

SUBCHAPTER C—OTHER LAWS

PART 801—APPLICATION OF THE EMPLOYEE POLYGRAPH PROTECTION ACT OF 1988

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APPENDIX A TO PART 801—NOTICE TO EXAMINEE

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Subpart A—General

§801.1 Purpose and scope.

(a) Effective December 27, 1988, the Employee Polygraph Protection Act of 1988 (EPPA or the Act) prohibits most private employers (Federal, State, and

local government employers are exempted from the Act) from using any lie detector tests either for pre-employment screening or during the course of employment. Polygraph tests, but no other types of lie detector tests, are permitted under limited circumstances subject to certain restrictions. The purpose of this part is to set forth the regulations to carry out the provisions of EPPA.

(b) The regulations in this part are divided into six subparts. Subpart A contains the provisions generally applicable to covered employers, including the requirements relating to the prohibitions on lie detector use and the posting of notices. Subpart A also sets forth interpretations regarding the effect of section 10 of the Act on other laws or collective bargaining agreements. Subpart B sets forth rules regarding the statutory exemptions from application of the Act. Subpart C sets forth the restrictions on polygraph usage under such exemptions. Subpart D sets forth the recordkeeping requirements and the rules on the disclosure of polygraph test information. Subpart E deals with the authority of the Secretary of Labor and the enforcement provisions under the Act. Subpart F contains the procedures and rules of practice necessary for the administrative enforcement of the Act.

§801.2 Definitions.

For purposes of this part:

(a) *Act* or *EPPA* means the Employee Polygraph Protection Act of 1988 (Pub. L. 100-347, 102 Stat. 646, 29 U.S.C. 2001-2009).

(b) (1) The term *commerce* has the meaning provided in section 3(b) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(b)). As so defined, *commerce* means trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof.

(2) The term *State* means any of the fifty States and the District of Columbia and any Territory or possession of the United States.

(c) The term *employer* means any person acting directly or indirectly in the interest of an employer in relation to an employee or prospective employee.

A polygraph examiner either employed for or whose services are retained for the sole purpose of administering polygraph tests ordinarily would not be deemed an *employer* with respect to the examinees.

(d) (1) The term *lie detector* means 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. Voice stress analyzers, or psychological stress evaluators, include any systems that utilize voice stress analysis, whether or not an opinion on honesty or dishonesty is specifically rendered.

(2) The term *lie detector* does not include medical tests used to determine the presence or absence of controlled substances or alcohol in bodily fluids. Also not included in the definition of *lie detector* are written or oral tests commonly referred to as "honesty" or "paper and pencil" tests, machine-scored or otherwise; and graphology tests commonly referred to as handwriting tests.

(e) The term *polygraph* means an instrument that—

(1) Records continuously, visually, permanently, and simultaneously changes in cardiovascular, respiratory, and electrodermal patterns as minimum instrumentation standards; and

(2) 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.

(f) The terms *manufacture*, *dispense*, *distribute*, and *deliver* have the meanings set forth in the Controlled Substances Act, 21 U.S.C. 812.

(g) The term *Secretary* means the Secretary of Labor or authorized representative.

(h) *Employment Standards Administration* means the agency within the Department of Labor, which includes the Wage and Hour Division.

(i) *Wage and Hour Division* means the organizational unit in the Employment Standards Administration of the Department of Labor to which is assigned primary responsibility for enforcement and administration of the Act.

(j) *Administrator* means the Administrator of the Wage and Hour Division, or authorized representative.

§ 801.3 Coverage.

(a) The coverage of the Act extends to “any employer engaged in or affecting commerce or in the production of goods for commerce.” (Section 3 of EPPA; 29 U.S.C. 2002.) In interpreting the phrase “affecting commerce” in other statutes, courts have found coverage to be coextensive with the full scope of the Congressional power to regulate commerce. See, for example, *Godwin v. Occupational Safety and Health Review Commission*, 540 F. 2d 1013, 1015 (9th Cir. 1976). Since most employers engage in one or more types of activities that would be regarded as “affecting commerce” under the principles established by a large body of court cases, virtually all employers are deemed subject to the provisions of the Act, unless otherwise exempt pursuant to section 7 (a), (b), or (c) of the Act and §§ 801.10 or 801.11 of this part.

(b) The Act also extends to all employees of covered employers regardless of their citizenship status, and to foreign corporations operating in the United States. Moreover, the provisions of the Act extend to any actions relating to the administration of lie detector, including polygraph, tests which occur within the territorial jurisdiction of the United States, e.g., the preparation of paperwork by a foreign corporation in a Miami office relating to a polygraph test that is to be administered on the high seas or in some foreign location.

[56 FR 9064, Mar. 4, 1991; 56 FR 14469, Apr. 10, 1991]

§ 801.4 Prohibitions on lie detector use.

(a) Section 3 of EPPA provides that, unless otherwise exempt pursuant to section 7 of the Act and §§ 801.10 through 801.14 of this part, covered employers are prohibited from:

- (1) Requiring, requesting, suggesting or causing, directly or indirectly, any employee or prospective employee to take or submit to a lie detector test;
- (2) Using, accepting, or inquiring about the results of a lie detector test

of any employee or prospective employee; and

(3) Discharging, disciplining, discriminating against, denying employment or promotion, or threatening any employee or prospective employee to take such action for refusal or failure to take or submit to such test, on the basis of the results of a test, for filing a complaint, for testifying in any proceeding, or for exercising any rights afforded by the Act.

(b) An employer who reports a theft or other incident involving economic loss to police or other law enforcement authorities is not engaged in conduct subject to the prohibitions under paragraph (a) of this section if, during the normal course of a subsequent investigation, such authorities deem it necessary to administer a polygraph test to an employee(s) suspected of involvement in the reported incident. Employers who cooperate with police authorities during the course of their investigations into criminal misconduct are likewise not deemed engaged in prohibitive conduct provided that such cooperation is passive in nature. For example, it is not uncommon for police authorities to request employees suspected of theft or criminal activity to submit to a polygraph test during the employee’s tour of duty since, as a general rule, suspect employees are often difficult to locate away from their place of employment. Allowing a test on the employer’s premises, releasing an employee during working hours to take a test at police headquarters, and other similar types of cooperation at the request of the police authorities would not be construed as “requiring, requesting, suggesting, or causing, directly or indirectly, any employee * * * to take or submit to a lie detector test.” Cooperation of this type must be distinguished from actual participation in the testing of employees suspected of wrongdoing, either through the administration of a test by the employer at the request or direction of police authorities, or through employer reimbursement of tests administered by police authorities to employees. In some communities, it may be a practice of police authorities to request employer testing of employees before a police investigation is initiated on a reported

incident. In other communities, police examiners are available to employers, on a cost reimbursement basis, to conduct tests on employees suspected by an employer of wrongdoing. All such conduct on the part of employers is deemed within the Act's prohibitions.

(c) The receipt by an employer of information from a polygraph test administered by police authorities pursuant to an investigation is prohibited by section 3(2) of the Act. (See paragraph (a)(2) of this section.)

(d) The simulated use of a polygraph instrument so as to lead an individual to believe that an actual test is being or may be performed (e.g., to elicit confessions or admissions of guilt) constitutes conduct prohibited by paragraph (a) of this section. Such use includes the connection of an employee or prospective employee to the instrument without any intention of a diagnostic purpose, the placement of the instrument in a room used for interrogation unconnected to the employee or prospective employee, or the mere suggestion that the instrument may be used during the course of the interview.

[56 FR 9064, Mar. 4, 1991; 56 FR 14469, Apr. 10, 1991]

§ 801.5 Effect on other laws or agreements.

(a) Section 10 of EPPA provides that the Act, except for subsections (a), (b), and (c) of section 7, does not preempt any provision of a State or local law, or any provision of a collective bargaining agreement, that prohibits lie detector tests or is more restrictive with respect to the use of lie detector tests.

(b)(1) This provision applies to all aspects of the use of lie detector tests, including procedural safeguards, the use of test results, the rights and remedies provided examinees, and the rights, remedies, and responsibilities of examiners and employers.

(2) For example, if the State prohibits the use of polygraphs in all private employment, polygraph examinations could not be conducted pursuant to the limited exemptions provided in section 7 (d), (e) or (f) of the Act; a collective bargaining agreement that provides greater protection to an exam-

inee would apply in addition to the protection provided in the Act; or more stringent licensing or bonding requirements in a State law would apply in addition to the Federal bonding requirement.

(3) On the other hand, industry exemptions and applicable restrictions thereon, provided in EPPA, would preempt less restrictive exemptions established by State law for the same industry, e.g., random testing of current employees in the drug industry not prohibited by State law but limited by this Act to tests administered in connection with ongoing investigations.

(c) EPPA does not impede the ability of State and local governments to enforce existing statutes or to enact subsequent legislation restricting the use of lie detectors with respect to public employees.

(d) Nothing in section 10 of the Act restricts or prohibits the Federal Government from administering polygraph tests to its own employees or to experts, consultants, or employees of contractors, as provided in subsections 7(b) and 7(c) of the Act, and § 801.11 of this part.

§ 801.6 Notice of protection.

Every employer subject to EPPA shall post and keep posted on its premises a notice explaining the Act, as prescribed by the Secretary. Such notice must be posted in a prominent and conspicuous place in every establishment of the employer where it can readily be observed by employees and applicants for employment. Copies of such notice may be obtained from local offices of the Wage and Hour Division.

§ 801.7 Authority of the Secretary.

(a) Pursuant to section 5 of the Act, the Secretary is authorized to:

(1) Issue such rules and regulations as may be necessary or appropriate to carry out the Act;

(2) Cooperate with regional, State, local, and other agencies, and cooperate with and furnish technical assistance to employers, labor organizations, and employment agencies to aid in effectuating the purposes of the Act; and

(3) Make investigations and inspections as necessary or appropriate,

through complaint or otherwise, including inspection of such records (and copying or transcription thereof), questioning of such persons, and gathering such information as deemed necessary to determine compliance with the Act or these regulations; and

(4) Require the keeping of records necessary or appropriate for the administration of the Act.

(b) Section 5 of the Act also grants the Secretary authority to issue subpoenas requiring the attendance and testimony of witnesses or the production of any evidence in connection with any investigation or hearing under the Act. The Secretary may administer oaths, examine witnesses, and receive evidence. For the purpose of any investigation or hearing provided for in the Act, the authority contained in sections 9 and 10 of the Federal Trade Commission Act (15 U.S.C. 49, 50), relating to the attendance of witnesses and the production of books, papers, and documents, shall be available to the Secretary.

(c) In case of disobedience to a subpoena, the Secretary may invoke the aid of a United States District Court which is authorized to issue an order requiring the person to obey such subpoena.

(d) Any person may report a violation of the Act or these regulations to the Secretary by advising any local office of the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, or any authorized representative of the Administrator. The office or person receiving such a report shall refer it to the appropriate office of the Wage and Hour Division, Employment Standards Administration, for the region or area in which the reported violation is alleged to have occurred.

(e) The Secretary shall conduct investigations in a manner which, to the extent practicable, protects the confidentiality of any complainant or other party who provides information to the Secretary in good faith.

