

Using the Polygraph in the 21st Century

Part I: Legal Issues

The polygraph was at one time the loss prevention tool of choice for many organizations. In fact, for some, it was the only focus of the loss prevention program. Some companies hired only polygraph examiners to fill their LP staff positions.

This all changed in the late 1980s when the federal government passed the Employee Polygraph Protection Act (EPPA). This legislation to a large extent outlawed the use of polygraphs in the private sector for pre-employment, periodic, or specific issue testing. The dire warnings of shrinkage going out of control because of the restrictions on the polygraph never materialized. Loss prevention turned to new, perhaps better ways of doing the job of controlling shrinkage within their organizations.

But the question remains, "Is there a place for the polygraph in today's loss prevention world?" The answer is, "probably, depending on how you are planning on using it." In this issue we will examine the legal aspects of using the polygraph and in the next issue discuss how the polygraph works and

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possible ways it might be used to assist in an investigation.

Let's examine the law first and the restrictions placed on its use.

Legal Aspects

The Employee Polygraph Protection Act (EPPA) is administered by the U.S. Department of Labor. We have incorporated selected sections from the statute for this column, but the law in its entirety may be examined at www.admpoly.com/eppahome.htm on the Internet. We should also note that there are a number of states, and in some cases local jurisdictions, that also either license polygraph examiners or place restrictions on the polygraph's use. A listing of state licensing laws, restrictions, and admissibility of polygraph results can be found on

the American Polygraph Association (APA) webpage, www.polygraph.org.

The EPPA defines a polygraph as follows:

29 U.S.C.A. § 2001: Definitions

The term "polygraph" means an instrument that –

(A) records continuously, visually, permanently, and simultaneously changes in cardiovascular, respiratory, and electrodermal patterns as minimum instrumentation standards; and

(B) 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.

As mentioned previously, many states have licensing laws that specify the educational and training requirements to be a polygraph examiner. These laws are often regulated by the state's department responsible for professional regulation. In the absence of these regulations, the American Polygraph Association inspects and certifies the educational requirements and curriculum of schools offering polygraph training. These schools and examiners can be checked with the APA to determine their status.

Membership in the APA is by examination and requires certain minimum standards that must be met by the examiner and the school attended. At the very least, when selecting an examiner, look for his or her APA membership and that the associated training was obtained from an APA-accredited school. Generally, the training of a polygraph examiner will take from six weeks to six months depending on the school and state regulations.

29 U.S.C.A. § 2002: Prohibitions on Use

An employer engaged in commerce or production for commerce cannot, in any manner or for any reason, have an employee or prospective employee submit to a polygraph test nor use the results or refusal to take such a test to discipline, discharge, or discriminate against the employee or prospective employee.

In essence, what this means is that a commercial business cannot request, require, or suggest that an applicant take a pre-employment polygraph

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examination. For existing employees, a polygraph can be suggested only when very specific criteria have been met. The act prohibits an employer from requiring that an employee take a polygraph examination or, if the employee refuses to submit to an examination, to use that refusal as a reason to discipline or discharge the individual. There are, however, exemptions to this in EPPA.

29 U.S.C.A. § 2006: Exemptions

1. EPPA does not apply to government employers.

2. The act does not apply to the federal government who may use the polygraph in the interests of national security for counter-intelligence purposes.

3. The act does not apply to FBI contractors in that the federal government can administer a polygraph test to an employee of a contractor who does work for the FBI.

4. There is an exemption for ongoing investigations where any employer suffering economic loss can administer a polygraph test in support of an ongoing investigation provided the employee had access to the property and the employer has a reasonable suspicion that the employee is involved in the incident or activity under investigation. There are procedural and record-keeping requirements the employer has to follow to receive the benefits of this exemption.

5. Exemption for security services. Provided an employer's primary business purpose involves providing security personnel for: any facility, materials, or operations that have an impact on the health and safety of any State or political subdivision, nuclear or electric power facilities, public water facilities, shipment of hazardous or radioactive waste, and operations involving currency or proprietary information, that employer may administer polygraph examinations except that an employee has to have access to these facilities, materials, or operations for the employer to be justified in administering the exam.

6. Exemption for drug security, drug theft, or drug diversion investigations. Any employer authorized to manufacture, distribute, or dispense a controlled substance can administer polygraph exams to their employees provided that the employees have access to the controlled substances.

The exemption of primary interest in this discussion is number four above where there is an "exemption for ongoing investigations where any employer suffering economic loss can administer a polygraph test in support of an ongoing investigation."

First of all, the act controls only those examinations of employees, not vendors, witnesses, or former employees. As a result there are a number of possible candidates for polygraph examinations who are outside the scope of the law.

Law enforcement may ask an employee to submit to a polygraph examination as part of an ongoing investigation. The test results or 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. Thus, the employer is placed in the awkward situation of having an employee tested by the police, but is then prohibited from knowing the results of the examination. The EPPA also places restrictions on the exemptions.

29 U.S.C.A. § 2007: Restrictions on the Use of Exemptions

A. An employer can benefit from the ongoing investigation exemption to EPPA only if they do not use the results of a polygraph examination as the sole reason for discipline or discharge without additional supporting evidence. In addition, an employer can benefit from the security or drug exemption only if they do use the polygraph as the sole basis for taking adverse action against an employee.

