

technical assistance to employers, labor organizations, and employment agencies to aid in effectuating the purposes of this chapter; and

(3) make investigations and inspections and require the keeping of records necessary or appropriate for the administration of this chapter.

(b) Subpoena authority

For the purpose of any hearing or investigation under this chapter, the Secretary shall have the authority contained in sections 49 and 50 of title 15.

(Pub. L. 100-347, § 5, June 27, 1988, 102 Stat. 647.)

§ 2005. Enforcement provisions

(a) Civil penalties

(1) In general

Subject to paragraph (2), any employer who violates any provision of this chapter may be assessed a civil penalty of not more than \$10,000.

(2) Determination of amount

In determining the amount of any penalty under paragraph (1), the Secretary shall take into account the previous record of the person in terms of compliance with this chapter and the gravity of the violation.

(3) Collection

Any civil penalty assessed under this subsection shall be collected in the same manner as is required by subsections (b) through (e) of section 1853 of this title with respect to civil penalties assessed under subsection (a) of such section.

(b) Injunctive actions by Secretary

The Secretary may bring an action under this section to restrain violations of this chapter. The Solicitor of Labor may appear for and represent the Secretary in any litigation brought under this chapter. In any action brought under this section, the district courts of the United States shall have jurisdiction, for cause shown, to issue temporary or permanent restraining orders and injunctions to require compliance with this chapter, 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.

(c) Private civil actions

(1) Liability

An employer who violates this chapter shall be liable to the employee or prospective employee affected by such violation. Such employer shall be liable 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) Court

An action to recover the liability prescribed in paragraph (1) 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 em-

ployee, prospective employee, and other employees or prospective employees similarly situated. No such action may be commenced more than 3 years after the date of the alleged violation.

(3) Costs

The court, in its discretion, may allow the prevailing party (other than the United States) reasonable costs, including attorney's fees.

(d) Waiver of rights prohibited

The rights and procedures provided by this chapter may not be waived by contract or otherwise, unless such waiver is part of a written settlement agreed to and signed by the parties to the pending action or complaint under this chapter.

(Pub. L. 100-347, § 6, June 27, 1988, 102 Stat. 647.)

§ 2006. Exemptions

(a) No application to governmental employers

This chapter shall not apply with respect to the United States Government, any State or local government, or any political subdivision of a State or local government.

(b) National defense and security exemption

(1) National defense

Nothing in this chapter shall be construed to prohibit the administration, by the Federal Government, in the performance of any counterintelligence function, of any lie detector test to—

(A) any expert or consultant under contract to the Department of Defense or any employee of any contractor of such Department; or

(B) any expert or consultant under contract with the Department of Energy in connection with the atomic energy defense activities of such Department or any employee of any contractor of such Department in connection with such activities.

(2) Security

Nothing in this chapter shall be construed to prohibit the administration, by the Federal Government, in the performance of any intelligence or counterintelligence function, of any lie detector test to—

(A)(i) any individual employed by, assigned to, or detailed to, the National Security Agency, the Defense Intelligence Agency, the National Geospatial-Intelligence Agency, or the Central Intelligence Agency,

(ii) any expert or consultant under contract to any such agency,

(iii) any employee of a contractor to any such agency,

(iv) any individual applying for a position in any such agency, or

(v) any individual assigned to a space where sensitive cryptologic information is produced, processed, or stored for any such agency; or

(B) any expert, or consultant (or employee of such expert or consultant) under contract with any Federal Government department, agency, or program whose duties involve ac-

cess 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).

(c) FBI contractors exemption

Nothing in this chapter shall be construed to prohibit the administration, by the Federal Government, in the performance of any counter-intelligence function, of any lie detector test to an 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 the contract with such Bureau.

(d) Limited exemption for ongoing investigations

Subject to sections 2007 and 2009 of this title, this chapter shall not prohibit an employer from requesting an employee to submit to a polygraph test if—

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

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

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

(4) the employer executes a statement, provided to the examinee before the test, that—

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

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

(C) is retained by the employer for at least 3 years, and

(D) contains at a minimum—

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

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

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

(e) Exemption for security services

(1) In general

Subject to paragraph (2) and sections 2007 and 2009 of this title, this chapter shall not prohibit the use of polygraph tests on prospective employees by any private employer whose primary business purpose consists of providing armored car personnel, personnel engaged in the design, installation, and maintenance of security alarm systems, or other uniformed or plainclothes security personnel and whose function includes protection of—

(A) 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, as determined under rules

and regulations issued by the Secretary within 90 days after June 27, 1988, including—

(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

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

(2) Access

The exemption provided under this subsection shall not apply if the test is administered to a prospective employee who would not be employed to protect facilities, materials, operations, or assets referred to in paragraph (1).

(f) Exemption for drug security, drug theft, or drug diversion investigations

(1) In general

Subject to paragraph (2) and sections 2007 and 2009 of this title, this chapter shall not prohibit the use of a polygraph test by any employer authorized to manufacture, distribute, or dispense a controlled substance listed in schedule I, II, III, or IV of section 812 of title 21.

(2) Access

The exemption provided under this subsection shall apply—

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

(B) in the case of a test administered to a current employee, if—

(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.