(f) It is a violation of these regulations for any person to resist, oppose, impede, intimidate, or interfere with any official of the Department of Labor assigned to perform an investigation, inspection, or law enforcement func-

tion pursuant to the Act during the performance of such duties.

§ 801.8 Employment relationship.

(a) EPPA broadly defines “employer” to include “any person acting directly or indirectly in the interest of an employer in relationship to an employee or prospective employee” (EPPA section 2(2)).

(b) EPPA restrictions apply to State Employment Services, private employment placement agencies, job recruiting firms, and vocational trade schools with respect to persons who may be referred to potential employers. Such entities are not liable for EPPA violations, however, where the referrals are made to employers for whom no reason exists to know that the latter will perform polygraph testing of job applicants or otherwise violate the provisions of EPPA.

(c) EPPA prohibitions against discrimination apply to former employees of an employer. For example, an employee may quit rather than take a lie detector test. The employer cannot discriminate or threaten to discriminate in any manner against that person (such as by providing bad references in the future) because of that person’s refusal to be tested, or because that person files a complaint, institutes a proceeding, testifies in a proceeding, or exercises any right under EPPA.

Subpart B—Exemptions

§ 801.10 Exclusion for public sector employers.

(a) Section 7(a) provides an exclusion from the Act’s coverage for the United States Government, any State or local government, or any political subdivision of a State or local government, acting in the capacity of an employer. This exclusion from the Act also extends to any interstate governmental agency.

(b) The term *United States Government* means any agency or instrumentality, civilian or military, of the executive, legislative, or judicial branches of the Federal Government, and includes independent agencies, wholly-owned government corporations, and non-appropriated fund instrumentalities.

(c) The term *any political subdivision of a State or local government* means any entity which is either.

(1) Created directly by a state or local government, or

(2) Administered by individuals who are responsible to public officials (i.e., appointed by an elected public official(s) and/or subject to removal procedures for public officials, or to the general electorate.

(d) This exclusion from the Act applies only to the Federal, State, and local government entity with respect to its own public employees. Except as provided in sections 7 (b) and (c) of the Act, and §801.11 of the regulations, this exclusion does not extend to contractors or nongovernmental agents of a government entity, nor does it extend to government entities with respect to employees of a private employer with which the government entity has a contractual or other business relationship.

§801.11 Exemption for national defense and security.

(a) The exemptions allowing for the administration of lie detector tests in the following paragraphs (b) through (e) of this section apply only to the Federal Government; they do not allow private employers/contractors to administer such tests.

(b) Section 7(b)(1) of the Act provides that nothing in the Act shall be construed to prohibit the administration of any lie detector test by the Federal Government, in the performance of any counterintelligence function, to any expert, consultant or employee of any contractor under contract with the Department of Defense; or with the Department of Energy, in connection with the atomic energy defense activities of such Department.

(c) Section 7(b)(2)(A) provides that nothing in the Act shall be construed to prohibit the administration of any lie detector test by the Federal Government, in the performance of any intelligence or counterintelligence function of the National Security Agency, the Defense Intelligence Agency, or the Central Intelligence Agency, to any individual employed by, assigned to, or detailed to any such agency; or any expert or consultant under contract to

any such agency; or any employee of a contractor to such agency; or any individual applying for a position in any such agency; or any individual assigned to a space where sensitive cryptologic information is produced, processed, or stored for any such agency.

(d) Section 7(b)(2)(B) provides that nothing in the Act shall be construed to prohibit the administration of any lie detector test by the Federal Government, in the performance of any intelligence or counterintelligence function, to any expert, or consultant (or employee of such expert or consultant) under contract with any Federal Government department, agency, or program whose duties involve access to information that has been classified at the level of top secret or designated as being within a special access program under section 4.2 (a) of Executive Order 12356 (or a successor Executive Order).

(e) Section 7(c) provides that nothing in the Act shall be construed to prohibit the administration of any lie detector test by the Federal Government, in the performance of any counterintelligence function, to any employee of a contractor of the Federal Bureau of Investigation of the Department of Justice who is engaged in the performance of any work under a contract with the Bureau.

(f) *Counterintelligence* for purposes of the above paragraphs means information gathered and activities conducted to protect against espionage and other clandestine intelligence activities, sabotage, terrorist activities, or assassinations conducted for or on behalf of foreign governments, or foreign or domestic organizations or persons.

(g) Lie detector tests of persons described in the above paragraphs will be administered in accordance with applicable Department of Defense directives and regulations, or other regulations and directives governing the use of such tests by the United States Government, as applicable.

§801.12 Exemption for employers conducting investigations of economic loss or injury.

(a) Section 7(d) of the Act provides a limited exemption from the general

prohibition on lie detector use in private employment settings for employers conducting ongoing investigations of economic loss or injury to the employer's business. An employer may request an employee, subject to the conditions set forth in sections 8 and 10 of the Act and §§ 801.20, 801.22, 801.23, 801.24, 801.25, 801.26, and 801.35 of this part, to submit to a polygraph test, but no other type of lie detector test, only if—

(1) The test is administered in connection with an ongoing investigation involving economic loss or injury to the employer's business, such as theft, embezzlement, misappropriation or an act of unlawful industrial espionage or sabotage;

(2) The employee had access to the property that is the subject of the investigation;

(3) The employer has a reasonable suspicion that the employee was involved in the incident or activity under investigation;

(4) The employer provides the examinee with a statement, in a language understood by the examinee, prior to the test which fully explains with particularity the specific incident or activity being investigated and the basis for testing particular employees and which contains, at a minimum:

(i) An identification with particularity of the specific economic loss or injury to the business of the employer;

(ii) A description of the employee's access to the property that is the subject of the investigation;

(iii) A description in detail of the basis of the employer's reasonable suspicion that the employee was involved in the incident or activity under investigation; and

(iv) Signature of a person (other than a polygraph examiner) authorized to legally bind the employer; and

(5) The employer retains a copy of the statement and proof of service described in paragraph (a)(4) of this section for at least 3 years and makes it available for inspection by the Wage and Hour Division on request. (See § 801.30(a).)

(Approved by the Office of Management and Budget under control number 1225-0170)

(b) For the exemption to apply, the condition of an "ongoing investigation" must be met. As used in section 7(d) of the Act, the ongoing investigation must be of a specific incident or activity. Thus, for example, an employer may not request that an employee or employees submit to a polygraph test in an effort to determine whether or not any thefts have occurred. Such random testing by an employer is precluded by the Act. Further, because the exemption is limited to a specific incident or activity, an employer is precluded from using the exemption in situations where the so-called "ongoing investigation" is continuous. For example, the fact that items in inventory are frequently missing from a warehouse would not be a sufficient basis, standing alone, for administering a polygraph test. Even if the employer can establish that unusually high amounts of inventory are missing from the warehouse in a given month, this, in and of itself, would not be a sufficient basis to meet the specific incident requirement. On the other hand, polygraph testing in response to inventory shortages would be permitted where additional evidence is obtained through subsequent investigation of specific items missing through intentional wrongdoing, and a reasonable suspicion that the employee to be polygraphed was involved in the incident under investigation. Administering a polygraph test in circumstances where the missing inventory is merely unspecified, statistical shortages, without identification of a specific incident or activity that produced the inventory shortages and a "reasonable suspicion that the employee was involved," would amount to little more than a fishing expedition and is prohibited by the Act.

(c)(1)(i) The terms *economic loss or injury to the employer's business* include both direct and indirect economic loss or injury.

(ii) Direct loss or injury includes losses or injuries resulting from theft, embezzlement, misappropriation, industrial espionage or sabotage. These examples, cited in the Act, are intended to be illustrative and not exhaustive. Another specific incident

which would constitute direct economic loss or injury is the misappropriation of confidential or trade secret information.

(iii) Indirect loss or injury includes the use of an employer's business to commit a crime, such as check-kiting or money laundering. In such cases, the ongoing investigation must be limited to criminal activity that has already occurred, and to use of the employer's business operations (and not simply the use of the premises) for such activity. For example, the use of an employer's vehicles, warehouses, computers or equipment to smuggle or facilitate the importing of illegal substances constitutes an indirect loss or injury to the employer's business operations. Conversely, the mere fact that an illegal act occurs on the employer's premises (such as a drug transaction that takes place in the employer's parking lot or rest room) does not constitute an indirect economic loss or injury to the employer.

(iv) Indirect loss or injury also includes theft or injury to property of another for which the employer exercises fiduciary, managerial or security responsibility, or where the firm has custody of the property (but not property of other firms to which the employees have access by virtue of the business relationship). For example, if a maintenance employee of the manager of an apartment building steals jewelry from a tenant's apartment, the theft results in an indirect economic loss or injury to the employer because of the manager's management responsibility with respect to the tenant's apartment. A messenger on a delivery of confidential business reports for a client firm who steals the reports causes an indirect economic loss or injury to the messenger service because the messenger service is custodian of the client firm's reports, and therefore is responsible for their security. Similarly, the theft of property protected by a security service employer is considered an economic loss or injury to that employer.

(v) A theft or injury to a client firm does not constitute an indirect loss or injury to an employer unless that employer has custody of, or management, or security responsibility for, the prop-

erty of the client that was lost or stolen or injured. For example, a cleaning contractor has no responsibility for the money at a client bank. If money is stolen from the bank by one of the cleaning contractor's employees, the cleaning contractor does not suffer an indirect loss or injury.

(vi) Indirect loss or injury does not include loss or injury which is merely threatened or potential, e.g., a threatened or potential loss of an advantageous business relationship.

(2) Economic losses or injuries which are the result of unintentional or lawful conduct would not serve as a basis for the administration of a polygraph test. Thus, apparently unintentional losses or injuries stemming from truck, car, workplace, or other similar type accidents or routine inventory or cash register shortages would not meet the economic loss or injury requirement. Any economic loss incident to lawful union or employee activity also would not satisfy this requirement. It makes no difference that an employer may be obligated to directly or indirectly incur the cost of the incident, as through payment of a "deductible" portion under an insurance policy or higher insurance premiums.

(3) It is the business of the employer which must suffer the economic loss or injury. Thus, a theft committed by one employee against another employee of the same employer would not satisfy the requirement.

(d) 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 7(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).

(e) Section 7(d)(2) provides that, as a condition for the use of the exemption, the employee must have had access to the property that is the subject of the investigation.

(1) The word *access*, as used in section 7(d)(2), 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. The

term “access”, thus, includes more than direct or physical contact during the course of employment. For example, as a general matter, all employees working in or with authority to enter a warehouse storage area have “access” to unsecured property in the warehouse. All employees with the combination to a safe have “access” to the property in a locked safe. Employees also have “access” who have the ability to divert possession or otherwise affect the disposition of the property that is the subject of investigation. For example, a bookkeeper in a jewelry store with access to inventory records may aid or abet a clerk who steals an expensive watch by removing the watch from the employer’s inventory records. In such a situation, it is clear that the bookkeeper effectively has “access” to the property that is the subject of the investigation.

(2) As used in section 7(d)(2), *property* refers to specifically identifiable property, but also includes such things of value as security codes and computer data, and proprietary, financial or technical information, such as trade secrets, which by its availability to competitors or others would cause economic harm to the employer.

