



**U.S. Department of Labor**  
Employment Standards Administration  
Wage and Hour Division  
Washington, D.C. 20210



January 13, 2009

FIELD ASSISTANCE BULLETIN No. 2009-1

MEMORANDUM FOR REGIONAL ADMINISTRATORS  
DISTRICT DIRECTORS

FROM: ALEXANDER J. PASSANTINO *AJP*  
Acting Administrator

SUBJECT: Application of the Employee Polygraph Protection Act (EPPA)  
to Security Personnel Working for Air Cargo Companies.

This memorandum is to advise staff of a change in the application of the partial exemption provided for security services under section 7(e) of the Employee Polygraph Protection Act (EPPA) (<http://www.dol.gov/esa/whd/regs/statutes/poly01.pdf>). Section 7(e) authorizes the use of polygraph tests (but no other lie detector) under certain circumstances for certain prospective employees by certain private employers whose primary business purpose is to provide armored car, security alarm, and security guard services related to the protection of “[f]acilities, 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.” 29 C.F.R. § 801.14(a)(1) ([http://www.dol.gov/dol/allcfr/ESA/Title 29/Part 801/29CFR801.14.htm](http://www.dol.gov/dol/allcfr/ESA/Title%2029/Part%20801/29CFR801.14.htm)). “The specific ‘facilities, materials, or operations’ contemplated by this exemption include those against which acts of sabotage, espionage, terrorism, or other hostile, destructive, or illegal acts could significantly impact on the general public's safety or health, or national security.” 29 C.F.R. § 801.14(d)(2).

In Wage and Hour Opinion Letter October 27, 1992, the Wage and Hour Division (WHD) previously determined that the 7(e) exemption does not apply to security services provided to air-cargo transporters for the purpose of preventing drug smuggling by use of air-cargo planes. Although WHD agrees with the letter's conclusion to the extent that it applies to security services provided with the sole intent of preventing drug smuggling, we now clarify that the exemption may apply, under certain circumstances, to security services provided to air cargo transporters. It is clear that the use of airplanes to perpetrate acts of terrorism can significantly impact public safety, health and national security. Therefore, the 7(e) exemption may apply to security services provided to air

cargo transporters if they are intended, in part, to safeguard against hijacking of air-cargo planes, as this would constitute an act of sabotage, espionage, terrorism, or other hostile, destructive, or illegal act that could significantly impact the general public's safety, health, or national security. Accordingly, to the extent that it is inconsistent with this Field Assistance Bulletin, Wage and Hour Opinion Letter October 27, 1992, is withdrawn.

OCT 27 1992

John E. Thompson, Esquire  
Fisher & Phillips  
1500 Resurgens Plaza  
945 East Paces Ferry Road  
Atlanta, Georgia 30326

Dear Mr. Thompson:

This is in response to your letter requesting information concerning the Employee Polygraph Protection Act of 1988 (EPPA) on behalf of your client, an air carrier with travel routes between south Florida and Central and South America. You indicate that these are known high risk areas for illegal drug smuggling activities. You ask that we confirm your view that the protection of the planes, operations and facilities of your client, and similar carriers, involves protecting "... facilities, materials or operations having a significant impact ... on health or safety ..." as described in the exemption for certain security employers in Section 7(e) of EPPA.

Exemptions from EPPA's prohibitions against polygraph and other lie detector use are limited to covered employers conducting ongoing investigations involving economic loss or injury to the employer's business (section 7(d)); to certain employers providing armored car, security alarm, and security guard services (section 7(e)); and to employers who are authorized by the Drug Enforcement Administration to manufacture, distribute or dispense controlled substances under the Controlled Substances Act (section 7(f)).

The EPPA sections 7(e)(1)(A) (i) through (iv) specifically set forth examples of the "facilities, materials and operations" to be considered in determining the applicability of the exemption for security service employers. Included are facilities engaged in the production, transmission, and distribution of electric or nuclear power; public water supply facilities; shipments or storage of radioactive or other toxic waste materials; and public transportation.

