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LIE DETECTOR TESTS: REVISITING THE POLYGRAPH PROTECTION ACT

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Over the years, our attorneys have fielded many questions from employers regarding the administration of lie detector tests. Many times employers are faced with situations where they suspect an employee of theft or other wrongdoing and would like the employee to take a lie detector test. Unfortunately, an employer's options with regard to lie detector tests are severely limited. In this edition, we revisit the law and its restrictions.

The Employee Polygraph Protection Act was enacted in 1988 and became effective on December 27, 1988. The law applies to all employers engaged in or affecting interstate commerce or engaged in the production of goods for interstate commerce. The U.S. government, state and local governments, and political subdivisions of state and local governments are totally exempt. There are also limited exemptions for guard services and companies involved in drug manufacturing and distribution.

The law prohibits employers from:

1. directly or indirectly requiring or suggesting to any employee or applicant that he take a lie detector test;

2. using, referring to, or inquiring concerning the results of any lie detector tests taken by any employee or applicant for employment; and

3. discharging or otherwise disciplining employees or applicants because they refuse to take a test, because they fail such a test, or because they exercise their rights under the law.

An employer may not hire someone else to give the test to avoid this law. The term "employer" is defined in the law to include "any person acting directly or indirectly in the interest of an employer."

The term "lie detector" is defined in the law to include "a polygraph, deceptograph, voice stress analyzer, psychological stress evaluator, or any other similar device (whether mechanical or electrical) that is used, or the results of which are used, for the purpose of rendering a diagnostic opinion regarding the honesty or dishonesty of an individual."

Only under very stringent requirements may an employer ask an employee to take a test. An employer can request that an employee submit to a test if it is being administered in connection with an ongoing investigation involving economic loss or injury to the employer's business, such as theft, embezzlement, misappropriation, industrial espionage, or sabotage. The conference report to the bill specifically states that not all losses will allow testing. For example, in *Lyle v. Mercy Hospital Anderson*, 876 F. Supp. 157 (S.D. Ohio 1995), a federal court ruled that theft committed by one employee against another employee was not an economic loss suffered by the employer and, thus, did not trigger the ongoing investigation exemption. More particularly, the conference report says that "an unintentional loss, such as one stemming from a truck or workplace accident, shall not serve as a pretext for the administration of a polygraph test."

The law also requires that the employee must have had access to the property that is the subject of the investigation and the employer must have a reasonable suspicion that the employee was involved in the incident or activity under investigation.

If a test is given, the employer must execute a statement, and give it to the employee before he takes the test, which sets forth "with particularity the specific incident or activity being investigated and the basis for testing particular employees." Furthermore, the document must be signed by a person authorized to legally bind your company, the document must be retained by you for at least three years, and it must contain: (1) an identification of the specific economic loss or injury to your business; (2) a statement indicating that the employee had access to the property that is the subject of the investigation; and (3) a statement describing the basis for your reasonable suspicion that the employee was involved in the incident or activity under investigation.

The employer must also provide the employee with reasonable written notice of:

1. the date, time, and location of the test;

2. the employee's right to obtain and consult with legal counsel or with his union representative before each phase of the test;

3. information on the nature and characteristics of the test and of the instruments involved;

4. whether the testing area contains a two-way mirror, a camera, or any other device through which the employee can be observed;

5. whether any other device, including recording or monitoring devices, will be used; and

6. the employee's right to make a recording of the test.

The employer must further provide the employee with a written notice, to be signed by the employee, notifying him:

1. that he cannot be required to take the test as a condition of employment;

2. that any statement made by the employee during the test may constitute additional evidence against that employee; and

3. of his legal rights and remedies if the test is not conducted in accordance with the law.

Further, the employer must provide the employee with the opportunity to review all questions to be asked during the test and the employer must inform the employee of his/her right to terminate the test at any time.

<u>There are also limits on what can be asked during the test</u>. The examination must not be conducted in a manner designed to degrade or needlessly intrude upon the employee's religious beliefs or affiliations; beliefs or opinions regarding racial matters; political beliefs or affiliations; any matters relating to sexual behavior; or beliefs, opinions, or lawful

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activities regarding unions. Additionally, as previously stated, the employee must not be asked any relevant question during the test that was not presented in writing for review before the test began.