(Pub. L. 100-347, §7, June 27, 1988, 102 Stat. 648; Pub. L. 103-359, title V, §501(m), Oct. 14, 1994, 108 Stat. 3430; Pub. L. 104-201, div. A, title XI, §1122(b)(3), Sept. 23, 1996, 110 Stat. 2687; Pub. L. 110-417, [div. A], title IX, §931(b)(3), Oct. 14, 2008, 122 Stat. 4575.)

REFERENCES IN TEXT

Executive Order 12356, referred to in subsec. (b)(2)(B), was Ex. Ord. No. 12356, Apr. 2, 1982, 47 F.R. 14874, 15557, which was formerly set out as a note under section 435 (now section 3161) of Title 50, War and National Defense, and was revoked by Ex. Ord. No. 12958, §6.1(d), Apr. 17, 1995, 60 F.R. 19843. For provisions relating to special access programs, see section 4.3 of Ex. Ord. No. 13526, set out as a note under section 3161 of Title 50.

AMENDMENTS

2008—Subsec. (b)(2)(A)(i). Pub. L. 110-417 substituted “National Geospatial-Intelligence Agency” for “National Imagery and Mapping Agency”.

1996—Subsec. (b)(2)(A)(i). Pub. L. 104-201 substituted “National Imagery and Mapping Agency” for “Central Imagery Office”.

1994—Subsec. (b)(2)(A)(i). Pub. L. 103-359 inserted “the Central Imagery Office,” after “Defense Intelligence Agency.”

EFFECTIVE DATE OF 1996 AMENDMENT

Amendment by Pub. L. 104-201 effective Oct. 1, 1996, see section 1124 of Pub. L. 104-201, set out as a note under section 193 of Title 10, Armed Forces.

§ 2007. Restrictions on use of exemptions

(a) Test as basis for adverse employment action

(1) Under ongoing investigations exemption

Except as provided in paragraph (2), the exemption under subsection (d) of section 2006 of this title shall not apply if an employee is discharged, disciplined, denied employment or promotion, or otherwise discriminated against in any manner on the basis of the analysis of a polygraph test chart or the refusal to take a polygraph test, without additional supporting evidence. The evidence required by such subsection may serve as additional supporting evidence.

(2) Under other exemptions

In the case of an exemption described in subsection (e) or (f) of such section, the exemption shall not apply if the results of an analysis of a polygraph test chart are used, or the refusal to take a polygraph test is used, as the sole basis upon which an adverse employment action described in paragraph (1) is taken against an employee or prospective employee.

(b) Rights of examinee

The exemptions provided under subsections (d), (e), and (f) of section 2006 of this title shall not apply unless the requirements described in the following paragraphs are met:

(1) All phases

Throughout all phases of the test—

(A) the examinee shall be permitted to terminate the test at any time;

(B) the examinee is not asked questions in a manner designed to degrade, or needlessly intrude on, such examinee;

(C) the examinee is not asked any question concerning—

- (i) religious beliefs or affiliations,
- (ii) beliefs or opinions regarding racial matters,
- (iii) political beliefs or affiliations,
- (iv) any matter relating to sexual behavior; and
- (v) beliefs, affiliations, opinions, or lawful activities regarding unions or labor organizations; and

(D) the examiner does not conduct the test if there is sufficient written evidence by a physician that the examinee is suffering from a medical or psychological condition or undergoing treatment that might cause abnormal responses during the actual testing phase.

(2) Pretest phase

During the pretest phase, the prospective examinee—

(A) is provided with reasonable written notice of the date, time, and location of the test, and of such examinee’s right to obtain and consult with legal counsel or an employee representative before each phase of the test;

(B) is informed in writing of the nature and characteristics of the tests and of the instruments involved;

(C) is informed, in writing—

(i) whether the testing area contains a two-way mirror, a camera, or any other device through which the test can be observed,

(ii) whether any other device, including any device for recording or monitoring the test, will be used, or

(iii) that the employer or the examinee may (with mutual knowledge) make a recording of the test;

(D) is read and signs a written notice informing such examinee—

(i) that the examinee cannot be required to take the test as a condition of employment,

(ii) that any statement made during the test may constitute additional supporting evidence for the purposes of an adverse employment action described in subsection (a) of this section,

(iii) of the limitations imposed under this section,

(iv) of the legal rights and remedies available to the examinee if the polygraph test is not conducted in accordance with this chapter, and

(v) of the legal rights and remedies of the employer under this chapter (including the rights of the employer under section 2008(c)(2) of this title); and

(E) is provided an opportunity to review all questions to be asked during the test and is informed of the right to terminate the test at any time.

(3) Actual testing phase

During the actual testing phase, the examiner does not ask such examinee any question relevant during the test that was not presented in writing for review to such examinee before the test.

(4) Post-test phase

Before any adverse employment action, the employer shall—

(A) further interview the examinee on the basis of the results of the test; and

(B) provide the examinee with—

(i) a written copy of any opinion or conclusion rendered as a result of the test, and

(ii) a copy of the questions asked during the test along with the corresponding charted responses.

(5) Maximum number and minimum duration of tests

The examiner shall not conduct and complete more than five polygraph tests on a calendar day on which the test is given, and shall not conduct any such test for less than a 90-minute duration.