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Specific Incident Exemption of the Employee Polygraph Protection Act: Deceptively Straightforward

Charles P. Cullen

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I. Introduction

Employee theft has reached epidemic proportions in the United States with estimated losses ranging from $9.2 billion to $50 billion per year.[1] A recent survey showed that at least one-third of retail manufacturing and service organization employees have stolen company property.[2] Others have estimated that "seventy percent of all workers steal something during the course of their employment."[3] In 1982, approximately 335,000 American workers were arrested for theft from their employers even though "discipline, not arrest, is the normal consequence" of employee theft.[4]

Employers have attacked this epidemic, in part, by making widespread use of the polygraph.[5] In recent years, employers have conducted approximately two million polygraph examinations annually[6] to screen job applicants, investigate specific instances of employee theft, and uncover employee misconduct.[7] However, objections to employer use of the polygraph have been raised on the grounds that experts have not agreed on the polygraph's ability to detect deception[8] and polygraph examiners frequently ask needlessly intrusive questions.[9]

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1 D. LYKKEN, A TREMOR IN THE BLOOD 185 (1981). *See also* Staff Report, *To Catch a Thief: Stealing in the Workplace Studied*, 70 A.B.A. J. Apr. 1984, at 38 (quoting a three year study by the National Institute of Justice entitled "Theft by Employees in Work Organizations" which estimated employee theft at between $5 billion and $10 billion per year).

2 *See* Staff Report, *supra* note 1, at 38.

3 Nagle, *The Polygraph in the Workplace*, 18 U. RICH. L. REV. 43, 63 (1983).

4 *Id.*

5 For a basic introduction to the polygraph and polygraph testing, *see infra* text accompany notes 17-42.

6 *See Polygraph Protection Act of 1985: Hearings on S. 1815 Before the Senate Comm. on Labor and Human Resources*, 99th Cong., 2d Sess. 1 (1986) (opening statement of Sen. Hatch). It has also been reported that 30% of Fortune 500 companies and over 50% of retail businesses use the polygraph. H.R. REP. No. 416, 99th Cong., 1st Sess. 7 (1985). A study also reported that 50% of commercial banks, fast food restaurants, and retailers use polygraphs. Belt & Holden, *Polygraph Usage Among Major U.S. Corporations*, PERSONNEL J., Feb. 1978, at 80-86. The use of lie detectors has increased rapidly in recent years. A study conducted in 1977 estimated that only 300,000 people were given polygraph tests in 1974. *See* PRIVACY PROTECTION STUDY COMMISSION, PERSONAL PRIVACY IN AN INFORMATION SOCIETY (1977).

7 *See* Tiner & O'Grady, *Lie Detectors in Employment*, 23 HARV. C.R.-C.L. L. REV. 85 (1988).

8 A witness at a Senate Committee hearing estimated that annually 400,000 innocent employees are labeled deceptive and suffer adverse employment decisions as a result. *See* S. REP. No. 284, 100th Cong., 2d Sess. 41, *reprinted in* 1988 U.S. CODE CONG. & ADMIN. NEWS 726, 729 [hereinafter SENATE REPORT].

9 For example, Adolf Coors Brewery required employees to answer the following questions: "Are you a Communist?" "Have you ever been involved with homosexuals?" "Have you ever participated in a march or riot or demonstration?" "How much do you owe on your home?" "Is there anything that you know of for which you could be blackmailed?" D. LYKKEN, *supra* note 1, at 3.

In response to these objections, forty-one states enacted regulations governing polygraph use. These state laws lacked uniformity, however, and were often circumvented by employers who could easily require employees to submit to polygraph tests in neighboring states with less stringent regulations.[10] As a result, after the introduction of nearly fifty bills limiting polygraph use over a period of at least twenty years, Congress passed the Employee Polygraph Protection Act of 1988[11] ("EPPA" or "the Act").

The Act prohibits the use of lie detectors[12] for pre-employment screening or random testing[13] by most employers engaged in interstate commerce.[14] These employers may now only use the polygraph to investigate "specific incidents" of "economic loss."[15] Employers wishing to conduct tests under this "specific incident" exemption are faced with a maze of requirements and a serious risk of liability.[16] This Note examines the specific incident exemption of the Act. Part I gives an introduction to polygraph testing in the private-sector and considers the issue of polygraph validity. Part II provides an overview of the Act and its legislative history and puts the specific incident exemption into context. Part III focuses on the requirements of the specific incident exemption and attempts to clarify when employers may conduct polygraph examinations under this exemption. In addition, Part III suggests that courts should broadly construe the exemption in order to permit employers' use of the polygraph as an investigative tool.

II. Polygraph Methodology and Validity

A. *Introduction to the Polygraph and Private-sector Examination Techniques*

Polygraph examiners conduct exams by asking the subject a series of questions designed to elicit triggering responses.[17] The modern polygraph measures the subject's blood pressure, pulse, respiration, and galvanic skin responses throughout the examination.[18] Polygraph validity is premised on the assumption that lying produces physiological responses

10 SENATE REPORT, supra note 8, at 731.

11 29 U.S.C.A. §§ 2001-2009 (West Supp. 1988).

12 "The term 'lie detector' includes 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." *Id.* § 2001(3).

13 *Id.*

14 *Id.* § 2002. Under the Act, the term "commerce" has the meaning provided by section 3(b) of the Fair Labor Standards Act of 1938. *Id.* § 2001(1). Under this definition, approximately 5.7 million businesses and 94 million employees and job applicants will be affected by the Act.

15 *Id.* § 2006(d).

16 *See infra* text accompanying notes 132-61 for a discussion of the requirements of testing under the specific incident exception and a discussion of potential liability for employers conducting polygraph tests.

17 *See* J. REID & F. INBAU, TRUTH AND DECEPTION: THE POLYGRAPH ("LIE DETECTOR") TECHNIQUE, 3 (1966). *See* text accompanying notes 30-42 for a discussion of questions that might be asked during a relevant/irrelevant test or a control question test.

18 *See* OFFICE OF TECHNOLOGY ASSESSMENT, SCIENTIFIC VALIDITY OF POLYGRAPH TESTING: A RESEARCH REVIEW AND EVALUATION-A TECHNICAL MEMORANDUM (1983) [hereinafter OTA REPORT].

which the polygraph can measure.[19] However, other factors, such as examiner competence, may affect the outcome of the polygraph test.[20]

There are three phases to a polygraph test—a pretest interview, the test, and a posttest interview.[21] During the pretest interview, the examiner explains the test procedure and previews questions that will be asked during the inquiry.[22] This phase of the test provides an opportunity for the examiner to condition the subject for the examination and observe helpful indications of guilt.[23] In the testing phase, the examiner typically asks a series of questions several times, often pausing 15-20 seconds between questions, and records the answers and question numbers directly on the polygraph test chart.[24] Finally, in the posttest phase, the examiner discusses the results of the test with the subject and may ascertain other possible explanations for distorted physiological responses if the test results indicated deception.[25]

Polygraph examiners use at least six different questioning methods.[26] However, the two methods which are used most often in the employment context are the relevant/irrelevant test and the control question test. Examiners typically choose among the methods based on their own experience and the situation at hand;[27] however, the decision is usually driven by the situation at hand. For example, the relevant/irrelevant test is used for most preemployment screening and random testing,[28] while the control question method is used for most investigations of specific incidents of wrongdoing.[29]

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19 Skolnick, *Scientific Theory and Scientific Evidence: An Analysis of Lie Detection*, 70 YALE L.J. 694, 699-700 (1961).

20 *See infra* text accompanying notes 77-78. The competence and experience of the examiner is the most important factor affecting the reliability of the polygraph examination. *See* F. INBAU & J. REID, LIE DETECTION AND CRIMINAL INTERROGATION 5 (1953); Note, *The Polygraph Protection Act of 1985: Bobbing Pinocchio's New Nose?*, 43 WASH. & LEE L. REV. 1411, 1414 (1986). Other factors that could affect the polygraph test results include:

1. Nervousness or extreme emotional tension caused by the fact that an accusation has been leveled against the subject;
2. Fear that the examination will expose information unconnected to the investigation;
3. Anger or resentment over having to take a lie-detector test;
4. Physiological abnormalities such as high or low blood pressure, respiratory disorders or heart disease;
5. Drug use;
6. Level of intelligence or mental disorders; and
7. Lack of fear of exposure through the polygraph.

See F. INBAU & J. REID, *supra*, at 67; Gardner, *Wiretapping the Mind: A Call to Regulate Truth Verification in the Workplace*, 21 SAN DIEGO L. REV. 295, 303 (1984); Hurd, *Use of Polygraph in Screening Job Applicants*, 22 AM. BUS. L.J. 527, 530-31 (1985).

21 *See* OTA REPORT, *supra* note 18, at 12.

