

Recent Case Law Under the Employee Polygraph Protection Act: A Practical Review

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This article discusses the most recent case law and provides employer guidelines for complying with the Employee Polygraph Protection Act.

The Employee Polygraph Protection Act (“EPPA”) is one of the least-known federal workplace statutes, yet its broad prohibitions have virtually eliminated polygraph exams from the workplace. The EPPA forbids employers from administering lie detector tests during pre-employment screening and also during the course of employment. Several exceptions to the EPPA do permit polygraph examinations under limited circumstances, provided that certain statutory procedures are observed. An employer who violates this statute has exposure to a penalty of up to \$10,000, as well as the prospect of a civil lawsuit by the employee or prospective employee to recover lost wages and benefits, attorney’s fees, and court costs. An employee (or potential employee) may also be entitled to equitable relief in addition to damages, which could include reinstatement (if the employee or prospective employee was unlawfully fired or denied a job based on test results), and promotion.

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There is a dearth of case law interpreting the statute.¹ However, in a rare decision under the EPPA, the Fourth Circuit recently ruled that a bank violated the EPPA when it fired an assistant manager based partly on lie detector test results taken after an attempted robbery on one of the bank's branches. The Eastern District of Virginia also recently ruled that a plaintiff was entitled to proceed to trial on allegations that his employer unlawfully caused him to take a polygraph examination, failed to provide him with documents required under the EPPA, and unlawfully terminated him based on the test's results. That same court also held that an employee cannot waive her procedural rights under the EPPA to bring suit in federal court. This article provides a unique analysis of these cases, examines the major provisions of the Act, and provides suggestions for compliance.

THE EMPLOYEE POLYGRAPH PROTECTION ACT

Major Provisions of the Act

Congress' stated purpose when passing the EPPA was "[t]o prevent the denial of employment opportunities by prohibiting the use of lie detectors by employers involved in or affecting interstate commerce."² Therefore, the EPPA — which Congress passed on June 27, 1988, and became effective on December 27, 1988 — generally acts to prohibit employers from using lie detector tests both when screening prospective employees and also during the course of an employee's employment.³ Specifically, the EPPA provides:

[I]t shall be unlawful for any employer engaged in or affecting commerce or in the production of goods for commerce—

- (1) directly or indirectly, to require, request, suggest, or cause any employee or prospective employee to take or submit to any lie detector test;
- (2) to use, accept, refer to, or inquire concerning the results of any lie detector test of any employee or prospective employee;
- (3) to discharge, discipline, discriminate against in any manner, or deny employment or promotion to, or threaten to take any such

action against—

- (A) any employee or prospective employee who refuses, declines, or fails to take or submit to any lie detector test, or
- (B) any employee or prospective employee on the basis of the results of any lie detector test....⁴

Based on this language, it is clear that the EPPA places broad prohibitions against employers, preventing them not only from requiring employees or prospective employees to submit to a lie detector test, but also prohibiting employers from even suggesting that an employee or prospective employee submit to a lie detector test.⁵ Furthermore, the EPPA also acts to prevent employers from terminating an employee or denying employment to a prospective employee based on the employee's or prospective employee's refusal to submit to a lie detector test; nor can an employer terminate an employee or deny employment to a prospective employee based on the results of a lie detector test.⁶ Finally, the EPPA also prohibits employers from retaliating against employees or prospective employees when an employee or prospective employee has filed a claim under the EPPA or has declined to submit to a lie detector test.⁷

The EPPA defines a "lie detector test" as: "a polygraph, deceptograph, voice stress analyzer, psychological stress evaluator, or any other similar device (whether mechanical or electrical) that is used, or the results of which are used, for the purpose of rendering a diagnostic opinion regarding the honesty or dishonesty of an individual."⁸ This definition is broad and clearly encompasses a wide array of tests and methods.

The EPPA requires that employers must prominently place notices in the workplace regarding the protections provided to employees by the EPPA.⁹ Employers who violate the EPPA are subject to the significant civil penalty of \$10,000 per violation. The EPPA also provides employees and prospective employees with a private right of action to pursue claims against employers for potential violations of the Act.¹⁰ However, while the EPPA does provide employees and prospective employees with significant protections, the Act does have limits, which are provided in its exemptions.

The Narrowly-Defined Exemptions

While the EPPA does place broad prohibitions against an employer's use of lie detector tests, the EPPA also provides exemptions to its general prohibition. Those exemptions, however, which are examined in greater detail below, are limited and carefully circumscribed.

