

Quad A News

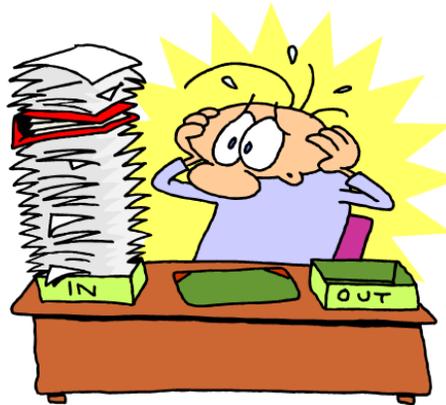
Job Descriptions & the Law

By **Kenneth H. Pritchard, CCP**

This paper provides intermediate-level information for today's HR professionals. It is not legal advice.

Generally, federal law does not require employers to have job descriptions, but there are some exceptions. One exception concerns jobs where employees handle or dispose of hazardous waste such as oil, antifreeze, transmission fluid, auto parts cleaner, paint thinner and similar material. The governing regulation (40 CFR 264.16) does not prescribe a format or degree of specificity for descriptions of these jobs, but it does outline what must, at a minimum, be in them.

Federal regulations and guidance governing the Americans With Disabilities Act (ADA) do not require employers to have job descriptions. However, employers choosing to have job descriptions will find that the ADA has a significant impact on format and content. Because the



employment provisions of the ADA focus on essential functions, the employer must ensure that all essential functions are covered in the job description. A single job task may be essential. If so, it should be covered in the job description. If the essential task exists in the job by itself, apart from a "larger" essential duty (or function) that is described, then it

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Compliant & Effective Job Descriptions & Postings

February Membership Meeting

DATE: February 15, 2011
TIME: 8:30-10:00 a.m.
LOCATION: Sundt Construction
 2641 South 20th Place, Phoenix
 (A triple-trailer unit across from Employment Office)

Please RSVP by Friday, February 11 to azquada@aol.com

**Mark your
calendars now to join us
for the Arizona
Affirmative Action
Association's
36th Annual
Conference
April 18, 2011**

Job Descriptions & the Law

Continued from Page 1

must be expressed, not implied. Conversely, if it is an integral part of a duty (or function) that is expressed, then it may be implied. Another requirement of the ADA is that essential functions be distinguished from non-essential ones if the employer chooses to describe non-essential functions. There are several practical approaches to meeting this requirement. Employers may:

- ⊕ Indicate the time spent on each function (most, but not all, functions that account for only a small part of the job are non-essential).
- ⊕ Surround non-essential functions with asterisks.
- ⊕ List non-essential functions last under a separate heading or other means of demarcation.
- ⊕ Put non-essential functions in a footnote.

Caution: There is general agreement that entries such as "Performs other duties (or functions) as assigned" are not suitable for covering essential functions. If it is essential, it needs to be described, either explicitly or implicitly. It is also important to use language that effectively establishes the nature and importance of essential functions without being prejudicial to persons with disabilities. The ADA requires that job descriptions focus on essential functions in terms of what they actually require, not simply the ways they are currently or have customarily been performed.

Although care is needed to craft descriptive but non-prejudicial language, the wording need not be awkward. One simple pattern that may be followed is to:

- ⇒ Give some notion of frequency, intensity and/or duration (to help establish the level of the work demand).
- ⇒ Describe the current or customary manner of performance, then add the words "or otherwise (do something)" or use the word "typically" (to acknowledge the possibility that alternate manners of performance may be reasonable, as determined on a case-by-case basis).
- ⇒ Provide operational linkage to establish importance to the job.

Examples:

- ◆ Frequently (*frequency*) lifts, carries or otherwise moves and positions (*nonprejudicial language*) objects weighing up to 25 pounds (intensity) when stocking supply room and setting up equipment (*operational linkage*).
- ◆ Typically (*nonprejudicial language*) bends, stoops

and crouches on a regular basis (*frequency*) to adjust settings on machinery (*operational linkage*).

- ◆ One way to avoid having to use the words "or otherwise ..." or "typically" is to avoid describing current and customary means of performance altogether by using generic action verbs in lieu of specific action verbs. Examples:
- ◆ Constantly (*frequency*) moves about (generic action verb) to coordinate work (*operational linkage*).
- ◆ Regularly (*frequency*) sets up, adjusts, assembles, controls, tests and operates (*generic action verbs*) computer equipment to generate input and output and transmit data (*operational linkage*).