22 *See* J. REID & F. INBAU, *supra* note 17, at 10-16.

23 *Id.* at 10. The examiner "conditions" a subject in the pre-test interview by persuading him/her that the examination will be "professionally conducted and that any deception attempted 'will be very obvious to the examiner.' " OTA REPORT, *supra* note 18, at 12 (citation omitted).

24 *See id.* at 17-18; Nagle, *The Polygraph in the Workplace*, 18 U. RICH. L. REV. 43, 55 (1983).

25 Nagle, *supra* note 24, at 58.

26 D. LYKKEN, *supra* note 1, at 85. The six methods are the relevant/irrelevant test, the control question test, the truth control test, the positive control test, the relevant control test, and the searching peak of tension test. *See id.* at 103-50 for a detailed discussion of these tests.

27 *Id.* at 85.

28 SENATE REPORT, *supra* note 8, at 42. *See also* Saxe, Dougherty & Cross, *The Validity of Polygraph Testing*, 40 AM. PSYCHOLOGIST 355, 357 (1985).

29 SENATE REPORT, *supra* note 8, at 42.

Under the relevant/irrelevant method, the subject is typically asked relevant questions, preceded and followed by irrelevant questions.[30] A relevant question tests the subject's knowledge and involvement in the case at hand.[31] In other words, a relevant question is the " 'Did you do it?' question."[32] An irrelevant question concerns facts that the examiner knows are true but are unrelated to the matter under investigation.[33] Examples of irrelevant questions include: Are you in Baltimore now?, Is today Tuesday?, Did you have a coat with you today?[34] Irrelevant questions are designed "primarily to establish the subject's normal physiological responses under test conditions."[35] The examiner's interpretation of the subject's physiological response to the relevant questions, when compared to responses for irrelevant questions, ultimately determines whether the subject will be evaluated as truthful or deceptive. One expert summarized this procedure by saying that "[i]f the subject shows a strong polygraphic reaction to some or all of the relevant questions, but not to the irrelevant questions, then his answers to the relevant questions are classified Deceptive."[36]

The control question method differs from the relevant/irrelevant method in that it attempts to guard against the possibility that some innocent examinees may appear responsive to threatening relevant questions.[37] The control question test utilizes questions which are designed to provide a sample of physiological responses elicited by untruthful answers ("known lies").[38] The subject's reactions to these "control questions" are compared with those to relevant questions.[39] If the examinee is more responsive to the control questions than to the relevant questions, the answers to the relevant questions are labeled truthful.[40] Conversely, if the subject has a greater reaction to the relevant questions, the relevant answers are scored deceptive.[41] If there is a minimal difference between the subject's reactions to relevant and control questions, the examiner labels the test results inconclusive.[42]

30 D. LYKKEN, *supra* note 1, at 105.

31 Nagle, *supra* note 24, at 55.

32 D. LYKKEN, *supra* note 1, at 104.

33 Nagle, *supra* note 24, at 55.

34 *See* F. INBAU & J. REID, *supra* note 20, at 17.

35 Nagle, *supra* note 24, at 55.

36 D. LYKKEN, supra note 1, at 105.

37 Nagle, *supra* note 24, at 56.

38 D. LYKKEN, *supra* note 1, at 110-11. For example, an examiner may ask "Before age 19, did you ever lie to get out of trouble?" *Id.* at 110. If the subject answers "No", the "examiner privately assumes that this answer is a lie." *Id.* at 111. To provide assurance that a "No" response really is deceptive, Reid and Inbau, who developed the lie control technique, explain that "the examiner should select as controls only questions to which the subject shows 'behavior symptoms of deception' (hesitation, breaking eye contact, squirming, etc.)." *Id.* (citation omitted). But Lykken notes that "[o]ther examiners simply assume that everyone has done the sorts of things referred to in these questions and that a 'No' answer *must* be deceptive." *Id.*

39 For a hypothetical control question test format, see *id.* at 110-11.

40 *Id.*

41 *Id.*

42 *Id.*

B. *The Validity of Polygraph Results*

For years the center of the debate concerning polygraph use has focused on the validity of polygraph test results. Numerous studies have attempted to resolve this issue.[43] The purpose of this discussion is not to show that polygraphs are foolproof lie detectors, but rather to set forth the results of various studies in order to give an overall impression of polygraph validity. This data forms the basis for this Note's argument that courts should broadly construe the specific incident exemption in order to permit employers to use the polygraph as an investigative tool.

1. Pre-employment Screening and Random Testing

The Act's legislative history shows that there is very little evidence establishing the validity of polygraph tests conducted for pre-employment screening or on a random basis.[44] In fact, the little data that exists "raises serious doubts about the validity of such tests."[45] Since polygraph advocates failed to establish the accuracy of the polygraph when used for pre-employment screening or random testing, Congress prohibited most employers from using polygraphs for either purpose.[46]

2. Specific Incident Testing

Congress did find "some evidence of validity" when the polygraph is used to investigate specific instances of misconduct.[47] This evidence of validity was found, in part, in a 1983 Office of Technology Assessment Report (OTA Report)[48] which reviewed numerous studies on the subject. Although the OTA Report "concluded that no overall measure or single simple judgment of polygraph testing validity can be established based on available scientific evidence,"[49] the Report's summaries of specific incident studies indicated a fairly low rate of inaccuracy.[50]

The OTA Report grouped polygraph validity tests into two categories—laboratory studies and field studies. Laboratory studies involve research in a controlled environment and may or may not be based on real-life situations.[51] Certain differences between real-world testing and tests

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43 *See infra* tables accompanying notes 56-76.

44 SENATE REPORT, *supra* note 8, at 42.

45 *Id.* at 43. The Senate Report states:

> Unlike the control question test, which is based upon a specific issue or fact situation, the relevant-irrelevant test [which is used for most pre-employment screening or random testing] tends to be vague and broad, because the examiner is seeking to determine what an employee or prospective employee may do in the future. Also, these examinations are usually much shorter in duration than control question tests, and most experts agree that both factors significantly undercut the potential accuracy of the examination.

Id. at 42-43.

46 *See infra* note 82.

47 The Senate Committee on Labor and Human Resources did note, however, that the control question technique, which is used for most specific incident testing, often yielded false positive results. SENATE REPORT, *supra* note 8, at 42.

48 *See* OTA REPORT, *supra* note 18.

49 *Id.* at 3.

50 *See* charts accompanying notes 56-76 for a summary of polygraph validity studies.

51 The broad category of laboratory studies includes the subcategory of analog studies which are conducted in the laboratory using "designs that simulate actual testing conditions, such as mock

conducted in the laboratory have made lie detection in the laboratory more difficult.[52] Since these differences undercut certain basic polygraph premises,[53] researchers have generally found that polygraph validity is lower in the laboratory setting as compared to the field situation.[54] But despite these differences, laboratory studies have generally indicated that lie detectors, when conclusive,[55] are fairly accurate.

Table 1 summarizes results of various laboratory studies considered in the OTA Report.[56]

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crimes." S. ABRAMS, THE COMPLETE POLYGRAPH HANDBOOK 254 (1989). The OTA Report only considered analog laboratory studies.

52 The following differences make lie detection in the laboratory more difficult. First, laboratory subjects have little or nothing to lose if a lie is detected as opposed to real-life examinees who could lose their jobs or face imprisonment. *Id.* at 181. Abrams points out that:

> [e]ven in analog [laboratory] studies that attempt to simulate actual testing conditions through the use of mock crimes, the emotions associated with deception are simply not the same and not of the same degree. Because of this, the examinee does not experience the same degree of sympathetic arousal that stimulates the physiological reactions that allow for the detection of lies.

Id. Second, laboratory examiners are often untrained and inexperienced. *Id.* Finally, control question tests conducted in the laboratory have not been as effective because "relevant questions . . . relate to a mock crime that has relatively little meaning for the subject, whereas the control question, which deals with real personal issues, [may] be [a] threat to the individual's privacy. It would seem, therefore, that the control question could become more relevant than the relevant item." *Id.*

53 *See supra* text accompanying notes 17-42 for a discussion of lie detection methods.

54 *See infra* charts accompanying notes 56-76.

55 Conclusive, in this context, means that the examiner was able to make a determination (either correctly or incorrectly) as to whether the examinee's answers were honest or deceptive.

56 The figures in this chart are based on table 6 of the OTA REPORT, *supra* note 18, at 63. In the studies presented, there were an equal number of "innocent" and "guilty" subjects, i.e., an equal number of subjects who were told either that they had or had not committed a crime. The "accurate," "inconclusive," and "inaccurate" figures were obtained by averaging the respective "correct," "inconclusive," and "incorrect" percentages from the guilty and innocent groups on the OTA Report. The "false positive" and "false negative" percentages are shown as a percentage of the entire population, i.e., not as a percentage of the guilty and innocent subjects as shown in the OTA Report. These percentages reflect the overall percentage of false positives that would be obtained in a situation where half of the population was "guilty" and half "innocent." These percentages would probably vary if a different percentage of the population were either "guilty" or "innocent."

