

The Employee Polygraph Protection Act of 1988 (EPPA)

Since EPPA became Federal law in December 1988 the use of polygraph in screening employees has changed dramatically. EPPA severely restricts the manner by which employees may be subjected to polygraph examinations and it lays out certain procedures that must be followed to be in compliance with the law. The Act also calls for significant penalties for businesses that fail to conform with or violate the measure. EPPA applies only to businesses involved in interstate commerce. EPPA does not apply to individuals, any government entity, or those not involved with interstate commerce. The Wage and Hour Division of the U.S. Department of Labor enforce EPPA. Violations of the Act can subject the offending business to administrative fines of up to \$10,000.00 and then have the case forwarded to the U.S. Attorney's Office for criminal prosecution in Federal court.

Pre-employment polygraph can only be done on certain classifications of Guards and anyone dealing in Pharmaceuticals (from manufacturing to dispensing.) An applicant regarding pre-employment testing must sign a 48-hour notice.

The only other category of polygraph testing allowed by EPPA is for economic loss. An employer must conduct enough of an investigation to establish that the business has suffered an economic loss (theft) and continue that investigation to the point that employee suspects are developed.

To conduct polygraph examinations on employees for reasons of economic loss, the employer must provide the employee with a written *48-hour Notice*. The notice must request that the employee submit to a polygraph examination, identifying the loss they will be questioned about and stating their access to the loss. The notice must also state the employer's *reasonable suspicion* regarding each particular employee involved in the loss.

48-hours after this document is executed with the employee, an examination can be can be administered. Weekends and holidays cannot be counted in the 48-hour notification period. The employer must also read the suspected employee *Appendix A to Part 801 - Notice to Examinee* and the employee must acknowledge, by their signature, that they have read this document and that they received a copy of such. The employer must receive a copy of both the *48-hour Notice* and a copy of the *Appendix A*. The employer must keep a copy of both documents in a separate confidential file for 3 years and the polygraph examiner must also keep a copy of both documents for 3 years.

The Act requires a governmental filing of the investigation. This can be accomplished by filing a police report, or if the business desires, they may forward a copy of their internal report to the Wage and Hour Division of the U.S. Department of Labor within 30 days of the polygraph examinations.

Checklist for the Employer

1. The incident must be an ongoing, specific investigation.
2. It must be an identifiable economic loss to the employer.
3. Obtain a copy of the Employer Polygraph Protection Act of 1988.
4. Provide the employee with a written statement that includes:
 - a. Identification of the company and location of employee
 - b. Description of the loss or activity under investigation
 - c. Location of the loss
 - d. Specific amount of the loss
 - e. Type of economic loss
 - f. How the employee had access to the loss (Note: access alone is not sufficient grounds for polygraph testing.)
 - g. What kind of reasonable suspicion there is to suspect the employee of being involved in the loss
5. The Statement provided to employee **MUST** be signed by someone other than the polygraph examiner, who is authorized to legally bind the employee, and **MUST** be retained by the employer for at least 3 years.
6. Read the Notice to Examinee to the employee, which should be signed, timed, dated and witnessed.
7. Provide the employee with 48 hours advanced notice (not counting weekends or holidays) to the date and time of the scheduled polygraph test.
8. Provide employee with written notice of the date, time and location of the polygraph test, including written directions if the test is to be conducted at a location other than at the place of employment.
9. Maintain a statement of adverse actions taken against the employee following a polygraph test.

10. Conduct an additional interview of employee prior to any adverse action following a polygraph test.
11. Maintain records of ALL of the above for a minimum of 3 years.
12. Employees may not waive their rights.
13. Police and investigators are not exempt and must comply if they are conducting an employment related polygraph test, i.e., when conducting a polygraph test on an internal theft for a missing deposit. Information about a polygraph provided to the employer by a police officer or investigator is prohibited under the Act, since employers are not allowed to use, accept or inquire about the results.
14. There is a \$10,000 penalty for EACH violation of the law.
15. Check out the credentials of the polygraph examiner that you use and verify that the examiner meets EPPA requirements. Never hesitate to ask for written proof of licensing, liability insurance, etc.
16. Use your company letterhead on all forms you provide to the employee. Have your corporate attorney review your actions to assure your compliance of EPPA.