SPEAKER'S PROFILE

Michael Mason
Associate
Greenberg Traurig



Michael Mason focuses his practice on commercial litigation and labor and employment issues. Michael has handled breach of contract cases and commercial disputes in state and federal courts throughout the Southwest, including first chair trial experience. Michael also represents employers facing claims by current and former employees alleging sexual harassment, discrimination, retaliation, wrongful termination, breach of contract, and wage/hour violations. Michael has defended employers in class action lawsuits and complex commercial litigation. He also has wide-ranging experience drafting and litigating employment contracts and non-compete and non-solicitation agreements. Michael also specializes in regulations related to Affirmative Action Plans, and has represented employers before various administrative agencies, including the EEOC, DOL, and OFCCP.

Michael received both his Juris Doctorate and bachelor's degree, *magna cum laude*, from Arizona State University.

Non-Prejudicial Language for ADA-Compliant Job Descriptions

By Kenneth H. Pritchard, CCP

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This paper provides intermediate-level information for today's HR professionals. It is not legal advice.



This paper provides help on how to use non-prejudicial language to write job descriptions that comply with the requirements of the Americans with Disabilities Act (ADA). Title I (Employment) of the ADA covers recruitment, selection, placement, job classification, compensation, training and a host of other HR management concerns, including job descriptions. The concept of essential functions drives most of Title I. This concept has a profound impact on job analysis and documentation of all types, especially job descriptions.

“The term essential functions means the fundamental job duties of the employment position the individual with a disability holds or desires.” See 29 CFR §1630.2(n)(1). However, essential job features that are not commonly called duties, such as physical effort, also may be essential under the ADA. Most physical demands may be categorized as (1) strength, (2) climbing or balancing, (3) walking/running, stooping, kneeling, crouching and/or crawling, (4) reaching, handling, fingering and/or feeling, (5) talking and/or hearing, (6) seeing or (7) other demands (e.g., smelling). A major problem confronting job analysts and job description writers alike when they are examining the physical effort in a job is that different people may sometimes accomplish the same functions in quite different, but still acceptable ways. In accordance with the ADA, the analysis of work and the job description both must focus on essential functions and what they require, not the ways they are currently or customarily performed. Unless alternative manners or means of accomplishment are unreasonable or unacceptable for lawful reasons, entries about effort in a job description may not simply reflect current activities and practices. Accordingly, the language in a job description (or a vacancy announcement or any other official document) must be chosen carefully so that it is not prejudicial to qualified persons with disabilities. Some practice is needed to craft judicious language that is not awkward. There are no forbidden words, but some ways of phrasing a job situation and other job content are superior to others.

Job Descriptions and the Accommodation Process

By Beth Loy, PhD

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Sometimes it can be overwhelming when trying to get a sense of the overall accommodation picture. A job description can be a constructive tool for exploring task-specific accommodation options. Often, it is beneficial to consider the specific tasks that comprise the job. This can help pinpoint what limitations are affecting an individual's job performance and what functions can be accommodated. Understanding an individual's functional limitations provides helpful clues when searching for accommodation solutions. The following situations and accommodation solutions are based on sample job descriptions provided in the appendix of this document which can be found on <http://askjan.org/media/jobdescriptions.html>.

Situations and Accommodation Solutions

SITUATION 1: An applicant is interviewing for a Computer Programmer position. Although not required to disclose, the applicant decides to tell the employer she has diabetes due to questions about a particular job requirement for which she may need an accommodation.

Job Task: “Responsibilities occasionally may require an adjusted work schedule, overtime, and evening/weekend hours in order to meet deadlines or to access the computer to perform program tests.”

Limitation: Person needs to eat at specific time each day. May need to test blood sugar and take insulin while at work. Prospective employee is happy to work adjusted hours provided that she can take the steps necessary to regulate her diabetes.

Accommodation Solution: Employer accommodates the employee by allowing her to adjust her lunch hour to 11-12 a.m. rather than the typical 12-1 p.m. lunch break and permits flexible break times. The employee was allowed to bring a small refrigerator to store food and medication in her office. When working evening hours, the employee could set her own dinner breaks accordingly.

SITUATION 2: The new Food Service Manager is a person who has multiple sclerosis. She uses a cane for mobility assistance.