(f)(1) As used in section 7(d)(3), the term *reasonable suspicion* refers to an observable, articulable basis in fact which indicates that a particular employee was involved in, or responsible for, an economic loss. Access in the sense of possible or potential opportunity, standing alone, does not constitute a basis for “reasonable suspicion”. Information from a co-worker, or an employee’s behavior, demeanor, or conduct may be factors in the basis for reasonable suspicion. Likewise, inconsistencies between facts, claims, or statements that surface during an investigation can serve as a sufficient basis for reasonable suspicion. While access or opportunity, standing alone, does not constitute a basis for reasonable suspicion, the totality of circumstances surrounding the access or opportunity (such as its unauthorized or unusual nature or the fact that access was limited to a single individual) may constitute a factor in determining whether there is a reasonable suspicion.

(2) For example, in an investigation of a theft of an expensive piece of jewelry, an employee authorized to open the establishment’s safe no earlier than 9 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 a.m., 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 unless access to the safe was limited solely to the employee. If no one other than the employee possessed the combination to the safe, and all other possible explanations for the loss are ruled out, such as a break-in, the employer may formulate a basis for reasonable suspicion based on sole access by one employee.

(3) The employer has the burden of establishing that the specific individual or individuals to be tested are “reasonably suspected” of involvement in the specific economic loss or injury for the requirement in section 7(d)(3) to be met.

(g)(1) As discussed in paragraph (a)(4) of this section, section 7(d)(4) of the Act sets forth what information, at a minimum, must be provided to an employee if the employer wishes to claim the exemption.

(2) The statement required under paragraph (a)(4) of this section must be received by the employee at least 48 hours, excluding weekend days and holidays, prior to the time of the examination. The statement must set forth the time and date of receipt by the employee and be verified by the employee’s signature. This will provide the employee with adequate pre-test notice of the specific incident or activity being investigated and afford the employee sufficient time prior to the test to obtain and consult with legal counsel or an employee representative.

(3) The statement to be provided to the employee must set forth with particularity the specific incident or activity being investigated and the basis for testing particular employees. Section 7(d)(4)(A) requires specificity beyond the mere assertion of general statements regarding economic loss, employee access, and reasonable suspicion. For example, an employer's assertion that an expensive watch was stolen, and that the employee had access to the watch and is therefore a suspect, would not meet the "with particularity" criterion. If the basis for an employer's requesting an employee (or employees) to take a polygraph test is not articulated with particularity, and reduced to writing, then the standard is not met. The identity of a co-worker or other individual providing information used to establish reasonable suspicion need not be revealed in the statement.

(4) It is further required that the statement provided to the examinee be signed by the employer, or an employee or other representative of the employer with authority to legally bind the employer. The person signing the statement must not be a polygraph examiner unless the examiner is acting solely in the capacity of an employer with respect to his or her own employees and does not conduct the examination. The standard would not be met, and the exemption would not apply if the person signing the statement is not authorized to legally bind the employer.

(h) Polygraph tests administered pursuant to this exemption are subject to the limitations set forth in sections 8 and 10 of the Act, as discussed in §§ 801.20, 801.22, 801.23, 801.24, 801.25, 801.26, and 801.35 of this part. As provided in these sections, the exemption will apply only if certain requirements are met. Failure to satisfy any of the specified requirements nullifies the statutory authority for polygraph test administration and may subject the employer to the assessment of civil money penalties and other remedial actions, as provided for in section 6 of the Act (see subpart E, § 801.42 of this part). The administration of such tests is also subject to State or local laws, or collective bargaining agreements, which may either prohibit lie detector tests,

or contain more restrictive provisions with respect to polygraph testing.

§801.13 Exemption of employers authorized to manufacture, distribute, or dispense controlled substances.

(a) Section 7(f) provides an exemption from the Act's general prohibition regarding the use of polygraph tests for employers authorized to manufacture, distribute, or dispense a controlled substance listed in schedule I, II, III, or IV of section 202 of the Controlled Substances Act (21 U.S.C. 812). This exemption permits the administration of polygraph tests, subject to the conditions set forth in sections 8 and 10 of the Act and §§ 801.21, 801.22, 801.23, 801.24, 801.25, 801.26, and 801.35 of this part, to:

(1) A prospective employee who would have direct access to the manufacture, storage, distribution, or sale of any such controlled substance; or

(2) A current employee if the following conditions are met:

(i) The test is administered in connection with an ongoing investigation of criminal or other misconduct involving, or potentially involving, loss or injury to the manufacture, distribution, or dispensing of any such controlled substance by such employer; and

(ii) The employee had access to the person or property that is the subject of the investigation.

(b)(1) The terms *manufacture, distribute, distribution, dispense, storage, and sale*, for the purposes of this exemption, are construed within the meaning of the Controlled Substances Act (21 U.S.C. 812 et seq.), as administered by the Drug Enforcement Administration (DEA), U.S. Department of Justice.

(2) The exemption in section 7(f) of the Act applies only to employers who are authorized by DEA to manufacture, distribute, or dispense a controlled substance. Section 202 of the Controlled Substances Act (21 U.S.C. 812) requires every person who manufactures, distributes, or dispenses any controlled substance to register with the Attorney General (i.e., with DEA). Common or contract carriers and warehouses whose possession of the controlled substance is in the usual course of their

business or employment are not required to register. Since this exemption is intended to apply only to employees and prospective employees of persons or entities registered with DEA, and is not intended to apply to truck drivers employed by persons or entities who are not so registered, it has no application to employees of common or contract carriers or public warehouses. Truck drivers and warehouse employees of the persons or entities registered with DEA and authorized to manufacture, distribute, or dispense controlled substances, are within the scope of the exemption where they have direct access or access to the controlled substances, as discussed below.

(c) In order for a polygraph examination to be performed, section 7(f) of the Act requires that a prospective employee have "direct access" to the controlled substance(s) manufactured, dispensed, or distributed by the employer. Where a current employee is to be tested as a part of an ongoing investigation, section 7(f) requires that the employee have "access" to the person or property that is the subject of the investigation.

(1) A prospective employee would have "direct access" if the position being applied for has responsibilities which include contact with or which affect the disposition of a controlled substance, including participation in the process of obtaining, dispensing, or otherwise distributing a controlled substance. This includes contact or direct involvement in the manufacture, storage, testing, distribution, sale or dispensing of a controlled substance and may include, for example, packaging, repackaging, ordering, licensing, shipping, receiving, taking inventory, providing security, prescribing, and handling of a controlled substance. A prospective employee would have "direct access" if the described job duties would give such person access to the products in question, whether such employee would be in physical proximity to controlled substances or engaged in activity which would permit the employee to divert such substances to his or her possession.

(2) A current employee would have "access" within the meaning of section 7(f) if the employee had access to the

specific person or property which is the subject of the on-going investigation, as discussed in §801.12(e) of this part. Thus, to test a current employee, the employee need not have had "direct" access to the controlled substance, but may have had only infrequent, random, or opportunistic access. Such access would be sufficient to test the employee if the employee could have caused, or could have aided or abetted in causing, the loss of the specific property which is the subject of the investigation. For example, a maintenance worker in a drug warehouse, whose job duties include the cleaning of areas where the controlled substances which are the subject of the investigation were present, but whose job duties do not include the handling of controlled substances, would be deemed to have "access", but normally not "direct access", to the controlled substances. On the other hand, a drug warehouse truck loader, whose job duties include the handling of outgoing shipment orders which contain controlled substances, would have "direct access" to such controlled substances. A pharmacy department in a supermarket is another common situation which is useful in illustrating the distinction between "direct access" and "access". Store personnel receiving pharmaceutical orders, i.e., the pharmacist, pharmacy intern, and other such employees working in the pharmacy department, would ordinarily have "direct access" to controlled substances. Other store personnel whose job duties and responsibilities do not include the handling of controlled substances but who had occasion to enter the pharmacy department where the controlled substances which are the subject of the investigation were stored, such as maintenance personnel or pharmacy cashiers, would have "access". Certain other store personnel whose job duties do not permit or require entrance into the pharmacy department for any reason, such as produce or meat clerks, checkout cashiers, or baggers, would not ordinarily have "access." However, any current employee, regardless of described job duties, may be polygraphed if the employer's investigation of criminal or other misconduct discloses that such employee in fact took action to obtain

“access” to the person or property that is the subject of the investigation—e.g., by actually entering the drug storage area in violation of company rules. In the case of “direct access”, the prospective employee’s access to controlled substances would be as a part of the manufacturing, dispensing or distribution process, while a current employee’s “access” to the controlled substances which are the subject of the investigation need only be opportunistic.

(d) The term *prospective employee*, for the purposes of this section, includes a current employee who presently holds a position which does not entail direct access to controlled substances, and therefore is outside the scope of the exemption’s provisions for preemployment polygraph testing, provided the employee has applied for and is being considered for transfer or promotion to another position which entails such direct access. For example, an office secretary may apply for promotion to a position in the vault or cage areas of a drug warehouse, where controlled substances are kept. In such a situation, the current employee would be deemed a “prospective employee” for the purposes of this exemption, and thus could be subject to preemployment polygraph screening, prior to such a change in position. However, any adverse action which is based in part on a polygraph test against a current employee who is considered a “prospective employee” for purposes of this section may be taken only with respect to the prospective position and may not affect the employee’s employment in the current position.

(e) Section 7(f) of the Act makes no specific reference to a requirement that employers provide current employees with a written statement prior to polygraph testing. Thus, employers to whom this exemption is available are not required to furnish a written statement such as that specified in section 7(d) of the Act and § 801.12(a)(4) of this part.

(f) For the section 7(f) exemption to apply, the polygraph testing of current employees must be administered in connection with an ongoing investigation of criminal or other misconduct involving, or potentially involving, loss or injury to the manufacture, dis-

tribution, or dispensing of any such controlled substance by such employer.

(1) Current employees may only be administered polygraph tests in connection with an ongoing investigation of criminal or other misconduct, relating to a specific incident or activity, or potential incident or activity. Thus, an employer is precluded from using the exemption in connection with continuing investigations or on a random basis to determine if thefts are occurring. However, unlike the exemption in section 7(d) of the Act for employers conducting ongoing investigations of economic loss or injury, the section 7(f) exemption includes ongoing investigations of misconduct involving potential drug losses. Nor does the latter exemption include the requirement for “reasonable suspicion” contained in the section 7(d) exemption. Thus, a drug store employer is permitted to polygraph all current employees who have access to a controlled substance stolen from the inventory, or where there is evidence that such a theft is planned. Polygraph testing based on an inventory shortage of the drug during a particular accounting period would not be permitted unless there is extrinsic evidence of misconduct.

(2) In addition, the test must be administered in connection with loss or injury, or potential loss or injury, to the manufacture, distribution, or dispensing of a controlled substance.

(i) Retail drugstores and wholesale drug warehouses typically carry inventory of so-called health and beauty aids, cosmetics, over-the-counter drugs, and a variety of other similar products, in addition to their product lines of controlled drugs. The noncontrolled products usually constitute the majority of such firms’ sales volumes. An economic loss or injury related to such noncontrolled substances would not constitute a basis of applicability of the section 7(f) exemption. For example, an investigation into the theft of a gross of cosmetic products could not be a basis for polygraph testing under section 7(f), but the theft of a container of valium could be.