Several studies considered by the OTA Report were excluded from the present analysis for various reasons. For example, a study conducted by Szucko & Kleinmuntz, *Statistical Versus Clinical Lie Detection*, 36 AM. PSYCHOLOGIST 488 (1981), was excluded because examiners were not able to score the test inconclusive, as they may and often do, in the real world. In addition, the figures from Honts and Hodes, *see infra* notes 68-69, regarding subjects who used countermeasures such as tongue biting and toe pressing were excluded because a significant number of real-life examinees would not receive training sessions in the use of countermeasures, as was the case in this study. Finally, a study conducted by Heckel, Brokaw, Salzberg, & Wiggins, *Polygraphic Variations in Reactivity Between Delusional, Nondelusional, and Control Groups in a Crime Situation*, 53 J. OF CRIM. L., CRIMINOLOGY AND POLICE SCI. 380 (1962), was excluded because it measured the validity of the polygraph when used to test nondelusional and delusional psychiatrics, rather than normal examinees who would generally be tested in the employment context.

Table 1

	Number of subjects	Accurate	Inconclusive	Inaccurate	False Positive[57]	False Negative[58]	Accurate or Inconclusive	Accurate or Inconclusive or False Negative
Barland and Raskin[59] (1975)	72	52.8%	34.75%	12.5%	8.35%	4.15%	87.56%	91.71%
Podlesney and Raskin[60] (1978)	40	80.0	10.0	10.0	2.0	8.0	90.0	98.0
Raskin and Hare[61] (1978)	48	81.25	16.65	2.0	2.0	0.0	97.0	97.0
Rovner, et al.[62] (1979)	72	79.15	9.7	11.1	6.95	.15	88.85	93.0
Kircher[63] (1983)	100	68.0	29.0	3.0	1.0	2.0	97.0	99.0
Dawson[64] (1980)	24	75.0	12.5	12.5	12.5	0.0	87.5	87.5
Bradley and Janisse[65] (1981)	192							
EDR[66]		59.35	29.15	11.45	4.7	6.75	88.5	95.25
Heart Rate		34.35	45.35	20.3	9.9	10.4	79.7	90.1
Ginton, et al.[67] (1982)	15	92.3	0.0	7.7	7.7	0.0	92.3	92.3
Honts and Hodes[68] (1982)	40	50.0	41.5	8.5	8.5	0.0	91.5	91.5
Honts and Hodes[69] (1982)	57	57.9	34.2	7.9	7.9	0.0	92.1	92.1
Hammond[70] (1980)	62	56.0	32.0	12.0	10.0	2.0	88.0	90.0
Average		65.51	24.57	9.92	6.79	3.12	90.0	93.12

57 A "false positive" is an inaccurate polygraph test result which shows that a person is lying when in fact that person is telling the truth.
58 A "false negative" is an inaccurate polygraph test result which shows that a person is telling the truth when in fact that person is lying.
59 Barland and Raskin, *An Evaluation of Field Techniques in Detection of Deception*, 12 PSYCHOPHYSIOLOGY 321 (1975).
60 Podlesny and Raskin, *Effectiveness of Techniques and Physiological Measures in the Detection of Deception*, 15 PSYCHOPHYSIOLOGY 344 (1978).
61 Raskin and Hare, *Psychopathy and Detection of Deception in a Prison Population*, 15 PSYCHOPHYSIOLOGY 126 (1978).
62 L. Rovner, D. Raskin, and J. Kircher, Effects of Information and Practice on Detection of Deception, (paper presented at the meetings of the Society for Psychophysiological Research, Wisconsin, 1979).
63 J. Kircher, Computerized Decision-Making and Patterns of Activation in the Detection of Deception, (unpublished doctoral dissertation, University of Utah, 1983).
64 Dawson, *Physiological Detection of Deception: Measurement of Responses to Questions and Answers During Countermeasure Maneuvers*, 17 PSYCHOPHYSIOLOGY 8 (1980).
65 Bradley and Janisse, *Accuracy Demonstrations, Threat and Detection of Deception: Cardiovascular, Electrodermal and Pupillary Measures*, 18 PSYCHOPHYSIOLOGY 307 (1981).

66 EDR stands for "electrodermal response." The OTA Report defines this term as "[a] physiological measure that has been shown to be related to physiological arousal. It is measured as the electrical resistance of the skin through the use of electrodes attached to the fingertips." OTA REPORT, *supra* note 18, at 120.

67 Ginton, Netzer, and Elaand, *A Method for Evaluating the Use of the Polygraph in Real-life Situation*, 67 J. APPLIED PSYCHOLOGY 131 (1982).

68 C. Honts and R. Hodes, The Effect of Simple Physical Countermeasures on the Detection of Deception, (paper presented at the meetings of the Society for Psychophysiological Research, Minneapolis, Minn., 1982).

69 Honts and Hodes, *The Effects of Multiple Physical Countermeasures on the Detection of Deception*, 19 PSYCHOPHYSIOLOGY 564 (1982).

70 D. Hammond, The Responding of Normals, Alcoholics and Psychopaths in a Laboratory Lie-Detection Experiment, (unpublished doctoral dissertation, California School of Professional Psychology, 1980).

Table 2 shows that field studies considered by the OTA Report also yielded fairly high validity percentages.[71]

71 Figures were compiled from data presented on Table 5 in the OTA REPORT, *supra* note 18, at 53. The studies conducted by Davidson and Raskin, *see infra* notes 75-76, did not test the same number of "guilty" and "innocent" subjects and therefore the percentages of "accurate," "inconclusive," and "inaccurate" test results for "guilty" and "innocent" subjects were weighted to obtain overall "accurate," "inconclusive," and "inaccurate" percentages. Test results which did not report "inconclusive" results or which did not allow the examiner to reach an inconclusive determination were excluded for the same reason mentioned, *supra* note 56, namely that real-life examiners are allowed to make inconclusive determinations. In addition, a study reported in NATIONAL INSTITUTE OF JUSTICE, DEPARTMENT OF JUSTICE, VALIDITY AND RELIABILITY OF POLYGRAPH EXAMINATIONS OF CRIMINAL SUSPECTS, REPORT NO. 76-1 (1976), which used judicial determinations of ground truth (the establishment of actual guilt or innocence) was excluded because of "the fact that the judicial outcome is not a highly accurate measure of guilt because of such characteristics of the legal system as proof beyond a reasonable doubt, and the prevalence of plea bargaining." OTA REPORT, *supra* note 18, at 56. The portion of Barland and Raskin's study using a panel to determine ground truth was also excluded on the grounds that

> many of the investigative files that were given to the panel were incomplete. The files had been compiled by inexperienced student assistants who often did not know where to obtain necessary information. The officials responsible for providing the information were, more often than not, unavailable or, when they were available, unable to recall the details of a crime. In many cases few details were available.

Id. at 54.

Table 2

	Guilty Subjects				Innocent Subjects				Overall				
	Number of Cases	Accurate	Inaccurate (False −)	Inconclusive	Number of Cases	Accurate	Inaccurate (False +)	Inconclusive	Number of Cases	Accurate	Inaccurate	Inconclusive	Accurate or Inconclusive
Hunter & Ash[72] (1973)	10	7.1%	11.4%	1.4%	10	86.4%	14.1%	0.0%	20	86.75%	12.75%	.7%	87.45%
Slowick & Buckley[73] (1975)	15	84.0	15.3	.7	15	90.7	6.6	2.7	30	87.35	10.95	1.7	89.05
Wicklander[74] (1975)	10				10				20				
PG+		98.6	1.3	0.0		86.6	8.3	5.0		92.6	4.8	2.5	95.1
PG		90.0	8.3	1.6		86.6	5.0	8.3		88.3	6.65	4.95	93.25
Davidson[75] (1979)	10	90.0	10.0	0.0	11	91.0	0.0	9.0	21	90.5	4.75	4.75	95.25
Raskin[76] (1976)	12				4				16				
Numerical		91.7	0.0	8.3		75.0	0.0	25.0		87.5	0.0	12.5	100.0
Nonnumerical		83.3	8.3	8.3		25.0	50.0	25.0		68.75	18.75	12.5	81.25
Average		89.24	7.8	2.9		77.27	12.0	10.71		85.96	8.38	5.66	91.62

72 Hunter and Ash, *The Accuracy and Consistency of Polygraph Examiners' Diagnosis*, 1 J. POLICE SCI. AND ADMIN. 370 (1973).

73 Slowick and Buckley, *Relative Accuracy of Polygraph Examiner Diagnosis of Respiration, Blood Pressure, and GSR Recordings*, 3 J. POLICE SCI. AND ADMIN. 305 (1975).