Government Exemption

Under the EPPA, the prohibition against requiring employees or prospective employees to submit to a lie detector test does not prohibit a federal, state, or local government from administering a lie detector test to employees of the federal, state, or local government.¹¹

National Defense and Security Exemption

Additionally, the exemptions to the EPPA's prohibition against lie detector tests also provide that the EPPA does not act to prevent the federal government, when engaging in counterintelligence functions, to administer a lie detector test to an expert or consultant under contract with the Department of Defense, or under contract with the Department of Energy in connection with atomic energy.¹² Similarly, the EPPA also does not prohibit the federal government, when engaging in its counterintelligence functions, from administering a lie detector test to an employee or contractor with National Security Agency, the Defense Intelligence Agency, the National Geospatial-Intelligence Agency, or the Central Intelligence Agency.¹³ Notably, the private contractors themselves, even when contracted by the federal government, cannot rely on EPPA's national defense exemption in order to administer a lie detector test to an employee because the exemption only applies when the test is administered by the federal government itself.¹⁴

Limited Exemption for Ongoing Workplace Investigations

State and federal governments are not the only recipients of exemptions to the EPPA's general prohibition against lie detector tests. In limited

circumstances, private employers may utilize *polygraph tests*¹⁵ for “ongoing investigations”¹⁶ when the employer has a “reasonable suspicion”¹⁷ that an employee or prospective employee was involved in an economic loss suffered by the employer. Specifically, a private employer may request that an employee take a polygraph test if:

[(1) the] test is administered in connection with an ongoing investigation involving economic 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; [and] (3) the employer has a reasonable suspicion that the employee was involved in the incident or activity under investigation....¹⁸

Moreover, the polygraph test may only be administered in this situation if, before the test, the employer executes a statement and provides that statement to the employee, which statement:

[(1)] sets forth with particularity the specific incident or activity being investigated and the basis for testing particular employees[; (2)] is signed by a person (other than a polygraph examiner) authorized to legally bind the employer... [; (3) provides that the statement will be] retained by the employer for at least 3 years[;] and [(4)] contains at a minimum...an identification of the specific economic loss or injury to the business of the employer,...a statement indicating that the employee had access to the property that is the subject of the investigation, and...a statement describing the basis of the employer’s reasonable suspicion that the employee was involved in the incident or activity under investigation.¹⁹

Based on the language of the EPPA, while the ongoing-workplace-investigation exemption does provide employers with the ability to utilize certain lie detector tests (only polygraph tests) in certain circumstances (only in pursuit of an ongoing investigation), the employers’ rights are carefully circumscribed. Additionally, an employer may not terminate,

deny employment to, or otherwise discipline an employee or prospective employee based on the results of a polygraph test administered under the ongoing-workplace-investigation exception — or based on an employee’s or prospective employee’s refusal to submit to a polygraph test — unless the employer has “additional supporting evidence” justifying its actions.²⁰

Exemption for Private Employers Engaged in Security Services

In addition to the private employer exemption to the EPPA provided for ongoing-workplace-investigations, private employers engaged in certain security services also enjoy an exemption from the prohibition against the use of *polygraph tests*²¹ when such tests are administered to certain *prospective employees*.²² Specifically, the security services exemption provides that the EPPA does:

[N]ot 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[: (1) the] protection of...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[;]...[or (2) the protection of] currency, negotiable securities, precious commodities or instruments, or proprietary information.²³

As was the case with the ongoing-workplace-investigation exemption, the securities-services exemption to the EPPA’s restrictions does provide employers with the right to administer a certain type of lie detector test, but, like the ongoing-workplace-investigation exemption, that right is restricted — only employers engaged in certain securities services can administer only polygraph tests to only prospective employees who will be engaged in those specific securities services. Additionally, the EPPA provides that an employer will lose the benefit of the securities-services exemption if the results of polygraph test — or the refusal to submit to a polygraph

test — is used as the “sole basis” for deciding to deny employment to a prospective employee.²⁴

Exemption for Investigations Conducted by Employers Engaged in the Manufacture and Distribution of Controlled Substances

