

STRAP HIM IN - POLYGRAPH TESTS

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I. New Jersey Statute Regarding Polygraphs provides:

Section 2C: 40A-1. Employer Requiring Lie Detector Test

Any persons who as an employer shall influence, request or require an employee or prospective employee to take or submit to a lie detector test as a condition of employment or continued employment, commits a disorderly person's offense. Provisions of this Section shall not apply if: (1) the employer is authorized to manufacture, distribute or dispense controlled dangerous substances pursuant to the provisions of the "New Jersey Controlled Dangerous Substances Act,"; (2) the employee or prospective employee is or will be directly involved in the manufacture, distribution, or dispensing of, or has or will have access to, legally distributed controlled dangerous substances; and (3) the test, which shall cover a period of time no greater than five years preceding the test, and except as provided in this Section, shall be limited to the work of the employee or prospective employee and the individuals in proper handling, use or illegal sale of legally distributed controlled dangerous substances. The test may include standard baseline questions necessary and for the sole purpose of establishing a normal test pattern. An employee or prospective employee who is required to take a lie detector test as a precondition of employment or continued employment shall have the right to be represented by legal counsel. A copy of the report containing the results of a lie detector test shall be in writing and be provided, upon request, to the individual who has taken the test. Information obtained from the test shall not be released to any other employer or person. The employee or prospective employee shall be informed of his right to present to his employer the results of an independently administered second lie detector examination prior to any personnel decision being made in his behalf by the employer.

The U.S Congress enacted the **Employee Polygraph Protection Act of 1988 ("EPPA")** with certain exceptions within the Act applicable to employers.

The state or local government cannot restrict the federal government's administration of polygraph tests to its employees, or to experts, consultants or employees of contractors within Section 2006(b) and (c), national defense and security exception.

In **Stehney v. Perry**, 101 F.3d 925, (3d Cir. 1996) the court held that an employee of a National Security Agency contractor who refused to take a polygraph test as a condition to receiving clearance to work in a NSA project, could not rely on the protection of a New Jersey statute that prohibited the use of polygraphs as a condition of employment. The court stated that the state could not prohibit or otherwise regulate the

federal government from requiring employees of NSA contractors to take polygraph examinations. The federal law within that context preempts the states from prohibiting the use of polygraphs as part of a security clearance investigation.

While state law cannot restrict the federal government's administration of polygraph tests to its employees or within the 2006(b) and (c) exceptions, the EPPA does not otherwise preempt state or local law from prohibiting or making more restrictive, the use or administration of lie detector tests. (29 U.S.C.A. § 2009). States may prohibit or otherwise regulate testing in the employment context and regulate types of lie detector testing and license examiners.

New Jersey has enacted one of the most comprehensive prohibitions on the use of polygraphs and the New Jersey Supreme Court has interpreted the Act in such a manner.

In ***State of New Jersey v. Community Distributors, Inc.***, 64 N.J. 479; 317 A. 2d 697 (19 N.J. 1973) the New Jersey Supreme Court upheld a conviction of a defendant employer for influencing, requesting or requiring an employee to take or submit to a lie detector test as a condition of continued employment in violation of the New Jersey statutes. The lower court upheld the defendant's employer's conviction for influencing requesting or requiring an employee to take or submit to a lie detector test as a condition of employment or continued employment in violation of the Act.

The court rejected defendant's argument that the statute deprived it of its property without due process of law by preventing it from taking necessary steps towards reducing its losses from theft. The court also rejected defendant's contention that it request that various employees take polygraph tests was not a condition of employment or continued employment within the statutory contemplation.

In ***Community Distributors*** (aka "Drug Fair") each of the employees signed a form "Consent To Taking A Lie Detector Test." The consent form stated that "Drug Fair" has not influenced, requested, or required me to take this lie detector test as a condition of employment or continued employment." The defendant did stipulate that all tests were

given at the request of the employer. The New Jersey Supreme Court has cited statutes that contained exemptions and specifically found that the New Jersey statute does not. **Engel v. T. Woodbridge**, 124 N.J. Super. 307. Some of the statutes are restricted in terminology to situations where employers "require" employees to complete polygraph tests as a condition of employment or continued employment.