(ii) Polygraph testing, with respect to an ongoing investigation concerning

products other than controlled substances might be initiated under section 7(d) of the Act and § 801.12 of this part. However, the exemption in section 7(f) of the Act and this section is limited solely to losses or injury associated with controlled substances.

(g) Polygraph tests administered pursuant to this exemption are subject to the limitations set forth in sections 8 and 10 of the Act, as discussed in §§ 801.21, 801.22, 801.23, 801.24, 801.25, 801.26, and 801.35 of this part. As provided in these sections, the exemption will apply only if certain requirements are met. Failure to satisfy any of the specified requirements nullifies the statutory authority for polygraph test administration and may subject the employer to the assessment of civil money penalties and other remedial actions, as provided for in section 6 of the Act (see subpart E, § 801.40 of this part). The administration of such tests is also subject to State or local laws, or collective bargaining agreements, which may either prohibit lie detector tests, or contain more restrictive provisions with respect to polygraph testing.

[56 FR 9064, Mar. 4, 1991; 56 FR 14469, Apr. 10, 1991]

§ 801.14 Exemption for employers providing security services.

(a) Section 7(e) of the Act provides an exemption from the general prohibition against polygraph tests for certain armored car, security alarm, and security guard employers. Subject to the conditions set forth in sections 8 and 10 of the Act and §§ 801.21, 801.22, 801.23, 801.24, 801.25, 801.26, and 801.35 of this part, section 7(e) permits the use of polygraph tests on certain prospective employees provided that such employers have as their primary business purpose the providing of armored car personnel, personnel engaged in the design, installation, and maintenance of security alarm systems, or other uniformed or plainclothes security personnel; and provided the employer's function includes protection of:

(1) Facilities, materials, or operations having a significant impact on the health or safety of any State or political subdivision thereof, or the national security of the United States, such as—

(i) Facilities engaged in the production, transmission, or distribution of electric or nuclear power,

(ii) Public water supply facilities,

(iii) Shipments or storage of radioactive or other toxic waste materials, and

(iv) Public transportation; or

(2) Currency, negotiable securities, precious commodities or instruments, or proprietary information.

(b)(1) Section 7(e) permits the administration of polygraph tests only to prospective employees. However, security service employers may administer polygraph tests to current employees in connection with an ongoing investigation, subject to the conditions of section 7(d) of the Act and § 801.12 of this part.

(2) The term *prospective employee* generally refers to an individual who is not currently employed by and who is being considered for employment by an employer. However, the term “prospective employee” also includes current employees under circumstances similar to those discussed in paragraph (d) of § 801.13 of this part, i.e., if the employee was initially hired for a position which was not within the exemption provided by section 7(e) of the Act, and subsequently applies for, and is under consideration for, transfer to a position for which pre-employment testing is permitted. Thus, for example, a security guard may be hired for a job outside the scope of the exemption's provisions for pre-employment polygraph testing, such as a position at a supermarket. If subsequently this guard is under consideration for transfer or promotion to a job at a nuclear power plant, this currently-employed individual would be considered to be a “prospective employee” for purposes of this exemption, prior to such proposed transfer or promotion. However, any adverse action which is based in part on a polygraph test against a current employee who is considered to be a “prospective employee” for purposes of this exemption may be taken only with respect to the prospective position and may not affect the employee's employment in the current position.

(c) Section 7(e) applies to certain private employers 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. Thus, the exemption is limited to firms primarily in the business of providing such security services, and does not apply to firms primarily in some other business who employ their own security personnel. (For example, a utility company which employs its own security personnel could not qualify.) In the case of diversified firms, the term *primary business purpose* shall mean that at least 50% of the employer’s annual dollar volume of business is derived from the provision of the types of security services specifically identified in section 7(e). Where a parent corporation includes a subsidiary corporation engaged in providing security services, the annual dollar volume of business test is applied to the legal entity (or entities) which is the employer, i.e., the subsidiary corporation, not the parent corporation.

(d)(1) As used in section 7(e)(1)(A), the terms *facilities, materials, or operations having a significant impact on the health or safety of any State or political subdivision thereof, or the national security of the United States* include protection of electric or nuclear power plants, public water supply facilities, radioactive or other toxic waste shipments or storage, and public transportation. These examples are intended to be illustrative, and not exhaustive. However, the types of “facilities, materials, or operations” within the scope of the exemption are not to be construed so broadly as to include low priority or minor security interests. The “facilities, materials, or operations” in question consist only of those having a “significant impact” on public health or safety, or national security. However, the “facilities, materials, or operations” may be either privately or publicly owned.

(2) 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 significantly impact on the general public’s safety or health, or national security. In addition to the specific examples set forth in the Act and in paragraph (d)(1) of this section, the terms would include:

(i) Facilities, materials, and operations owned or leased by Federal, State, or local governments, including instrumentalities or interstate agencies thereof, for which an authorized public official has determined that a need for security exists, as evidenced by the establishment of security requirements utilizing private armored car, security alarm system, or uniformed or plainclothes security personnel, or a combination thereof. Examples of such facilities, materials and operations include:

- (A) Government office buildings;
- (B) Prisons and correction facilities;
- (C) Public schools;
- (D) Public libraries;
- (E) Water supply;

(F) Military reservations, installations, posts, camps, arsenals, laboratories, Government-owned and contractor operated (GOCO) or Government-owned and Government-operated (GOGO) industrial plants, and other similar facilities subject to the custody, jurisdiction, or administration of any Department of Defense (DOD) component;

(ii) Commercial and industrial assets and operations which—

(A) Are protected pursuant to security requirements established in contracts with the United States or other directives by a Federal agency (such as those of defense contractors and researchers), including factories, plants, buildings, or structures used for researching, designing, testing, manufacturing, producing, processing, repairing, assembling, storing, or distributing products or components related to the national defense; or

(B) Are protected pursuant to security requirements imposed on registrants under the Controlled Substances Act; or

(C) Would pose a serious threat to public health or safety in the event of a breach of security (this would include, for example, a plant engaged in the manufacture or processing of hazardous materials or chemicals but

would not include a plant engaged in the manufacture of shoes);

(iii) Public and private energy and precious mineral facilities, supplies, and reserves, including—

(A) Public or private power plants and utilities;

(B) Oil or gas refineries and storage facilities;

(C) Strategic petroleum reserves; and

(D) Major dams, such as those which provide hydroelectric power;

(iv) Major public or private transportation and communication facilities and operations, including—

(A) Airports;

(B) Train terminals, depots, and switching and control facilities;

(C) Major bridges and tunnels;

(D) Communications centers, such as receiving and transmission centers, and control centers;

(E) Transmission and receiving operations for radio, television, and satellite signals; and

(F) Network computer systems containing data important to public health and safety or national security;

(v) The Federal Reserve System and stock and commodity exchanges;

(vi) Hospitals and health research facilities;

(vii) Large public events, such as political conventions and major parades, concerts, and sporting events; and

(viii) Large enclosed shopping centers (malls).

(3) If an employer believes that “facilities, materials, or operations” which are not listed in this subsection fall within the contemplated purview of this exemption, a request for a ruling may be filed with the Administrator. A ruling that such “facilities, materials, or operations” are included within this exemption must be obtained prior to the administration of a polygraph test or any other action prohibited by section 3 of the Act. It is not possible to exhaustively account for all “facilities, materials, or operations” which fall within the purview of section 7(e) (1) (A). While it is likely that additional entities may fall within the exemption’s scope, any such “facilities, materials, or operations” must meet the “significant impact” test. Thus, “facilities, materials, or operations” which would be of vital importance

during periods of war or civil emergency, or whose sabotage would greatly affect the public health or safety, could fall within the scope of the term “significant impact”.

(e)(1) Section 7(e)(1)(B) of the Act extends the exemption to firms whose function includes protection of “currency, negotiable securities, precious commodities or instruments, or proprietary information”. These terms collectively are construed to include assets primarily handled by financial institutions such as banks, credit unions, savings and loan institutions, stock and commodity exchanges, brokers, or security dealers.

(2) The terms “currency, negotiable securities, precious commodities or instruments or proprietary information” refer to assets which are typically handled by, protected for and transported between and among commercial and financial institutions. Services provided by the armored car industry are thus clearly within the scope of the exemption, as are security alarm and security guard services provided to financial and similar institutions of the type referred to above. Also included are the cash assets handled by casinos, racetracks, lotteries, or other businesses where the cash constitutes the inventory or stock in trade. Similarly, security services provided to businesses engaged in the sale or exchange of precious commodities such as gold, silver, or diamonds, including jewelry stores that stock such precious commodities prior to transformation into pieces of jewelry, are also included. The term “proprietary information” generally refers to business assets such as trade secrets, manufacturing processes, research and development data, and cost/pricing data. Security alarm or guard services provided to protect the premises of private homes, or businesses not primarily engaged in handling, trading, transferring, or storing currency, negotiable securities, precious commodities or instruments, or proprietary information, on the other hand, are normally outside the scope of the exemption. This is true even though such places may physically house some such assets. However, where such security alarm or guard service is specifically designed or limited to the protection of

the types of assets identified above, whether located in businesses or residences, or elsewhere, the security services provided are within the scope of the exemption. For example, a security system specially designed to protect diamonds kept in a home vault of a diamond merchant would be within the exemption. However, a security system installed generally to protect the premises of the home of the same merchant would not be within the exemption. A guard sent to a client firm to secure a restricted office in which only proprietary research data is developed and stored is within the scope of the exemption. Another guard sent to the same firm to protect the building entrance from unwanted intruders is not within the scope of the exemption even though the building contains the restricted room in which the proprietary research data is developed and stored, since the security system is not specifically designed to protect the proprietary information.

(f) An employer who falls within the scope of the exemption is one "whose function includes" protection of "facilities, materials, or operations", discussed in paragraph (d) of this section or of "currency, negotiable securities, precious commodities or instruments, or proprietary information" discussed in paragraph (e) of this section. Thus, assuming that the employer has met the "primary business purpose" test, as set forth in paragraph (c) of this section, the employer's operations then must simply "include" protection of at least one of the facilities within the scope of the exemption.

(g)(1) Section 7(e) (2) provides that the exemption shall not apply if a polygraph test is administered to a prospective employee who would not be employed to protect the "facilities, materials, operations, or assets" referred to in section 7(e) (1) of the Act, and discussed in paragraphs (d) and (e) of this section. Thus, while the exemption applies to employers whose function "includes" protection of certain facilities, employers would not be permitted to administer polygraph tests to prospective employees who are not being employed to protect such functions.

(2) The phrase "employed to protect" in section 7(e)(2) has reference to a

wide spectrum of prospective employees in the security industry, and includes any job applicant who would likely protect the security of any qualifying "facilities, materials, operations, or assets."

(3) In many cases, it will be readily apparent that certain positions within security companies would, by virtue of the individual's official job duties, entail "protection". For example, armored car drivers and guards, security guards, and alarm system installers and maintenance personnel all would be employed to protect in the most direct and literal sense of the term.