Congressional debates emphasized that the overriding concern was the protection of "sensitive facilities affecting public health and welfare." 133 Cong. Rec. H9560 (daily ed. Nov. 4, 1987) (Statement of Rep. Roukema). In other words, the exemption was focused on protecting the public from "terrorist or psychopathic takeovers of vulnerable public installations." 133 Cong. Rec. H9561 (daily ed. Nov. 4, 1987) (Statement of Rep. Sunquist).

Representative Biaggi, a cosponsor of the Amendment in 1986, which included the §7 (e) (1) (A) exemption, stated that the exemption would allow pre-hiring polygraph tests "only in those cases where employees would be responsible for high priority security functions, such as protecting public utilities, hazardous materials shipments, public transportation ..." 132 Cong. Rec. H1061 (daily ed. Mar. 12, 1986) (Statement of Rep. Biaggi) (emphasis added). When the House reintroduced the amendment the following year, Biaggi further added that the exemption would apply to security personnel employed to protect against "terrorism and other highly dangerous security risks. Nothing more." 133 Cong. Rec. H9561 (daily ed. Nov. 4, 1987) Statement of Rep. Biaggi).

In view of the foregoing, it seems clear that the drafters of the exemption did not contemplate that it would be applied to security personnel employed to protect air cargo against drug smuggling or other illegal activity. While the regulations and remarks concerning the scope of the exemption during the floor debates indicate that the exemption may be applied to public transportation, such as airports, the intended application of the exemption is to the physical security of the airport as a whole for the safe transport of the traveling public, and not to the security of air cargo transportation companies, since these "facilities or operations" cannot be said to have a significant impact on the health or safety of the public.

It is therefore our opinion that your client may not polygraph its employees for the activity described in your letter. I hope this responds fully to your inquiry. If you have any further questions, please contact Corlis Sellers, Director, Division of Farm Labor, Child Labor and Polygraph Standards on (202) 219-4670.

Sincerely,

Karen R. Keesling  
Acting Administrator

Enclosure

EAOLC: Dillon, FISHER (DLN), draft submitted 1/9/92; ran final gal 1/24/92; ran 1/28/92; ran final gal 6/8/92; RAN GAL 6/22/92

File Name C:\gloria\Fisher  
CC: General Files, WH/RA Atlanta, Sellers, Stovall, Child Labor Br., Dillon, A/S, Adm.

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November 27, 1991

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Mr. John R. Fraser  
Acting Administrator  
Wage and Hour Division  
U. S. Department of Labor  
200 Constitution Avenue, N. W.  
Room S3502  
Washington, DC 20210

Re: Request for Ruling

Dear Mr. Fraser:

On behalf of a client, we hereby request your ruling as to the application of one criterion for the Employee Polygraph Protection Act's Section 7(e) exemption for certain security-related employers.<sup>1</sup>

Specifically, we seek your confirmation that guarding against the illegal importation of contraband controlled or prohibited substances through the surreptitious use of an air carrier's planes and related operations constitutes "protection of . . . facilities, materials, or operations having a significant impact on . . . health or safety" within the exemption's meaning.<sup>2</sup> Our request is limited solely to this aspect of Section 7(e).

**A. BACKGROUND**

Our client is engaged in the transportation of cargo by air. Its routes include travel between south Florida and Central and South America. This employer must therefore be constantly vigilant that its planes, facilities, and personnel are not used

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<sup>1</sup> 29 U.S.C.A. § 2006(e); 29 C.F.R. § 801.14.

<sup>2</sup> Our request is authorized by and is made pursuant to 29 C.F.R. § 801.14(d)(3).



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to smuggle contraband substances. Management's efforts in this connection have been lauded by government enforcement officials.