Finally, the EPPA provides an exemption allowing certain employers engaged in the manufacture or distribution of controlled substances to administer *polygraph tests*²⁵ to employees or prospective employees if certain preconditions are met. Specifically, an employer engaged in the manufacture or distribution of a controlled substance may require that a prospective employee submit to a polygraph test if the prospective employee “would have direct access to the manufacture, storage, distribution, or sale of any such controlled substance.”²⁶ Additionally, an employer engaged in the manufacture or distribution of controlled substances may administer a polygraph test to a current employee, but only if:

[T]he 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 [if] the employee had access to the person or property that is the subject of the investigation.²⁷

As was the case with the securities-services exemption and the ongoing-investigation exemption, the exemption for manufacturers of controlled substances is a limited one — it only allows employers to administer polygraph tests and it only allows them to do so under certain circumstances. Furthermore, similar to the securities-services exemption, the EPPA provides that the an employer will lose the benefit of the controlled-substances-manufacturer exemption if the results of polygraph test — or the refusal to submit to a polygraph test — is used as the “sole basis” for taking an adverse employment action against an employee or prospective employee.²⁸

RECENT DECISIONAL LAW

Harmon v. CB Squared Services: EPPA Prohibits Waiver of Procedural Right to Bring Suit in Federal Court

In *Harmon v. CB Squared Services, Inc.*,²⁹ approximately one year and four months after the plaintiff-employee began working for CB Squared, the company requested that the employee take a polygraph examination on the next business day. Although CB Squared gave the employee written directions to the office of the polygraph examiner, the employee alleged that the company provided him with no other documents relating to the polygraph exam. The day after the polygraph examination, CB Squared terminated the plaintiff's employment allegedly because the results of his exam indicated "deception." The plaintiff filed a complaint alleging that CB Squared violated the EPPA by causing him to take the polygraph examination, failing to provide him with certain documents required by the EPPA, and terminating him based on the test's results. CB Squared argued that: (1) the plaintiff failed to state a claim under the EPPA; and (2) the claims should have been dismissed because he failed to submit his EPPA claims to "mediation and/or arbitration" pursuant to the terms of a "Dispute Resolution Agreement" he signed upon hire.

Regarding the argument that the plaintiff failed to state a claim, the court noted that a complaint need not assert "detailed factual allegations" to survive a motion to dismiss.³⁰ Accepting the plaintiff's allegations as true, the court concluded that the complaint stated a valid claim for relief under the EPPA.³¹

The court then addressed the defendant's argument that the claim should have been dismissed because the employee previously agreed to submit to mediation or arbitration for any legal claims arising from his employment. The arbitration agreement was a contractual waiver of the employee's right to bring suit on an EPPA claim in federal court. In rejecting the employer's argument that the complaint should be dismissed, the court stated:

The EPPA itself grants Plaintiff the right to bring suit in federal court for an alleged violation of the statute. *See* 29 U.S.C. § 2005(c)(1)-(2).

Under the EPPA, however, “[t]he rights and *procedures* provided by [the EPPA] may not be waived by contract or otherwise....” 29 U.S.C. § 2005(d) (emphasis added). Because the EPPA expressly prohibits the waiver of Plaintiff’s procedural right to bring suit in federal court for an alleged violation, Defendant’s arbitration argument must fail.³²

Thus, the court held that the EPPA expressly prohibits the waiver of a plaintiff’s procedural right to bring suit in federal court for an alleged violation.

Simply stated, *CB Squared* provides that an employee who is fired for “deception” after being forced to take a polygraph test can sue his employer under the EPPA. The case also provides that an employee cannot contract away her procedural rights under the EPPA.

Worden v. SunTrust Banks: Employer Cannot Base Firing on Polygraph Results

In *Worden v. SunTrust Banks*,³³ the U.S. Court of Appeals for the Fourth Circuit ruled that a bank violated the EPPA when it decided to fire an assistant manager based partly on lie detector test results obtained after an attempted robbery on one of the bank’s branches. Daniel Worden worked at SunTrust Banks. One morning, a SunTrust branch received a telephone call from Worden, who claimed that he had been kidnapped and forced to participate in an attempted bank robbery. According to Worden, the night before the attempted robbery, he was held in his home overnight at gunpoint by two individuals who wanted to use him to rob the Anderson County, South Carolina branch. Later that same day, one of the Anderson County police investigators on the case informed Worden that law enforcement suspected he was behind the attempted robbery. He requested and received Worden’s consent to administer a polygraph examination. No one from SunTrust requested, participated in, or was present during Worden’s polygraph examination.

