

**EMPLOYEE POLYGRAPH TESTING:
EFFECTIVE INVESTIGATION TOOL OR LIABILITY TRAP?**

**By S. Charles Archuleta, Keleher & McLeod Law Firm
and Lynn E. Mostoller, Keleher & McLeod Law Firm**

A leading employment law treatise notes the increasing use of polygraph tests by private employers in the course of theft investigations. Shawe & Rosenthal, *Employment Law Deskbook*, § 9.03[5] (2006). It notes two reasons for this increased use: (1) “polygraph tests are commonly perceived as a reliable and cost-effective means of identifying thieves,” and (2) “their use is said to deter further theft incidents.” *Id.* Given these reasons, it is no wonder that private employers would be attracted to this device. Caution, however, is advised. A private employer’s use of polygraph testing on employees is strictly regulated by the Employee Polygraph Protection Act of 1988 (“EPPA” or “Act”), 29 U.S.C. §§ 2001-09. The EPPA applies to any private employer “engaged in or affecting commerce or in the production of goods for commerce,” and as suggested by its name, the Act generally prohibits requesting or requiring that an employee or prospective employee submit to a polygraph test. *See id.* at § 2002.

The EPPA, however, enumerates, a number of exemptions. *See id.* at § 2006. For example, the EPPA has no application to governmental employers, § 2006(a), certain employers involved in national defense or national and security, § 2006(b), and FBI contractors, § 2006(c). Of most interest to the average private employer, however, is the limited exemption for ongoing investigations. Employers are not prohibited from requesting an employee take a polygraph test if “the test is 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.” *Id.* at § 2006(d). Caution in applying this exemption, however, is still advised. Again, as one might expect from its name, the EPPA

provides an employee tested under this exemption with significant protections. The following is an outline of issues an employer should address prior to requesting an employee submit to a polygraph test, even if done so as part of an ongoing investigation.

A. **Qualifying For The Ongoing-Investigation Exemption**

- The ongoing-investigation exemption also requires the following before an employee may be tested, *see id.* at § 2006(d)(2)-(4):
 - The employee had **access to the property** that is the subject of the investigation;
 - The employer has **reasonable suspicion** that the employee was involved in the incident or activity under investigation; and
 - The **employer executes a statement**, provided to the examinee before the test. At a minimum the statement must:
 - sets forth with particularity the specific incident or activity being investigated and the basis for testing particular employees,
 - be signed by a person (other than a polygraph examiner) authorized to legally bind the employer,
 - state:
 - the specific economic loss or injury to the employer’s business
 - that the employee had access to the property that is the subject of the investigation
 - a description of the employer’s reasonable suspicion that the employee was involved in the incident or activity under investigation.
- **A note on reasonable suspicion:** “reasonable suspicion” under the EPPA, means “an observable, articulable basis in fact which indicates that a particular employee was involved in or responsible for an economic loss.” 29 C.F.R. § 801.12(f). In sum, the regulations **require more than access or opportunity**. “Information from a co-worker, or an employee’s behavior, demeanor, or conduct may be factors in the basis for reasonable suspicion. Likewise, inconsistencies between facts, claims, or statements that surface during an investigation can serve as a sufficient basis for reasonable suspicion.” *Id.* Access or opportunity, maybe considered as factors. *Compare Jones v. Mango’s Tropical Café, Inc.*, 972 F. Supp. 655, 658-60 (S.D. Fla. 1997) (finding employer had reasonable suspicion to request polygraph test); *with Polkey v. Transtecs Corp.*, 404 F.3d 1264, 1270 (11th Cir. 2005) (upholding employer liable under the EPPA for failure to satisfy reasonable suspicion requirement).

B. Compliance With The Employee Polygraph Protection Act

In addition to the above requirements, an employer who requests that an employee undergo a polygraph test must conform with the following in order to fully comply with the EPPA:

- **Adverse Employment Action:** Under the ongoing investigations exemption, an employee shall not be “discharged, disciplined, denied employment or promotion, or otherwise discriminated against in any manner on the basis of the analysis of the polygraph test chart or the refusal to take a polygraph test, **without additional supporting evidence.**” 29 U.S.C. § 2007(a). Additional supporting evidence may be access to the missing or damaged property, evidence leading to the reasonable suspicion that the employee was involved, or admissions or statements made by an employee before, during or following a polygraph examination. *See* 29 C.F.R. § 801.20.
- **Rights of the Examinee:** The exemption shall not apply unless the following requirements are met:
 - **All Phases:**
 - the examinee shall be permitted to terminate the test at any time
 - the examinee is not asked questions in a manner designed to degrade, or needlessly intrude on the examinee;
 - the examinee is not asked any question concerning:
 - religious beliefs,
 - beliefs or opinions regarding racial matters,
 - political beliefs or affiliations,
 - any matter relating to sexual behavior, and
 - beliefs, affiliations, opinions, or lawful activities regarding unions, or labor organizations
 - the examiner does not conduct the test if 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
 - **Pretest Phase:** The examinee is
 - Provided with **reasonable written notice of the date, time, and location of the test, and of such examinee’s right to obtain and consult with legal counsel or an employee representative before each phase of the test** (in language understood by the examinee);
 - This notice must be received by the examinee **at least 48 hours before the time of the exam** (excluding weekend days and holidays). 29 C.F.R. 801.23. **Proof of service** of the notice is also required.

