

# NON-PREJUDICIAL LANGUAGE FOR ADA-COMPLIANT JOB DESCRIPTIONS

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

**By Kenneth H. Pritchard, CCP**

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.

Following is a list of verbs that 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.

PHYSICAL DEMAND CATEGORY	HELPFUL VERBS
1. Strength	Moves/transport Puts

	Installs/takes out Removes/replaces Positions/places transfers
2. Climbing or balancing	Ascends/descends Works atop Traverses
3. Walking/running/stooping, kneeling, crouching and/or crawling	Moves (about or to) Traverses Positions self (to)
4. 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
5. Talking and/or hearing	Communicates Detects Converses with Discerns Conveys Expresses oneself Discusses Exchanges information
6. Seeing	Detects Determines Distinguishes

	Identifies Recognizes Perceives Estimates Judges Discerns Inspects Compares Observes assesses
7. Other demands	Detects Uses Perceives Discerns

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

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## **JOB DESCRIPTIONS -- AN OVERVIEW**

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Many employers formally document the content of their company's jobs. Some of the more common methods of job documentation are checklists, SOPs and job descriptions. Generally, employers are free to decide whether they will have job descriptions and, if so, how to use them. Many employers choose to use the written job description because they find it provides them the greatest utility of all job documentation methods. Depending on how detailed they are, job descriptions can be used directly or indirectly to:

- Assign work and document work assignments.
- Help clarify missions.
- Establish performance requirements.
- Assign occupational codes, titles and/or pay levels to jobs.
- Recruit for vacancies.
- Explore reasonable accommodation.
- Counsel people on career opportunities and their vocational interests.
- Train employees.
- Check for compliance with legal requirements related to equal opportunity, equal pay, overtime eligibility, etc.
- Make decisions on job restructuring.
- Suggest ways to enrich the work experience.

In plain, clear language, job descriptions document a job's major functions or duties, responsibilities and/or other critical features, such as skill, effort and working conditions. They may be specific and detailed or generic and general. In accordance with the employer's purposes, job descriptions may tell:

- Who (usually the incumbent or the supervisor).

- Does what work (including review of the work of others).
- Where.
- When (or how often).
- Why (the purpose or impact of the work).
- How (it is accomplished).

To the extent practicable, the job description writer should use action verbs with an implied subject (who) and explicit work objects and/or outputs (what).

Example of an entry from a specific and detailed job description:

(Implied subject) evaluates (action verb) jobs (what) by assigning official title, occupational code and grade in accordance with the job evaluation system (how). (Implied subject) collects (action verb) key job information (what) from various sources, e.g., work interviews and direct observation (where), (implied subject) analyzes (action verb) the data (what) to identify job content and critical evaluation issues (why), then (when) (implied subject) prepares (action verb) or revises (action verb) job descriptions (what).

Example of a corresponding entry from a generic and general job description:

(Implied subject) evaluates (action verb) jobs (what) and prepares or revises (action verbs) job descriptions (what).

All job descriptions are summaries. The baseline objective is to provide enough information in the right format and language to be accurate, clear and useful to the employer. Clarity and utility are particular concerns when generic, general job descriptions are used. The employer must ensure that job descriptions of this type:

- Contain enough accurate information to be useful to the employer for at least one important purpose, and
- Are not so broad that they confuse or mislead managers, employees and/or job applicants.

## **Job Descriptions and the Law**

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 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 nonprejudicial 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) .

### **Keeping Job Descriptions Current**

Job descriptions (and other forms of job documentation) have the potential to become the subject of contention, including grievances or litigation. Accordingly, it is critical that accuracy be maintained. To ensure this, the employer should designate one party (for example, the supervisor or the HR department) as having primary responsibility for keeping them current. In addition, the employer should have a plan for reviewing them regularly. A plan of this type should reflect the personnel resources available to do the review and the character of the job content. Some jobs are dynamic, changing rapidly and extensively (due to technological or organizational considerations); these job descriptions should be reviewed often. Other jobs change very little over long periods of time; these job descriptions need not be reviewed often.

### **Use of Disclaimers**

Some employers use one or more disclaimers to remind readers that job descriptions are not meant to be all-inclusive and/or the job itself is subject to change. Some examples are:

- Nothing in this job description restricts management's right to assign or reassign duties and responsibilities to this job at any time.
- This job description reflects management's assignment of essential functions, it does not prescribe or restrict the tasks that may be assigned.

- Critical features of this job are described under the headings below. They may be subject to change at any time due to reasonable accommodation or other reasons.

## **Describing Discrete Job Tasks Versus Broad Job Roles**

Traditionally, jobs have had clearly identifiable functions and types and levels of required skill, effort, responsibility and working conditions. Such jobs are relatively easy to accurately describe in writing. Recently, however, some employers have decided to broadband their pay levels. In some instances, this broadbanding of pay reflects very broad, non-traditional job "roles" where the types and levels of required skill, effort, responsibility and even working conditions (such as the pressures inherent in the job) are very broad. Descriptions of these job "roles" must, by necessity, be rather general. Care must be taken to ensure that these descriptions do not become so general that they become confusing or open to contradictory interpretations by employees and/or management officials. Otherwise, they run the risk of being used against the employer in grievances and litigation.

### **Summary**

Job descriptions can be very useful to employers, employees and job applicants. However, there are pitfalls. To avoid them, the employer must:

- Carefully consider the format and degree of detail to be used (generic/general v. specific/detailed, disclaimer(s), etc.).
- Ensure that the descriptions are prepared with care (clear, accurate and sufficient for the intended purpose(s), using nonprejudicial language).
- Keep them current.

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