



## Labor & Employment Law News

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### Federal and State Laws May Restrict Employers from Administering Certain Lie Detector Tests

Employers may not be aware that both federal and New York State laws may limit the use of certain tests to render an opinion as to the honesty or dishonesty of employees or prospective employees.

The federal Employee Polygraph Protection Act of 1988 (“EPPA”) generally prevents private sector employers engaged in interstate commerce from using lie detector tests for pre-employment screening or during the course of employment, with certain exemptions. (*29 U.S.C. §§2001 et seq.*)

Article 20-B of the New York State Labor Law (“Article 20-B”) makes it unlawful for all employers, including public employers, to administer or participate in the administration of psychological stress evaluator examinations, devices used to determine vocal fluctuations or vocal stress if an employee or prospective employee is telling the truth.

#### What employers are covered?

The EPPA covers private sector employers engaged in interstate commerce, but excludes federal, state and local employers. It does not apply to lie detector tests administered by the federal government to employees of federal contractors engaged in national security intelligence or counterintelligence functions. Article 20-B applies to all employers, including individuals, corporations, boards, bureaus, agencies, commissions, offices, councils or committees of state government, public authorities and political subdivisions of the state and any other business entity which employs or seeks to employ individuals.

#### What is prohibited under the EPPA?

Under the EPPA, covered employers may not:

- Require, request, suggest or cause an employee or prospective employee to take or submit to any lie detector test;
- Use, accept, refer to, or inquire about the results of any lie detector test taken by an employee or prospective employee.

#### What is a “lie detector” or “polygraph” under the EPPA?

- A lie detector includes a polygraph, deceptograph, voice stress analyzer, psychological stress evaluator or similar device, mechanical or electrical, used to render a diagnostic opinion as to an individual’s honesty or dishonesty.

- A polygraph means an instrument that records continuously, visually, permanently, and simultaneously changes in cardiovascular, respiratory and electrodermal patterns as minimum instrumentation standards which is used to render a diagnostic opinion as to an individual’s honesty or dishonesty.

#### What exceptions exist under the EPPA?

The EPPA has limited exemptions where polygraph tests but not other lie detector tests may be administered, subject to certain restrictions:

- To employees who are reasonably suspected of involvement in a work place incident that results in economic loss to the employer and who had access to the property that is the subject of an investigation; and
- To prospective employees of armored car, security alarm, and security guard firms which protect facilities, materials or operations affecting health or safety, national security, or currency and other like instruments; and
- To prospective employees of pharmaceutical and other firms authorized to manufacture, distribute, or dispense controlled substances who will have direct access to such controlled substances, and to current employees who had access to persons or property that are the subject of an ongoing investigation.

Polygraph examinations permitted under the EPPA are subject to strict standards concerning the pre-test, testing and post-test phases of the examination. Under the exemption for ongoing investigations of work place incidents involving economic loss, a written or oral statement must be provided to the employee prior to the polygraph test, explaining the incident or activity being investigated and the basis for the employer’s reasonable suspicion that the employee was involved.

#### What is prohibited under Article 20-B?

Article 20-B makes it unlawful for employers to require, request, suggest or knowingly permit any employee or prospective employee to submit to a psychological stress evaluator examination or to administer or utilize the results of such tests inside or outside New York.

“Psychological stress evaluator examination” means:

- The questioning or interviewing of an employee or prospective employee in order to subject their statements to analysis by a psychological stress evaluator;
- The recording of statements by an employee or prospective employee in order to subject their statements to analysis by a psychological stress evaluator; or
- Analyzing, with a psychological stress evaluator, statements made by an employee or prospective employee to determine their truth or falsity.

In addition, all individual practitioners are prohibited from administering or participating in the administration of psychological stress evaluator examinations of employees or prospective employees.

#### **What is a “psychological stress evaluator” under Article 20-B?**

This is a mechanical device or instrument which purports to determine the truth or falsity of statements made by an employee or prospective employee from vocal fluctuations or vocal stress. This definition is much more limited than the scope of lie detector devices covered by the EPPA.

#### **What rights do covered employees have under the EPPA?**

An employee or prospective employee may refuse to take a test, terminate a test at any time, or decline to take a test, if he/she suffers from a medical condition. In addition, test results cannot be disclosed to anyone other than the employee, prospective employee or employer without the consent of the employee or, pursuant to court order, to a court, government agency, arbitrator or mediator.

#### **Does “whistleblower protection” exist for covered employees who refuse to submit to illegal tests or report a violation of the laws?**

- Under the EPPA, employers cannot discharge, discipline, discriminate against, deny employment or promotion to, or threaten to take any such action against an employee or prospective employee for refusing to take a lie detector test, or based on the results of a test, or for filing a complaint, testifying in a proceeding or exercising any rights afforded by the Act.
- Under Article 20-B, employers cannot discharge, discipline or discriminate against employees who file complaints or testify in any proceeding or action involving violations of the law. Employees who are subjected to discrimination are entitled to recover double their lost wages and benefits

arising out of the discrimination and to be restored to their previous position.

#### **What notice must an employer provide under the laws?**

The EPPA requires an employer to provide employees and prospective employees with a written notice explaining their rights and the limitations imposed by the statute, such as prohibited areas of questioning and restrictions on the use of test results. Article 20-B has no notice obligations.

#### **What posting requirements exist under the laws?**

Under the EPPA, employers are required to post notices summarizing the protections of the law. The required notice is posted on our website: <http://www.hancocklaw.com/news/posters.cfm>. There is no posting requirement under Article 20-B.

#### **What civil penalties exist for violations of the laws?**

Under the EPPA, an employee or prospective employee may bring a lawsuit in federal or state court against an employer who violates the Act, seeking reinstatement, promotion, and lost wages and benefits. Damages awarded to the prevailing party may include reasonable costs, including attorney’s fees. An action must be brought within three years of the alleged violation.

The EPPA also allows the Secretary of Labor to bring an injunctive action in U.S. District Court to restrain violations, and to assess penalties up to \$10,000 against employers who violate the Act. In determining a penalty, the Secretary will consider the prior record of the employer and the gravity of the violation.

Under Article 20-B, a civil action may be brought by any employee or prospective employee damaged as a result of a violation of the law. An employee who is discriminated against in any way for filing a complaint or testifying in any proceeding related to a violation of the law will be eligible to recover double the lost wages and benefits caused by the discrimination and to be restored to employment.

#### **What criminal sanctions exist for violations of the laws?**

Under Article 20-B, employers and their agents who violate the law are guilty of a class B misdemeanor on the first conviction and a class A misdemeanor for any subsequent conviction. Individuals who administer or participate in the administration of psychological stress evaluator examinations in New York State to individuals seeking employment outside of the state are subject to similar criminal penalties.

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