(4) The scope of the exemption is not limited, however, to those security personnel having direct, physical access to the facilities being protected. Various support personnel may also, as a part of their job duties, have access to the process of providing security services due to the position's exposure to knowledge of security plans and operations, employee schedules, delivery schedules, and other such activities. Where a position entails the opportunity to cause or participate in a breach of security, an employee to be hired for the position would also be deemed to be "employed to protect" the facility.

(i) For example, in the armored car industry, the duties of personnel other than guards and drivers may include taking customer orders for currency and commodity transfers, issuing security badges to guards, coordinating routes of travel and times for pick-up and delivery, issuing access codes to customers, route planning and other sensitive responsibilities. Similarly, in the security alarm industry, several types of employees would have access to the process of providing security services, such as designers of security systems, system monitors, service technicians, and billing clerks (where they review the system design drawings to ensure proper customer billing). In the security industry, generally, administrative employees may have access to customer accounts, schedules, information relating to alarm system failures, and other security information, such as security employee absences due to illness that create "holes" in a security plan. Employees

of this type are a part of the overall security services provided by the employer. Such employees possess the ability to affect, on an opportunistic basis, the security of protected operations, by virtue of the knowledge gained through their job duties.

(ii) On the other hand, there are certainly some types of employees in the security industry who “would not be employed to protect” the facilities or assets within the purview of the exemption, and who would not be in the process of providing exempt security services. For example, custodial and maintenance employees typically would not have access, either directly or indirectly as a part of their job duties, to the operations or clients of the employer. Any employee whose “access” to secured areas or to sensitive information is on a controlled basis, such as by escort, would also be outside the scope of the exemption. In cases where security service companies also provide janitorial, food and beverage, or other services unrelated to security, the exemption would clearly not extend to any employee considered for employment in such activity.

(5) The phrase “employed to protect” includes any job applicant who, if not hired specifically to protect the listed facilities or assets, would likely be so employed, as through a systematic assignment process, such as rotation of work assignments or selection from a pool of available employees, even if selection for such work is unpredictable or infrequent. A prospective employee whose job assignment to perform qualifying protective functions would be made by selection from a pool of available employees (all of whom have an equal chance of being selected), or an employee who is to be rotated through different job assignments which include some qualifying protective functions, is included within the exemption. However, if there is only a remote possibility that a prospective employee, if hired, would perform exempt protective functions, such as on an emergency basis, or if a prospective employee by reason of his or her position, qualifications, or level of experience or for other reasons, would when hired, not ordinarily be assigned to protect qualifying facilities, such an

employee would be deemed to have not been hired to protect such facilities and would be excluded from the exemption.

(h) Polygraph tests administered pursuant to this exemption are subject to the limitations set forth in sections 8 and 10 of the Act, as discussed in §§ 801.21, 801.22, 801.23, 801.24, 801.25, 801.26, and 801.35 of this part. As provided in these sections, the exemption will apply only if certain requirements are met. Failure to satisfy any of the specified requirements nullifies the statutory authority for polygraph test administration and may subject the employer to the assessment of civil money penalties and other remedial actions, as provided for in section 6 of the Act (see subpart E, § 801.42 of this part). The administration of such tests is also subject to State or local laws, or collective bargaining agreements, which may either prohibit lie detectors test, or contain more restrictive provisions with respect to polygraph testing.

Subpart C—Restrictions on Polygraph Usage Under Exemptions

§ 801.20 Adverse employment action under ongoing investigation exemption.

(a) Section 8(a) (1) of the Act provides that the limited exemption in section 7(d) of the Act and § 801.12 of this part for ongoing investigations shall not apply if an employer discharges, disciplines, denies employment or promotion or otherwise discriminates in any manner against a current employee based upon the analysis of a polygraph test chart or the refusal to take a polygraph test, without additional supporting evidence.

(b) “Additional supporting evidence”, for purposes of section 8(a) of the Act, includes, but is not limited to, the following:

(1)(i) Evidence indicating that the employee had access to the missing or damaged property that is the subject of an ongoing investigation; and

(ii) Evidence leading to the employer’s reasonable suspicion that the employee was involved in the incident or activity under investigation; or

(2) Admissions or statements made by an employee before, during or following a polygraph examination.

(c) Analysis of a polygraph test chart or refusal to take a polygraph test may not serve as a basis for adverse employment action, even with additional supporting evidence, unless the employer observes all the requirements of sections 7(d) and 8(b) of the Act, as described in §§ 801.12, 801.22, 801.23, 801.24, and 801.25 of this part.

§ 801.21 Adverse employment action under security service and controlled substance exemptions.

(a) Section 8(a) (2) of the Act provides that the security service exemption in section 7(e) of the Act and § 801.14 of this part and the controlled substance exemption in section 7(f) of the Act and § 801.13 of this part shall not apply if an employer discharges, disciplines, denies employment or promotion, or otherwise discriminates in any manner against a current employee or prospective employee based solely on the analysis of a polygraph test chart or the refusal to take a polygraph test.

(b) Analysis of a polygraph test chart or refusal to take a polygraph test may serve as one basis for adverse employment actions of the type described in paragraph (a) of this section, provided that the adverse action was also based on another bona fide reason, with supporting evidence therefor. For example, traditional factors such as prior employment experience, education, job performance, etc. may be used as a basis for employment decisions. Employment decisions based on admissions or statements made by an employee or prospective employee before, during or following a polygraph examination may, likewise, serve as a basis for such decisions.

(c) Analysis of a polygraph test chart or the refusal to take a polygraph test may not serve as a basis for adverse employment action, even with another legitimate basis for such action, unless the employer observes all the requirements of section 7 (e) or (f) of the Act, as appropriate, and section 8(b) of the Act, as described in §§ 801.13, 801.14, 801.22, 801.23, 801.24, and 801.25 of this part.

§ 801.22 Rights of examinee—general.

(a) Pursuant to section 8(b) of the Act, the limited exemption in section 7(d) of the Act for ongoing investigations, and the security service and controlled substance exemptions in 7(e) and (f) of the Act (described in § 801.12, 801.13, and 801.14 of this part) shall not apply unless all of the requirements set forth in this section and §§ 801.23 through 801.25 of this part are met.

(b) During all phases of the polygraph testing the person being examined has the following rights:

(1) The examinee may terminate the test at any time.

(2) The examinee may not be asked any questions in a degrading or unnecessarily intrusive manner.

(3) The examinee may not be asked any questions dealing with:

- (i) Religious beliefs or affiliations;
- (ii) Beliefs or opinions regarding racial matters;
- (iii) Political beliefs or affiliations;
- (iv) Sexual preferences or behavior;

or

(v) Beliefs, affiliations, opinions, or lawful activities concerning unions or labor organizations.

(4) The examinee may not be subjected to a test when there is sufficient written evidence by a physician that the examinee is suffering from any medical or psychological condition or undergoing any treatment that might cause abnormal responses during the actual testing phase. "Sufficient written evidence" shall constitute, at a minimum, a statement by a physician specifically describing the examinee's medical or psychological condition or treatment and the basis for the physician's opinion that the condition or treatment might result in such abnormal responses.

(5) An employee or prospective employee who exercises the right to terminate the test, or who for medical reasons with sufficient supporting evidence is not administered the test, shall be subject to adverse employment action only on the same basis as one who refuses to take a polygraph test, as described in §§ 801.20 and 801.21 of this part.

(c) Any polygraph examination shall consist of one or more pretest phases, actual testing phases, and post-test

(2) Admissions or statements made by an employee before, during or following a polygraph examination.

(c) Analysis of a polygraph test chart or refusal to take a polygraph test may not serve as a basis for adverse employment action, even with additional supporting evidence, unless the employer observes all the requirements of sections 7(d) and 8(b) of the Act, as described in §§ 801.12, 801.22, 801.23, 801.24, and 801.25 of this part.

§ 801.21 Adverse employment action under security service and controlled substance exemptions.

(a) Section 8(a) (2) of the Act provides that the security service exemption in section 7(e) of the Act and § 801.14 of this part and the controlled substance exemption in section 7(f) of the Act and § 801.13 of this part shall not apply if an employer discharges, disciplines, denies employment or promotion, or otherwise discriminates in any manner against a current employee or prospective employee based solely on the analysis of a polygraph test chart or the refusal to take a polygraph test.

(b) Analysis of a polygraph test chart or refusal to take a polygraph test may serve as one basis for adverse employment actions of the type described in paragraph (a) of this section, provided that the adverse action was also based on another bona fide reason, with supporting evidence therefor. For example, traditional factors such as prior employment experience, education, job performance, etc. may be used as a basis for employment decisions. Employment decisions based on admissions or statements made by an employee or prospective employee before, during or following a polygraph examination may, likewise, serve as a basis for such decisions.

(c) Analysis of a polygraph test chart or the refusal to take a polygraph test may not serve as a basis for adverse employment action, even with another legitimate basis for such action, unless the employer observes all the requirements of section 7 (e) or (f) of the Act, as appropriate, and section 8(b) of the Act, as described in §§ 801.13, 801.14, 801.22, 801.23, 801.24, and 801.25 of this part.

§ 801.22 Rights of examinee—general.

(a) Pursuant to section 8(b) of the Act, the limited exemption in section 7(d) of the Act for ongoing investigations, and the security service and controlled substance exemptions in 7(e) and (f) of the Act (described in § 801.12, 801.13, and 801.14 of this part) shall not apply unless all of the requirements set forth in this section and §§ 801.23 through 801.25 of this part are met.

(b) During all phases of the polygraph testing the person being examined has the following rights:

(1) The examinee may terminate the test at any time.

(2) The examinee may not be asked any questions in a degrading or unnecessarily intrusive manner.

(3) The examinee may not be asked any questions dealing with:

- (i) Religious beliefs or affiliations;
- (ii) Beliefs or opinions regarding racial matters;
- (iii) Political beliefs or affiliations;
- (iv) Sexual preferences or behavior;

or

(v) Beliefs, affiliations, opinions, or lawful activities concerning unions or labor organizations.

(4) The examinee may not be subjected to a test when there is sufficient written evidence by a physician that the examinee is suffering from any medical or psychological condition or undergoing any treatment that might cause abnormal responses during the actual testing phase. "Sufficient written evidence" shall constitute, at a minimum, a statement by a physician specifically describing the examinee's medical or psychological condition or treatment and the basis for the physician's opinion that the condition or treatment might result in such abnormal responses.

(5) An employee or prospective employee who exercises the right to terminate the test, or who for medical reasons with sufficient supporting evidence is not administered the test, shall be subject to adverse employment action only on the same basis as one who refuses to take a polygraph test, as described in §§ 801.20 and 801.21 of this part.

(c) Any polygraph examination shall consist of one or more pretest phases, actual testing phases, and post-test

phases, which must be conducted in accordance with the rights of examinees described in §§801.23 through 801.25 of this part.

§801.23 Rights of examinee—pretest phase.

