



## LIE DETECTOR TESTING OF EMPLOYEES

The right of an employer to conduct lie detector tests is controlled by the federal Employee Polygraph Protection Act of 1988 ("EPPA") and by the California Labor Code. Since the EPPA generally imposes greater obligations on employers seeking to engage in polygraph testing than the California Labor Code, this Newsletter shall focus exclusively on the EPPA rules.

The EPPA makes it unlawful for an employer to require, request, or suggest that any job applicant or employee submit to a lie detector test. However, security guards, employees with direct access to controlled substances, and employees of federal, state, and local governments, are exempt from the EPPA, and are subject to pre-employment polygraph testing. An employer may not discharge, discipline, discriminate against, or deny employment opportunities to, or threaten any job applicant or employee who refuses to take a lie detector test.

The EPPA permits an employer to use a polygraph test only when investigating a specific incident of theft, embezzlement, misappropriation or unlawful industrial espionage. Thus random polygraph testing is not permitted to investigate a generalized loss of inventory.

Before an employee is selected for testing, the employer must show that the employee had access to the missing property, and that it has reason to believe the employee was involved in the incident. After selection of the employee for testing, the employer must give the employee a statement listing specific information about the loss and the specific basis for its belief that the employee was involved in the incident.

An employee who is requested to take a polygraph test in connection with an investigation has the right to refuse to submit to the examination, and such refusal, by itself, may not be used against the employee. Once the polygraph test starts, the employee may terminate the test at any time.

If the employee agrees to submit to the polygraph test, the employee must be given reasonable notice of the date, time, and location of the test, and must also be informed of the right to consult with legal counsel before taking the test. Furthermore, the employee must be given the opportunity to review all questions to be asked before the test is given. The EPPA prohibits questions about the employee's religious beliefs or affiliations, any matters related to sexual behavior, or union activities or opinions. The employee must also be advised as to whether a two-way mirror, camera, or other device which permits the test to be observed will be used, and whether the employer or the employee may make a recording of the test.

Finally, the employee must sign a written notice stating:

- (a) that the employee cannot be required to take the test as a condition of employment;
- (b) that any statement made during the test may constitute additional evidence for the purpose of an adverse employment action;
- (c) the employee's legal rights and remedies if the test is not conducted in accordance with the EPPA;  
and
- (d) that the employee had the opportunity to review all questions to be asked on the test and was informed of the right to terminate the test at any time. The written notice is also required to be read to the employee.

An employee cannot be discharged solely because of the results of the polygraph test. The employer must look to other independent supporting evidence, such as prior employment experience, job performance, or any statements or admissions by the employee.

The EPPA is enforced by the Secretary of Labor and by the right of the employee or prospective employee to sue the employer for damages. The Secretary of Labor may assess a penalty of \$10,000 for each violation of the EPPA, and may seek reinstatement, promotion, and the payment of lost wages and benefits to the employee.

*This complimentary newsletter is intended to provide general information. Because of the complexities and constant changes in the law, it is important to seek professional advice before acting on any of the matters covered herein.*