



EPPA-10

May 17, 1996

This is in response to your letter of February 6, 1996, requesting information concerning the Employee Polygraph Protection Act of 1988 (EPPA). Specifically, you ask whether section 7(d) of EPPA permits an employer to administer polygraph examinations to certain employees in two different fact situations. 29 U.S.C. 2006(d).

In the first fact situation, you inquire whether the employer can offer a polygraph test to the night manager of a fast food restaurant to verify his actions with respect to a missing deposit of \$2,500.00. You note the night manager's claim that he made the deposit, and the day manager's statement that the deposit was missing the following morning. You also ask whether the day manager can be offered a polygraph to establish his actions if the night manager declines to take the polygraph or if no deception is noted during the night manager's examination. You point out that "management has no reason to suspect either of the managers." The facts as described in your letter indicate that no other individuals had access to the deposit in question.

You also ask whether an employer can request five employees to submit to a polygraph examination regarding a shortage of \$300.00 from a register to which each of the five employees had access. According to your letter, only these particular employees had access to the register, but each has denied any knowledge about the missing money and "management has no derogatory information on any of the five cashiers."

Section 7(d) of EPPA does not prohibit an employer from requesting an employee to submit to a polygraph test provided that (1) the test is administered in connection with an ongoing investigation involving economic loss or injury to the employer's business, (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 (4) the employer complies with the notice requirements under this exemption. 29 U.S.C. 2006(d).

The regulations explain the conditions for the exemption for ongoing investigations to apply. 29 C.F.R. 801.12. "Reasonable suspicion" is defined in the regulations as "an observable, articulable basis in fact which indicates that a particular employee was involved in, or responsible for, an economic loss." 29 C.F.R. 801.12(f)(1). The regulations make clear that "access in the sense of possible or potential opportunity, standing alone, does not constitute a basis for 'reasonable suspicion.'" 29 C.F.R. 801.12(f)(1) (emphasis added). The regulations specify, however, that there may be circumstances in which "the employer may formulate a basis for reasonable suspicion based on sole access by one employee." 29 C.F.R. 801.12(f)(2) (emphasis added).

In the first case, although the employer can meet the conditions of loss or injury and access, the employer cannot meet the burden of establishing that the night manager or the day manager are "reasonably suspected" of involvement in the specific economic loss. In fact, you stated that

"management has no reason to suspect either of the managers." Access to the safe by both employees is insufficient to serve as a basis for reasonable suspicion that either employee was involved in the loss being investigated.

Furthermore, the Department has taken the position that polygraph results cannot form a basis for "reasonable suspicion" as to other employees. 56 Federal Register 9051-52 (1991). Hence, reasonable suspicion of involvement by the day manager cannot be drawn from the polygraph results of any test administered to the night manager. Based on the information provided, EPPA prohibits this employer from offering polygraph tests to either the night manager or the day manager.

In the second case, notwithstanding the employer's apparent establishment of the required loss or injury and access, you have not articulated a basis for reasonable suspicion of any of the five cashiers who had access to the register with the cash shortage. Management has no "derogatory information" on any of these employees and access was not limited to a single individual (which may constitute a factor in demonstrating reasonable suspicion). Even though each of the five cashiers had access to the register and were the only employees to have that access, this fact, standing alone, does not form the basis for reasonable suspicion. Accordingly, this employer does not appear to come within the limited exemption for ongoing investigations from the general prohibition on polygraph examinations.

We trust the above is responsive to your inquiry.

Sincerely,

Howard B. Ostmann  
Office of Enforcement Policy  
Employee Polygraph Protection Act Team