(a) The pretest phase consists of the questioning and other preparation of the prospective examinee before the actual use of the polygraph instrument. During the initial pretest phase, the examinee must be:

(1) Provided with written notice, in a language understood by the examinee, as to when and where the examination will take place and that the examinee has the right to consult with counsel or an employee representative before each phase of the test. Such notice shall be received by the examinee at least forty-eight hours, excluding weekend days and holidays, before the time of the examination, except that a prospective employee may, at the employee's option, give written consent to administration of a test anytime within 48 hours but no earlier than 24 hours after receipt of the written notice. The written notice or proof of service must set forth the time and date of receipt by the employee or prospective employee and be verified by his or her signature. The purpose of this requirement is to provide a sufficient opportunity prior to the examination for the examinee to consult with counsel or an employee representative. Provision shall also be made for a convenient place on the premises where the examination will take place at which the examinee may consult privately with an attorney or an employee representative before each phase of the test. The attorney or representative may be excluded from the room where the examination is administered during the actual testing phase.

(2) Informed orally and in writing of the nature and characteristics of the polygraph instrument and examination, including an explanation of the physical operation of the polygraph instrument and the procedure used during the examination.

(3) Provided with a written notice prior to the testing phase, in a language understood by the examinee, which shall be read to and signed by

the examinee. Use of appendix A to this part, if properly completed, will constitute compliance with the contents of the notice requirement of this paragraph. If a format other than in appendix A is used, it must contain at least the following information:

(i) Whether or not the polygraph examination area contains a two-way mirror, a camera, or other device through which the examinee may be observed;

(ii) Whether or not any other device, such as those used in conversation or recording will be used during the examination;

(iii) That both the examinee and the employer have the right, with the other's knowledge, to make a recording of the entire examination;

(iv) That the examinee has the right to terminate the test at any time;

(v) That the examinee has the right, and will be given the opportunity, to review all questions to be asked during the test;

(vi) That the examinee may not be asked questions in a manner which degrades, or needlessly intrudes;

(vii) That the examinee may not be asked any questions concerning religious beliefs or opinions; beliefs regarding racial matters; political beliefs or affiliations; matters relating to sexual behavior; beliefs, affiliations, opinions, or lawful activities regarding unions or labor organizations;

(viii) That the test may not be conducted if there is sufficient written evidence by a physician that the examinee is suffering from a medical or psychological condition or undergoing treatment that might cause abnormal responses during the examination;

(ix) That the test is not and cannot be required as a condition of employment;

(x) That the employer may not discharge, dismiss, discipline, deny employment or promotion, or otherwise discriminate against the examinee based on the analysis of a polygraph test, or based on the examinee's refusal to take such a test, without additional evidence which would support such action;

(xi)(A) In connection with an ongoing investigation, that the additional evidence required for the employer to

take adverse action against the examinee, including termination, may be evidence that the examinee had access to the property that is the subject of the investigation, together with evidence supporting the employer's reasonable suspicion that the examinee was involved in the incident or activity under investigation;

(B) That any statement made by the examinee before or during the test may serve as additional supporting evidence for an adverse employment action, as described in paragraph (a)(3)(x) of this section, and that any admission of criminal conduct by the examinee may be transmitted to an appropriate government law enforcement agency;

(xii) That information acquired from a polygraph test may be disclosed by the examiner or by the employer only:

(A) To the examinee or any other person specifically designated in writing by the examinee to receive such information;

(B) To the employer that requested the test;

(C) To a court, governmental agency, arbitrator, or mediator pursuant to a court order;

(D) To a U.S. Department of Labor official when specifically designated in writing by the examinee to receive such information;

(E) By the employer, to an appropriate governmental agency without a court order where, and only insofar as, the information disclosed is an admission of criminal conduct;

(xiii) That if any of the examinee's rights or protections under the law are violated, the examinee has the right to file a complaint with the Wage and Hour Division of the U.S. Department of Labor, or to take action in court against the employer. Employers who violate this law are liable to the affected examinee, who may recover such legal or equitable relief as may be appropriate, including, but not limited to, employment, reinstatement, and promotion, payment of lost wages and benefits, and reasonable costs, including attorney's fees. The Secretary of Labor may also bring action to obtain compliance with the Act, and may assess civil money penalties against the employer;

(xiv) That the examinee has the right to obtain and consult with legal counsel or other representative before each phase of the test, although the legal counsel or representative may be excluded from the room where the test is administered during the actual testing phase.

(xv) That the employee's rights under the Act may not be waived, either voluntarily or involuntarily, by contract or otherwise, except as part of a written settlement to a pending action or complaint under the Act, agreed to and signed by the parties.

(b) During the initial or any subsequent pretest phases, the examinee must be given the opportunity, prior to the actual testing phase, to review all questions in writing that the examiner will ask during each testing phase. Such questions may be presented at any point in time prior to the testing phase.

§ 801.24 Rights of examinee—actual testing phase.

(a) The actual testing phase refers to that time during which the examiner administers the examination by using a polygraph instrument with respect to the examinee and then analyzes the charts derived from the test. Throughout the actual testing phase, the examiner shall not ask any question that was not presented in writing for review prior to the testing phase. An examiner may, however, recess the testing phase and return to the pre-test phase to review additional relevant questions with the examinee. In the case of an ongoing investigation, the examiner shall ensure that all relevant questions (as distinguished from technical baseline questions) pertain to the investigation.

(b) No testing period subject to the provisions of the Act shall be less than ninety minutes in length. Such "test period" begins at the time that the examiner begins informing the examinee of the nature and characteristics of the examination and the instruments involved, as prescribed in section 8(b)(2)(B) of the Act and § 801.23 (a)(2) of this part, and ends when the examiner completes the review of the test results with the examinee as provided in § 801.25 of this part. The ninety-minute minimum duration shall not apply if

the examinee voluntarily acts to terminate the test before the completion thereof, in which event the examiner may not render an opinion regarding the employee's truthfulness.

§ 801.25 Rights of examinee—post-test phase.

(a) The post-test phase refers to any questioning or other communication with the examinee following the use of the polygraph instrument, including review of the results of the test with the examinee. Before any adverse employment action, the employer must:

(1) Further interview the examinee on the basis of the test results; and

(2) Give to the examinee a written copy of any opinions or conclusions rendered in response to the test, as well as the questions asked during the test, with the corresponding charted responses. The term "corresponding charted responses" refers to copies of the entire examination charts recording the employee's physiological responses, and not just the examiner's written report which describes the examinee's responses to the questions as "charted" by the instrument.

§ 801.26 Qualifications of and requirements for examiners.

(a) Section 8 (b) and (c) of the Act provides that the limited exemption in section 7(d) of the Act for ongoing investigations, and the security service and controlled substances exemptions in section 7 (e) and (f) of the Act, shall not apply unless the person conducting the polygraph examination meets specified qualifications and requirements.

(b) An examiner must meet the following qualifications:

(1) Have a valid current license, if required by the State in which the test is to be conducted; and

(2) Carry a minimum bond of \$50,000 provided by a surety incorporated under the laws of the United States or of any State, which may under those laws guarantee the fidelity of persons holding positions of trust, or carry an equivalent amount of professional liability coverage.

(c) An examiner must also, with respect to examinees identified by the employer pursuant to § 801.30(c) of this part:

(1) Observe all rights of examinees, as set out in §§ 801.22, 801.23, 801.24, and 801.25 of this part;

(2) Administer no more than five polygraph examinations in any one calendar day on which a test or tests subject to the provisions of EPPA are administered, not counting those instances where an examinee voluntarily terminates an examination prior to the actual testing phase;

(3) Administer no polygraph examination subject to the provisions of the Act which is less than ninety minutes in duration, as described in § 801.24(b) of this part;

(4) Render any opinion or conclusion regarding truthfulness or deception in writing. Such opinion or conclusion must be based solely on the polygraph test results. The written report shall not contain any information other than admissions, information, case facts, and interpretation of the charts relevant to the stated purpose of the polygraph test and shall not include any recommendation concerning the employment of the examinee; and

(5) Maintain all opinions, reports, charts, written questions, lists, and other records relating to the test, including statements signed by examinees advising them of rights under the Act (as described in § 801.23 (a)(3) of this part) and any electronic recordings of examinations, for at least three years from the date of the administration of the test. (See § 801.30 of this part for recordkeeping requirements.)

Subpart D—Recordkeeping and Disclosure Requirements

§ 801.30 Records to be preserved for 3 years.

(a) The following records shall be kept for a minimum period of three years from the date the polygraph examination is conducted (or from the date the examination is requested if no examination is conducted):

(1) Each employer who requests an employee to submit to a polygraph examination in connection with an ongoing investigation involving economic loss or injury shall retain a copy of the statement that sets forth the specific

incident or activity under investigation and the basis for testing that particular employee, as required by section 7(d)(4) of the Act and described in § 801.12 (a)(4) of this part.

(2) Each employer who administers a polygraph examination under the exemption provided by section 7(f) of the Act (described in § 801.13 of this part) in connection with an ongoing investigation of criminal or other misconduct involving, or potentially involving, loss or injury to the manufacture, distribution or dispensing of a controlled substance, shall retain records specifically identifying the loss or injury in question and the nature of the employee's access to the person or property that is the subject of the investigation.

(3) Each employer who requests an employee or prospective employee to submit to a polygraph examination pursuant to any of the exemptions under section 7(d), (e) or (f) of the Act (described in §§ 801.12, 801.13, and 801.14) shall retain a copy of the written statement that sets forth the time and place of the examination and the examinee's right to consult with counsel, as required by section 8 (b)(2)(A) of the Act and described in § 801.23(a)(1) of this part.

(4) Each employer shall identify in writing to the examiner persons to be examined pursuant to any of the exemptions under section 7 (d), (e) or (f) of the Act (described in §§ 801.12, 801.13, and 801.14 of this part), and shall retain a copy of such notice.

(5) Each employer who retains an examiner to administer examinations pursuant to any of the exemptions under section 7 (d), (e) or (f) of the Act (described in §§ 801.12, 801.13, and 801.14 of this part) shall maintain copies of all opinions, reports or other records furnished to the employer by the examiner relating to such examinations.

(6) Each examiner retained to administer examinations to persons identified by employers under paragraph (a)(4) of this section shall maintain all opinions, reports, charts, written questions, lists, and other records relating to polygraph tests of such persons. In addition, the examiner shall maintain records of the number of examinations conducted during each day in which one or more tests are conducted pursu-

ant to the Act, and, with regard to tests administered to persons identified by their employer under paragraph (a)(4) of this section, the duration of each test period, as defined in § 801.24(b) of this part.

(b) Each employer shall keep the records required by this part safe and accessible at the place or places of employment or at one or more established central recordkeeping offices where employment records are customarily maintained. If the records are maintained at a central recordkeeping office, other than in the place or places of employment, such records shall be made available within 72 hours following notice from the Secretary or an authorized representative.

(c) Each examiner shall keep the records required by this part safe and accessible at the place or places of business or at one or more established central recordkeeping offices where examination records are customarily maintained. If the records are maintained at a central recordkeeping office, other than in the place or places of business, such records shall be made available within 72 hours following notice from the Secretary or an authorized representative.