74 Wicklander and Hunter, *The Influence of Auxiliary Sources of Information in Polygraph Diagnoses*, 3 J. POLICE SCI. AND ADMIN. 405 (1975). The Wicklander study figures represent the average of test results where certain evaluators had access to written information in addition to polygraph charts (PG+), e.g., case details, subject behavior during examinations etc. Other evaluators only had access to the polygraph charts (PG). *See*, OTA REPORT, *supra* note 18, at 53.

75 Davidson, *Validity and Reliability of the Cardio Activity Monitor*, 8 POLYGRAPH 104 (1979).

76 NATIONAL INSTITUTE OF LAW ENFORCEMENT AND CRIMINAL JUSTICE, LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, U.S. DEPARTMENT OF JUSTICE, REPORT NO. 76-3 (1976). The numerical/nonnumerical headings refer to scoring systems used by the examiners. Seven examiners used numerical scoring; 18 used nonnumerical scoring procedures.

Although these figures standing alone are impressive, conclusions regarding overall polygraph test validity must be carefully drawn.[77] The polygraph test is a very complex process and there are many factors, such as examiner competence and duration of the test, which could affect its validity.[78] Congress recognized these factors, though, and included several provisions in the Act, such as an examiner licensing provision, to minimize their effect.[79]

II. The Employee Polygraph Protection Act

Since the 1960's, Congress considered, but refused to pass, legislation restricting private-sector polygraph testing.[80] In the 100th Congress, however, the House passed H.R. 1212 which banned private-sector polygraph testing with two industry exemptions;[81] and the Senate passed S. 1904 which banned testing where "evidence [of polygraph reliability] indicate[d] a lack of validity"[82] and carefully regulated testing where "evidence indicate[d] some validity."[83] The House of Representatives version eventually was accepted by both Houses after substantial incorporation of the Senate bill[84]—including the specific incident exemption.

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77 As the OTA Report pointed out:

> [a]lthough, the instrument is essentially the same for all applications, the types of individuals tested, training of the examiner, purpose of the test, and types of questions asked, among other factors, can differ substantially. A polygraph test requires that the examiner infer deception or truthfulness based upon a comparison of the person's physiological responses to various questions. . . . Thus, conclusions about scientific validity can be made only in the context of specific applications and even then must be tempered by the limitations of available research evidence.

OTA REPORT, *supra* note 18, at 4.

78 *See generally*, chapter six of the OTA REPORT, *supra* note 18.

79 *See infra* text accompanying notes 125-31.

80 "From the 93rd Congress through the 100th, almost 50 bills have been introduced to ban, restrict, or regulate [polygraph testing]." SENATE REPORT, *supra* note 8, at 44. Recently, however, the House passed H.R. 1524, 99th Cong., 2d Sess. (1986), which banned private sector polygraph testing with the exception of certain industry exemptions. Unfortunately, the 99th Congress expired before the Senate could act on S. 1815, 99th Cong., 1st Sess. (1985). S. 1815 banned private industry testing with no industry exemptions. *Id.*

81 H.R. 1212, 100th Cong., 1st. Sess. (1988). H.R. 1212 exempted private security services and drug manufacturers and distributors. H.R. CONF. REP. No. 659, 100th Cong., 2d Sess. 11, 12 *reprinted in* 1988 U.S. CODE CONG. & ADMIN. NEWS 749, 750 [hereinafter HOUSE CONFERENCE REPORT].

82 S. 1904, 100th Cong., 2d Sess. (1988). The Senate Labor and Human Resources Committee found no evidence of validity when employers used the polygraph for pre-employment screening or on a random basis. The Report stated:

> The Committee received no reports which indicated that the . . . test is an accurate indicator of deception. Instead, the existing data raises serious doubts about the validity of such tests . . . . [T]here is very little research or scientific evidence to establish polygraph test validity in large-scale screening as part of unauthorized disclosure investigations, or in personnel security screening situations, whether they be pre-employment, preclearance, periodic or aperiodic, random, or "dragnet."

SENATE REPORT, *supra* note 8, at 43 (quoting OTA REPORT, *supra* note 18, at 102).

83 SENATE REPORT, *supra* note 8, at 45. The Senate found evidence of validity when polygraph examinations are conducted in the specific incident context. *See supra* text accompanying note 47.

84 HOUSE CONFERENCE REPORT, *supra* note 81. Commentators speculated that, based on prior statements from the Administration, President Reagan would not sign the House version. *See e.g.*, *Polygraph Testing in the Private Work Force: Hearings Before the Subcomm. on Employment Opportunities of the House Committee on Education and Labor*, 100th Cong., 1st Sess. 77 (1988) (testimony of Stephen J. Markman, Assistant Attorney General, Office of Legal Policy). In addition, "[b]ased on the House vote, it [did] not appear [that there were] sufficient votes in the House to override a presidential

On June 27, 1988, President Reagan signed EPPA into law and it went into effect on December 27, 1988.[85] Prior to the enactment of EPPA, there were no federal restrictions on polygraph testing in the private sector. Under EPPA, approximately eighty-five percent of polygraph testing conducted by private employers "engaged in or affecting commerce or in the production of goods for commerce"[86] should be eliminated.[87] As a result, EPPA-regulated employers will now have to rely on other methods to screen job applicants or randomly check current employees.[88]

Under the Act's provisions, employers who are not exempt may not ask employees or job applicants to take lie detector tests[89] unless the employer is conducting an ongoing investigation and then only if the employer follows strict guidelines.[90] In addition, employers may not take retaliatory actions against employees who refuse to take lie detector tests[91] and may not use the results of lie detector tests as the sole basis for adverse employment decisions.[92]

If an employer violates the Act's provisions, an employee or job applicant may bring a civil action in either state or federal court and recover such legal or equitable relief as the court deems appropriate.[93] In addition, the Secretary of Labor may assess a penalty of up to $10,000 and bring an action to enjoin the employer from further violations.[94]

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veto." Fitzpatrick, *Polygraph Testing of Employees in Private Industry: A Legal Overview*, 35 FED. BAR NEWS & J. 132, 133 (1988). But the New York Times reported that the Administration found the Senate version "more agreeable." Molotsky, *Senate Votes Limit on Polygraph Use in Private Industry*, N.Y. Times, March 4, 1988, at A1, col. 1.

85 29 U.S.C.A. § 2010(a).

86 29 U.S.C.A. § 2002.

87 DAILY LAB. REP. (BNA) A-11 (June 28, 1988). The Senate Committee on Labor and Human Resources found that "70% of tests administered are preemployment, another 15% of tests are post-employment random, and only 15% involve polygraph examinations as part of an investigation of a specific incident relating to the employer." SENATE REPORT, *supra* note 8, at 46.

88 The alternate testing methods include psychological honesty tests, but the efficacy of these methods has also been debated. *See, e.g.*, D. LYKKEN, *supra* note 1, at 193-203.

89 29 U.S.C.A. § 2002.

90 *Id.* § 2006(d). *See infra* text accompanying notes 132-76 for a discussion of the specific incident exemption of the Act.

91 *Id.* § 2007(a).

92 The Act requires employers to obtain additional supporting evidence before firing or taking other adverse employment action against an employee who failed a lie detector test. *Id.* This additional supporting evidence may be obtained, however, by confessions or other statements made by the examinee during the course of the examination. SENATE REPORT, *supra* note 8, at 40. Polygraph examinations often yield confessions. It has been estimated that "during polygraph examinations, three out of four job applicants admit to theft of previous employers' property." *Polygraph Control and Civil Liberties Protection Act: Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 95th Cong., 1st Sess. 142 (1977). *See also* D. LYKKEN, *supra* note 1, at 206-07.

93 The Act provides that the legal or equitable relief "includes, but [is] not limited to, employment, reinstatement, promotion, and the payment of lost wages and benefits." 29 U.S.C.A. § 2005(c)(1). Given the broad language of § 2005(c)(1), actions brought under EPPA are not subject to damage caps and plaintiffs may recover punitive damages.

94 *Id.* § 2005(a), (b).

A. *Statutory Exemptions*

Federal, state, and local governments are exempt from the Act's coverage.[95] Congress exempted these employers primarily because government employees are protected by the United States Constitution.[96] In addition, the conferees reporting on the Act recognized that neither the House Education and Labor Committee nor the Senate Labor and Human Resources Committee had jurisdiction over the functions performed by public sector employers and private contractors engaged in intelligence and counterintelligence work.[97] Therefore, policy decisions and legislative prerogative were left to committees with appropriate jurisdiction and expertise.[98]

The Act also does not prohibit the federal government from administering lie detector tests to experts or consultants whose duties involve national defense or security.[99] Congress justified this exemption on the basis of the "compelling governmental interest in national security"[100] and the fact that current regulations governing the use of lie detectors by these agencies are extremely stringent. For example, under Department of Defense regulations, lie detector testing may only be used in conjunction with an in-depth investigation and other evidence must corroborate the test's results.[101]

In addition to government and national security exemptions, the Act provides for exemptions to certain targeted industries. Under the Act, employers who manufacture, distribute, or dispense controlled substances may administer lie detector tests to either prospective or current employees.[102] Private employers whose primary business consists of providing security services, such as armored cars and security alarm systems are also exempt.[103] Although employers engaged in these indus-

95 The Act does not apply to the "United States Government, any State or local government, or any political subdivision of a state or local government." *Id.* § 2006(a).