After the examination was administered, Worden was joined by SunTrust’s regional security manager. The detective informed SunTrust’s security manager that he suspected Worden was involved in the attempted

robbery, and that Worden had agreed to take a polygraph examination. While they were discussing the incident, the polygraph examiner entered the room and announced that Worden had failed the exam. The examiner also stated that a second exam would be appropriate because the results of the first exam might be challenged as inconclusive because the “traumatic experience was so recent in time.”

As part of its investigation, the FBI initiated and administered a second polygraph examination, again with Worden’s consent. Upon completion of the exam, the FBI informed Worden that the results again indicated “deception” and that it still considered him to be a suspect. Worden shared the results with SunTrust. Thereafter, SunTrust decided to terminate Worden’s employment. SunTrust argued that it would have made the decision to terminate Worden even if he had passed the polygraph examinations and even if it was not aware of the negative results. Worden brought a civil action, alleging that SunTrust violated two provisions of the EPPA. The district court granted summary judgment in SunTrust’s favor, and Worden appealed.

Worden argued that the district court erred in holding that an employer can only be liable under the EPPA if the polygraph examination results are the employer’s “sole factor” for termination or other adverse employment action. He also argued that summary judgment was inappropriate because a genuine issue of material fact existed regarding whether SunTrust would have terminated Worden even if it had not known the results of the polygraph examinations.

On the “sole factor” issue, the Fourth Circuit stated:

The district court appears to have blended two different grounds in its analysis of the § 2002(3) claim. First, it determined the statute did not prohibit employers from discharging an employee as a result of polygraph examination results as long as the results were not the “sole factor” for the decision. Separately, the district court reviewed the evidence and held that the record “unequivocally establishe[d]” that SunTrust “would have made the same decision even if law enforcement (and [Worden]) had not disclosed the results to SunTrust.”

To the extent the district court interpreted § 2002(3) to require “dis-

charge...on the basis of” the results of a polygraph examination as the sole factor for the employment-related decision, we reject that interpretation. The language of § 2002(3) is plain and straightforward: it is unlawful for an employer “to discharge...any employee...on the basis of the results of any lie detector test.” Reading the statute so as to require the results of the polygraph examination to be the “sole” basis of that decision would require adding words to the statute, a task in the province of the legislature and not the judiciary....³⁴

As such, the Fourth Circuit concluded that a plaintiff is only required to show that the results of the polygraph examination were *a* factor in the termination of employment; the EPPA does not require that the employee show that polygraph test results were the “sole” basis for an employment decision.³⁵

As to whether SunTrust would have terminated Worden even if it had not known of the polygraph examination results, the court noted that, under the EPPA, it is unlawful for an employer “to use, accept, refer to, or inquire concerning the results of any lie detector test of any employee or prospective employee.”³⁶ It is also unlawful for an employer “to discharge...any employee...on the basis of the results of any lie detector test.”³⁷ After noting this language, the court first addressed Worden’s argument on appeal as to the “accept” prong of his EPPA claim. Since SunTrust was aware of the results of the two polygraph examinations, the Fourth Circuit concluded that Worden had shown that those results were a factor in the decision to terminate. Nevertheless, the court noted, the evidence in the record overwhelmingly supported the district court’s conclusion that SunTrust would have discharged Worden even without knowing the results of the polygraph examination.³⁸ The two individuals who made the decision to discharge Worden testified that, when making their employment decision, they relied on the statements of law enforcement officers that Worden was suspected of involvement in the attempted robbery.³⁹ In addition, SunTrust provided information showing that it terminated another employee who law enforcement suspected in an unrelated criminal investigation, even though the evidence was circumstantial, even though the authorities had not pressed charges against the employee, and

even though the employee had not taken a polygraph examination.⁴⁰

Moreover, the Fourth Circuit noted that the district court determined SunTrust's mere receipt of the polygraph results was not "acceptance" of the results for purposes of an EPPA claim.⁴¹ Rather, SunTrust's knowledge came either because law enforcement voluntarily announced the results in the presence of SunTrust employees or because Worden informed SunTrust of the results. The court determined that the district court properly held that, in order to amount to "acceptance," the actual language of the EPPA requires more than the employer's passive receipt of polygraph information from law enforcement.⁴²