The New Jersey statute does not provide for exceptions for it is aimed at employers who "influence, request or require" the taking of a lie detector test as a condition of employment or continued employment.

In **State of New Jersey v. Vornado, Inc., T/A Two Guys**, 155 N.J. Super. 354; 382 A. 2d 945 (1977) two employees offered to take polygraph tests but one refused after price tags were found removed from various articles of merchandise in the store. The security supervisor at the store individually questioned various security employees including employee Layton about the theft. Shortly after leaving the security office, Layton was confronted by her supervisor who asked her why she had balked at the request to take the test. The supervisor told Layton that security personnel should take the test because the incident was causing unrest in the department. A few days later Layton was told she was being transferred to a different store to remove the "a cloud from the department." When Layton did not report to her new assignment she was terminated.

Vornado was convicted pursuant to the statute and then challenged the conviction asserting that there could be no conviction, if no lie detector test was taken. The court found that the essence of the defense is the influence, request or requirement flowing from the employer or its agents. There is no statutory requirement that a polygraph test actually be administered before a violation occurs. The legislature is meant to prevent direct or indirect psychological pressures to submit to testing, not to simply punish administration of a polygraph test actually conducted. The employee does not have to succumb before the statute is violated.

In interpreting the word "influence" the court referred to a definition as follows:

Influence refers to power exerted over others, often through high position, strength of intellect, force of character, degree of accomplishment, sometimes exercise unconsciously and felt insensibly, sometimes consciously or calculated brought to bear ...

In ***State of New Jersey v. Berkey Photo Inc.***, 150 N.J. Super. 56; 374 A. 2d 1226; N.J. Super. (1977) certain employees were requested to take a lie detector test as an aid in investigating a theft from the employer's plant. Defendant contended that the New Jersey statute was not violated because the police suggested the use of the lie detector test and the employees took the test voluntarily and not as a condition of continued employment within the meaning of the act.

The defendant reported the theft of a case of cameras to the Clifton Police Department. Two detectives with the store's director of security investigated the theft and interviewed four of the employees and asked each if they would be willing to submit to the polygraph test. The four agreed to do so. Thereafter the detective recommended to the security director that the polygraph test be used in the investigation and also recommended that defendant arrange for the test privately because the Clifton Police Department did not have a polygraph team and there would be a delay of a month or more if the State Police were asked to perform the test.

All employees agreed to the test and signed "a waiver form stating that they were taking the test voluntarily." All employees were informed in advance that under the laws of New Jersey, no employer may require a person to take a polygraph test as a condition of employment or continued employment. Although one employee testified that the security director did not tell him that the test was voluntary and that he could refuse to take it he still signed the form when asked to do so by the person who administered the lie detector test.

The court found that there is no question that the employer did request the employees to take or submit to the test. It makes no difference that the police initiated or recommended the procedure. The sole issue before the court was whether in the

circumstances of this case the request to take the test "was a condition of employment or continued employment," within the meaning of the statute.

The fact that the crime was being investigated and the police were involved does not justify the employer's intrusion of a lie detector test into an employment relationship. Nor do these factors lessen the compulsion inherent in the situation. The fact that one of the employees wanted to "clear himself" of suspicion was not relevant under the statute.

II. The Employee Polygraph Protection Act of 1988 ("EPPA")

The Employee Polygraph Protection Act of 1988 prohibits most private employers from using polygraph examinations or other lie detector tests in either pre-employment applicant screenings or in dealing with employees. The Act contains limited exceptions that in appropriate cases and with narrow parameters allow a private employer to overcome the prohibition against the use of polygraph examinations. (29 U.S.C.A. § 2001 et. seq.)