96 *See* SENATE REPORT, *supra* note 8, at 47 (citing Texas State Employees Union v. Texas Dep't of Mental Health and Retardation, 31 Tex. Sup. Ct. J. 33 (October 28, 1987) (absent a compelling governmental objective, the state's use of a polygraph violated its employees' constitutional right to privacy)). Although the federal Constitution does not expressly provide a right to privacy, the Supreme Court has found "zones of privacy" in the penumbras of the first, third, fourth, fifth, and ninth amendments, Griswold v. Connecticut, 381 U.S. 479, 484 (1965), and the personal liberty guarantee of the fourteenth amendment, Roe v. Wade, 410 U.S. 113, 152-53 (1973).

97 HOUSE CONFERENCE REPORT, *supra* note 81, at 12.

98 *Id.* The Labor and Human Resource Committee did not recommend that other committees look into public sector polygraph testing because it found the "overwhelming evidence of [polygraph testing] abuse in the private sector," not in the public sector. SENATE REPORT, *supra* note 8, at 48.

99 29 U.S.C.A. § 2006(b). This exemption includes experts or consultants under contract to the Department of Defense, the Department of Energy, the National Security Agency, the Defense Intelligence Agency, and the Federal Bureau of Investigation.

100 SENATE REPORT, *supra* note 8, at 48.

101 *Id.*

102 29 U.S.C.A. § 2006(f). The employer may only test a prospective employee if that employee would have "*direct* access to the manufacture, storage, distribution, or sale of any such controlled substance;. . ." *Id.* § 2006(f)(2)(A) (emphasis added). Current employees could only be tested if the test were administered in connection with an ongoing investigation of "loss or injury to the manufacture, distribution, or dispensing of any such controlled substance by such employer, and . . . the employee had *access* to the person or property that is the subject of the investigation." *Id.* § 2006(f)(2)(B) (emphasis added).

103 *Id.* § 2006(e). The Act exempts the following security services:

tries may use lie detectors to screen prospective employees and randomly test current employees, the tests conducted pursuant to these exemptions must comply with the restrictions outlined in Part II B of this Note.

Finally, the Act provides an exemption for the investigation of specific incidents of economic loss to the employer's business.[104] This exemption only applies, however, if the following four requirements are met: 1) the test must be administered in "connection with an ongoing investigation involving economic loss or injury to the employer's business . . . .";[105] 2) the employee must have had *access* to the missing property;[106] 3) the employer must have a *reasonable suspicion* that the employee was involved in the incident under investigation;[107] and 4) the employer must execute a statement which sets forth, inter alia, the details of the incident under investigation and describes the basis for the employer's reasonable suspicion.[108] As with the industry exemptions, specific incident testing may be conducted only if the situation satisfies the limitations outlined below.

[A]ny 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 protection of—

(A) facilities, materials, or operations having significant impact on the health or safety of any State or political subdivision thereof, or the national security of the United States, as determined by the Secretary [of Defense] . . . .

(B) currency, negotiable securities, precious commodities or instruments, or proprietary information.

Id. The Secretary of Labor promulgated interim regulations providing that 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 have a serious effect on the general public's safety or health, or national security." For examples of qualifying employers, see 53 Fed. Reg. 41,494 (1988) (to be codified at 29 C.F.R. pt. 801) (proposed Oct. 21, 1988) [hereinafter "Interim Regulations"].

104 29 U.S.C.A. § 2006(d).

105 *Id.* § 2006(d)(1).

106 *Id.* § 2006(d)(2).

107 *Id.* § 2006(d)(3). *See infra* text accompanying notes 152-61 describing the "reasonable suspicion" requirement in detail.

108 *Id.* § 2006(d)(4). Section 2006(d)(4) of the Act provides as follows:

[T]he employer [must] execute[] a statement, provided to the examinee before the test, that—

(A) sets forth with particularity the specific incident or activity being investigated and the basis for testing particular employees,

(B) is signed by a person (other than the polygraph examiner) authorized to legally bind the employer,

(C) is retained by the employer for at least three years, and

(D) contains at a minimum—

(i) an identification of the specific economic loss or injury to the business of the employer,

(ii) a statement indicating that the employee had access to the property that is the subject of the investigation, and

(iii) a statement describing the basis of the employer's reasonable suspicion that the employee was involved in the incident or activity under investigation.

Id.

B. *Restrictions on the Use of Exemptions*

Congress included restrictions on exempted employers' use of polygraphs to further decrease polygraph abuse.[109] The restrictions were designed to serve three purposes: eliminate adverse employment action based solely on lie detector results, protect employees' privacy rights, and reduce the possibility of inaccurate test results.

The first set of restrictions, aimed at reducing unjustified adverse employment action, treats employers who test under the specific incident exemption differently from employers in exempt targeted industries. Employers who test under the specific incident exemption must obtain "additional supporting evidence" before taking adverse action against either a prospective employee or a current employee who failed a lie detector test.[110] Under the Act, admissions made by an employee either before, during, or after a polygraph test may constitute "additional supporting evidence."[111] Evidence which is required for use of the specific incident exemption may also serve as "additional supporting evidence."[112] Accordingly, once the predicate requirements of the specific incident exemption have been met,[113] an employer may be able to take adverse employment action on the basis of the polygraph test results or the refusal to take a polygraph test. However, Congress failed to clarify exactly what evidence is necessary to meet the predicate requirements of the specific incident exemption.[114]

Targeted industry employers[115] lose their exemption if the results of a polygraph test or the refusal to take such a test forms the "sole basis upon which adverse employment action . . . is taken."[116] The Act, however, provides no guidance concerning what other reasons would be necessary to avoid a "sole basis" determination. Apparently, any bona fide employer reason would suffice.[117] Therefore, this limitation provides no real protection for current or prospective employees who are screened or randomly tested by targeted industries.[118]

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109 *See supra* text accompanying notes 8-9.

110 29 U.S.C.A. § 2007(a).

111 Interim Regulations, *supra* note 103, at 41,504.

112 29 U.S.C.A. § 2007(a)(1).

113 *See infra* text accompanying notes 135-61.

114 *See infra* text accompanying notes 135-61.

115 *See supra* notes 102-03 for the Act's description of exempt targeted industries.

116 29 U.S.C.A. § 2007(a)(2).

117 *See* Interim Regulations, *supra* note 103, at 41,504. Examples of bona fide reasons included in the regulations are "traditional factors such as prior employment experience, education, job performance, etc." *Id.*

118 Consider the following hypothetical which illustrates this problem. An employee applies for a job as a uniformed security guard to protect a nuclear power plant. As part of its application process, the plant requires all security guard applicants to submit to a polygraph test as permitted by § 2006(e) of the Act. The applicant submits to and fails a polygraph test. The plant then rejects his application and, as is typically the case, does not give the applicant an explanation of why the application was denied. Under this scenario, the applicant would probably not recover under the Act (even though in fact the decision may have been based solely on the polygraph test results) because, it would be easy for the employer to give some reason that would easily fit into the broad category of bona fide reasons and satisfy the § 2007(a)(2) requirement that the decision not be based solely on the polygraph test results. Of course, the employer would have to give a reason that would also not violate other state or federal laws such as Title VII in order to avoid all liability.

The second set of restrictions, aimed at protecting employees' privacy rights, are more detailed. In a broad sense, the Act protects employees' privacy interests simply because no employee may be required to submit to a lie detector test as a condition of employment.[119] Examinees who do submit to a test may terminate the test during any phase.[120] Even if an employee completes a test, the test results may be disclosed only to those individuals or entities named in the statute (the examinee; any person designated by the examinee; the employer; or any court, governmental agency, arbitrator, or mediator pursuant to a court order).[121]

In addition to the disclosure limitations, the Act limits the manner in which examiners may ask questions and the types of questions. Section 2007(b)(1)(B) imposes an overriding limitation that questions may not be asked "in a manner designed to degrade, or needlessly intrude" on the examinee. In conjunction with section 2007(b)(1)(B), section 2007(b)(1)(C) specifically prohibits questions concerning religious beliefs, opinions regarding race, political beliefs, sexual behavior, and beliefs or affiliations regarding labor unions.