As to the "use" component of Worden's claim, the court stated that a plaintiff need only prove that the employer "used" or "referred to" polygraph examination results.⁴³ Such a claim constitutes an independent basis for asserting the liability of an employer. The district court, therefore, improperly determined it would not recognize Worden's claim on the "use" or "refer to" prongs only because Worden's "accept" claim had failed. The Fourth Circuit held that the district court erred in granting summary judgment on the "use" or "refer to" portions of Worden's claim because the district court failed to consider each prong of the statute as an individual basis for liability. The district court's grant of summary judgment on this part of Worden's claim was grounded in the erroneous conclusion that Worden's "used" or "referred to" claim was dependent upon the success or failure of Worden's "accept" claim. As such, the Fourth Circuit reversed and remanded the district court's judgment as to the "use" and "refer to" prongs of Worden's EPPA claim, and affirmed the award of summary judgment as to the "accept" portion of his claim.⁴⁴

EMPLOYER GUIDELINES

In regulations interpreting the EPPA, the U.S. Department of Labor states that "virtually all employers are deemed subject to the provisions of the Act, unless otherwise exempt" under the Act.⁴⁵ As such, employers should assume that the EPPA prohibits the use of lie detector tests in rendering an opinion of honesty as it applies to its employees and prospective employees. If an employer believes that it clearly falls within one of

the exemptions, it should first consult with counsel and the Department of Labor.

Even if a private employer accurately concludes that it falls within one of the exemptions to the EPPA, it must still be careful to follow the guidelines outlined by the EPPA for administering a polygraph test. In that regard, the EPPA provides an extensive list of rights to employees or prospective employees who are subjected to polygraph tests under the exemptions for ongoing workplace investigations, for employers engaged in securities services, and for employers engaged in the manufacture or distribution of controlled substances.⁴⁶ If these rights are infringed, the employer loses the exemption.⁴⁷ As previously stated, but worth noting again, an employee cannot waive any EPPA procedures or any of their rights under the EPPA, by contract or otherwise.⁴⁸ The rights provided to such employees by the EPPA include the following, which must be adhered to during all phases of testing:

1. The employee or prospective employee must be permitted to terminate the test at any time;⁴⁹
2. The employee or prospective employee must not be asked questions in a manner intended “to degrade or needlessly intrude on” him/her;⁵⁰
3. The employee or prospective employee must not be asked any question concerning “religious beliefs or affiliations, beliefs or opinions regarding racial matters, political beliefs or affiliations, any matter relating to sexual behavior; [or] beliefs, affiliations, opinions, or lawful activities regarding unions or labor organizations”;⁵¹ and
4. The employer must 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.”⁵²

In addition to the EPPA’s continuously running protections, during the pretest phase, when an employer administers a polygraph test under the exemptions for ongoing workplace investigations, for employers engaged in securities services, or for employers engaged in the manufacture

or distribution of controlled substances, the EPPA provides employees or prospective employees with the following rights:

1. The employee or prospective employee must be provided with “reasonable written notice of the date, time, and location of the test,” and of his/her “right to obtain and consult with legal counsel or an employee representative before each phase of the test”;⁵³
2. The employee or prospective employee must be “informed in writing of the nature and characteristics of the tests and of the instruments involved”;⁵⁴
3. The employee or prospective employee must be informed, in writing, whether the testing area contains a two-way mirror, a camera, or any other device through which the test can be observed[;] whether any other device, including any device for recording or monitoring the test, will be used[;] or that the employer or the examinee may (with mutual knowledge) make a recording of the test”;⁵⁵
4. The employee or prospective employee must read and sign a written notice informing the employee or prospective employee “that the examinee cannot be required to take the test as a condition of employment[;] that any statement made during the test may constitute additional supporting evidence for the purposes of an adverse employment ...[;] of the limitations imposed under this section[;] of the legal rights and remedies available to the examinee if the polygraph test is not conducted in accordance with this chapter[;] and of the legal rights and remedies of the employer under this chapter”;⁵⁶
5. The employee or prospective employee must be provided with “the opportunity to review all questions to be asked during the test and [must be] informed of the right to terminate the test at any time”;⁵⁷ and
6. Specifically under the exemption for ongoing investigations of workplace incidents involving economic loss, the employer must provide a written statement to the employee before the polygraph test, which explains: (1) the specific incident or activity being investigated; and (2) the basis for the employer’s reasonable suspicion that the employee was involved in such incident or activity.⁵⁸

Furthermore, during the actual testing phase, an employer administering a polygraph test to an employee or prospective employee must not ask any employee or prospective employee any questions that were not presented in writing to the employee or prospective employee before the test.⁵⁹ Moreover, no polygraph test may last more than 90 minutes in duration, and no employer may subject an employee or a prospective employee to more than five polygraph tests in a given year.⁶⁰