(d) All records shall be available for inspection and copying by the Secretary or an authorized representative. Information for which disclosure is restricted under section 9 of the Act and § 801.35 of this part shall be made available to the Secretary or the Secretary's representative where the examinee has designated the Secretary, in writing, to receive such information, or by order of a court of competent jurisdiction.

(Approved by the Office of Management and Budget under control number 1215-0170)

§ 801.35 Disclosure of test information.

Section 9 of the Act prohibits the unauthorized disclosure of any information obtained during a polygraph test by any person, other than the examinee, directly or indirectly, except as follows:

(a) A polygraph examiner or an employer (other than an employer exempt under section 7 (a), (b), or (c) of the Act (described in §§ 801.10 and 801.11 of this

part)) may disclose information acquired from a polygraph test only to:

(1) The examinee or an individual specifically designated in writing by the examinee to receive such information;

(2) The employer that requested the polygraph test pursuant to the provisions of this Act (including management personnel of the employer where the disclosure is relevant to the carrying out of their job responsibilities);

(3) Any court, governmental agency, arbitrator, or mediator pursuant to an order from a court of competent jurisdiction requiring the production of such information;

(4) The Secretary of Labor, or the Secretary's representative, when specifically designated in writing by the examinee to receive such information.

(b) An employer may disclose information from the polygraph test at any time to an appropriate governmental agency without the need of a court order where, and only insofar as, the information disclosed is an admission of criminal conduct.

(c) A polygraph examiner may disclose test charts, without identifying information (but not other examination materials and records), to another examiner(s) for examination and analysis, provided that such disclosure is for the sole purpose of consultation and review of the initial examiner's opinion concerning the indications of truthfulness or deception. Such action would not constitute disclosure under this part provided that the other examiner has no direct or indirect interest in the matter.

Subpart E—Enforcement

§ 801.40 General.

(a) Whenever the Secretary believes that the provisions of the Act or these regulations have been violated, such action shall be taken and such proceedings instituted as deemed appropriate, including the following:

(1) Petitioning any appropriate District Court of the United States for temporary or permanent injunctive relief to restrain violation of the provisions of the Act or this part by any person, and to require compliance with the Act and this part, including such

legal or equitable relief incident thereto as may be appropriate, including, but not limited to, employment, reinstatement, promotion, and the payment of lost wages and benefits;

(2) Assessing a civil penalty against any employer who violates any provision of the Act or this part in an amount of not more than \$10,000 for each violation, in accordance with regulations set forth in this part; or

(3) Referring any unpaid civil money penalty which has become a final and unappealable order of the Secretary or a final judgment of a court in favor of the Secretary to the Attorney General for recovery.

(b)(1) Any employer who violates this Act shall be liable to the employee or prospective employee affected by such violation for such legal or equitable relief as may be appropriate, including, but not limited to, employment, reinstatement, promotion, and the payment of lost wages and benefits.

(2) An action under this subsection may be maintained against the employer in any Federal or State court of competent jurisdiction by an employee or prospective employee for or on behalf of such employee, prospective employee and others similarly situated. Such action must be commenced within a period not to exceed 3 years after the date of the alleged violation. The court, in its discretion, may allow reasonable costs (including attorney's fees) to the prevailing party.

(c) The taking of any one of the actions referred to in paragraph (a) of this section shall not be a bar to the concurrent taking of any other appropriate action.

§ 801.41 Representation of the Secretary.

(a) Except as provided in section 518(a) of title 28, U.S. Code, relating to litigation before the Supreme Court, the Solicitor of Labor may appear for and represent the Secretary in any civil litigation brought under section 6 of the Act, as described in § 801.40 of this part.

(b) The Solicitor of Labor, through authorized representatives, shall represent the Administrator in all administrative hearings under the provisions of section 6 of the Act and this part.

§ 801.42 Civil money penalties—assessment.

(a) A civil money penalty in an amount not to exceed \$10,000 for any violation may be assessed against any employer for:

(1) Requiring, requesting, suggesting or causing an employee or prospective employee to take a lie detector test or using, accepting, referring to or inquiring about the results of any lie detector test of any employee or prospective employee, other than as provided in the Act or this part;

(2) Taking an adverse action or discriminating in any manner against any employee or prospective employee on the basis of the employee's or prospective employee's refusal to take a lie detector test, other than as provided in the Act or this part;

(3) Discriminating or retaliating against an employee or prospective employee for the exercise of any rights under the Act;

(4) Disclosing information obtained during a polygraph test, except as authorized by the Act or this part;

(5) Failing to maintain the records required by the Act or this part;

(6) Resisting, opposing, impeding, intimidating, or interfering with an official of the Department of Labor during the performance of an investigation, inspection, or other law enforcement function under the Act or this part; or

(7) Violating any other provision of the Act or this part.

(b) In determining the amount of penalty to be assessed for any violation of the Act or this part, the Administrator will consider the previous record of the employer in terms of compliance with the Act and regulations, the gravity of the violations, and other pertinent factors. The matters which may be considered include, but are not limited to, the following:

(1) Previous history of investigation(s) or violation(s) of the Act or this part;

(2) The number of employees or prospective employees affected by the violation or violations;

(3) The seriousness of the violation or violations;

(4) Efforts made in good faith to comply with the provisions of the Act and this part;

(5) If the violations resulted from the actions or inactions of an examiner, the steps taken by the employer to ensure the examiner complied with the Act and the regulations in this part, and the extent to which the employer could reasonably have foreseen the examiner's actions or inactions;

(6) The explanation of the employer, including whether the violations were the result of a bona fide dispute of doubtful legal certainty;

(7) The extent to which the employee(s) or prospective employee(s) suffered loss or damage;

(8) Commitment to future compliance, taking into account the public interest and whether the employer has previously violated the provisions of the Act or this part.

[56 FR 9064, Mar. 4, 1991; 56 FR 14469, Apr. 10, 1991]

§ 801.43 Civil money penalties—payment and collection.

Where the assessment is directed in a final order of the Department, the amount of the penalty is immediately due and payable to the United States Department of Labor. The person assessed such penalty shall remit promptly the amount thereof as finally determined, to the Administrator by certified check or by money order, made payable to the order of "Wage and Hour Division, Labor". The remittance shall be delivered or mailed to the Wage and Hour Division Regional Office for the area in which the violations occurred.

Subpart F—Administrative Proceedings

GENERAL

§ 801.50 Applicability of procedures and rules.

The procedures and rules contained in this subpart prescribe the administrative process for assessment of civil money penalties for violations of the Act or of these regulations.

PROCEDURES RELATING TO HEARING

§ 801.51 Written notice of determination required.

Whenever the Administrator determines to assess a civil money penalty for a violation of the Act or this part, the person against whom such penalty is assessed shall be notified in writing of such determination. Such notice shall be served in person or by certified mail.

§ 801.52 Contents of notice.

The notice required by § 801.51 of this part shall:

- (a) Set forth the determination of the Administrator and the reason or reasons therefor;
- (b) Set forth a description of each violation and the amount assessed for each violation;
- (c) Set forth the right to request a hearing on such determination;
- (d) Inform any affected person or persons that in the absence of a timely request for a hearing, the determination of the Administrator shall become final and unappealable; and
- (e) Set forth the time and method for requesting a hearing, and the procedures relating thereto, as set forth in § 801.53 of this part.

§ 801.53 Request for hearing.

- (a) Any person desiring to request an administrative hearing on a civil money penalty assessment pursuant to this part shall make such request in writing to the official who issued the determination at the Wage and Hour Division address appearing on the determination notice, no later than 30 days after the date of receipt of the notice referred to in § 801.51 of this part.
- (b) The request for hearing must be received by the Administrator at the address set forth in the notice issued pursuant to § 801.52 of this part, within the time set forth in paragraph (a) of this section. For the affected person's protection, if the request is by mail, it should be by certified mail, return receipt requested.
- (c) No particular form is prescribed for any request for hearing permitted by this subpart. However, any such request shall:
 - (1) Be typewritten or legibly written;

(2) Specify the issue or issues stated in the notice of determination giving rise to such request;

(3) State the specific reason or reasons why the person requesting the hearing believes such determination is in error;

(4) Be signed by the person making the request or by an authorized representative of such person; and

(5) Include the address at which such person or authorized representative desires to receive further communications relating thereto.

[56 FR 9064, Mar. 4, 1991; 56 FR 14469, Apr. 10, 1991, as amended at 60 FR 46531, Sept. 7, 1995]

RULES OF PRACTICE

§ 801.58 General.

Except as provided in this subpart, and to the extent they do not conflict with the provisions of this subpart, the "Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges" established by the Secretary at 29 CFR part 18 shall apply to administrative proceedings under this subpart.

§ 801.59 Service and computation of time.

- (a) Service of documents under this subpart shall be made by personal service to the individual, officer of a corporation, or attorney of record or by mailing the determination to the last known address of the individual, officer, or attorney. If done by certified mail, service is complete upon mailing. If done by regular mail, service is complete upon receipt by addressee.
- (b) Two (2) copies of all pleadings and other documents required for any administrative proceeding provided by this part shall be served on the attorneys for the Department of Labor. One copy shall be served on the Associate Solicitor, Division of Fair Labor Standards, Office of the Solicitor, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210, and one copy on the Attorney representing the Department in the proceeding.
- (c) Time will be computed beginning with the day following the action and includes the last day of the period unless it is a Saturday, Sunday, or federally-observed holiday, in which case

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the time period includes the next business day.

(d) When a request for hearing is served by mail, five (5) days shall be added to the prescribed period during which the party has the right to request a hearing on the determination.

§ 801.60 Commencement of proceeding.

Each administrative proceeding permitted under the Act and these regulations shall be commenced upon receipt of a timely request for hearing filed in accordance with § 801.53 of this part.

§ 801.61 Designation of record.

(a) Each administrative proceeding instituted under the Act and this part shall be identified of record by a number preceded by the year and the letters "EPPA".

(b) The number, letter, and designation assigned to each such proceeding shall be clearly displayed on each pleading, motion, brief, or other formal document filed and docketed of record.

§ 801.62 Caption of proceeding.

(a) Each administrative proceeding instituted under the Act and this part shall be captioned in the name of the person requesting such hearing, and shall be styled as follows:

In Matter of _____, Respondent.

(b) For the purposes of administrative proceedings under the Act and this part the "Secretary of Labor" shall be identified as plaintiff and the person requesting such hearing shall be named as respondent.

REFERRAL FOR HEARING

§ 801.63 Referral to Administrative Law Judge.

(a) Upon receipt of a timely request for a hearing filed pursuant to and in accordance with § 801.53 of this part, the Administrator, by the Associate Solicitor for the Division of Fair Labor Standards or by the Regional Solicitor for the Region in which the action arose, shall by Order of Reference, promptly refer a copy of the notice of administrative determination complained of, and the original or a duplicate copy of the request for hearing

signed by the person requesting such hearing or the authorized representative of such person, to the Chief Administrative Law Judge, for a determination in an administrative proceeding as provided herein. The notice of administrative determination and request for hearing shall be filed of record in the Office of the Chief Administrative Law Judge and shall, respectively, be given the effect of a complaint and answer thereto for purposes of the administrative proceeding, subject to any amendment that may be permitted under this part.