Recognizing that it has developed some measure of expertise in this area, management contemplates creating a separate subsidiary which would provide contraband-related security services to similar employers and to its own transportation company.<sup>3</sup> To ensure that the security personnel so employed would be satisfactory for such a purpose, this entity would prefer to use pre-employment polygraph examinations as a part of its hiring process to the extent that EPPA so permits.

Of course, to avail itself of the Section 7(e) exemption, this subsidiary's function would have to include the protection of "facilities" or "operations" having "a significant impact on the health or safety of any State or political subdivision thereof . . . ." 29 U.S.C.A. § 2006(e)(1)(A). We submit that the entity's activity in connection with protecting against the secreting of contraband substances among lawful cargo being transported would unquestionably fall within this description.

#### B. DISCUSSION

The activities we have described do not appear in the various examples which have been given in the statute or in the regulations. However, the Division recognizes that no exhaustive listing is possible, and that protecting other sorts of facilities or operations can also qualify. 29 C.F.R. §§ 801.14(d)(1), (d)(3). See also 29 C.F.R. § 801.14(d)(2)(iv) (mentioning private transportation demonstrations and facilities). Other portions of the regulations demonstrate that the subsidiary's protecting airplanes, cargo warehouses, and related facilities and operations would satisfy the test.

The regulations state that, in general, the facilities and operations they contemplate are those as to which "illegal acts" could "significantly impact on the general public's safety or health . . ." 29 C.F.R. § 801.14(d)(2). They also refer to operations as to which security breaches would "pose a serious threat to public health or safety . . ." 29 C.F.R. § 801.14(d)

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<sup>3</sup> We are aware that other issues would be raised by this arrangement, such as the "primary business purpose" test. We do not include these issues within the scope of our request.

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(2)(ii)(C). It is difficult to imagine a situation more clearly meeting these descriptions than does the illegal importation of contraband drugs and other substances via cargo planes and associated facilities and operations.

As both a host of government officials and many other authoritative sources have repeatedly declared, drug smuggling and the societal ills it generates do far more than "significant" damage to the general public's safety and health. Unfortunately, the air transportation of lawful cargo into the United States serves as a principal avenue by which opportunistic smugglers accomplish their purposes.

Furthermore, the facilities and operations with which our client's subsidiary would be concerned satisfy the regulations' criteria at least as well as do the illustrations the Division has selected. For example, security services provided to political conventions, parades, concerts, sporting events, and shopping malls certainly cannot be said to have greater ramifications for the safety and health of the general public than would those about which we inquire. See 29 C.F.R. § 801.14(d)(2)(vii), (d)(2)(viii).

### C. CONCLUSION

In summary, we conclude that the proposed security services we have described would constitute the protection of "facilities, materials, or operations having a significant impact on the health or safety of" the general public within the meaning of EPPA and its pertinent regulations. We ask that you so rule.

Your expeditious reply would be greatly appreciated.

Sincerely,



JOHN E. THOMPSON  
For FISHER & PHILLIPS

JET:mo

FISHER & PHILLIPS

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**Ginley, Michael F - ESA**

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**From:** Ginley, Michael F - ESA  
**Sent:** Friday, January 16, 2009 3:06 PM  
**To:** zzESA-WHD-NO-REGIONAL-ADMINISTRATORS-ALL  
**Cc:** zzESA-WHD-MANAGERS-ALL  
**Subject:** WHD Memo 2009-1 and Field Advisory Bulletin 2009-1  
**Attachments:** WHM 2009-1.pdf; 22 (541) 01-15-2009 final.pdf; FAB 2009-1 EPPA Air Cargo.pdf

Please distribute the attached Wage and Hour Memorandum, with the advance copy of the new FOH chapter 22 (541 Exemptions), to all enforcement staff. The new chapter 22 replaces the current Chapter 22 in its entirety, effective today. Also please distribute the attached Field Advisory Bulletin to all enforcement staff.

These documents will be placed on our intranet and internet sites, as appropriate, in the near future. Please contact me if you have any questions.

Michael Ginley  
Office of Enforcement Policy