- Informed in writing of the nature and characteristics of the tests and of the instruments involved;
 - Informed in writing:
 - whether the testing area contains a two-way mirror, a camera, or any other device through which the test can be observed;
 - whether any other device, including a recording or monitoring device will be used;
 - that the employer or the examinee may (with mutual knowledge) make a recording of the test
 - **Reads and signs a written notice informing the examinee:**
 - that the examinee cannot be required to take the test as a condition of employment;
 - that any statement made during the test may constitute additional supporting evidence for the purpose of an adverse employment action;
 - of the limitations imposed under the EPPA;
 - of the legal rights and remedies available to the examinee if the polygraph test is not conducted in accordance with the EPPA; and
 - of the legal rights and remedies available to the employer under the EPPA
 - Provided an opportunity to **review all questions** to be asked during the test and is informed of the right to **terminate the test at any time**
 - A compliant notice form is printed in the regulations. *See* 29 C.F.R. 801, Appendix A
 - **Actual Testing Phase:** The examiner may not ask any questions that were not presented in writing for review to the examinee before the test.
 - **Post-Test Phase:** Before any adverse employment action the employer must:
 - **Further interview the examinee on the basis of the test results**
 - Provide the examinee with:
 - **A written copy of any opinion or conclusion rendered as a result of the test;** and
 - **A copy of the questions asked during the test along with the corresponding charted responses**
 - **Maximum Number & Minimum Duration of Tests:** the examiner shall not conduct and complete more than five polygraph tests on a calendar day on which the test is given, and shall not conduct any test for less than 90 minutes
- **Qualifications and Requirements of Examiners:** the exemption will not apply unless the examiner
 - Has a **valid and current New Mexico polygraph license**
 - Maintains a **\$ 50,000 bond or an equivalent amount of professional liability coverage**
 - Renders any opinion or conclusion regarding the test:
 - **in writing and solely on the basis of an analysis of polygraph test charts**

- **that does not contain information other than admissions, information, case facts, and interpretation of the chart relevant to the purpose and stated objectives of the test**
 - **that does not include any recommendation concerning the employment of the examinee**
 - Maintains all opinions, reports, charts, written questions, lists, and records relating to the test for a **minimum period of 3 years** after the administration of the test. (The employer must also maintain the same records for a minimum of 3 years. 29 C.F.R. § 801.30)
- **Disclosure of Information:** a person other than the examinee, may not disclose information obtained during a polygraph test, EXCEPT:
 - The polygraph examiner may disclose information from the polygraph test to ONLY:
 - The examinee or any other person specifically designated in writing by the examinee;
 - The employer that requested the test; or
 - Any court, governmental agency, arbitrator, or mediator, in accordance with due process of law, pursuant to a court order.
 - An employer may disclose information from the test to ONLY:
 - The examinee or any other person specifically designated in writing by the examinee;
 - Any court, governmental agency, arbitrator, or mediator, in accordance with due process of law, pursuant to a court order;
 - A governmental agency, but only insofar as the disclosed information is an admission of criminal conduct.

The above outline is intended to be a general overview of the requirements of the EPPA. Before counseling employers or employees regarding their rights and responsibilities under the EPPA, further study of the statute, the related regulations, and the interpretive caselaw is advised.

C. Considerations Under New Mexico Law

Currently, New Mexico law does not regulate the use of polygraph testing in the employment context. One case, however, suggests that an employer may expose itself to tort liability if adequate care is not taken in using polygraph examination results in making adverse employment decisions. In *Conant v. Rodriguez*, 1985 N.M. App. LEXIS 634 (Ct. App. 1985), an

employer was sued for defamation. The employer requested the polygraph test be connected with a theft investigation and terminated the employee after the polygraph examiner reported she had failed the exam. *See id.* At *1-2. The employer settled with the employee. *See id.* at * 3. The polygraph examiner was later found liable for compensatory and punitive damages. *See Conant v. Rodriguez*, 113 N.M. 513 (Ct. App. 1992). Unfortunately, these cases provide little guidance because the employer settled and the polygraph examiner's liability was based upon a default judgment. *See generally Conant*, 1985 N.M. App. Lexis 634. The employer's decision to settle, however, does tend to indicate that exposure to tort liability should be considered when to use polygraph testing as part of an on going investigation.

D. Conclusion

An employer may use polygraph testing in the course of an ongoing investigation. In addition to being an effective investigation tool, the use of such testing may itself deter further problems. Such testing, however, should be carefully planned. Liability under the EPPA is not inconsequential. *See* 29 U.S.C.S. § 2005 (providing for civil penalty of up to \$10,000, compensatory damages, equitable relief, fees, and costs). Thus, due care should be exercised in fulfilling the requirements necessary to qualify for an exemption under the EPPA, giving adequate notice to any examination, selecting an appropriately qualified polygraph examiner, maintaining proper records, and adequately controlling disclosure of information obtained during the polygraph test.