Finally, while an employer is not prohibited from taking adverse employment actions against an employee or a prospective employee after a polygraph test has been properly administered, the employer must still comply with further requirements of the EPPA before doing so. During the post-test phase — after an employer has administered a polygraph test under the exemptions to the EPPA for ongoing workplace investigations, for employers engaged in securities services, or for employers engaged in the manufacture or distribution of controlled substances — an employer may not take an adverse employment action against an employee or against a prospective employee unless:

1. The employer conducts an additional interview with the employee or prospective employee regarding the results of the test;⁶¹ and
2. The employer provides the employee or prospective employee with “a written copy of any opinion or conclusion rendered as a result of the test, and a copy of the questions asked during the test along with the corresponding charted responses.”⁶²

Therefore, even after the employer has properly administered a polygraph test in situations in which it is permitted to do so under the exemptions provided in the EPPA, the employer must be certain to follow additional guidelines when carrying out any adverse employment action against an employee or prospective employee to whom the test was administered.

In addition, the employer is not permitted to disclose the results of a test to anyone other than an employee or prospective employee unless the employee or prospective employee consents to the disclosure or unless a court has issued an order requiring that the results be disclosed to

the court, a government agency, or an arbitrator or a mediator.⁶³ Also, employers must keep, for a minimum of three years, all records relating to the polygraph examination, including copies of the employee notices given in the pre-test phase, any consent forms, all documentation relating to workplace theft investigations, all documents that detail compliance efforts, and all opinion reports of the examiner.⁶⁴

Based on the language of the EPPA, it is clear that, even under the exemptions provided under the Act, an employer's right to utilize lie detector tests is highly restricted. Because the standards under the EPPA are so stringent, it is advisable for employers to consult with counsel in order to ensure appropriate testing procedures.

Imprecise Statutory Language

The EPPA contains some unclear language that may be interpreted in a way that reaches unintended results. Though the ambiguity may be deliberate on the part of the drafters because it offers flexibility, it also creates uncertainty. For example, the Act provides an exemption from the general prohibition against polygraph tests for certain employers that provide "security services." This includes facilities, materials, or operations having a significant impact on the health or safety of any state or the national security of the United States. While the notion seems simple enough, the Act's nonexhaustive list of "facilities, materials, or operations" falling under the exemption does not provide a bright-line rule. Examples of such facilities listed in the statute include: government office buildings; prisons and correction facilities; public schools; and libraries. The Act further provides that the security exemption applies to those employers that have network computer systems containing data important to public health and safety or national security — a large list of potential employers, which includes: hospitals and health research facilities; employers engaged in holding large public events, such as political conventions and major parades, concerts, and sporting events; and owners and operators of large enclosed shopping centers.⁶⁵ The entities delineated in the statute suggest an expansive definition of those providing "security" services. Therefore, within the limitations of the EPPA's language, it is impossible to provide a

concise definition that furnishes a universal, easy to apply formula for use when determining to which employers the exemption will apply. However, throughout the Act, it is clear that the exemptions are meant to apply only to those entities that have a significant impact on public health or safety, or that have an impact on national security. As such, the EPPA, as drafted with its relatively expansive definition of those employers providing security services, could provide a false sense of exemption-applicability to some employers.

If an employer believes that its “facilities, materials, or operations” fall within the purview of an exemption, a request for a ruling may be filed with the Department of Labor. A ruling that such “facilities, materials, or operations” are included within an exemption must be obtained *before* the employer administers a polygraph test.⁶⁶ Any such “facilities, materials, or operations” must meet the “significant impact” test. Stated differently, only facilities that would be of vital importance during periods of war or civil emergency, or whose sabotage would greatly affect the public health or safety, could fall within the scope of the term “significant impact” and would thereby fall under the exemption.⁶⁷

CONCLUSION

Though the EPPA is a seldom-litigated federal statute, employers should be aware that, unless an exemption applies, they may not administer a lie detector test, suggest that a person take a lie detector test, use the results of a lie detector test, or inquire about the results of a lie detector test; nor may employers discharge or take an adverse employment action against an employee or against a prospective employee on the basis of the results of a lie detector test or on the basis of an employee’s or prospective employee’s refusal to submit to a lie detector test. Recent case law serves as a reminder to employers of the illegality of considering polygraph results when making employment decisions. Not only does the EPPA prohibit private employers from using lie detector tests while screening job applicants and from taking disciplinary action against employees or prospective employees who refuse to submit to a polygraph exam, it also limits employers’ rights to test current employees unless the employers

reasonably suspect that the employees are involved in an incident resulting in an economic loss. As noted, certain exemptions apply, but only in very narrow circumstances. Given the broad application of the law, employers should assume that they are subject to the provisions of the EPPA, and that they are, therefore, not permitted to use lie detector tests. Employers should consult with counsel if they believe they are otherwise exempt under the Act before administering any lie detector test to a prospective or current employee.

