

## EMPLOYEE POLYGRAPH PROTECTION ACT OF 1988 Polygraph Testing

### SUMMARY

The Employee Polygraph Protection Act of 1988 (29 U.S.C.A 2001) was signed into law by President Reagan on June 27, 1988. The law bars most polygraph tests for pre-employment screening and for employee testing, but does permit tests to be administered to employees reasonably suspected of workplace theft or other incidents causing the employer economic loss.

#### PROHIBITIONS ON LIE DETECTOR USE

The law makes it unlawful for an employer:

1. Directly or indirectly to require, request, suggest or cause any employee or prospective employee to take or submit to a lie detector test;
2. To use, accept, refer to or inquire concerning the results of any such test;
3. To discharge, discipline, discriminate against, or to deny employment or promotion to, or threaten to take any such action against any employee or applicant who refuses or fails to take any polygraph test or on the basis of the results of any such test; or
4. To discipline, discharge, discriminate against or deny employment to any employee or applicant who filed a complaint against, testified against or exercised any right under this law.

#### ENFORCEMENT PROVISIONS

Civil penalties of up to \$10,000 can be assessed by the Secretary of Labor and the Solicitor of Labor is authorized to seek injunctive relief for violation of the law.

Private civil actions are also authorized in Federal or State Courts for reinstatement, promotion or the payment of lost wages and benefits. The prevailing party may also collect court costs and attorney's fees.

It is important to note that neither an employee nor his union can waive the rights conferred by the Employee Polygraph Protection Act, unless the waiver is in writing and is part of a pending action or complaint brought under the Act.

#### EXCEPTIONS

1. The law does not apply to the U.S. Government, any State or Local Government or any political subdivisions of a State or Local government;
2. The law does not apply to National defense and/or Security, and does not apply to FBI contractors;
3. The law does not apply to an ongoing investigation involving economic loss or injury to the employer's business, such as embezzlement, misappropriation, or industrial espionage or sabotage, if:
  - a. The employee had access to the property that is the subject of the investigation;
  - b. The employer has reasonable suspicion that the employee was involved; and,
  - c. The employer executes a written statement to the employee prior to the test that sets forth with particularity the specific incident or activity being investigated and the basis for testing particular employees, which statement the employer must keep for at least three (3) years.
4. The law does not apply to Security Services such as armored car service, installation of security systems, or security personnel - where the health and safety of the nation, a State or political subdivision is concerned, or the water supply, electric or nuclear power, radioactive or toxic waste, public transportation and the like are involved; and,
5. The law does not apply to drug security, drug theft, or drug diversion investigations involving employers authorized to manufacture controlled substances.

## ADDITIONAL RESTRICTIONS

Even if an employer decides to administer a polygraph test pursuant to the exemption for an ongoing investigation for theft, for example, strict additional restrictions apply.

Thus, an employer is prohibited from taking any action against any employee due to the test results or for refusing to take the test, unless the employer has additional supporting evidence to support the action.

Moreover, the employee must be permitted to terminate the test at any time and no questions can be asked of an employee which degrade him/her or intrude on such issues as:

1. Religious beliefs or affiliations;
2. Beliefs or opinions regarding racial matters;
3. Political beliefs or affiliations;
4. Any matter relating to sexual behavior; or
5. Beliefs, affiliations, opinion or lawful activity regarding unions.

From the above restrictions, it is easy to understand that certain restrictions also apply to the pre-test phase of such investigation. Thus,

1. The employee must be provided with a written notice of the day, date, place and time of the test and that the employee is free to consult legal counsel and /or an employee representative;
2. The employee is informed in writing of the nature and characteristics of the test and test instruments;
3. Is informed in writing whether the testing area contains one-way mirrors, cameras or other devices through which the test can be observed and whether any other monitoring device is being used.

Finally, the employee must be informed in writing and must sign that:

1. No employee can be required to take the test as a condition of continued employment;
2. Any statement made during the test may constitute additional supporting evidence for the purpose of adverse employment action;
3. He must also be informed of all the limitations as set forth above and his legal rights if the test is not conducted in accordance with law; and

4. He is provided an opportunity to review all questions asked during the test and informed of his right to terminate the test at any time.

Once a polygraph test is completed, if one is ever given under the yoke of this law, the employee is entitled to:

1. A written copy of any opinion or conclusion rendered as a result of the test, and
2. A copy of the questions asked during the test together with the corresponding charted responses.

No polygraph test shall take less than 90 minutes to complete and disclosure of test results can only be made to the employee or the employer and to the Government, or to a governmental agency, arbitrator or mediator pursuant to court order. The employer can only disclose the test results to the same entities as the examiner or to a governmental agency, but only insofar as it discloses information or admission of criminal conduct.

## CONCLUSION

When all of the requirements of the law are fully examined and considered, it appears the best course to take is that course preferred by the drafters of the legislation - do not administer a polygraph test to an employee or applicant for employment. It can hardly be worth the hassle.

Moreover, it is only problematical that a successful polygraph test will result from all your efforts because (a) the employee must be provided with the questions in advance and can prepare his/her answers and (b) the employee can withdraw from the test at any time so that once the examinee begins to feel uncomfortable, the test will probably be terminated.

If an employer feels it must administer such a test, do not do so without the active and close participation of counsel. The roadblocks are many, the loopholes few, and the penalties are substantial.

**This BMA was prepared by NTMA Labor Relations Counsel, Alan Berger, Partner; McMahan, Berger, Hanna, Linihan, Cody & McCarthy, St. Louis, MO.**