A. Prohibited Activities

- Directly or indirectly requiring, requesting, or causing employees or prospective employees "to take or submit to any lie detector test";
- Or from using, accepting, referring to, or inquiring about the results of a lie detector test of employees or prospective employees.
- Employers may not discharge, discipline, or discriminate against, deny, or threaten to deny employment to, or threaten such actions against (1) employees or prospective employees who refuse or fail to take the lie detector test, or (2) employees or prospective employees on the basis of the results of those tests.

Employer:

- Any person acting directly or indirectly in the interest of an employer in relation to an employee or prospective employee (29 U.S.C.A. § 2001 (2)).

Federal regulations define employment agencies, placement services and vocational trade schools as employers under the Act with respect to the individuals they refer to potential employer, but only if the referring entities have reason to know that the employer will perform unlawful testing.

No Retaliation:

Employers also may not take action against employees or prospective employees for filing EPPA-related complaints or actions, testifying in EPPA-related proceedings, or exercising rights under the Act (29 U.S.C.A. § 2002).

Federal regulations declare that the prohibition against discrimination continues as to former employers, as well. If an employee quits rather than take a lie detector test, the employer cannot provide a bad reference in the future because of the employee's refusal to be tested, or because the employee filed a complaint, testified in an EPPA-related proceeding, or otherwise exercised an EPPA right.

No Waiver of Employee's Rights Under the EPPA:

An employees or prospective employee's rights under the EPPA may not be waived by contract or otherwise, unless it is "part of the written settlement agreed to and signed by the parties to the pending action or complaint "under the Act." 29 U.S.C.A. § 2005(d).

B. Exceptions:

Government Employer

1. The EPPA excludes from coverage for the United States Government and states, local governments, and the "political subdivisions of states and local governments. 29 U.S.C.A. § 2006(a).

2. A federal regulation defines political subdivisions to include entities directly created by a state or local government, or administered by individuals who are responsible to public officials. A "political subdivision" has been interpreted to include a county hospital, even though the county was not involved in day-to-day operations of the hospital and received no revenue or income from the hospital's operation.

3. The EPPA permits the federal government in the performance of capturing intelligence functions to administer lie detector tests to experts and consultants under contract with the Defense Department and employees of Defense Department contractors (29 U.S.C.A. § 2006(b)(1)(A)).

4. An exception exists for experts and consultants under contract with the Energy Department “in connection with the atomic energy defense activities” of the Department or the employees of contractors in connection with these activities. 29 U.S.C.A. § 2006(b)(1)(B).

5. The Act permits the federal government, in performing intelligence or counter-intelligence functions, to administer lie detector tests to employees of, or employees assigned to, the National Security Agency Defense Intelligence Agency, National Imagery and Mapping Agency or the Central Intelligence; and in the performance of capturing intelligence functions, to the employees of contractors of the Federal Bureau of Investigation (29 U.S.C.A. § 2006(c)).

Private Employers:

Economic Losses

The EPPA provides employers, who otherwise would be prohibited from using lie detector tests under the Act, with the limited exception for ongoing investigations. The exception permits employers to request employees to take polygraph tests if the tests are administered “in connection with an ongoing investigation involving economic loss or injury to the employer’s business, such as theft, embezzlement, misappropriation, or an act of unlawful industrial espionage or sabotage” (29 U.S.C.A. § 2006(d)(1)).

The prohibition against requiring, requesting or causing employees or prospective employees to submit to tests does not apply to those situations in which employers cooperate with police in the course of a police investigation into criminal activity, as long as the employer’s conduct is merely “passive” in nature.

Conditions for the Exception to Apply:

“Access”

For the exception to apply, the employee to be tested must have “access” to the property

subject to the investigation, and the employer must have “reasonable suspicion” that the employee it seeks to test was involved in the activity being investigated.