B. Exemptions shall not apply unless the following procedures are met:

1. During all phases of the test:

a. Employee can terminate test at any time.

b. Employee cannot be asked degrading or needlessly intrusive questions.

c. Employee cannot be asked any questions regarding religious beliefs or affiliations, beliefs or opinions regarding racial matters, matters relating to sexual behavior, questions regarding unions or labor organizations.

d. The examiner should not conduct the test if there is written evidence by a physician that the employee is suffering from a medical or psychological condition or undergoing treatment that might cause abnormal responses during the examination.

2. During the pre-test:

a. Employee must be given reasonable notice of the test including the right to consult legal counsel or an employee representative during the test.

b. Employee is informed in writing of the nature and characteristics of the test, whether the test is being recorded or observed, whether any device will be used to record the test, and whether the employer and employee may (with mutual knowledge) make a recording of the test.

c. Employee reads and signs a written notice informing such examinee: that the employee cannot be required to take the test, any statement made during the test may constitute additional supporting evidence for adverse employment action, the limitations imposed under this section of EPPA, the legal rights and remedies imposed for not following this chapter, and the legal rights and remedies of the employer.

d. Employee is 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.

3. Actual testing phase: Employee must not be asked any question during the test that was not

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In our book, *Theft by Employees*, published in 1983, John Clark and I compared theft levels among the various occupations in three different industries: retailing, healthcare, and manufacturing. Generally speaking, employees working in those jobs possessing the greatest uncontrolled access to money and property did report slightly higher levels of theft.

It is also important to note, however, that the majority of employees with high opportunity to steal were *not* involved in dishonest activity. In other words, from my own research and other scholarly studies, it has become clear that just having access to things of value does not necessarily produce theft.

Opportunity also has an important subjective dimension. Three factors that can affect the subjective value of merchandise include social desirability, concealability, and proximity.

Social Desirability. Obviously, money has objective, or extrinsic, value. However, the same cannot always be said for merchandise, which has both objective (extrinsic) and subjective (intrinsic) value. Some merchandise in our stores is highly priced, but could not be given away. Other less expensive merchandise cannot even be kept on the shelves.

Most internal theft (and shoplifting) is focused on those items that are currently highly desirable. This is especially true for younger employees with minimal tenure with the firm.

Opportunity, then, is not just access to merchandise, it is also directly dependent on how “hot” the merchandise is. In other words, is the item currently in vogue? Or, as my generation said, “Is it cool?”

We should not just ask ourselves whether stolen items can be fenced or sold to strangers. Of greater importance, we might ask, “Does the merchandise in our stores have subjective value to the person who takes it, either for their personal use or to give to a friend or family member?” In other words, we need to continually reevaluate the social desirability of the merchandise in the store.

Concealability. This factor relates to the question, “Can the item easily be hidden on one’s person to be taken from the store?”

Americans are afraid to violate a person’s private social space. This is why there is so much objection to current airport security screening policies. It occurs to me that many things that are socially desirable are getting physically smaller, and as a result, easier to conceal on our persons. Just think of how much easier it is to conceal a CD when compared to a vinyl record of an earlier generation, or a DVD when compared to a VHS tape in its box.

Proximity. The old saying goes, “familiarity breeds contempt.” Perhaps in the retail store the saying should be restated: “proximity breeds devaluation.” Merchandise that is handled

continuously every day can allow the employee to eventually view these items as just “things” without great value to the company. For example, when I worked for the Air Force one summer, we often threw out equipment worth thousands of dollars, largely because everyone had forgotten its real value.

POS terminals automatically price items that allow associates to lose appreciation for the real value and price of store merchandise. Eventually, it just all becomes “stuff” with little or unknown value, making it much easier to steal and not worth protecting.

Understanding the subjective dimensions of opportunity can help understand the cause of both internal and external theft. If an item of merchandise is socially desirable, meaning it is envied and approved by one’s closest peers, can be easily concealed because of its small size, and is in continuous, unsupervised proximity to the sales associate during the work day, we should not be surprised if it is stolen with regularity.

In fact, alternatively, perhaps we should be examining those circumstances where we find high levels of opportunity, but with very little theft. Quite possibly the sales associates in those low-theft environments have internalized the real value of the merchandise, understand the harm that theft causes for the profitability of the firm, and have not yet rationalized away the wrongful nature of their dishonesty. ■

Interviewing & INTERROGATION

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presented in writing for review to such examinee before the test.

4. Post-test phase: Before any adverse employment action, the employer shall interview the employee further regarding the results of the test, provide the employee 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.

These restrictions are fairly straight forward and are the responsibility of the company and examiner to follow carefully.

- The applicant must be given the questions to be asked in writing and there must be a fact base presented to the employee relating why he was suspected.
- To test an employee about an economic loss, more than mere access is generally required unless specified otherwise in the act.

- The polygraph results alone cannot be used to discipline or discharge an employee and are best used in conjunction with a confession or other investigative findings.
- Before using the polygraph, an attorney should review the law and case facts to ensure compliance with the act.

In the January/February 2004 issue, we will discuss how the polygraph works along with various applications to aid an investigation. ■