FOUNDATION FOR POWERING PUBLIC SERVICE

Responding to Government Polygraph Examination Requests

This information is provided for general informational purposes only. It does not constitute legal guidance or advice, does not create or constitute an attorney-client relationship, is not intended as a solicitation, and is not a substitute for obtaining legal advice from a qualified attorney. Each individual's situation is different, and you are encouraged to consult with legal counsel and/or your employee or union representative, as appropriate.

The information below provides an overview of key considerations for federal government employees and contractors when confronted with a government agency's request to participate in a polygraph examination.

Polygraph Examinations

During a polygraph examination (often referred to as "a lie detector test"), a test subject will generally be asked to answer a series of questions that elicit a "yes" or "no" answer while they are simultaneously measured for certain physiological responses, such as blood pressure, respiration rate, skin conductivity, and pulse. A trained test operator will administer the test and then interpret the physiological activity to assess whether the test subject was truthful, deceitful, or if the results were inconclusive.

Over the years, however, polygraph test results have been considered unreliable for a number of reasons, including the high risk of human error (such as the operator's establishment of an incorrect physiological baseline for the test subject), the lack of standardization associated with many aspects of the test (such as whether the operator should attribute certain changes in physiological readings to deception or changes in the subject's unique state, such as nervousness), and the availability of potential countermeasures that can be deployed during a test. To that end, federal courts and most state courts have *per se* rules **against** the admissibility of polygraph test results as evidence. Note, however, that statements made by a test subject to the polygrapher during an examination **can** still be admissible.

Federal Employees, Contractors, and Polygraph Requests

Since 1988, the Employee Polygraph Protection Act (EPPA) has prohibited most private employers from using polygraph examinations in the employment setting,

both in connection with pre-employment screenings and after hiring.[1] The EPPA, however, does not apply to all employers and expressly **excludes coverage to federal and state government agencies, as well as contractors that require security clearances or provide counterintelligence or national security services for the government.**[2] Accordingly, polygraph testing is often required at certain agencies to establish eligibility for federal employment or permit access to certain federal facilities, and are periodically required for continued access to sensitive materials.

Federal agencies and their investigative bodies can also use polygraph examinations as an investigative tool when probing for alleged employee misconduct or potential breaches of agency policy or security protocol. Given that the EPPA does not provide blanket protection to federal employees or contractors against polygraph examinations, use of such testing methods is generally permissible. To the extent that a government employee or contractor is asked to undergo a polygraph examination, there are several key issues that should be considered.

1. ***What is required under your employment agreement and agency policies/protocols?*** As a federal government employee or contractor, the terms of your employment agreement may require cooperation with polygraph requests in connection with certain matters as a condition of your employment. As a federal employee or contractor, you may also be subject to additional agency policies or protocols (either explicitly incorporated by reference or as an extension of your job responsibilities) that could include the requirement to cooperate with polygraph examinations. While you may not have a **legal obligation** to consent to or agree to a polygraph test, failure to do so may trigger termination of your employment or noncompliance with (or termination of) your federal award. Review your government contracts, employment contracts, union contracts, agency policies, and other relevant documents to determine what risks or consequences may apply for non-cooperation.

2. ***Remember that you have a Fifth Amendment right against self-incrimination.*** To the extent that you agree to undergo a polygraph examination, you have a Fifth Amendment Constitutional right from being compelled to provide any self-incriminating statements. Accordingly, if the examination asks any questions that could elicit incriminatory information against you, you can

[1] 29 U.S.C. §§ 2001-2009, Pub. L. No. 100-347 (1988).

[2] *See* 19 CFR § 801, Exemptions.

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refuse to answer the question. The invocation of that right could be considered a refusal to take the examination and, as explained above, may have employment consequences. To the extent that you have any questions about the scope or limitations of your Fifth Amendment rights, you should consult with a qualified attorney.

3. ***Understand the consequences of taking a polygraph examination and your appeal rights.*** If you agree to a polygraph, be aware that there may also be employment consequences that stem from the results of your examination. As previously noted, polygraph tests can have deceptive, inaccurate or unreliable results, which can lead to potential termination from employment. Accurate results can also lead to termination. Keep in mind that your agency may have internal appeal or complaint processes, but those processes may take significant time.

4. ***Consult an attorney, your employee relations representative or union representative, as appropriate.*** Every individual's situation may be different and you should consider all of the options and potential consequences before consenting to a polygraph examination. Consult with a qualified attorney or employee/union representative if you are asked to take a polygraph. They can consider your agency's policies, the reasons you are being asked to take the test, and the consequences you may face, including if you refuse to take the test or take the test and obtain results with inconclusive or deceptive conclusions.

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