Fishing expeditions are prohibited since the ongoing investigation must concern “a specific incident or activity”. An employer cannot request an employee to take a polygraph test “in an effort to determine whether or not any thefts have occurred.” An employer could not administer a test in cases where “missing inventory is merely unspecified, statistical shortages, without identification of a specific incident or activity that produced the inventory shortages and a “reasonable suspicion that the employee was involved.”

“Reasonable Suspicion”

A “reasonable suspicion” requires more than mere “access”, that is, more than the mere opportunity “to cause or to aid or abet in causing” the economic loss or injury under investigation. A reasonable suspicion is “an observable articulable basis in fact which indicates that a particular employee was involved in, or responsible for, an economic loss.”

Factors That Might be Basis for Reasonable Suspicion:

- Information from other employees, and the behavior, demeanor, or conduct of the employee, and;
- Inconsistencies between facts and statements that occurred during an investigation
- What constitutes “reasonable suspicion” is a totality of circumstances approach to determine the existence of reasonable suspicion

Security Services Limited Exception

Private employers in security services, fitting within the exception may administer polygraph tests to certain prospective employees. The Act defines Security Services providers as “its primary business purpose consists of providing armored car personnel, personnel engaged in the design, installation and maintenance of security alarm systems, or other uniformed or plain clothes security personnel.”

Federal regulations state that in the case of diversified businesses, “primary business purpose” means “that at least 50 percent of the employer’s annual dollar volume of business is

derived from the provision of the types of security services specifically identified.

The security services provider's functions must entail the protection of facilities, materials, or operations having "a significant impact on the health or safety" of state or local governments or the national security or the functions must involve the protection of "currency, negotiable instruments, precious commodities or instruments, or proprietary information." The prospective employee subject to testing under the exception must be those who would be employed to protect the facilities, materials, operations, or assets mentioned.

Employers Involved in Manufacture, Distribution or Dispensing of Controlled Substances

These employers are those "who are authorized by the Drug Enforcement Administration to manufacture, distribute, or dispense a controlled substance pursuant to Section 202 of the Controlled Substance Act. Such employers are required by the controlled substance law to register with the DEA.

- Carriers and warehouses possessing controlled substances in the normal course of business but not required to register with the DEA are not within the limited exception.
- Truck drivers and warehouse employees of employers authorized and registered with the DEA "are within the scope of the exception where they have direct access or access to the controlled substances."
- The test may be administered only to prospective or current employees who would on being hired "have direct access to the manufacture, storage, or sale of any such controlled substance. A prospective employee includes a current employee not now holding a position with direct access to controlled substances but who is being considered for another position which entails such direct access."

Current Employees

Tests may be given to current employees only in connection with ongoing investigations of misconduct, involving or likely to involve, loss or injury "to the manufacture, distribution, or dispensing of any such controlled substance.

Additional Supporting Evidence

Although the Section 2006 provisions for the establishment of the ongoing investigation, security services, and drug security exemptions are met, the law applies stringent, additional restrictions on the use of the exemptions. In James v. Professionals' Detective Agency, Inc., 876 F.Supp. 1013 (N.D. Ill. 1995) the court explained that the additional restrictions are designed to eliminate adverse employment action based solely on the lie detector results, protect employees' privacy rights, and reduce the possibility of inaccurate test results. The ongoing investigation exemption will not apply if an employer discriminates in any manner against a current employee based on the analysis of a polygraph test chart or the refusal of the employee to take the polygraph test, "without additional supporting evidence."

"Additional Supporting Evidence" is defined by federal regulations as including, but not limited to, evidence that the employee had access to the property subject to the investigation, and evidence establishing a reasonable suspicion that the employee was involved in the activity under investigation; or the employee's admissions or statements made prior to, during, or after the polygraph examination (29 C.F.R. § 801.20(b)).

Even with the presence of additional supporting evidence, the exception will not apply unless all of the requirements of the limited exception are met and particular rights of the examinee as established under the Act are followed during the actual administration of the polygraph examination.

