

HOUSE OF REPRESENTATIVES / SENATE

PROHIBITIONS ON LIE DETECTOR USE:

Except as provided in sections 7 and 8, it shall be unlawful for any employer engaged in or affecting commerce or in the production of good for commerce –

- 1) Directly or indirectly, to require, suggest, or cause any employee or prospective employee to take or submit to any lie detector test;
- 2) to use, accept, refer to, or inquire concerning the results of any lie detector test of any employee or prospective employee;
- 3) to discharge, discipline, discriminate against in any manner, or deny employment or promotion to, or threaten to take any such action against –
 - a. such employee or prospective employee who refuses, declines, or fails to take or submit to any lie detector test, or
 - b. any employee or prospective employee on the basis of the results of any lie detector test; or
- 4) to discharge, discipline, discriminate against in any manner, or deny employment or promotion to, or threaten to take any such action against any employee or prospective employee because –
 - a. such employee or prospective employee has filed any such complaint or instituted or caused to be instituted any proceeding under or related to this Act;
 - b. such employee or prospective employee has testified or is about to testify in any such proceeding, or
 - c. of the exercise by such employee or prospective employee, on behalf of such employee or another person, of any right afforded by this Act.

Section 7. EXEMPTIONS:

A. NO APPLICATION TO GOVERNMENTAL EMPLOYERS—This Act shall not apply with respect to the United States Government, any State or local government, or any political subdivision of a State or local government.

B. NATIONAL DEFENSE AND SECURITY EXEMPTION—

- 1) NATIONAL DEFENSE—Nothing in this Act shall be construed to prohibit the administration, by the Federal Government, in the performance of any counterintelligence function, of any lie detector test to—
 - a) Any expert or consultant under contract to the Department of Defense or any employee of any contractor of such Department; or
 - b) Any expert or consultant under contract with the Department of Energy in connection with the atomic energy defense activities of such Department or any employee of any contractor of such Department in connection with such activities.
- 2) SECURITY—Nothing in the Act shall be construed to prohibit the administration, by the Federal Government, in the performance of any intelligence or counterintelligence function, of any lie detector test to –
 - a) (i) any individual employed by, assigned to, or detailed to, the National Security Agency, the Defense Intelligence Agency, or the Central Intelligence Agency.
(ii) any expert or consultant under contract to any such agency
(iii) any employee of a contractor to any such agency
(iv) any individual applying for a position in any such agency, or
 - b) any expert, or consultant (or employee of such expert or consultant) under contract with any Federal Government department, agency, or program whose duties involve access to information that has been classified at the level to top secret if designed as being within a special access program under section

4.2(a) of Executive Order 12356 (or a successor Executive Order).

C) FBI CONTRACTOR EXEMPTION—Nothing in the Act shall be construed to prohibit the administration, by the Federal Government, in the performance of any counterintelligence function, of any lie detector test to an employee of a contractor of the Federal Bureau of Investigation of the Department of Justice who is engaged in the performance of any work under the contract with such bureau.

There are five general requirements under the ongoing investigations exemption:

1. **Economic loss or injury to the employer's business**

The test must be administered in connection with an ongoing investigation involving economic loss or injury to the employer's business, such as theft, embezzlement, misappropriation, an act of unlawful industrial espionage or sabotage, check kiting, money laundering, or the misappropriation of confidential or trade secret information. In addition, instances such as theft from property managed by an employer or property held by an employer as a fiduciary or custodian would meet the required injury standard. Further, the economic loss must result from intentional wrongdoing, and not unintentional or economic losses. It is the business of the employer which must suffer the economic loss or injury. Thus, according to the Department of Labor, a theft committed by one employee against another employee of the same employer does not satisfy the requirement. In addition, the ongoing investigation exemption does not allow a polygraph test to be used to determine whether an employee has used drugs or alcohol, or has engaged in misconduct other than misconduct causing economic loss or injury to the employer's business.

2. **Access**

Only employees who have access to the property that is the subject of the investigation may be polygraphed. The term "access", however, includes more than direct or physical contact during the course of employment. Generally, all employees who have the ability to divert possession or otherwise affect the disposition of the property that is the subject of the investigation will be deemed to have "access" under the ongoing investigation exemption.