Job Task: “2% of time: Assists in production area during absence of primary kitchen staff.”

Limitation: Employee has difficulty standing for long periods of time.

Accommodation Solution: The employer and employee agree to use a sit/stand work stool and an anti

OFCCP Updates: Enforcement Trends, CSALs, Healthcare, and Compensation Audit Enforcement

Berkshire & Associates

The Office of Federal Contract Compliance Programs (OFCCP) is shifting focus to areas where they can have direct impact, and away from areas where they would refer potential violations to other agencies. As an example, the OFCCP has indicated it will no longer review I-9s as part of routine compliance reviews for investigating only those areas where they have enforcement jurisdiction. Any I-9 issues found during reviews were referred to Immigrations and Customs Enforcement.

Also, in a shift away from investigating patterns or practices of discrimination, the agency is pursuing individual complaints at a higher rate, instead of referring the complaints to the U.S. Equal Employment Opportunity Commission (EEOC). According to Director Patricia Shiu of the OFCCP, a recent analysis indicated individual complaints are twice as likely to reveal discrimination as the neutral audit selection process, so it is a good use of agency resources. In the coming year, the agency is expected to strengthen the regulations for Veterans, possibly adding in a utilization style analysis which is currently completed for minorities and women.

Contractor's outreach efforts for individuals with disabilities are also expected to be scrutinized more closely. Proactive HR professionals are well-advised to review their affirmative action plans (AAPs.) applicant tracking procedures, and outreach programs in advance of an OFCCP audit.

Corporate Scheduling Announcement Letters (CSALs): The OFCCP has begun sending out its 2011 CSALs to CEOs. This letter is sent to any company with two or more establishments on the OFCCP's list to be audited in the upcoming year, and identifies the location(s) likely to be audited. More information is available at the OFCCP website at <http://www.dol.gov/ofccp/regs/compliance/faqs/csalfaqs.htm>.

Healthcare: In an example of its continued focus on the healthcare industry, the OFCCP filed a lawsuit against a Florida hospital claiming justification in cases where a facility performs services under a contract with TRICARE—the health care program serving Uniformed Service members and retirees. In this case, Humana Military Healthcare Services, Inc. (HMHS) was contracted to provide networks of health care providers for TRICARE beneficiaries. Florida Hospital then signed a "Hospital Agreement" with HMHS, to become a participating network hospital and provide health

care services for beneficiaries eligible for benefits under the contract between HMHS and TRICARE. The Administrative Law Judge (ALJ) found as a result of this arrangement, Florida Hospital is a covered subcontractor and must grant OFCCP access to its facilities, and otherwise permit the agency to conduct and complete a compliance review.

The OFCCP has not indicated whether it will consider Florida Hospital to be a binding precedent and certainly the case will be appealed. However, TRICARE network and all other Government-sponsored healthcare program providers should review their contracts with any healthcare maintenance entities or insurers, and evaluate whether to comply with federal contractor and subcontractor obligations. A comprehensive review of the impact of this decision is available through one of Berkshire's legal partners and is available at <http://www.berkshireassociates.com/news/2011/1/13/TRICARE.htm>.

Compensation: The OFCCP has filed a request to rescind the two 2006 guidelines on compensation analysis, "Interpreting Nondiscrimination Requirements of Executive Order 11246 with Respect to Systemic Compensation Discrimination" and "Voluntary Guidelines for Self-Evaluation of Compensation Practices for Compliance with Executive Order with Respect to Systemic Compensation Discrimination." The details of the document have not been released. Based on Director Shiu's comments at the NILG Conference and other industry presentations, it is apparent the OFCCP is looking to establish a new method to collect compensation data from contractors. Director Shiu has also emphasized the OFCCP's role in working to close the wage gap and improve interagency cooperation to address compensation disparities. Read the text of her remarks from NILG at http://www.dol.gov/_sec/newsletter/2010/20100805-3.htm. While the 2006 guidelines did not create new regulations, they established a structured way for contractors to conduct compensation analyses using similarly situated employee groups (SSEGs) and multiple regression analyses. This request to rescind the guidelines opens the door for the OFCCP to begin to analyze compensation without the endorsement of a proscribed grouping or statistical approach. The agency has just begun the process of rescinding the guidelines and the immediate effect on the contractor community is not known.

To find out more about any of these updates, please contact Berkshire Associates at 800.882.8904 or email bai@berkshireassociates.com.

