

(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.

(e) Exemption for security services

(1) In general

Subject to paragraph (2) and sections 2007 and 2009 of this title, this chapter shall not prohibit the use of polygraph tests on prospective employees by any private employer whose primary business purpose consists of providing armored car personnel, personnel engaged in the design, installation, and maintenance of security alarm systems, or other uniformed or plainclothes security personnel and whose function includes protection of—

(A) facilities, materials, or operations having a significant impact on the health or safety of any State or political subdivision thereof, or the national security of the United States, as determined under rules and regulations issued by the Secretary within 90 days after June 27, 1988, including—

(i) facilities engaged in the production, transmission, or distribution of electric or nuclear power,

(ii) public water supply facilities,

(iii) shipments or storage of radioactive or other toxic waste materials, and

(iv) public transportation, or

(B) currency, negotiable securities, precious commodities or instruments, or proprietary information.

(2) Access

The exemption provided under this subsection shall not apply if the test is administered to a prospective employee who would not be employed to protect facilities, materials, operations, or assets referred to in paragraph (1).

(f) Exemption for drug security, drug theft, or drug diversion investigations

(1) In general

Subject to paragraph (2) and sections 2007 and 2009 of this title, this chapter shall not prohibit the use of a polygraph test by any employer authorized to manufacture, distribute, or dispense a controlled substance listed in schedule I, II, III, or IV of section 812 of title 21.

(2) Access

The exemption provided under this subsection shall apply—

(A) if the test is administered to a prospective employee who would have direct access to the manufacture, storage, distribution, or sale of any such controlled substance; or

(B) in the case of a test administered to a current employee, if—

(i) the test is administered in connection with an ongoing investigation of criminal or other misconduct involving, or potentially involving, loss or injury to the manufacture, distribution, or dispensing of any such controlled substance by such employer, and

(ii) the employee had access to the person or property that is the subject of the investigation.

(Pub. L. 100-347, § 7, June 27, 1988, 102 Stat. 648; Pub. L. 103-359, title V, § 501(n), Oct. 14, 1994, 108 Stat. 3430; Pub. L. 104-201, div. A, title XI, § 1122(b)(3), Sept. 23, 1996, 110 Stat. 2687; Pub. L. 108-136, div. A, title IX, § 921(g), Nov. 24, 2003, 117 Stat. 1570.)

REFERENCES IN TEXT

Executive Order 12356, referred to in subsec. (b)(2)(B), was Ex. Ord. No. 12356, Apr. 2, 1982, 47 F.R. 14874, 15557, which was set out as a note under section 435 of Title 50, War and National Defense, prior to revocation by Ex. Ord. No. 12958, § 6.1(d), Apr. 17, 1995, 60 F.R. 19843, set out as a note under section 435 of Title 50. For provisions relating to special access programs, see section 4.4 of Ex. Ord. No. 12958.

AMENDMENTS

2003—Subsec. (b)(2)(A)(i). Pub. L. 108-136 substituted “National Geospatial-Intelligence Agency” for “National Imagery and Mapping Agency”.

1996—Subsec. (b)(2)(A)(i). Pub. L. 104-201 substituted “National Imagery and Mapping Agency” for “Central Imagery Office”.

1994—Subsec. (b)(2)(A)(i). Pub. L. 103-359 inserted “the Central Imagery Office,” after “Defense Intelligence Agency.”.

EFFECTIVE DATE OF 1996 AMENDMENT

Amendment by Pub. L. 104-201 effective Oct. 1, 1996, see section 1124 of Pub. L. 104-201, set out as a note under section 193 of Title 10, Armed Forces.

§ 2007. Restrictions on use of exemptions

(a) Test as basis for adverse employment action

(1) Under ongoing investigations exemption

Except as provided in paragraph (2), the exemption under subsection (d) of section 2006 of this title shall not apply if an employee is discharged, disciplined, denied employment or promotion, or otherwise discriminated against in any manner on the basis of the analysis of a polygraph test chart or the refusal to take a polygraph test, without additional supporting evidence. The evidence required by such subsection may serve as additional supporting evidence.

(2) Under other exemptions

In the case of an exemption described in subsection (e) or (f) of such section, the exemption shall not apply if the results of an analysis of a polygraph test chart are used, or the refusal to take a polygraph test is used, as the sole basis upon which an adverse employment action described in paragraph (1) is taken against an employee or prospective employee.

(b) Rights of examinee

The exemptions provided under subsections (d), (e), and (f) of section 2006 of this title shall not apply unless the requirements described in the following paragraphs are met:

(1) All phases

Throughout all phases of the test—

(A) the examinee shall be permitted to terminate the test at any time;

(B) the examinee is not asked questions in a manner designed to degrade, or needlessly intrude on, such examinee;

(C) the examinee is not asked any question concerning—

- (i) religious beliefs or affiliations,
- (ii) beliefs or opinions regarding racial matters,
- (iii) political beliefs or affiliations,
- (iv) any matter relating to sexual behavior; and
- (v) beliefs, affiliations, opinions, or lawful activities regarding unions or labor organizations; and

(D) 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 during the actual testing phase.