The security services and drug security exemptions will not apply if the results of the polygraph test chart, analysis or a refusal to take a polygraph test is the "sole basis upon which employment action" is taken against the employee or prospective employee. An adverse action must be supported by evidence establishing other "bona fide" reasons for the employment action. Other legitimate bases to support adverse action can include "prior employment experience, education, job performance, etc. or the employee's admissions or statements made prior to, during or after the polygraph examination.

III. REQUIREMENTS TO PERFORM LIE DETECTOR TEST

A. On-Going Investigation Exception

The "ongoing investigation exception" requires an employer to do the following in performing the test:

1. Give the examinee a statement prior to testing, at least 48 hours, excluding weekdays and holidays, prior to the time of the examination with the time and date of receipt verified on the statement by the employee's signature.
2. An authorized agent of the employer must execute the statement and the statement must set forth "with particularity, the activity being investigated and the basis for the decision to test the employee."
3. The employer must retain the statement at least three years;
4. The statement must identify the economic loss or injury suffered by the employer, and indicate that the employee tested has had access to the property subject to the investigation, and describe the basis of the employer's reasonable suspicion that the employee was involved in the incident under investigation. 29 U.S.C.A. § 2006(d)(4).

B. Rights of the Examinee during the Administration of Polygraph Test

Pre-Test Phase – The examinee has the right to:

1. To have "reasonable written notice of the date, time, location of the test.
2. The right to consult with an attorney or employee representative before the test is administered.
3. Must receive written information about the nature of the test and the instruments used in the administration of the test.
4. Written information is also required concerning whether devices in the testing area will be used to observe, record, or monitor the test and that the examinee or employer may with the other's knowledge, record the test.

5. Examinee must also read and execute a notice informing the examinee of additional rights including notice that the examinee cannot be required to take the test as a condition of employment and that statements made by the examinee during a test can constitute “additional supporting evidence for the purpose of an adverse employment action.”
6. Information provided to the examinee of the limitations imposed by the Act on the use and taking of the test and the remedies available under the Act to the examinee and employer.
7. Opportunity to review the test questions;

C. During the administration of the polygraph test the examinee has the right to:

- Examinee may terminate a test at any time.
- The test may last no more than 90 minutes;
- Examinee must not be asked questions that degrade or intrude unnecessarily on the examinee.
- Questions to the examinee may not include those designed to elicit information regarding (1) religious beliefs or affiliations, (2) beliefs or opinions regarding racial matters, (3) political beliefs or affiliations, (4) any matter relating to sexual behavior, and (5) beliefs, affiliations, opinions or lawful activities regarding unions or labor organizations.
- The examiner may not proceed with testing when there is sufficient written evidence by a physician that the examinee is suffering from a medical or psychological condition or undergoing treatment that might cause abnormal responses during the actual testing phase.
- Sufficient written evidence is defined to include at the minimum a physician’s statement specifically describing the examinee’s medical or psychological condition or treatment and the basis for the physician’s opinion that the condition or treatment might result in such abnormal responses.

- Ask the examinee questions that were not part of those made available to the examinee for review in the pre-test phase;

The Polygraph Results

- After the test is completed the employer is prohibited from taking adverse action against the examinee without a further interview based on the results of the test.
- May not take adverse action without first providing the examinee a written copy of the questions asked, the corresponding charted responses elicited and the opinion rendered as a result of the testing.
- The examiner must render a written opinion or conclusion based only on the polygraph test chart analysis. The opinion or conclusion must not obtain information “other than admissions, information, case facts, and interpretation of the charts relevant to the purpose and stated objectives of the test.
- The examiner’s opinion or conclusion must not include recommendations as to the examinee’s employment. The opinions, reports, questions, charts and other information related to the test must be maintained for at least three years after the test is administered.

Acknowledgments

- Construction and Application of Employee Polygraph Protection Act of 1988
Joseph M. Pellicciotti, J.D.
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