(b) A copy of the Order of Reference, together with a copy of this part, shall be served by counsel for the Secretary upon the person requesting the hearing, in the manner provided in 29 CFR 18.3.

§ 801.64 Notice of docketing.

The Chief Administrative Law Judge shall promptly notify the parties of the docketing of each matter.

PROCEDURES BEFORE ADMINISTRATIVE LAW JUDGE

§ 801.65 Appearances; representation of the Department of Labor.

The Associate Solicitor, Division of Fair Labor Standards, or Regional Solicitor shall represent the Department in any proceeding under this part.

§ 801.66 Consent findings and order.

(a) *General.* At any time after the commencement of a proceeding under this part, but prior to the reception of evidence in any such proceeding, a party may move to defer the receipt of any evidence for a reasonable time to permit negotiation of an agreement containing consent findings and an order disposing of the whole or any part of the proceeding. The allowance of such deferment and the duration thereof shall be at the discretion of the Administrative Law Judge, after consideration of the nature of the proceeding, the requirements of the public interest, the representations of the parties, and the probability of an agreement being reached which will result in a just disposition of the issues involved.

(b) *Content.* Any agreement containing consent findings and an order disposing of a proceeding or any part thereof shall also provide:

(1) That the order shall have the same force and effect as an order made after full hearing;

(2) That the entire record on which any order may be based shall consist solely of the notice of administrative determination (or amended notice, if one is filed), and the agreement;

(3) A waiver of any further procedural steps before the Administrative Law Judge; and

(4) A waiver of any right to challenge or contest the validity of the findings and order entered into, in accordance with the agreement.

(c) *Submission.* On or before the expiration of the time granted for negotiations, the parties or their authorized representatives or their counsel may:

(1) Submit the proposed agreement for consideration by the Administrative Law Judge; or

(2) Inform the Administrative Law Judge that agreement cannot be reached.

(d) *Disposition.* In the event an agreement containing consent findings and an order is submitted within the time allowed therefor, the Administrative Law Judge, within thirty (30) days thereafter, shall, if satisfied with its form and substance, accept such agreement by issuing a decision based upon the agreed findings.

§ 801.67 Decision and Order of Administrative Law Judge.

(a) The Administrative Law Judge shall prepare, as promptly as practicable after the expiration of the time set for filing proposed findings and related papers, a decision on the issues referred by the Secretary.

(b) The decision of the Administrative Law Judge shall be limited to a determination whether the respondent has violated the Act or these regulations and the appropriateness of the remedy or remedies imposed by the Secretary. The Administrative Law Judge shall not render determinations on the legality of a regulatory provision or the constitutionality of a statutory provision.

(c) The decision of the Administrative Law Judge, for purposes of the Equal Access to Justice Act (5 U.S.C. 504), shall be limited to determinations of attorney fees and/or other litigation expenses in adversary proceedings requested pursuant to § 801.53 of this part which involve the imposition of a civil money penalty assessed for a violation of the Act or this part.

(d) The decision of the Administrative Law Judge shall include a statement of findings and conclusions, with reasons and basis therefor, upon each material issue presented on the record. The decision shall also include an appropriate order which may be to affirm, deny, reverse, or modify, in whole or in part, the determination of the Secretary. The reason or reasons for such order shall be stated in the decision.

(e) The Administrative Law Judge shall serve copies of the decision on each of the parties.

(f) If any party desires review of the decision of the Administrative Law Judge, a petition for issuance of a Notice of Intent shall be filed in accordance with § 801.69 of this subpart.

(g) The decision of the Administrative Law Judge shall constitute the final order of the Secretary unless the Secretary, pursuant to § 801.70 of this subpart issues a Notice of Intent to Modify or Vacate the Decision and Order.

[56 FR 9064, Mar. 4, 1991; 56 FR 14469, Apr. 10, 1991]

MODIFICATION OR VACATION OF DECISION AND ORDER OF ADMINISTRATIVE LAW JUDGE

§ 801.68 Authority of the Secretary.

(a) The Secretary may modify or vacate the Decision and Order of the Administrative Law Judge whenever the Secretary concludes that the Decision and Order:

(1) Is inconsistent with a policy or precedent established by the Department of Labor;

(2) Encompasses determinations not within the scope of the authority of the Administrative Law Judge;

(3) Awards attorney fees and/or other litigation expenses pursuant to the

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Equal Access to Justice Act which are unjustified or excessive; or

(4) Otherwise warrants modifying or vacating.

(b) The Secretary may modify or vacate a finding of fact only where the Secretary determines that the finding is clearly erroneous.

§ 801.69 Procedures for initiating review.

(a) Within twenty (20) days after the date of the decision of the Administrative Law Judge, the respondent, the Administrator, or any other party desiring review thereof, may file with the Secretary an original and two copies of a petition for issuance of a Notice of Intent as described under § 801.70. The petition shall be in writing and shall contain a concise and plain statement specifying the grounds on which review is sought. A copy of the Decision and Order of the Administrative Law Judge shall be attached to the petition.

(b) Copies of the petition shall be served upon all parties to the proceeding and on the Chief Administrative Law Judge.

[56 FR 9064, Mar. 4, 1991; 56 FR 14469, Apr. 10, 1991]

§ 801.70 Implementation by the Secretary.

(a) Review of the Decision and Order by the Secretary shall not be a matter of right but of the sound discretion of the Secretary. At any time within 30 days after the issuance of the Decision and Order of the Administrative Law Judge the Secretary may, upon the Secretary's own motion or upon the acceptance of a party's petition, issue a Notice of Intent to modify or vacate the Decision and Order in question.

(b) The Notice of Intent to Modify or Vacate a Decision and Order shall specify the issue or issues to be considered, the form in which submission shall be made (i.e., briefs, oral argument, etc.), and the time within which such presentation shall be submitted. The Secretary shall closely limit the time within which the briefs must be filed or oral presentations made, so as to avoid unreasonable delay.

(c) The Notice of Intent shall be issued within thirty (30) days after the

date of the Decision and Order in question.

(d) Service of the Notice of Intent shall be made upon each party to the proceeding, and upon the Chief Administrative Law Judge, in person or by certified mail.

§ 801.71 Filing and service.

(a) Filing. All documents submitted to the Secretary shall be filed with the Secretary of Labor, U.S. Department of Labor, Washington, DC 20210.

(b) Number of copies. An original and two copies of all documents shall be filed.

(c) Computation of time for delivery by mail. Documents are not deemed filed with the Secretary until actually received by the Secretary. All documents, including documents filed by mail, must be received by the Secretary either on or before the due date. No additional time shall be added where service of a document requiring action within a prescribed time thereafter was made by mail.

(d) Manner and proof of service. A copy of all documents filed with the Secretary shall be served upon all other parties involved in the proceeding. Service under this section shall be by personal delivery or by mail. Service by mail is deemed effected at the time of mailing to the last known address.

[56 FR 9064, Mar. 4, 1991; 56 FR 14469, Apr. 10, 1991]

§ 801.72 Responsibility of the Office of Administrative Law Judges.

Upon receipt of the Secretary's Notice of Intent to Modify or Vacate the Decision and Order of an Administrative Law Judge, the Chief Administrative Law Judge shall, within fifteen (15) days, forward a copy of the complete hearing record to the Secretary.

§ 801.73 Final decision of the Secretary.

The Secretary's final Decision and Order shall be served upon all parties and the Chief Administrative Law Judge.

RECORD

§ 801.74 Retention of official record.

The official record of every completed administrative hearing provided by this part shall be maintained and filed under the custody and control of the Chief Administrative Law Judge.

§ 801.75 Certification of official record.

Upon receipt of timely notice of appeal to a United States District Court of a Decision and Order issued under this part, the Chief Administrative Law Judge shall promptly certify and file with the appropriate United States District Court, a full, true, and correct copy of the entire record, including the transcript of proceedings.

APPENDIX A TO PART 801—NOTICE TO EXAMINEE

Section 8(b) of the Employee Polygraph Protection Act, and Department of Labor regulations (29 CFR 801.22, 801.23, 801.24, and 801.25) require that you be given the following information before taking a polygraph examination:

1. (a) The polygraph examination area [does] [does not] contain a two-way mirror, a camera, or other device through which you may be observed.

(b) Another device, such as those used in conversation or recording, [will] [will not] be used during the examination.

(c) Both you and the employer have the right, with the other's knowledge, to record electronically the entire examination.

2. (a) You have the right to terminate the test at any time.

(b) You have the right, and will be given the opportunity, to review all questions to be asked during the test.

(c) You may not be asked questions in a manner which degrades, or needlessly intrudes.

(d) You may not be asked any questions concerning: Religious beliefs or opinions; beliefs regarding racial matters; political beliefs or affiliations; matters relating to sexual preference or behavior; beliefs, affiliations, opinions, or lawful activities regarding unions or labor organizations.

(e) The test may not be conducted if there is sufficient written evidence by a physician that you are suffering from a medical or psychological condition or undergoing treatment that might cause abnormal responses during the examination.

(f) You have the right to consult with legal counsel or other representative before each phase of the test, although the legal counsel or other representative may be excluded

from the room where the test is administered during the actual testing phase.

3. (a) The test is not and cannot be required as a condition of employment.

(b) The employer may not discharge, dismiss, discipline, deny employment or promotion, or otherwise discriminate against you based on the analysis of a polygraph test, or based on your refusal to take such a test without additional evidence which would support such action.

(c)(1) In connection with an ongoing investigation, the additional evidence required for an employer to take adverse action against you, including termination, may be (A) evidence that you had access to the property that is the subject of the investigation, together with (B) the evidence supporting the employer's reasonable suspicion that you were involved in the incident or activity under investigation.

(2) Any statement made by you before or during the test may serve as additional supporting evidence for an adverse employment action, as described in 3(b) above, and any admission of criminal conduct by you may be transmitted to an appropriate government law enforcement agency.

4. (a) Information acquired from a polygraph test may be disclosed by the examiner or by the employer only:

(1) To you or any other person specifically designated in writing by you to receive such information;

(2) To the employer that requested the test;

(3) To a court, governmental agency, arbitrator, or mediator that obtains a court order;

(4) To a U.S. Department of Labor official when specifically designated in writing by you to receive such information.

(b) Information acquired from a polygraph test may be disclosed by the employer to an appropriate governmental agency without a court order where, and only insofar as, the information disclosed is an admission of criminal conduct.

5. If any of your rights or protections under the law are violated, you have the right to file a complaint with the Wage and Hour Division of the U.S. Department of Labor, or to take action in court against the employer. Employers who violate this law are liable to the affected examinee, who may recover such legal or equitable relief as may be appropriate, including, but not limited to, employment, reinstatement, and promotion, payment of lost wages and benefits, and reasonable costs, including attorney's fees. The Secretary of Labor may also bring action to restrain violations of the Act, or may assess civil money penalties against the employer.

6. Your rights under the Act may not be waived, either voluntarily or involuntarily, by contract or otherwise, except as part of a written settlement to a pending action or

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complaint under the Act, and agreed to and signed by the parties.

I acknowledge that I have received a copy of the above notice, and that it has been read to me.

(Date)

(Signature)

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