preferred
  - Licensing
  - Experience – Can it be a substitute for one or more of the job requirements?
  - Languages – Mandatory or Preferred
Things to Keep in Mind

• Keep all references gender neutral
• Position Descriptions become outdated quickly
  ✓ Make sure to review them annually and update as necessary

Things to Keep in Mind

• Job Title Changes? Revise Position Description
• Greater/Reduced Responsibilities? Revise Position Description
• Changes in Physical Requirements? Revise Position Description
• Changes in Work Location? Revise Position Description
Things to Keep in Mind

• Position Descriptions can encourage employees to think that the only duties they have are the ones specifically listed – “that’s not part of my job description” mentality
  ✓ Make sure that there is room for flexibility
  ✓ Consider including a statement to the effect that the employee may be required to perform additional/fewer duties as determined by management

Things to Keep in Mind

• Poorly written or outdated job descriptions may be used against you
  ✓ “Shield vs. Sword”
• Accurate job descriptions can be used to support employers’ actions in hiring, evaluating, promoting, and termination
  ✓ “Shield vs. Sword”
Things to Keep in Mind

• Job Descriptions may be used to determine an employer’s obligations to accommodate a disabled employee under the ADA as well as state and local law
• Job Descriptions may be used to make and support employers decisions regarding telework/work from home

Performance Evaluations

• "The ideal outcome for a performance appraisal is for managers and employees to have meaningful, reflective conversations together," said Julie Rieken, CEO of evaluation software company Trakstar. "It’s a chance to document the year's accomplishments...understand expectations and celebrate progress.”
• Performance Evaluations are a “shield” or “sword” when defending discrimination or other employment related legal claims
Conducting Effective Evaluations

- Make sure to document performance issues (positive or negative) as they occur so that you are not just working from memory at the time of the actual evaluation
- Make sure that you accurately and honestly critique performance

Conducting Effective Evaluations

- Do not let Managers fall into the trap of giving “satisfactory” evaluations for fear of upsetting the employee
- Accurate and honest evaluations give the employee the information and tools needed to improve and succeed
Conducting Effective Evaluations

- Give suggestions for ways that improvement can be achieved
  - This will not only help the employee improve, but it will also be crucial to defending against any claim of discrimination/unfair treatment

Conducting Effective Evaluations

- If it is not in the evaluation, then it was not a performance problem!!
- If overall evaluation is “satisfactory” it will be difficult to claim performance problems
- Document, Document, Document
Use of Performance Review Forms

• If using forms they must be clear and evaluation topics should be related to the particular job
  ✓ The most effective way to do this is to model the form after the job description
• Numerical evaluations okay as long as you also have space available for written explanation and for suggested areas of improvement

Use of Performance Review Forms

• Do not just have numerical assessment
  ✓ 1 = Poor  ➔  5 = Excellent
• Numerical assessments give little information to the employee about what they did wrong or how they can improve performance
**Use of Performance Review Forms**

- In the event of a claim of discrimination, numerical assessments – without more – are more difficult to defend as there is no description to explain how or why that particular number was derived.

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**Employment Contracts & Independent Contractor Agreements**
Employment Agreements – General Considerations

• Make sure to specify if employment is “at will”
• If not an “at will” agreement, clearly designate the term of the agreement and the manner that it can be terminated prior to expiration of the term

Employment Agreements – General Considerations

• Failure to provide a definitive term or method/reason for termination of the contract could convert the contract into a term contract that can only be ended early for breach or misconduct
• Know state law before entering into term agreement
Employment Agreements – General Considerations

• If including any reference to benefits, make sure to:
  ✓ Include a disclaimer indicating that the firm reserves the right to change benefits at any time
  ✓ Include a statement that in the event of a conflict between the terms of the Employment Agreement and the Plan Documents, in all cases the Plan Documents will control
  ✓ This will minimize the chance of exposure to liability under ERISA