An employer can only use an examiner who is currently licensed by the state in which the test is to be conducted and who has, at a minimum, a $50,000 bond. Furthermore, the examiner may not conduct the test "if there is significant 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 test.

<u>Before taking any adverse action</u>, an employer must further interview the employee on the basis of the results of the test and provide him with:

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 along with the corresponding charted responses.

An employer still cannot discharge or otherwise discipline anyone "on the basis of the analysis of a polygraph test chart or the refusal to take a polygraph test – WITHOUT ADDITIONAL SUPPORTING EVIDENCE." The law does not specifically define this term, except to note that it may include the company's "reasonable suspicion that the employee was involved in the incident or activity under investigation." This could include the demeanor of the employee or discrepancies which arise during the course of the investigation. It could also include the totality of circumstances concerning access to the property, such as unauthorized or unusual access.

With regard to test results, an employer can tell the employee, or any other person specifically designated in writing by the employee, about the results. Also, an employer may disclose the information to any court, governmental agency, arbitrator, or mediator, in accordance with due process of law "pursuant to an order from a court of competent jurisdiction." An employer may also disclose the information to a governmental agency if it contains an admission of criminal guilt by the employee.

The Secretary of Labor can fine employers up to $10,000 and can also bring an injunctive suit against the employer in federal court for violation of this law. The employee or applicant involved can also bring suit against the employer and can collect "such legal or equitable relief as may be appropriate, including, but not limited to, employment, reinstatement, promotion, the payment of lost wages and benefits," and attorney's fees.

The law also states that it "shall not preempt any provision of any state or local law or of any negotiated collective bargaining agreement that prohibits lie detector tests or that is more restrictive with respect to lie detector tests than any provision of this Act."

All employers must post a notice on the bulletin boards for all employees to read, setting forth excerpts from the Employee Polygraph Protection Act.

Companies manufacturing, distributing, or dispensing controlled substances may administer lie detector tests to applicants who would have direct access to those controlled substances. They may also administer tests to employees if the test is given in connection with an ongoing investigation involving loss or injury to the manufacturing, distribution, or dispensing of any controlled substance and if the employee had access to the person or property that is the subject of the investigation. Additionally, the tested person must be advised of all of his/her rights and be given the same written statement as already described, and the test questions must be limited as previously outlined. Furthermore, the test results, or the refusal to take the test itself, cannot be the "sole basis upon which an adverse employment action is taken."

Companies whose 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, may give lie detector tests, subject to the same restrictions as drug companies. The law does go on to state that the security personnel must have the function of protecting: (1) currency, negotiable securities, precious commodities or instruments, proprietary information; or

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(2) facilities, materials, or operations having a significant impact on the health or safety of any state or political subdivision or upon the national security of the United States. The latter would include electrical and nuclear power facilities, public water supply facilities, shipments of radioactive or other toxic waste materials, and public transportation.

Compliance with this Act is extremely important. Noncompliance can be very costly for employers, as the following case will demonstrate. In *Albin v. Cosmetics Plus, N.Y. Ltd.*, 2001 WL 15676 (S.D. N.Y. 2001), a United States district court affirmed a jury's award of $5,000 for emotional distress and $75,000 for lost wages against an employer who had violated the Act. These damages were awarded after a jury concluded that the employer had wrongfully terminated the plaintiff for his refusal to submit to a requested polygraph test. According to the Act, a private employer may not directly or indirectly suggest that an employee submit to a lie detector test and also may not terminate the employee for his refusal to take such a test. If an employee sues an employer for violating this rule, the plaintiff must prove by a preponderance of the evidence that his refusal to take the test was a factor in his termination. It is then the defendant's responsibility to prove that the plaintiff would have been terminated regardless of his decision to forgo the polygraph test. In *Albin*, the district court concluded that the plaintiff had met this burden and refused to overturn the jury's decision that the employer had failed to meet its burden. Taking the above facts into consideration, the court found that the $80,000 award to the plaintiff was not excessive. Damage awards like the one granted in *Albin* make compliance with this Act a necessity for conscientious employers.

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