(2) Pretest phase

During the pretest phase, the prospective examinee—

(A) 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;

(B) is informed in writing of the nature and characteristics of the tests and of the instruments involved;

(C) is informed, in writing—

- (i) whether the testing area contains a two-way mirror, a camera, or any other device through which the test can be observed,
- (ii) whether any other device, including any device for recording or monitoring the test, will be used, or
- (iii) that the employer or the examinee may (with mutual knowledge) make a recording of the test;

(D) is read and signs a written notice informing such examinee—

- (i) that the examinee cannot be required to take the test as a condition of employment,
- (ii) that any statement made during the test may constitute additional supporting evidence for the purposes of an adverse employment action described in subsection (a) of this section,
- (iii) of the limitations imposed under this section,
- (iv) of the legal rights and remedies available to the examinee if the polygraph test is not conducted in accordance with this chapter, and

(v) of the legal rights and remedies of the employer under this chapter (including the rights of the employer under section 2008(c)(2) of this title); and

(E) 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

During the actual testing phase, the examiner does not ask such examinee any question relevant during the test that was not presented in writing for review to such examinee before the test.

(4) Post-test phase

Before any adverse employment action, the employer shall—

(A) further interview the examinee on the basis of the results of the test; and

(B) provide the examinee with—

- (i) a written copy of any opinion or conclusion rendered as a result of the test, and
- (ii) a copy of the questions asked during the test along with the corresponding charted responses.

(5) Maximum number and 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 such test for less than a 90-minute duration.

(c) Qualifications and requirements of examiners

The exemptions provided under subsections (d), (e), and (f) of section 2006 of this title shall not apply unless the individual who conducts the polygraph test satisfies the requirements under the following paragraphs:

(1) Qualifications

The examiner—

(A) has a valid and current license granted by licensing and regulatory authorities in the State in which the test is to be conducted, if so required by the State; and

(B) maintains a minimum of a \$50,000 bond or an equivalent amount of professional liability coverage.

(2) Requirements

The examiner—

(A) renders any opinion or conclusion regarding the test—

- (i) in writing and solely on the basis of an analysis of polygraph test charts,
- (ii) that does not contain information other than admissions, information, case facts, and interpretation of the charts relevant to the purpose and stated objectives of the test, and
- (iii) that does not include any recommendation concerning the employment of the examinee; and

(B) maintains all opinions, reports, charts, written questions, lists, and other records relating to the test for a minimum period of 3 years after administration of the test.

(Pub. L. 100-347, § 8, June 27, 1988, 102 Stat. 650.)

§ 2008. Disclosure of information

(a) In general

A person, other than the examinee, may not disclose information obtained during a polygraph test, except as provided in this section.

(b) Permitted disclosures

A polygraph examiner may disclose information acquired from a polygraph test only to—

- (1) the examinee or any other person specifically designated in writing by the examinee;
- (2) the employer that requested the test; or
- (3) any court, governmental agency, arbitrator, or mediator, in accordance with due process of law, pursuant to an order from a court of competent jurisdiction.

(c) Disclosure by employer

An employer (other than an employer described in subsection (a), (b), or (c) of section 2006 of this title) for whom a polygraph test is conducted may disclose information from the test only to—

- (1) a person in accordance with subsection (b) of this section; or
- (2) a governmental agency, but only insofar as the disclosed information is an admission of criminal conduct.

(Pub. L. 100-347, § 9, June 27, 1988, 102 Stat. 652.)

§ 2009. Effect on other law and agreements

Except as provided in subsections (a), (b), and (c) of section 2006 of this title, this chapter shall not preempt any provision of any State or local law or of any negotiated collective bargaining agreement that prohibits lie detector tests or is more restrictive with respect to lie detector tests than any provision of this chapter.

(Pub. L. 100-347, § 10, June 27, 1988, 102 Stat. 653.)

CHAPTER 23—WORKER ADJUSTMENT AND RETRAINING NOTIFICATION

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§ 2101. Definitions; exclusions from definition of loss of employment

(a) Definitions

As used in this chapter—

(1) the term “employer” means any business enterprise that employs—

(A) 100 or more employees, excluding part-time employees; or

(B) 100 or more employees who in the aggregate work at least 4,000 hours per week (exclusive of hours of overtime);

(2) the term “plant closing” means the permanent or temporary shutdown of a single site of employment, or one or more facilities or operating units within a single site of employment, if the shutdown results in an employment loss at the single site of employment during any 30-day period for 50 or more employees excluding any part-time employees;

(3) the term “mass layoff” means a reduction in force which—

(A) is not the result of a plant closing; and

(B) results in an employment loss at the single site of employment during any 30-day period for—

(i) at least 33 percent of the employees (excluding any part-time employees); and

(ii) at least 50 employees (excluding any part-time employees); or

(iii) at least 500 employees (excluding any part-time employees);

(4) the term “representative” means an exclusive representative of employees within the meaning of section 159(a) or 158(f) of this title or section 152 of title 45;

(5) the term “affected employees” means employees who may reasonably be expected to experience an employment loss as a consequence of a proposed plant closing or mass layoff by their employer;

(6) subject to subsection (b) of this section, the term “employment loss” means (A) an employment termination, other than a discharge for cause, voluntary departure, or retirement, (B) a layoff exceeding 6 months, or (C) a reduction in hours of work of more than 50 percent during each month of any 6-month period;

(7) the term “unit of local government” means any general purpose political subdivision of a State which has the power to levy taxes and spend funds, as well as general corporate and police powers; and

(8) the term “part-time employee” means an employee who is employed for an average of fewer than 20 hours per week or who has been employed for fewer than 6 of the 12 months preceding the date on which notice is required.

(b) Exclusions from definition of employment loss

(1) In the case of a sale of part or all of an employer’s business, the seller shall be responsible for providing notice for any plant closing or mass layoff in accordance with section 2102 of this title, up to and including the effective date of the sale. After the effective date of the sale of part or all of an employer’s business, the purchaser shall be responsible for providing notice for any plant closing or mass layoff in accordance with section 2102 of this title. Notwith-