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Pre-employment Polygraph Examinations of Public Safety Applicants

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❖ Introduction

Federal law enforcement and security agencies use polygraph examinations as part of their pre-employment screening of applicants, as do many state and local public safety employers.

This two-part article briefly examines some of the controversy concerning the validity and reliability of polygraph examination as a means of detecting deception, as well as the general legal rules concerning the use of polygraphs in pre-employment examinations, the use of discriminatory questions, and disability discrimination and the polygraph.

At the end of part one of this article, there is a listing of relevant resources and references. Part two takes a look at some case law on the use of polygraphs to screen public safety applicants, and presents some general suggestions.

❖ Validity of Polygraph Examinations

Deception of all kinds imposes a heavy burden on society. In one popular futuristic novel, [The Truth Machine](#) (1996) by [James L. Halperin](#), the author speculates on the impact that the invention of an absolutely reliable lie detection device would have on employment, professional licensing, the court system, commercial transactions, and personal relations. He portrays the consequences of the wide availability of such a device, with most people wearing them all the times, eliminating much crime, terrorism, cheating spouses, Monday morning calling in “sick,” and even “little white lies.” (“No, you don’t look fat,” and “Of course, I love your cooking.”).

Contemporary reality as to the attempts to scientifically detect deception is, of course, far from this fantasy. There have been attempts to develop lie detection devices at least since Italian criminologist [Cesare Lombroso](#) in 1885 invented a device to measure changes in blood pressure in persons being questioned. The assumption was that lying often results in physical side effects.

Over the next hundred and twenty five years, the modern polygraph machine was developed and refined, as well as various techniques intended to attempt to enhance its reliability. Such machines now record and measure a number of physiological responses, such as skin conductivity, pulse, perspiration, and blood pressure, and intensive training in the use of the device and interrogation techniques is undergone by many polygraph examiners.

Estimates of the validity of polygraph testing as a method of lie detection range from 90-95% by proponents of the polygraph to as low as 61% in a [1997 survey](#) of 424 psychologists.

As a consequence, in [U.S. v. Scheffer](#), #96-1133, (1998), the U.S. Supreme Court stated that “There is simply no consensus that polygraph evidence is reliable.” In that case, the Court ruled that polygraph evidence was properly excluded during a court-martial; that its exclusion was not arbitrary, and that this did not impair the defendant’s right to present a defense.

In [U.S. v. Henderson](#), #04-11545, 409 F.3d 1293 (11th Cir. 2005), the court found that “polygraphy did not enjoy general acceptance from the scientific community.”

A report by the National Academy of Sciences (NAS) (2003) entitled [The Polygraph and Lie Detection](#) (2003), stated that the majority of polygraph research was “Unreliable, Unscientific and Biased,” and that 57 of 80 research studies that polygraph proponents rely on were flawed. The report concluded that polygraph testing may have some usefulness, but that there was “little basis for the expectation that a polygraph test could have extremely high accuracy.”

This echoed the findings of an earlier 1983 report by the U.S. Congress Office of Technology Assessment, “[Scientific Validity of Polygraph Testing: A Research Review and Evaluation](#).”

While the authors of the NAS report were very skeptical of the validity of polygraph testing, they did still concede that such testing may still be useful in terms of deterring security violations, encouraging the admissions of such violations, deterring employment applications from potentially poor security risks, and also increasing public confidence in national security organizations. But they stated the belief that such usefulness comes from test subjects beliefs, whether right or wrong, about the validity of the polygraph, and are different from “actual validity or accuracy.”

A 1995 survey concerning the use of pre-employment screening of applicants via polygraph testing in 626 U.S. law enforcement agencies revealed that 62% of them used the polygraph during the hiring of new officers. A national survey of practices, policies and evaluative comments on the use of pre-employment polygraph screening in police agencies in the United States, by R. Messig & F. Horvath, *Polygraph* 24(2):57–131 (1995).

The agencies that did so indicated that the polygraph process caused them to reject about 25% of their applicants based on information revealed that had not turned up through other aspects of their screening process.

What type of information was revealed? Information about illegal drug use was a major item, but other criminal activities of a wide variety of types were also found. Nine percent of the agencies responding reported finding information concerning the possible involvement of rejected applicants in unsolved homicides, commission of rapes (34%), or involvement in armed robberies (38%).

Applicants are often asked to complete a background questionnaire prior to undergoing a polygraph examination, which serves as a basis for some questions to be asked by the examiner. An example of one such questionnaire can be found at this [link](#).

Knowing that they will be undergoing polygraph examination, and believing, whether correctly or not, that a polygraph examiner will be able to tell whether a dishonest answer concerning past involvement in criminal conduct is false, there are candidates who voluntarily reveal information on such questionnaires that may be used to disqualify them.