**** Notice of Polygraph Examination ****

Employee's Name Employer's Name

Duty Location of Employee Business Address

City City

Employers Statement to Employee with Respect to On-going Investigation

Incident or activity being investigated:

A. Description of incident or activity:

B. Date or time during which incident or activity is believed to have occurred: _____

C. Location(s) where incident or activity is believed to have taken place: _____

D. Incident involved: [] Money [] Merchandise [] Other

E. Approximate dollar value of loss:, if known: _____

F. Type of economic loss under investigation (circle one:)

Theft Embezzlement Misappropriation of funds Check Kiting Industrial

Espionage Money Laundering Misappropriation of proprietary information

Other _____

**Basis for Employer's Reasonable Suspicion
That Employee Was Involved
In The Activity or Incident
Under Investigation:**

1. If the incident or activity involved money, merchandise or other property, describe the area in which such money merchandise or property was located and how the employee had access to such:

2. Describe whether the information came from an anonymous or confidential source; or if suspicion arose from the employee's demeanor or behavior regarding the activity or incident; or if the employee reported inconsistencies between facts, claims or statements regarding the activity or incident; or other reasonable suspicion):

**REQUEST TO THE EMPLOYEE TO SUBMIT TO A POLYGRAPH
EXAMINATION**

Dear (Employee's Name)_____

You are hereby requested to appear at (describe and give directions to the testing site, if at a location other than the place of employment, provide a map if necessary.)

On (date)_____ at (time)_____, for the purpose of undergoing a voluntary polygraph examination. The undersigned, as an authorized representative of the employer, hereby states that:

The information contained herein is true to the best of our knowledge, information and belief;

Signature of Employee/Date

Signature of Employer/Date

Appendix A to Part 801 – Notice to Examinee

Section 8(b) of the Employee Polygraph Protection Act, and Department of Labor Regulations (29CFR 801.22, 801.23, 801.24, 801.25) require that you be given the following information before being administered a polygraph test:

1. Recording Devices.

- (a.) The polygraph testing area (does) (does not) contain a two-way mirror, a camera or other device through which you may be observed;
- (b.) Another device, such as those used in recording conversations (will) (will not) be used;
- (c.) Both you and the employer have the right, with each other's knowledge, to record electronically, the entire test.

2. Rights

- (a.) You have a right to terminate the test at any time;
- (b.) You have the right, and will be given an opportunity, to review all questions to be asked during the test;
- (c.) You may not be asked questions about any matter which degrades or needlessly intrudes.
- (d.) You may not be asked questions concerning religious beliefs or opinions, beliefs regarding racial matters, political beliefs or affiliations, matters relating to sexual behavior, beliefs, affiliations opinions or lawful activities regarding unions or labor organizations;
- (e.) The test may not be conducted if there is sufficient written evidence by a physician that you are suffering from a medical or psychological condition, or undergoing treatment that might cause abnormal responses during the test.
- (f.) You have the right to consult with legal counsel or other representative before each phase of the test, although the legal counsel or representative may be excluded from the room where the test is being administered during the actual testing phase;

3. Adverse Actions

(a.) The test is not and cannot be required as a condition of employment

(b.) The employer may not discharge, dismiss, discipline, deny employment or promotion, or otherwise discriminate against you based on the analysis of a polygraph test, or based on your refusal to take such a test without additional evidence which would support such an action.

(1.) In connection with an on-going investigation, the additional evidence required for an employer to take action against you, including termination, may be:

(a.) Evidence that you had access to the property that is subject of the investigation, together with:

(b.) The evidence supporting the employer's reasonable suspicion that you were involved in the incident under investigation.

(2.) Any statement made by you before and during the test may serve as additional supporting evidence for an adverse employment action, as described in 3(b.) above, and any admission of criminal conduct by you may be transmitted to an appropriate government law enforcement agency.

4. Release of the Polygraph Results

(a.) Information acquired from a polygraph test may be disclosed by the examiner to the employer only:

(1.) To you and any other person specifically designated in writing by you to receive such information;

(2.) To the employer that requested such a test;

(3.) To a court, government agency, arbitrator, or mediator that obtains a court order;

(4.) To a U.S. Department of Labor official when specifically designated in writing by you to receive such information.

(b.) Information acquired from a polygraph test may be disclosed by the employer to an appropriate governmental agency without a court order when and only insofar, as the information disclosed is an admission of criminal conduct.

5. Relief

If any of your rights or protections under the law are violated, you have the right to file a complaint with the Wage and Hour Division of the U.S. Department of Labor, or take action in court against the employer. Employers who violate this law are liable to the affect examinee, who may receive such legal or equitable relief as may be appropriate, including employment, reinstatement and promotion, and/or payment of lost wages and benefits. The Secretary of Labor may also begin action to restrain violations of the Act, or may assess more penalties against the employer.

6. Protections

Your rights under the Act may not be waived either voluntarily, or involuntarily, by contract or otherwise, except as part of a written settlement to a pending action or complaint under the Act, and agreed to and signed by both parties. I acknowledge that I have received a copy of the above notice and that it has been read to me.

Employees Signature _____ Date _____