Finally, the Act provides that the examinee must be informed in writing whether the test will be observed through a two-way mirror, a camera, or any other device.[122] If a recording or monitoring device is to be used, the examinee must also be informed in writing.[123] Additionally, the examinee must be informed that the test may be recorded so long as both parties are aware of the recording.[124]

Congress designed the third set of restrictions to reduce the possibility of inaccurate test results. The single-most important factor affecting polygraph validity is examiner competence.[125] To this end, the Act requires polygraph examiners to be licensed by the state, if the state so requires.[126] State licensing provisions are very similar to one another and the requirements for obtaining a license may be grouped into the following categories:

> 1. Age and citizenship. Minimum age requirements range from 18 to 21 years. Citizenship is usually restricted to U.S. citizens. . . .
> 2. Good moral character;

119 29 U.S.C.A. § 2002(3)(A).

120 *Id.* § 2007(b)(1)(A).

121 The Act breaks down the disclosure rules into permissible disclosure by polygraph examiners, *id.* § 2008(b), and permissible disclosure by employers, *id.* § 2008(c). The only real difference in treatment is that an employer may disclose the test results to a governmental agency, "but only insofar as the disclosed information is an admission of criminal conduct." *Id.*

122 *Id.* § 2007(b)(2)(C)(i).

123 *Id.* § 2007(b)(2)(C)(ii).

124 *Id.* § 2007(b)(2)(C)(iii).

125 INBAU & REID, *supra* note 20, at 5.

126 29 U.S.C.A. § 2007(c)(1)(A). Interestingly, Senator Dan Quayle, when stating his minority view, mis-characterized the licensing provision as requiring "federal licensing of polygraphers." *See* SENATE REPORT, *supra* note 8, at 57. In fact, the provision does not require licensing of polygraph examiners by the federal government. Instead, the provision allows for relief under the Act if a polygraph examiner does not comply with a particular state's licensing requirements, but not all states require licensing of polygraph examiners. *See id.* at 59 (minority view of Senator Thurmond stating that only 32 states have licensing requirements).

Examiners must also maintain at least a $50,000 bond or at least $50,000 in personal liability coverage. *Id.* § 2007(c)(1)(B).

3. No convictions for felonies or crimes involving moral turpitude;

4. Payment of a licensing fee; . . .

5. Educational requirements which vary from a high school diploma to a four-year college degree and special polygraph examiner training; . . .

6. Passing an oral or written test on polygraph examinations; and

7. Experience and/or internship in polygraph testing.[127]

Currently, however, only thirty-two of the fifty states have licensing provisions.[128]

In addition to licensing requirements, the Act prohibits examiners from conducting more than five examinations per day and requires that each test last at least ninety minutes.[129] Congress designed this requirement to curb the abuse of shotgun-type examinations which typically lasted no more than fifteen minutes.[130] Even polygraph advocates, such as F. Lee Bailey, recognized that polygraph examiners could not accurately gauge responses when tests were administered in such short intervals.[131]

IV. Polygraph Testing Under the Specific Incident Exemption

As the overview of the Act indicates, non-exempt employers may now conduct polygraph tests only in conjunction with ongoing investigations of specific incidents resulting in economic loss. Since this is the only permissible context for polygraph use by non-exempt employers, it is likely that most of the litigation arising under the Act will center on the specific incident exemption. As a result, employers planning to conduct polygraph tests pursuant to this exemption must consider the following important issues:

1. Whether state law or a collective bargaining agreement contains further restrictions on polygraph testing.[132]

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127 Zafran and Stickle, *Polygraphs in Employment: A State Survey*, 33 CLEV. ST. L. REV. 751 (1984) (citations omitted).

128 *See* SENATE REPORT, *supra* note 8, at 59 (minority view of Senator Thurmond). *See generally*, Zafran and Stickle, *supra* note 127.

129 29 U.S.C.A. § 2007(b)(5).

130 SENATE REPORT, *supra* note 8, at 43.

131 *Id.* at 43. In Mr. Bailey's opinion, a responsible examination would take a minimum of several hours to complete. *Id.*

132 The Act provides that state laws, local laws, or collective bargaining agreements which prohibit lie detector tests or which are more restrictive than the Act are not preempted. 29 U.S.C.A. § 2009. The Senate Report states that

> [c]urrently, nine states have no laws governing any aspect of employment polygraph testing, twelve states and the District of Columbia have laws which prohibit most private employers from requiring or requesting that a polygraph test be taken as a condition of employment, ten states prohibit most private employers from requiring an examination but allow employers to request such an exam, and the remaining states have enacted laws which either license polygraph examiners or regulate the use of polygraph examinations, and in some instances do both.

SENATE REPORT, *supra* note 8, at 43. For a discussion of state regulations on polygraph testing, see Herron, *Statutory Restrictions on Polygraph Testing in Employer-Employee Relationships*, 1986 LAB. L.J. 632; Zafran and Stickle, *supra* note 127.

2. Whether the examinee could successfully bring a common law cause of action.[133]

3. Whether the chosen polygraph examiner is competent.[134]

4. Whether the polygraph test results will be disclosed only to persons listed in section 2008 of the Act.

5. Whether the predicate economic loss or injury, access, reasonable suspicion, and notice requirements of the specific incident exemption have been met.

Aside from analysis of possible common law causes of action, the most difficult issue facing the employer may be deciding whether the economic loss, access, and reasonable suspicion requirements of the specific incident exemption have been met. The purpose of this Part is, therefore, twofold: first, to provide guidance on when these predicate requirements have been met; and second, to suggest that courts resolve the exemption's ambiguities in favor of employers in order to permit polygraph use as an investigative tool.

A. *Specific Incident Requirements*

1. Economic Loss or Injury

The specific incident exemption applies only to investigations of incidents involving "economic loss or injury to the employer's business, such as theft, embezzlement, misappropriation, or an act of industrial espionage or sabotage,"[135] but these examples are "illustrative not exhaustive."[136] Even though the legislative history of the Act indicates that the economic loss or injury requirement is to be "narrowly construed," the House Conference Report included examples which might even result in a short term gain to the employer such as check-kiting, money launder-

133 It has been suggested that the Act may preempt all common law causes of action and this point may be litigated. *See* Fitzpatrick, *supra* note 84, at 370. However, since the Act probably does not fit within the current preemption principles outlined in Pacific Gas & Elec. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190, 203-04 (1983), "employees should still be able to pursue common-law causes of action." Fitzpatrick, *supra* note 84, at 370. The Supreme Court summarized these pre-emption principles as follows:

> Absent explicit pre-emptive language, Congress' intent to supercede state law altogether may be found from a "scheme of federal regulation so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it," because "the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject," or because "the object sought to be obtained by federal law and the character of obligations imposed by it may reveal the same purpose." Even where Congress has not entirely displaced state regulation in a specific area, state law is preempted to the extent that it actually conflicts with federal law. Such a conflict arises when "compliance with both federal and state regulations is a physical impossibility," or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

Pacific Gas, 461 U.S. at 203-04 (citations omitted). Employees have recovered on a number of different causes of action including public policy tort theories, breach of contract, invasion of privacy, defamation, negligence, intentional infliction of emotional distress and discrimination. Fitzpatrick, *supra* note 84, at 370. *See also*, NAT'L L.J., Jan. 24, 1983, at 1, col. 1.

134 Competence in this situation not only includes meeting the licensing and bonding requirements of the Act, *see supra* note 126 and accompanying text, but also understanding and complying with the testing requirements contained in § 2007 of the Act.

135 29 U.S.C.A. § 2006(d)(1).

136 Interim Regulations, *supra* note 103, at 41,499.

ing, or misappropriating confidential or trade secret information.[137] In addition, indirect losses attributable to theft from property managed by an employer or over which the employer acts as a fiduciary or custodian clearly fit within the requirement.[138]

In contrast, the Act's interim regulations give examples of situations that do not fit within the economic loss requirement. For example, unintentional losses fall outside of the requirement.[139] Accordingly, losses to an employer resulting from workplace accidents would not qualify.[140] Similarly, losses suffered by an employee, as opposed to the employer, do not meet the requirement.[141] Polygraph tests conducted to determine whether an employee used drugs or alcohol are also outside of the exemption, despite the fact that such drug or alcohol use may have contributed to an economic loss.[142] The regulations also exclude frequent economic losses, such as frequent inventory shortages, which are investigated without evidence of intentional wrongdoing as part of ongoing investigations.[143] Finally, the regulations prohibit an employer from conducting polygraph tests "to determine whether or not any thefts have occurred."[144]

Since the Act, its legislative history, and the interim regulations largely define "economic loss or injury" by examples rather than specific guidelines, the exact scope of the economic loss requirement will not be determined until courts decide cases litigating this point. Attorneys advising their clients should carefully consider the examples contained in the regulations and should remember that Congress intended a narrow construction of the economic loss requirement.[145]

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137 HOUSE CONFERENCE REPORT, *supra* note 81, at 12. *See also* Interim Regulations, *supra* note 103, at 41,500.