❖ **General Laws on Employment Polygraph Testing**

Congressional concerns about the perceived problems with the validity of polygraph testing for employment purposes led to the 1988 enactment of the [Employee Polygraph Protection Act, 29 U.S.C. Secs, 2001-2009](#).

This federal statute generally bars most private employers from using the polygraph either for purposes of pre-employment screening of applicants or during employment for purposes of discipline or discharge.

Exceptions were included, however, for polygraphs administered as part of an ongoing investigation involving economic loss or injury to an employer's business, such as theft, embezzlement or industrial espionage. When such testing is allowed, a variety of procedural protections for employees are provided.

The statute completely excludes federal, state, and local government employers from its application, and contains more limited exemptions for national defense and security contractors, FBI contractors, private security firms, and pharmaceutical firms,

This means that public safety agencies, such as police departments, fire departments, corrections, etc. may, as a matter of federal law, utilize polygraph testing both for pre-employment screening and for purposes of employee discipline or discharge.

This does not, however, mean that there are no federal legal restrictions on how polygraph exams of public safety personnel may be carried out.

❖ Questions With a Discriminatory Impact

The mere fact that polygraph examinations are permitted in screening government employees does not immunize your agency from the potential consequences of asking, during such polygraph tests, questions that could be considered discriminatory if asked in other contexts during the employment application process. If there are questions that, on the basis of employment discrimination laws such as Title VII, you would not ask applicants otherwise, you should not be asking those questions during polygraph examinations.

In [*Tye v. City of Cincinnati*](#), #C-1-89-124, 794 F. Supp. 824 (S.D. Ohio 1992), the court found that even where all job applicants are asked the same questions and even though approved minority hiring goals were met, the questions asked may still have an illegal disparate impact on minority job candidates. While the use of the polygraph was job-related because it allowed the city to make a more informed choice about its hiring decisions; there was uncontradicted testimony at trial that the polygraph “intimidated many applicants to reveal further information about their background.”

This occurred in the context of a previously entered consent decree designed to remedy alleged race discrimination in a fire department. The court held that the questions asked concerning two applicants’ arrest records violated the consent decree. The two responded that they had been arrested, and there was evidence that they may not have been hired because of this, making the defendants liable to them for violations of the consent decree.

❖ Polygraphs and Disability Discrimination.

In a U.S. Department of Justice publication entitled [The Americans With Disabilities Act and Hiring Police Officers](#), (1997), it states that while “[y]ou can conduct polygraph exams before a conditional job offer is made, however, employers must exercise care not to ask any prohibited disability-related inquiries in administering the pre-offer polygraph exam.”

Earlier, the EEOC General Counsel concluded that polygraph exams are not medical examinations, and therefore are not subject to the ADA’s restrictions on such exams, requiring them to be “job-related and consistent with business necessity.” But operators may not ask prohibited questions before or during a test that is part of an employer’s pre-

offer screening. See EEOC: Enforcement Guidance on Pre-Employment Inquiries Under the A.D.A., FEP Manual (BNA) 405:7210-11 (#748, 1994).

What kind of questions may be prohibited in a polygraph examination conducted before there has been a conditional offer of employment? Questions that seek to discover an applicant's disability are prohibited. That may include inquiries about past addiction to drugs. Screening out such applicants on the basis of past addiction or a perception of such addiction must be justified by showing it to be job-related and consistent with business necessity.

“If safety is asserted as a justification for such a policy, then the employer must be able to show that individuals excluded because of a history of drug addiction or treatment would pose a direct threat -- i.e., a significant risk of substantial harm -- to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.”

But casual drug use is not a disability under the ADA. In addition, the ADA does not protect applicants currently using illegal drugs, even if they are addicted. The inquiry on a pre-offer polygraph examination, therefore, can properly, without running afoul of the ADA, ask an applicant if they currently use illegal drugs.

Additionally, it does not violate the ADA to ask an applicant, prior to a job offer, whether he or she has ever used illegal drugs or been arrested for their use. “However, a law enforcement agency may not ask at the pre-offer stage about the frequency of past illegal drug use or whether the applicant has ever been addicted to drugs or undergone treatment for addiction.”

On the other hand, unlike current users of illegal drugs, “a person who currently uses alcohol is not automatically denied protection. An alcoholic is a person with a disability and is protected by the ADA if he or she is qualified to perform the essential functions of the job.”

It is beyond the scope of this article to address in detail the questions that may or may not be asked during a polygraph examination, but care must be taken to comply with applicable federal, state, and local employment discrimination laws that protect applicants and employees on the basis of race, sex, national origin, religion, age, sexual

orientation, disability or other protected categories or statuses. More discussion of this issue under the ADA may be found at this [link](#).