Source: <http://www.berkshireassociates.com/infocenter/newsletters/4q2010.pdf>



**The Louisiana ILG
is privileged to host the**

**29th Annual Industry
Liaison Group National
Conference**

“Embrace the Rhythms of Harmony & Equality”

July 25-29, 2011

at the New Orleans Marriott



**Early Registration ends
May 1st so book now to save
\$200 off your registration**

- | | |
|-------|---|
| \$495 | <i>(2 1/2 day conference) register by April 29</i> |
| \$645 | <i>(3 1/2 day preconference and conference) register by April 29</i> |
| \$695 | <i>(2 1/2 day conference) register after April 30</i> |
| \$845 | <i>(3 1/2 day preconference and conference) register after April 30</i> |

Register at:

<http://www.ilgconference2011.com>

Non-Prejudicial Language for ADA-Compliant Job Descriptions

(Continued from Page 5)

The list of verbs listed here are often helpful in describing *customary* physical effort in a job without risking prejudice to qualified persons with disabilities. Several verbs are listed in more than one physical demand category.

Phrasing that emphasizes the work action is no harder to develop than phrasing that emphasizes the physical attributes typically applied. All it takes is practice. ADA compliance is one of the rewards.

Selected References

SHRM White Papers:

- Job Descriptions – An Overview
- Introduction to Work (Job) Analysis

Other References:

- A Technical Assistance Manual on the Employment Provisions (Title I) of the Americans With Disabilities Act, U.S. Equal Employment Opportunity Commission

Source: http://www.hrtutor.com/en/news_rss/articles/2004/ADALegalJobDescriptions.pdf

Job Descriptions and the Accommodation Process

By Beth Loy, PhD

-fatigue mat to accommodate rare occasions when she will need to assist in the kitchen.

SITUATION 3: A Sheet Metal Worker has a speech impairment. He stutters and when nervous, the condition becomes much more prevalent.

Job Task: “Makes recommendations to supervisor about the need for different materials, equipment, and parts.”

Limitation: Employee has difficulty with verbal communication.

Accommodation Solution: As needed, the employee makes recommendations in writing. When discussion or clarification is necessary, employer and employee meet one-to-one in a quiet environment to eliminate noise, distraction and alleviate the employee’s stress about speaking in group situations.

Source: JAN (Job Accommodation Network) For the complete article, go to <http://askjan.org/media/jobdescriptions.html>.

| PHYSICAL DEMAND CATEGORY | HELPFUL VERBS | | |
|---|------------------------------|-----------------------|----------|
| Strength | Moves/transport | Puts | |
| | Installs/takes out | Removes/replaces | |
| Climbing or balancing | Ascends/descends | Works atop | |
| | Traverses | | |
| Walking/running/stooping, kneeling, crouching and/or crawling | Moves (about or to) | Traverses | |
| | Positions self (to) | | |
| Reaching, handling, fingering and/or feeling | Detects | Diagnoses | |
| | Installs/places | Removes/replaces | |
| | Operates | Adjusts | |
| | Attaches | Positions | |
| | Sets up | Handles/tends | |
| | Activates, feeds or controls | Applies | |
| | Measures | Uses | |
| | Modifies | Signals | |
| | Inputs | Drafts/writes | |
| | Compiles/retrieves | Makes/constructs | |
| | Creates/fabricates | Collects | |
| | Inspects | Prepares | |
| | Serves/services | | |
| | Talking and/or hearing | Communicates | Detects |
| | | Converses with | Discerns |
| Conveys | | Expresses oneself | |
| Discusses | | Exchanges information | |
| Seeing | Detects | Determines | |
| | Distinguishes | Identifies | |
| | Recognizes | Perceives | |
| | Estimates | Judges | |
| | Discerns | Inspects | |
| | Compares | Observes | |
| Other demands | Detects | Uses | |
| | Perceives | Discerns | |

2011 Membership Application

Thank you for your continuing interest in and support of the Arizona Affirmative Action Association (Quad A). Our members include professionals in the fields of human resource management, equal employment opportunity, affirmative action, workplace diversity and other related fields. For over 35 years, Quad A has been providing its members with quality, up-to-date information through workshops, seminars and conferences. Your membership entitles you to a monthly newsletter, quarterly meetings/workshops, seminars, the Annual Conference (in April) and Compliance Conference (in the fall). Most activities are included in your membership; others are offered at a substantial discount. At only \$75 per year (Jan-Dec), membership in Quad A is a true value for the money. *(Individual memberships only; no organizational memberships at this time.)*

Goals of the Arizona Affirmative Action Association are to:

- Promote equal employment opportunity, diversity and affirmative action in the workplace.
- Promote awareness and recognition in the workplace and the community of the benefits of taking affirmative action to provide equal employment opportunities
- Share and disseminate up-to-date information on EEO, AA and diversity issues, legislation, judicial decisions, best practices and trends.
- Provide an opportunity for professionals interested in EEO, AA and diversity issues to network and communicate.