138 Interim Regulations, *supra* note 103, at 41,500.

139 *Id.* at 41,499.

140 *Id.*

141 *Id.* at 41,500.

142 *Id.* The regulations provide:

> While nothing in the Act prohibits the use of medical tests to determine the presence of controlled substances or alcohol in bodily fluids, the section 2007(d) exemption does not permit the use of a polygraph test to learn whether an employee has used drugs or alcohol, even where such possible use may have contributed to an economic loss to the employer [e.g., an accident involving a company vehicle].

Id.

143 *Id.* at 41,499. The regulations provide that

> even if the employer can establish that unusually high amounts of inventory are missing from warehouses in a given month, this, in and of itself, would not be sufficient basis to meet the specific incident requirement without evidence of intentional wrongdoing. Administering a polygraph test in such circumstances . . . would amount to little more than a fishing expedition.

Id.

144 *Id.*

145 It has been observed that other employer losses, in particular losses due to drug trafficking on work premises, may fit within the economic loss requirement. *See* 200 N.Y.L.J., Nov. 15, 1988, at 1, col. 1. This observation is based on the "strong public policy against drug trafficking" which should encourage employers to use the polygraph "to help root out this insidious activity from the workplace." *Id.* In contrast to polygraph testing aimed at determining whether an employee used drugs, investigations of drug trafficking on work premises are not specifically excluded from the specific incident exemption. Since it may be argued that drug trafficking at least indirectly injures the employer, aggressive employers may use the polygraph in this situation. *Id.*

2. Access

Employees given polygraph tests under the specific incident exemption must have "had access to the property that is the subject of the investigation."[146] Although the Act does not define the term "access," the interim regulations explain that "access" refers to "the opportunity which an employee had to cause, or to aid or abet in causing, the specific economic loss or injury under investigation."[147] This definition includes not only those employees who had physical contact with the property under investigation, but also those employees with the "ability to divert possession or otherwise affect the disposition of the property."[148]

The "access" required for application of the specific incident exemption must be distinguished from "direct access" which is required for pre-employment testing by employers who manufacture, distribute, or dispense controlled substances.[149] In order to screen prospective employees, direct access to the controlled substance is required. An employer would meet the "direct access" requirement if he could show that "the position being applied for has responsibilities which include contact with or affect the disposition of a controlled substance."[150] Thus, according to the interim regulations, in a situation where an employee had only "infrequent, random, or opportunistic" access, the "access" requirement would be satisfied, but the "direct access" requirement would not be met.[151]

3. Reasonable Suspicion

The specific incident exemption also requires that an employer have a "reasonable suspicion that the employee was involved in the incident or activity under investigation."[152] Once again, the statute itself does not define the phrase and its varying usage in different contexts has led to speculation that its meaning "may be the most complex issue posed by, and ultimately litigated under the Act."[153]

The Act's legislative history shows that Congress intended "reasonable suspicion" to refer "to some observable, articulable basis in fact beyond predicate loss and access required for any testing. This could

146 29 U.S.C.A. § 2006(d)(2).

147 Interim Regulations, *supra* note 103, at 41,500.

148 *Id.* As a demonstration of direct or physical contact, the regulations provide that "all employees working in or with authority to enter a warehouse storage area have 'access' to the property in the warehouse." *Id.*

The "ability to affect the disposition of the property" would be satisfied where "[f]or example, a bookkeeper in a jewelry store with access to inventory records may aid and abet a clerk who steals an expensive watch by removing the watch from the employer's inventory records." *Id.*

149 *See supra* text accompanying note 102.

150 Interim Regulations, *supra* note 103, at 41,501.

151 The interim regulations equate the "access" required in § 2006(f)(2)(b)(access required for ongoing investigation testing by employers who manufacture, distribute or dispense controlled substances), with the "access" required in § 2006(d)(2)(access required for specific incident testing by non-exempt employers). *Id.* Accordingly, since the interim regulations provide that § 2006(f)(2)(b) "access" may be met with only "infrequent, random, or opportunistic" contact, such contact should be sufficient to meet the "access" requirement of § 2006(d)(2). *See id.* for further examples illustrating the difference between "access" and "direct access."

152 29 U.S.C.A. § 2006(d)(3).

153 Fitzpatrick, *supra* note 84, at 370.

include such factors as the demeanor of the employee or discrepancies which arise during the course of an investigation."[154] Although the "articulable basis in fact" language parallels guidance from cases interpreting "reasonable suspicion" as required by the fourth amendment in certain search and seizure situations,[155] Congress clearly did not intend courts to construe the Act's "reasonable suspicion" requirement as strictly as it has been construed under the fourth amendment. The legislative history expressly provides that "the standards contained in [the] legislation are not as stringent as those afforded criminal subjects."[156] Therefore, in cases where the state has met the fourth amendment's "reasonable suspicion" requirement, employers have clearly met the Act's requirement.[157]

Even in factual situations where courts have split on whether the fourth amendment standard has been satisfied, such as in cases based solely on accusations by fellow employees,[158] courts interpreting the Act will probably find that the "reasonable suspicion" requirement has been met. The interim regulations support this position by stating that "[i]nformation from a co-worker, or an employee's behavior, demeanor,

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154 HOUSE CONFERENCE REPORT, *supra* note 81, at 13. Congress further provided that "while access alone does not constitute a basis for reasonable suspicion, the totality of circumstances surrounding such access, such as its unauthorized or unusual nature, may constitute an additional factor." *Id.* The interim regulations give the following example to illustrate this point:

> [I]n an investigation of a theft of an expensive piece of jewelry, an employee authorized to open the establishment's safe no earlier than 9:00 a.m., in order to place the jewelry in a window display case, is observed opening the safe at 7:30 a.m. In such a situation, the opening of the safe by the employee one and one-half hours prior to the specified time may serve as the basis for reasonable suspicion. On the other hand, in the example given, if the employer asked the employee to bring the piece of jewelry to his or her office at 7:30, and the employee then opened the safe and reported the jewelry missing, such access, standing alone, would not constitute a basis for reasonable suspicion that the employee was involved in the incident.

Interim Regulations, *supra* note 103, at 41,500.

155 The fourth amendment's prohibition against unreasonable searches and seizures requires "reasonable suspicion" before the state conducts searches in two contexts—first, in relation to stop and frisk searches, *see, e.g.*, Tennessee v. Garner, 471 U.S. 1 (1985) (officer did not have articulable basis to think that suspect was armed); Florida v. Rodriguez, 469 U.S. 1 (1984) (defendant's urging of confederates to leave and strange movements in an attempt to evade officers constituted articulable basis for brief detention); United States v. Malone, 886 F.2d 1162 (9th Cir. 1989) (the facts that the defendant fit the "gang profile," carried only a shoe bag for a three day trip, could not name anyone in the city to verify his identity, and could not explain his presence in the city constituted an articulable basis to suspect him of transporting illegal drugs); United States v. Taylor, 857 F.2d 210 (4th Cir. 1988) (search warrant based on probable cause that defendants were drug dealers and the fact that the defendant stored heroine in his residence gave articulable basis for stopping defendant's vehicle leaving defendant's residence), and second, in cases of drug testing by public employers, *see, e.g.*, McDonell v. Hunter, 809 F.2d 1302 (8th Cir. 1987)(reasonable inference that an employee is under the influence of drugs may be drawn from behavior) and cases cited *infra* note 158.

156 SENATE REPORT, *supra* note 8, at 48-49.

157 *See, e.g.*, cases meeting the requirement cited *supra* note 155 and *infra* note 158.

158 *See, e.g.*, Copeland v. Philadelphia Police Dep't., 840 F.2d 1139 (3d Cir. 1988)(accusation by co-workers gives rise to reasonable suspicion sufficient to order drug testing of police officer); Everett v. Napper, 833 F.2d 1507 (11th Cir. 1987)(fireman's statement made to co-worker gives rise to reasonable suspicion sufficient to order drug testing); Allen v. City of Marietta, 601 F. Supp. 482 (N.D.Ga. 1985)(reasonable suspicion satisfied on the basis of informer's observations). *But compare*, Hunter v. Anger, 672 F.2d 668 (11th Cir. 1982) (anonymous tip did not meet reasonable suspicion requirement to search prison visitors).

or conduct may be factors in the basis for reasonable suspicion."[159] In addition, "inconsistencies between facts, claims, or *statements* that surface during an investigation can serve as a sufficient basis for reasonable suspicion."[160] Finally, the interim regulations state that "[t]he identity of a *co-worker or other individual providing information used to establish reasonable suspicion* need not be revealed in the statement."[161] Based on these sections, even accusations by outsiders or anonymous informants may be sufficient to establish "reasonable suspicion" under the Act.