State statutes in some jurisdictions may also go beyond federal law in prohibiting, restricting, or regulating the use of the polygraph for employment purposes by public safety agencies, and care should be taken to comply with them.

❖ Resources

1. [Alaska State Trooper Background Questionnaire](#). Alaska State Trooper applicants are required to complete this questionnaire prior to pre-employment polygraph screening.
2. [Al-Qaeda Documentation on Lie Detection](#). Extract on instrumental lie detection from Al-Qaeda's *Encyclopedia of Jihad*.
3. [American Association of Police Polygraphists](#).
4. [American Polygraph Association](#).
5. [Antipolygraph.org](#). A website of material critical of polygraphs.
6. [Basic Outline of the Law of Polygraphs](#) by David L. Faigman U.C., Hastings College of the Law (January 2001).
7. [Canadian Association of Police Polygraphists](#).
8. FBI Form [FD-328b](#) Applicant Agreement to Interview With Polygraph.
9. FBI Manual of Investigative Operations and Guidelines, [Section 67-7.10, Polygraph Examinations of FBI Applicants](#) (1997).
10. [Federal Psychophysiological Detection of Deception Examiner Handbook](#), U.S. Department of Defense (Oct. 2006).
11. [Federation of American Scientists Polygraph Resource Page](#).
12. [Lie detection](#). Wikipedia article.
13. [Los Angeles Police Department Pre-Employment Polygraph Guidelines](#) (Dec. 2004).
14. [Oakland \(California\) Police Department Lie Detection Screening Devices Policy](#). (Feb. 16, 2001).
15. [Police Polygraph Questions](#) by George M. Godoy.
16. [Polygraph](#). Wikipedia article.
17. [Polygraph Association of South Africa](#).
18. [Polygraph for Screening](#). by Professor Charles R. Honts of Boise State University.
19. [Polygraph Exams](#). Summaries of cases reported in AELE publications.
20. [The Polygraph Museum](#).

21. [Polygraph use in Law Enforcement Hiring](#) by Michael Andrew Eagan, Texas State University.
22. [University of Texas System Police Pre-Employment Polygraph Questionnaire...](#)

❖ Relevant Prior Monthly Law Journal Articles

1. [Disciplinary Consequences of Peace Officer Untruthfulness Part I - Job Applications](#), 2008 (9) AELE Mo. L. J. 201.
2. [Disciplinary Consequences of Peace Officer Untruthfulness Part II - Employee Dishonesty](#), 2008 (10) AELE Mo. L. J. 201.

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1. [Integration of Pre-Employment Polygraph Screening into the Police Selection Process](#) by Mark Handler, Charles R. Honts, Donald J. Krapohl, Raymond Nelson and Stephen Griffin, J Police Crim Psych (2009).
2. [Polygraph Use by the Department of Energy: Issues for Congress](#), by Alfred Cumming, Congressional Research Service (Feb. 2009).
3. [New U.S. weapon Hand-held lie detector](#), MSNBC (April 9, 2008).
4. [The Lie Behind the Lie Detector](#) by George W. Maschke and Gino J. Scalabrini (2005).
5. [The Truth About Lie Detectors \(aka Polygraph Tests\)](#), American Psychological Association (August 5, 2004).
6. [The Polygraph and Lie Detection](#), report of the National Academy of Sciences' National Research Council (October 2002). Free registration required. [Executive Summary](#).
7. [Use of the Polygraph in Security Clearance Investigations](#). Chapter 8 of *Security Clearances and National Security Information: Law and Procedures* written by Sheldon I. Cohen for the Defense Personnel Security Research Center. (December 2000).
8. A national survey of practices, policies and evaluative comments on the use of pre-employment polygraph screening in police agencies in the United States, by R. Messig and F. Horvath, Polygraph 24(2):57–131 (1995).
9. [The polygraph as a truth detector](#), British Columbia Civil Liberties Association. (1984).

10. [Scientific Validity of Polygraph Testing: A Research Review and Evaluation](#), Washington, D. C.: U.S. Congress Office of Technology Assessment (1983).
 11. Police officer may not be dismissed for refusal to submit to a polygraph examination -- Farmer v. City of Ft. Lauderdale, 11 Fla. St. U.L. Rev. 697 (1983).
 12. ALR Annotation: Refusal to submit to polygraph examination as ground for discharge or suspension of public employees or officers, 15 A.L.R.4th 1207, Sec. 2.
 13. Book: *Detection of Deception, Electrodermal Activity in Psychological Research*. W. Prokasky & D. Raskin (1973).
 14. The Case Against the Polygraph, 51 Amer. Bar Assn. Journal 855 (1965).
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