

# Federal Compliance Checklist: Drafting Exempt Employees' Job Descriptions

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## ***Purpose:***

Creating accurate and defensible job descriptions requires careful consideration of business and legal issues. This checklist outlines best practices for drafting and maintaining legally compliant job descriptions for exempt employees (*i.e.*, those employees who qualify to be “exempt” from the minimum wage and overtime requirements of federal law). Of course, the wording of the job description alone is not sufficient to legally protect an employer from a challenge to the employment classification, but it can provide critical guidance to the employer and avoid employee confusion.

## **1. Gather the Necessary Information**

- Analyze job requirements through direct observation, employee/supervisor interviews, and/or outside sources by identifying the following:
  - Purpose of the position and specific employee responsibilities
  - Work environment and work conditions (*e.g.*, any standing, walking or other physical requirements)
  - Key performance indicators
- Assess and set legitimate qualifications including requirements for the following:
  - Education level and/or degrees
  - Certification/license requirements
  - Experience level
  - General skill/knowledge abilities
- Confirm, through analysis performed by legal counsel, that the position qualifies for an exemption under the FLSA and current regulations.

## **2. Identify the Applicable Exemption and Include Language Tracking the Exemption**

- If the “Executive Employee” exemption applies (*see 29 C.F.R. §541.100*), employers should confirm that the job description includes all of the following language in the list of responsibilities and duties over which the employee will be responsible:
  - Identification of either the enterprise or the department or subdivision of the enterprise

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that the employee will be responsible for managing

- A statement that the employee will be responsible for customarily and regularly directing the work of two or more full-time employees or the equivalent (e.g., one full-time employee and two half-time employees), and identifying, by job title, all such employees
- A statement that the employee will have the authority to hire or fire other employees and/or that the employee's suggestions and recommendations as to the changing status of other employees (e.g., regarding promotions, demotions or disciplinary actions) will be afforded particular weight
- If the “Administrative Employee” exemption applies (see 29 C.F.R. §541.200), employers should confirm that the job description does the following:
  - Identifies the office or non-manual work, which is directly related to the management or general business operations of the employer or its customers, over which the employee will be responsible
  - Includes a statement that the employee will be required to exercise discretion and independent judgment with regard to significant business matters and should include a non-exhaustive list identifying the matters of significance over which the employee shall have authority. Such a list should include statements, as applicable, that the employee has the authority to:
    - Formulate, interpret or implement management policies or operating practices;
    - Complete major assignments related to the operation of the business;
    - Bind the employer in matters of significant financial impact;
    - Perform work that affects business operations to a substantial degree, even if the employee's assignments are related to operation of a particular segment of the business;
    - Waive or deviate from established policies and procedures without prior approval;
    - Negotiate and bind the company on significant matters;
    - Provide consultation or expert advice to management;
    - Plan long- or short-term business objectives;
    - Investigate and resolve matters of significance on behalf of management; or
    - Represent the company in handling complaints, arbitrating disputes, or resolving grievances.
- If the “Learned Professional” exemption applies (see 29 C.F.R. §541.300), employers should understand that identification of the education level and degrees required for the position will be of special import, and the job description should include all of the following statements:
  - The work requires advanced knowledge
  - The nature of the work is predominately intellectual in character
  - The employee will consistently exercise discretion and independent judgment in carrying out his/her job duties
- If the “Creative Professional” exemption applies (see 29 C.F.R. §541.300), the employer should ensure that the specialized training, skills or abilities required for the job are specifically listed, and the job description should include a statement that the primary job duty consists of performing work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor (e.g., music, writing, acting or graphic arts).
- If the “Outside Salesperson” exemption applies (see 29 C.F.R. §541.500), employers should confirm that the job description includes the following:
  - A statement that the primary job duty is either making sales or obtaining orders or contracts for services or for the use of facilities for which consideration will be paid
  - Language that the employee will be customarily and regularly engaged in his/her work

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away from the employer's premises

- If the "Computer Professional" exemption applies (see 29 C.F.R. §541.400), employers should confirm that the job description includes the following:
  - Identification of the employee's primary job duty as that of a computer systems analyst, computer programmer, software engineer or a similarly skilled worker in the computer field.
  - A statement that the primary job duties and/or responsibilities involve:
    - The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;
    - The design, development, documentation, analysis, creation, testing, or modification of computer systems or programs, including prototypes based on and related to user system design specifications;
    - The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or
    - Any combination of the above duties, the performance of which requires the same level of skills.
- If the "Highly Compensated Employee" exemption applies (see 29 C.F.R. §541.601), employers should confirm that the job description includes the following:
  - The primary job duty involves performing office or non-manual work
  - The employee customarily and regularly performs any one or more of the exempt duties or responsibilities of an executive, administrative, or professional employee as discussed in more detail in this checklist above

### **3. Draft the Job Description**

- Use clear, precise, and consistent language
- Accurately describe the essential functions of the job including:
  - Title
  - Employee classification (e.g., whether the employee is exempt or non-exempt)
  - Duties and responsibilities, including primary and marginal duties
- Identify the employer's reporting structure
- List the responsibilities and duties required of the position using as much of the key language applicable to the job description as discussed in part 2 of this checklist above
- List any required qualifications
- Identify key performance indicators
- Include additional information as needed (e.g., expectations of employer, location, travel requirements and working hours)
- Include a disclaimer. (e.g., "This job description does not contain a comprehensive list of duties, responsibilities or activities that are required of the employee. Additional duties and responsibilities may be assigned to employee as needed at any time with or without notice.")
- Add a signature line asking the employee to acknowledge receipt of the job description

### **4. Maintain Accurate Job Descriptions**

- Store job descriptions in a secure location
- Coordinate with supervisors to ensure job descriptions are accurate and current
- Establish a regular procedure for assessing and updating job descriptions (at least annually)
- Conduct periodic evaluations of whether a position as performed by the employee(s) has been properly classified as exempt and meets all exemption requirements under applicable

law

- Permit employees to ask questions or seek clarification of any duties and responsibilities
- Update job descriptions as needed when the scope of the job changes
- Involve in-house or outside counsel as needed to assist in drafting or reviewing job descriptions and to ensure compliance with federal and state wage and hour laws and any updates to applicable laws
- Ensure compliance with applicable recordkeeping requirements (*e.g.*, employers covered by the Equal Pay Act must preserve written job descriptions for two years pursuant to 29 *C.F.R.* § 1620.32 )

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National Law Review, Volume VII, Number 335

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