NOTES

¹ *Watson v. Drummond Co.*, 436 F.3d 1310 (11th Cir. 2006) (holding that an employer does not violate EPPA when employee voluntarily requests to take polygraph test to prove innocence), *Fernandez v. Mora San Miguel Elec. Coop.*, 462 F.3d 1224 (10th Cir. 2006) (concluding that an independent polygraph examiner should not be held liable under EPPA because it was not considered an “employer” under the statute), *Calbillo v. Cavender Oldsmobile, Inc.*, 288 F.3d 721 (5th Cir. 2002) (deciding that a polygraph examiner not “employer” for EPPA purposes) and *Albin v. Cosmetics Plus, Ltd.*, 1997 WL 615494 (S.D.N.Y. Oct. 6, 1997) (interpreting the EPPA to prohibit an employer from requesting a polygraph exam from an employee, even where the exam is ultimately not administered) are among the rare cases.

² Employee Polygraph Protection Act, Pub. L. No. 100-347 (1988).

³ See, e.g., the EPPA, which can be found at 29 U.S.C. § 2001, *et seq.* See also *Watson v. Weekends Only, Inc.*, 2007 WL 1527227 (E.D. Mo. May 23, 2007) (concluding that an employee fired for insubordination after refusal to take polygraph test at local police station at the direction of his supervisor could possibly maintain a claim for violation of the EPPA; summary judgment denied).

⁴ 29 U.S.C. § 2002(1)-(3).

⁵ 29 U.S.C. § 2002(1)-(3).

⁶ 29 U.S.C. § 2002(1)-(3).

⁷ 29 U.S.C. § 2002(4).

⁸ 29 U.S.C. § 2001(3).

⁹ 29 U.S.C. § 2003.

¹⁰ 29 U.S.C. § 2005(a), (c). In *Mennen v. Easter Stores*, 951 F. Supp. 838, 864

(N.D. Iowa 1997), the court considered the damages available under Title VII of the Civil Rights Act of 1964 and other civil rights and employment-regulated statutes to determine the scope of appropriate relief under the EPPA. The court awarded past and future wages from the date of the employee's constructive discharge, plus pre-judgment interest on the back pay. The evidence also supported an award of damages for emotional distress resulting from the employer's violation of the EPPA.

¹¹ 29 U.S.C. § 2006(a).

¹² 29 U.S.C. § 2006(b)(1).

¹³ 29 U.S.C. § 2006(b)(2).

¹⁴ *Polsky v. Transtecs Corp.*, 404 F.3d 1264 (11th Cir. 2005) (holding that a company under contract with Department of Defense to perform mailroom services at Pensacola Naval Air Station could not benefit from EPPA's national defense exemption).

¹⁵ This is an important distinction because a polygraph test is a subset of the larger category of lie detector tests as those terms are defined in 29 U.S.C. § 2001. Therefore, under the ongoing workplace investigations exemption provided in 29 U.S.C. § 2006(d), employers engaged in ongoing investigations are limited in the type of lie detector tests they can permissibly utilize.

¹⁶ This exemption is a limit on an employee's right to be protected from such examinations; it is not an affirmative right conferred on an employer. See *In re Sekai Kyusei Kyo Izunome Church*, 2009 WL 222989 (D. Hawaii Jan. 30, 2009) (noting that an employer sued for requiring an examination may cite the limitation as a defense, but the limitation does not create an affirmative claim for an employer).

¹⁷ See, e.g., *Dilworth v. LaSalle-Chicago 24 Hour Currency Exchange*, 2004 WL 524665 (N.D. Ill. March 12, 2004) (holding an employer liable for violating EPPA for terminating employee that refused to submit to lie detector test even though employer had strong suspicion that employee stole \$2,000 of company funds) and *Polsky v. Transtecs Corp.*, 404 F.3d 1264 (11th Cir. 2005) (concluding that an employer could not satisfy its burden of establishing reasonable suspicion of subject employee's responsibility for mail tampering incident because it was conducting blanket testing of all employees).

