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# Employee Polygraph Protection Act

## Who, What, Why . . .

*Who does it apply to:* Employee Polygraph Protection Act of 1988 applies to virtually every employer who might think of giving a polygraph test as a prerequisite to hiring or to an existing employee.

*What does the law prohibit:* Employers cannot “require, request, suggest, or cause” an employee to take a polygraph or lie-detector test.

*What about a test by someone else, like the police:* Employers are also prohibited from “using, accepting, or inquiring about” the results of a test taken by someone else.

*How can an employer treat an employee who refuses to “volunteer” for a test:* This is covered too, employers cannot discriminate against or refuse promotion, etc., to any employee who refuses a test.

*Can I get around the general rule:* With all these prohibitions, you might wonder why I even wrote on this topic. Alas, there are five exceptions:

- You are investigating a crime in your business and meet all of the requirements;
- You are an FBI contractor;
- You are in the business of providing security services for sensitive facilities or armored cars;
- You manufacture, dispense, or distribute controlled substances; or
- You are a public employer – like the government.

*What are the requirements for the crime exception:* (1) the employer is investigating a crime that involves monetary 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 under investigation; and (4) before the test, the employer executes a statement to the employee that specifies the scope of the investigation and the specific loss being investigated, states that the employee had access to the property, and describes the reasonable suspicion and basis for testing particular employees.

*Are there requirements for the test:* If an employer meets one of the exceptions, he or she can’t just roll up their sleeves and pull out their handy-dandy “deceptograph.” There are a myriad of requirements for the test itself. Among them is a requirement that you use a licensed polygraph examiner. In addition to the polygraph examiner, an employer should really consult with their lawyer before testing to make sure they meet all the requirements which are simply too long and boring to list here.

## Common Situations:

*Police test:* SuperFast-Mart is robbed right as it is about to transfer its receipts from a three-day weekend to its Armored-car service. Police investigators suspect an employee helped plan the robbery and is in for a cut. They interview Suzy Quick who protests her innocence and offers to take a lie detector test for police. After the test, the police investigator makes an unsolicited call to SuperFast’s owner to let him know Suzy has failed the test miserably. The owner then decides to let Suzy go based on a lack of trust for Suzy as an employee. Is SuperFast potentially liable to Suzy for violating the EPPA? It depends. If the unsolicited information from the police was a factor in SuperFast’s decision, yes. Even though Suzy is a criminal, the law says SuperFast could be liable.

*Record voice and test later:* The owner of Bob's VCR Shop decides that he has a way to sneak around the EPPA and its exceptions. He'll video record a meeting with the employee and have it analyzed later by a polygraph examiner. A polygraph examiner would tell Bob he's out of luck because polygraph relies upon blood pressure, pulse, respiration, and skin conductivity results which means the employee has to be hooked up to a machine. In the eyes of the law, Bob will also be unsuccessful. Employers cannot wire around the test this way.

*Paper tests:* Monolithic, Inc. skips polygraph tests and goes straight to a "pencil and paper" honesty test devised by a psychologist. A prospective employee refuses to take the test and then sues under the EPPA. The employee is out of luck. The EPPA is only applicable to tests administered by mechanical or electronic means. Many paranoid employers have, in fact, switched to this type of test and claim that the results are better than a polygraph examination.

### **What should I do:**

*Good:* Post the required notice required under the EPPA and contact your employment lawyer if you meet an exception and ever really want to take a polygraph examination of an employee.

*Better:* Post notice and use a "pencil and paper" honesty test as an alternative to a polygraph. Unless you are in one of the businesses where polygraphs are regularly accepted, the risks of trying to use a polygraph are too high.

*Best:* "Good" and "Better" get it done this month. There is no best.



Michael Kelsheimer focuses his practice on the employment law needs of Texas businesses and executive employees. He recognizes that the cost and expense of litigation make resolving employment disputes challenging. To help avoid these concerns, he utilizes his experience in and out of the courtroom to prevent or quickly resolve employment disputes through proactive employer planning and timely advice. When a dispute cannot be avoided, Michael relies upon his prior experience as a briefing attorney for the United States District Court and his extensive experience in employment and commercial lawsuits to secure favorable resolutions for his clients.

This guide is one in a series. For more information, or to receive the entire collection contact Michael Kelsheimer by email at [mkelsheimer@grayreed.com](mailto:mkelsheimer@grayreed.com) or by phone at **469.320.6063**