3. **Reasonable Suspicion**

In addition to access, there must be a basis for "reasonable suspicion" that the employee to be polygraphed was involved in the incident or activity under investigation. The phrase "reasonable suspicion" simply means that

the employer must have an articulated basis to believe that the employee was involved in or responsible for the economic loss or injury. The employer's suspicions must not be based on whimsical or arbitrary factors, such as the race or ethnicity of the employee. Information from a co-worker, or information derived from an employee's behavior, demeanor, or conduct, may be factors in forming a "reasonable suspicion" Additionally, inconsistencies between facts, claims or statements that surface during an investigation can serve as a basis for "reasonable suspicion". The watchword is "reasonable", and so long as the employer can describe and articulate a reasonable basis for his suspicions, this requirement will be satisfied.

4. Special 48 Hour Notice

Before an employer may administer a polygraph examination to an employee under the ongoing investigations exemption, the employer must execute a statement that sets forth with particularity the specific incident being investigated, indicates that the employee has access to the property that is the subject of the investigation, and describes the basis of the employer's reasonable suspicion that the employee was involved in the incident or activity under investigation. This statement must be provided to the examinee at least 48 hours before the test; it must be signed by any person legally authorized to bind the employer; and it must be retained by the employer for at least three years. A sample special 48 hour notice under the ongoing investigation exemption is appended to this manual. *[Law amended to 24 hours is no objection by the subject.]*

5. Section 8 Procedures

In addition to all of the above, employers must comply with the restrictions, procedures, notices, and examinee "rights" which are spelled out in section 8 of EPPA and described more fully below.

Excerpt from the Employee Polygraph Protection Act of 1988:

Section 8. (Excerpt) this Act shall not prohibit an employer from requesting an employee to submit to a polygraph test if—

- 1) 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;
- 2) The employee had access to the property that is the subject of the investigation;
- 3) The employer has a reasonable suspicion that the employee was involved in the incident or activity under investigation; and

Hat Squad Investigations

- 4) The employer executes a statement, provided to the examinee before the test, that—
 - a. Sets forth with particularity the specific incident or activity being investigated and the basis for testing particular employees,
 - b. Is signed by a person (other than a polygraph examiner) authorized to legally bind the employer,
 - c. Is retained by the employer for at least 3 years, and
 - d. Contains, at a minimum-
 - i. An identification of the specific economic loss or injury to the business of the employer,
 - ii. A statement indicating that the employee had access to the property that is the subject of the investigation, and
 - iii. A statement describing the basis of the employer’s reasonable suspicion that the employee was involved in the incident or activity under investigation.

[Above embodied in FORM 101, attached]

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CURRENT STATE LAW RESTRICTIONS

California Labor Code S 432.2 states: “No employer shall demand or require any applicant for employment to submit to or take a Polygraph, Lie Detector or similar test or examination as a condition of employment or continued employment.”

NOTICE TO EMPLOYEE OF REQUEST FOR POLYGRAPH TEST

- A. You are requested to appear for a polygraph test at _____ on _____ at _____.
- B. You have the right to consult with counsel or an employee representative before each phase of the polygraph test. However, the attorney or employee representative will not be permitted in the room where the examination is administered during the actual testing phase.
- * * * * *

The undersigned, as an authorized representative of the Employer, hereby states as follows:

- A) The information contained herein is true to the best of my knowledge, information and belief.
- B) There is a reasonable suspicion that the Employee was involved in the incident of activity under investigation.
- C) A copy of the above statement was delivered to the Employee named herein on (date) _____ at (time) _____.

* * * * *

I have received my copy of form 101
And _____ agree _____ refuse
to take a polygraph examination
concerning that subject.

Employee

Date: _____

Witness: _____

Witness: _____

Firm Name

Officer's Name – Please Print

Signature

Title or Position

Date: _____

* * * * *

- NOTE:
- 1) This statement must be in a language understood by the employee
 - 2) A copy of this statement must be delivered to the Employee at least 48 hours prior to the time of the polygraph test, excluding weekend days and holidays. *[24 hours if no objection by the subject]*
 - 3) This statement must be signed by a person (other than a polygraph examiner) authorized to legally bind the Employer and must be retained by the employer for at least three years.