Employment Agreements – General Considerations

• Be cautious about including general policy information (such as partnership tenure track) in the Employment Agreement, which could make it contractually binding
Employment Agreements – General Considerations

• Such policies should be part of the Employee Manual (or other policy statement) – which if drafted properly will not be contractually binding and will be subject to change at the employer’s discretion

Employment Agreements – General Considerations

• Be cautious of violating Section VII of the NLRA – which protects “concerted activity”
• Confidentiality clauses and non-disparity clauses, if not properly drafted, can sometimes run afoul of the NLRA
Employment Agreements – General Considerations

• Section VII of the NLRA protects employees' right to complain about or discuss the “Terms and Conditions of Employment”

Arbitration Provisions in Employment Agreements

• Many employers include mandatory arbitration clauses in employment agreements under which employees agree to arbitrate all employment-related claims
  ✓ Including claims of discrimination or sexual harassment
• Employers include such causes to keep litigation costs down and to avoid class actions
Arbitration Provisions in Employment Agreements

• Some provisions require a sharing of the cost of arbitration, which may discourage the employee from pursuing the claim
• However, the law is still evolving with respect to whether such provisions are enforceable

EEOC’s Rights Not Impacted

• Although the U.S. Supreme Court has held that mandatory arbitration agreements are generally enforceable, plaintiffs' attorneys continue to challenge their enforceability
• Notably, the EEOC’s right to investigate and to maintain an action is not impacted by mandatory arbitration clauses contained in the complaining employee’s employment agreement or employer’s policies
Arbitration Agreements and the #MeToo Movement

• In December of 2017, the “Ending Forced Arbitration of Sexual Harassment Act” was introduced at the Federal level

• The Act would prohibit mandatory arbitration of sexual harassment claims, while leaving other claims subject to arbitration agreements

• Similar bills have been introduced in several other states, including New York

Arbitration Agreements and the #MeToo Movement

• Important to keep apprised of the pending legislation as well as case law developments

• Given the concerns raised by employees in the wake of the “#MeToo movement”, some law firms are electing to discontinue the use of mandatory arbitrations clauses

• Some law schools are not allowing law firms to interview on campus if they require attorneys to sign arbitration clauses
“After Munger Tolles's #MeToo Snafu, Orrick Touts End of Arbitration Agreements”

By Meghan Tribe | March 26, 2018 | The American Lawyer


Independent Contractor Agreements: To Use or Not to Use?

- Many employers elect to hire independent contractors to perform certain services
Independent Contractor Agreements: To Use or Not to Use?

• Using Independent contractors can be beneficial to businesses for several reasons:
  ✓ Employers can hire Independent contractors for a specific project
  ✓ Independent Contractors are not employees, and therefore many employment related laws (like Title VII) do not apply to Independent Contractors

Independent Contractor Agreements: To Use or Not to Use?

• Using Independent contractors can be beneficial to businesses for several reasons:
  ✓ Employers can compensate the contractor for the services rendered without incurring the normal costs of compensating an employee, such as:
    o Unemployment or Workers’ Compensation Insurance
    o Payroll Taxes, Vacation Pay, Overtime
Independent Contractor Agreements: To Use or Not to Use?

• Recently, there has been greater scrutiny by Federal and State agencies, as well as Court, regarding whether the designation of Independent Contractor is appropriate.
• Misclassification can result in significant exposure under tax, wage/hour and other employment laws.