Quad A is a nonprofit 501(c)3 organization (TIN 86-0966437).

Membership fee in Quad A is a qualified tax deduction. *Membership applications/renewals can be made online at www.azquada.org or e-faxed to (623) 321-6016. If paying by check, please return this renewal form along with a check or credit card for \$75 made payable to Arizona Affirmative Action Association to our office at P.O. Box 1848, Phoenix, AZ 85001.*

MEMBERSHIP APPLICATION/RENEWAL

Member Name: _____

Company Name: _____

Title: _____

Mailing Address: _____

City/State/Zip _____

Phone: _____

Fax: _____

E-mail (for member communications only): _____

___ Visa ___ MC ___ Am Ex Name on card: _____

Card # _____

Expires: _____

**Arizona Affirmative
Action Association
(aka) "Quad A"**

**P. O. Box 1848
Phoenix, AZ 85001
Phone: 555-555-5555
E-fax: 602-321-6016
E-mail: azquada@aol.com**

Board Members & Officers

**John Garza, President
Chair, AZILG**

*JAG Specialties, LLC
(602) 300-2023*

Maria Sandoval, Vice President

*MAS Specialists, LLC
623-451-6389*

Rebecca Rand, SPHR, Recording Secretary

*American Express
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Gail Painter, PHR

*Apollo Group
602-557-7586*

Marian Enriquez, CCEP, MHCS, PHR

*The Sundt Companies, Inc.
(480) 293-3108*

Neil Bourque, SPHR

*The Marc Center
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George Thorne

*Jobing.com
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Lisa Barnum

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Evelyn Miller

*Raytheon
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Charlene Valestin, SPHR

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*Bank of Nevada
(702) 248-4200*

Quad A Administrator

Chris Weakland, SPHR

*Legacy Partners Consulting & Coaching, LLC
(602) 377-0404*

**Membership meetings are the 3rd Tuesday
of every month from 8:30-10:00 a.m.**

2011 Calendar of Events

| DATE | TOPIC | HOST & LOCATION |
|--|---|--|
| Jan 18, 8:30-10:00 | 2011 Forecast & Trends in Employment | Blood Systems 4405 E. Cotton Center Suite 120 Phoenix |
| Feb 15, 8:30-10:00 | Compliant & Effective Job Descriptions & Postings | Sundt Construction 2641 S. 40 th Street Tempe |
| Mar 15, 8:30-10:00 | Can Your Organization Make the Grade? Passing the OFCCP/EEOC Tests | To Be Announced |
| Apr 19, 8:00-4:00 Cost: Members \$100 Nonmembers \$150 | 36th Annual Conference | Desert Willow Conference Center 4340 E Cotton Center #100 Phoenix |
| May 17, 8:30-10:00 | Medical Marijuana in the Workforce | American Express 18850 N. 56 th Street, Phoenix |
| June 21, 8:30-10:00 | Disabled/Vets Outreach -- Good Faith is Not Enough | Sundt (Los Alamos Rm) 2620 S. 55 th Street Phoenix (A triple-trailer unit) |
| July 25-29 | Annual National ILG Conference | New Orleans |
| AUGUST | MID-SUMMER BREAK | MID-SUMMER BREAK |
| Sept 20, 8:30-10:00 | Best Practices: Communicating AAPs | To Be Announced |
| Oct 16, 8:30-10:00 | Best Practices: Diversity – Not Why But How | To Be Announced |
| Nov 15, 8:30-10:00 COST: Members \$100 Nonmembers \$150 | 14th Annual Compliance Conference | Desert Willow Conference Center 4340 E Cotton Center #100 Phoenix |
| Dec 6, 8:30-11:30 COST: Members FREE Nonmembers \$75 | Annual Members Only Holiday Roundtable | To Be Announced |