B. *Construction of the Specific Incident Requirements*

Since the Act's requirements for specific incident testing are numerous and often ambiguous, employers may be discouraged from ever using the polygraph in the specific incident context.[162] Such reluctance would be detrimental to important interests of both employees and employers. First, innocent employees would not be able to use the polygraph to clear themselves of wrongful accusations.[163] Second, employers would not be able to legitimately use the threat of a polygraph examination as a deterrent to employee theft.[164] In order to protect these interests, courts should give employers greater latitude for use of polygraph testing by broadly construing the specific incident exemption.

The argument in favor of broad construction is supported by the fact that specific incident polygraph testing may act as an additional safeguard against the unjust firing of employees terminable at-will. Many employees who will be tested under the exemption are at-will employees.[165] The general rule with respect to these employees is that an employer may terminate them whenever and for whatever cause he chooses without incurring liability.[166] Although there are exceptions to this rule, such as an implied contractual duty not to discharge for reasons violative of public policy,[167] these exceptions would not prohibit an employer from firing an innocent employee whom the employer suspects may have been involved in some incident of wrongdoing. If courts narrowly con-

159 Interim Regulations, *supra* note 103, at 41,500.

160 *Id.*

161 *Id.* (emphasis added).

162 *See* Christopher, *The Employee Polygraph Protection Act of 1988*, 25 GA. ST. B. J. 174 (1989). *See also*, 134 CONG. REC. H3730 (daily ed. June 6, 1988) (remarks of Rep. Livingston and Bartlett).

163 Pursuant to 29 U.S.C.A. § 2005(d), an employee would not even be able to waive the Act's requirements and consent to a polygraph test in order to exonerate himself.

164 *See* SENATE REPORT, *supra* note 8, at 46.

165 Most collective bargaining agreements contain prohibitions on lie detector testing. *See* SENATE REPORT, *supra* note 8, at 56 (minority views of Sen. Quayle). These employees could not be tested under the specific incident exemption since the Act does not preempt collective bargaining agreements that are more restrictive. *See supra* note 132.

166 Annotation, *Modern Status of Rule that Employer May Discharge At-will Employee for Any Reason*, 12 A.L.R. 4TH 544 (1982).

167 In these cases, the employee is required to show that the employer acted in bad faith. Most of these cases have failed, however, because the court is either unwilling to depart from the general rule or there has been an insufficient bad faith showing. *Id.* at 550. For cases recognizing the exception, see, e.g., McNulty v. Borden, Inc., 474 F. Supp. 1111 (E.D.Pa. 1979) (antitrust laws state a public policy limiting the employer's contractual right to terminate at-will employment because of the employee's refusal to violate such laws); Monge v. Beebe Rubber Co., 114 N.H. 130, 316 A.2d 549 (1974) (breach of an employment contract when an employee's termination is motivated by bad faith, malice, or retaliation); Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 417 A.2d 505 (1980)

strue the exemption, employers who would otherwise conduct polygraph tests may not do so in the future and may, therefore, fire at-will employees solely on the basis of their suspicions.

Broad construction of the exemption is also supported by the usefulness of the polygraph in combatting employee theft. As noted above, the threat of a polygraph test may deter employee theft. In addition, many employees who are given polygraph tests confess to crimes during the course of the examination.[168]

Research also indicates that the polygraph is a fairly accurate lie detector when used in the specific incident context.[169] Polygraph adversaries often cite validity studies to show that the polygraph should be banned from the workplace. A sample of these studies shows polygraph validity percentages range from thirty-four percent to ninety-two percent.[170] However, the validity of the lie detector, i.e., the lie detector's ability to accurately detect honesty or dishonesty, should not be the primary focus in determining whether polygraphs should be used in the workplace. Instead, a "fairness" approach, which evaluates the polygraph on the basis of the percentage of cases where a polygraph test would not result in an unjustified adverse employment decision, i.e., where the polygraph would not yield a false positive, should be used.

A "fairness" approach recognizes that when a polygraph is administered, there are three possible results—either the test is accurate, inconclusive, or inaccurate (false positive or false negative). Only in the case of a false positive would the polygraph lead an employer to an unjustified employment decision. If the test is accurate, the employer would be justified in either firing or not firing the employee on the basis of the test results. If the test is inconclusive, the employer should either re-test the employee or take no employment action on the basis of the test. If the test resulted in a false negative, the employee would certainly suffer no injustice. In fact, the employee would receive a windfall in the sense that he or she lied during the examination, but tested as though telling the truth. Therefore, from the employees' perspective, it would be fair to use the polygraph in approximately eighty-seven to ninety-nine percent of employer investigations.[171]

(breach of an implied provision that an employer will not discharge an employee for refusing to perform an act violative of public policy).

Another exception to the general rule that has been recognized by some courts can be found in suits that are tortious in nature for retaliatory discharge based on dismissal for reasons violative of public policy. *See, e.g.*, Tameny v. Atlantic Richfield Co., 27 Cal.3d 167, 610 P.2d 1330, 164 Cal.Rptr. 839 (1980) (rejecting an employer's contention that an employee who alleged that he was fired because of his refusal to participate in the employer's price-fixing scheme was confined to a contract cause of action); Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 384 N.E.2d 353 (1978) (employee has a cause of action for retaliatory discharge when an employer fires the employee in order to prevent the employee from asserting his statutory worker's compensation rights).

For a general discussion of these and other exceptions to the general rule with respect to discharge of at-will employees, see *id.*

168 *See supra* note 92.

169 *See supra* text accompanying notes 47-79.

170 *See supra* table accompanying notes 56-70.

171 *See supra* table accompanying notes 56-70.

Given the Act's objective of increasing the accuracy of polygraphs conducted in the workplace,[172] polygraph tests conducted pursuant to these requirements should fairly distinguish guilty from innocent employees. Employers and employees each have an interest in making this distinction. Employers hope to avoid the costs of continued employee theft by recidivists and the recruiting and training costs for new employees which may be avoided if honest employees are able to exonerate themselves. Employees have an obvious interest in job security which may be severely threatened if employers no longer conduct polygraph tests, but dismiss or take other adverse employment action solely on the basis of suspicion. Broad construction of the specific incident exemption would encourage employers to take the extra step of polygraph testing to confirm or deny their suspicions.

The Act's legislative history provides an example which, although not used to demonstrate this point, illustrates the potential problem if employers no longer conduct polygraph tests in connection with specific incident investigations.[173] In the example, employers suspected 1,000 employees of theft[174] and gave them polygraph examinations. Assuming a ninety-five percent accuracy rate,[175] examiners would wrongfully label fifty innocent examinees deceptive and presumably fire them. Although this seems like a harsh result, consider the results if the employers had not conducted polygraph examinations. Assuming the employees were at-will employees, the employers could have taken adverse employment action, solely on the basis of the employer's "reasonable suspicion."[176] If half (500) the employees were in fact guilty, the employers would have wrongfully labeled the other half (500) of the employees (an additional 450 employees) deceptive and taken adverse employment action as a result. Both employers as well as employees unnecessarily suffer from this result because of the added recruiting and training costs and the costs associated with the lowered morale of the remaining employees who would resent the firing of innocent employees and might fear the same fate.

V. Conclusion

Congress passed EPPA considering the interests of both employers and employees. Under EPPA, non-exempt employers may no longer conduct polygraph tests in the least accurate contexts—pre-employment screening and random testing. Employers may, however, use the polygraph to investigate specific incidents of economic loss, where the polygraph has shown some evidence of validity.

172 *See supra* text accompanying notes 125-31.

173 *See* SENATE REPORT, *supra* note 8, at 42.

174 For purposes of this example, it is assumed that the predicate testing requirements, including "reasonable suspicion," have been met.

175 The report characterized this percentage as "extraordinary," but the figures presented in the OTA Report show that this figure is not too high. *See id.* at 42 and *supra* tables accompanying notes 56-76.

176 *See supra* text accompanying notes 166-67.

The requirements for testing under the specific incident exemption are numerous and often ambiguous. Employers planning to conduct tests under this exemption must first determine whether a state statute or a collective bargaining agreement preempts the Act's coverage. If the Act has not been preempted, then the employer must gain a thorough understanding of the procedural requirements of the Act, and carefully consider whether the predicate testing requirements have been met. In particular, the employer must determine whether the facts of the investigation satisfy the "articulable basis in fact" standard of "reasonable suspicion."

Finally, courts must broadly construe the specific incident exemption. Narrow construction would discourage employers from using the polygraph as an investigative tool. If employers no longer conduct polygraph tests, at-will employees will be deprived of an opportunity to use the polygraph to exonerate themselves if suspected of wrongdoing. Employers will also not be able to legitimately use the threat of a polygraph examination as a deterrent to the widespread problem of employee theft. Accordingly, broad construction would, consistent with the Act's purpose, serve the interests of both employers and employees.

Charles P. Cullen