Independent Contractor vs. Employee

• Over the years a variety of tests have evolved to assess whether an individual is properly classified as an Independent Contractor.
• While the tests vary in some areas, the most important factor is all tests is the “degree of control” exerted over the Independent Contractor.
Various Tests Used

• The primary test used by the EEOC when determining classification is “the hiring party’s right to control the manner and means by which the product is accomplished”

• The IRS implemented a 20 Factor Test for analyzing classification of employees

Various Tests Used

• These factors look to things such as behavioral and financial control of the “Independent Contractor”

• The Department of Labor applies the “economic realities test” which examines whether the individual is dependent on the company it works for or if he or she is in business for themselves

• Other tests may be applied by state agencies
Many Courts Apply the “Right to Control” Test

• When the hiring party controls the way work is carried out and a product is delivered, the relationship between the parties is employer/employee

• If an employer does not have authority over how a party accomplishes his or her work but simply assigns a task to be completed, the relationship between the parties is that of hiring party/independent contractor

Many Courts Apply the “Right to Control” Test

• Accordingly, any Independent Contractor Agreement should clearly specify that the Independent Contractor will have control over the method of delivery:
  ✓ Assign a task, but leave the Independent Contractor with the discretion as to how the task may be completed
  ✓ Time lines are acceptable
  ✓ In order to protect against liability, including liability as a joint employer, consider including an indemnity clause in an IC Agreement
Co/Joint Employer Concerns

• Recent NLRB decisions regarding “Co-Employer” status
  ✓ In 2015, the NLRB issued its decision in Browning-Ferris Industries
  ✓ This resulted in an expansion to the joint-employer test
  ✓ Ruled that an entity could be deemed a joint employer if it reserved contractual authority over some essential terms and conditions of employment, allowing it to have indirect control over the employees

Co/Joint Employer Concerns

• Due to changes in the NLRB under the Trump administration, the NLRB has sought to reverse Browning-Ferris Industries and return to the former joint-employer test that required direct and immediate control
  • However, it has yet had the opportunity to do so
    ✓ Arguably, the Browning-Ferris test is still controlling, at least for now
• Uncertain legal standard could expose firm to joint employer status with all IC or vendor’s employees
Proposed Legislative Changes to Joint Employer Test

- The “Save Local Business Act,” was introduced in the House of Representatives in July of 2017 (Bill, H.R. 3441)
- If enacted, the Act would amend the NLRA and the Fair Labor Standards Act to define which persons and entities may be considered joint employers

Legal Implications of Employment Related Documents

- “A Shield and Sword”
- Accurate and honest performance evaluations are critical to defending against employment related claims:
  ✓ Claims under the Americans with Disabilities Act (or related state claims), the job description will be critical to determining what accommodations may be reasonable and necessary to assist an employee in performing the essential elements of their job and/or whether the employee is a qualified person with a disability (meaning can the employee perform the essential elements of the job with or without a reasonable accommodation)
Legal Implications of Employment Related Documents

- Accurate and honest performance evaluations are critical to defending against employment related claims:
  - ✓ Job descriptions are used in evaluating and litigating requests for “reasonable accommodation” under the ADA
  - ✓ Job descriptions are also evaluating requests to telework

- Claims made pursuant to the Fair Labor Standards Act, the job description will be essential for determining whether the employee is properly classified as exempt versus non-exempt
  - ✓ Note that the Title of the job description will not control – it is the essential functions of the job that are determinative
Legal Implications of Employment Related Documents

- Accurate and honest performance evaluations are critical to defending against employment related claims:
  - Requests for leave or intermittent leave under the FMLA, a job description will be useful in determining rights and obligations under the FMLA (altered work schedule)
  - An employee who is not returned to the same position at the end of FMLA leave, the job description will be useful to establish that the position the employee was given was similar, so as to comply with the FMLA

Legal Implications of Employment Related Documents

- Accurate and honest performance evaluations are critical to defending against employment related claims:
  - Job descriptions can also be useful in defending against claims of unequal pay, which are on the rise
  - Differences in job descriptions between the complaining party and the comparator can be used to justify pay differentials and to establish that the comparator is not a similarly situated employee
Legal Implications of Employment Related Documents

• Accurate Performance Evaluations are also critical to defending against claims of discrimination of all kinds, as they serve as contemporaneous evidence of legitimate non-discriminatory reasons for any employment decision.
• Documentation is crucial

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Your opinion matters!

Please take a moment now to complete the evaluation.

Thank You!