¹⁸ 29 U.S.C. § 2006(d)(1)-(3).

¹⁹ 29 U.S.C. § 2006(d)(4).

²⁰ 29 U.S.C. § 2007(a)(1).

²¹ Again, as was the case with the ongoing workplace investigation exemption,

this is an important distinction because a polygraph test is a subset of the larger category of lie detector tests as those terms are defined in 29 U.S.C. § 2001. Therefore, under the security services exemption provided in 29 U.S.C. § 2006(e), private securities services employers are limited in the type of lie detector tests they can permissibly utilize.

²² 29 U.S.C. § 2006(e).

²³ 29 U.S.C. § 2006(e).

²⁴ 29 U.S.C. § 2007(a)(2).

²⁵ Again, as was the case with the ongoing workplace investigation exemption and the securities services exemption, this is an important distinction because a polygraph test is a subset of the larger category of lie detector tests as those terms are defined in 29 U.S.C. § 2001. Therefore, under the controlled substances manufacturers exemption provided in 29 U.S.C. § 2006(f), private securities services employers are limited in the type of lie detector tests they can permissibly utilize.

²⁶ 29 U.S.C. § 2006(f)(1), (f)(2)(A).

²⁷ 29 U.S.C. § 2006(f)(1), (f)(2)(B).

²⁸ 29 U.S.C. § 2007(a)(2).

²⁹ *Harmon v. CB Squared Services, Inc.*, 2009 WL 234982 (E.D. Va. Jan. 29, 2009).

³⁰ *Harmon v. CB Squared*, 2009 WL 234982, at *3-4.

³¹ *Id.*

³² *Id.*, at *3.

³³ *Worden v. SunTrust Banks*, 549 F.3d 334 (4th Cir. Nov. 24, 2008).

³⁴ *Worden*, 549 F.3d 334, at 341 (citations omitted).

³⁵ *Id.*, at 341.

³⁶ *Id.*, at 340.

³⁷ *Id.*, at 340.

³⁸ *Id.*, at 343.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*, at 346.

⁴² *Id.*, at 345.

⁴³ *Id.*, at 346.

⁴⁴ *Id.*, at 347.

⁴⁵ 29 C.F.R. § 801.3(a).

⁴⁶ 29 U.S.C. § 2007(b).

⁴⁷ 29 U.S.C. § 2007(b).

⁴⁸ 29 U.S.C. § 2005(d). *See also Harmon v. CB Squared*, 2009 WL 234982 (E.D. Va. Jan. 29, 2009) and *Long v. Mango's Tropical Café, Inc.*, 972 F. Supp. 655 (S.D. Fla. 1997).

⁴⁹ 29 U.S.C. § 2007(b)(1)(A).

⁵⁰ 29 U.S.C. § 2007(b)(1)(B).

⁵¹ 29 U.S.C. § 2007(b)(1)(C).

⁵² 29 U.S.C. § 2007(b)(1)(D).

⁵³ 29 U.S.C. § 2007(b)(2)(A).

⁵⁴ 29 U.S.C. § 2007(b)(2)(B).

⁵⁵ 29 U.S.C. § 2007(b)(2)(C).

⁵⁶ 29 U.S.C. § 2007(b)(2)(D). This notice must also include when the results of a polygraph may be disclosed to third parties under 29 U.S.C. § 2008.

⁵⁷ 29 U.S.C. § 2007(b)(2)(E).

⁵⁸ 29 C.F.R. § 801.23.

⁵⁹ 29 U.S.C. § 2007(b)(3).

⁶⁰ 29 U.S.C. § 2007(b)(5). Additionally, there are stringent requirements that must be met by the examiner — by the person actually administering the polygraph test. Those qualifications are provided in the EPPA at 29 U.S.C. § 2007(c).

⁶¹ 29 U.S.C. § 2007(b)(4)(A).

⁶² 29 U.S.C. § 2007(b)(4)(B).

⁶³ 29 C.F.R. § 801.35.

⁶⁴ 29 C.F.R. § 801.30.

⁶⁵ 29 C.F.R. § 801.14.

⁶⁶ 29 C.F.R. § 801.14.

⁶⁷ 29 C.F.R. § 801.14.