Specific Incident Polygraph Testing under the Employee Polygraph Protection Act of 1988

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UNDER THE EMPLOYEE POLYGRAPH
PROTECTION ACT OF 1988

Abstract: The Employee Polygraph Protection Act of 1988 was enacted to protect private individuals from unjust termination or denial of job opportunities resulting from unwarranted polygraph tests. The Act, however, allows private employers to continue using polygraphs as part of “ongoing investigations” of employee misconduct. This Comment examines the ambiguous language of this exemption that courts will encounter when determining whether employers have violated the Act. The Comment proposes that, unless legislative history or federal regulations indicate otherwise, ambiguities in the specific incident exemption should be broadly construed to avoid employer liability.

The Employee Polygraph Protection Act (“EPPA”) prohibits employers from requiring or requesting that any employee or job applicant take a lie detector test.1 The Act was effective December 27, 1988, and addresses Congressional concerns that individuals were being unjustly terminated or denied employment because of employers’ abuses of lie detector tests.2 However, the Act completely exempts governmental employers from the prohibition, and under certain circumstances also exempts private employers.3

This Comment examines ambiguities that may arise under the exemption in the EPPA that allows private employers to administer polygraph tests as part of ongoing investigations. The Comment first discusses polygraph testing techniques and the empirical data indicating that polygraph tests are only valid when used to investigate specific incidents. Second, the Comment discusses the need for the legislation that arose from widespread abuse of polygraphs by employers and the inadequate legal remedies available to employees. Third, after explaining the general provisions of the Act, the Comment clarifies some specific ambiguities within the “ongoing investigation exemption”4 by referring to legislative history and agency regulations. Finally, after examining Congress’ intentions and the impact of various constructions on employers and employees, the Comment suggests that any other ambiguities should be resolved in favor of employers who make a good faith effort to comply with the Act.

3. See infra notes 42-49 and accompanying text for a full discussion of the exemptions.
4. This exemption provides that:
I. BACKGROUND

A. The Polygraph and Its Use

The polygraph is one of several "lie detector" devices, but is the only one private employers may utilize under the EPPA. The scientific principle behind polygraphs is that lying induces anxiety, which causes variations in the skin's electrical conductivity, as measured by perspiration, as well as changes in blood pressure and respiratory patterns. The changes are measured and recorded by a pen register onto a chart which is interpreted by an examiner.

In recent years, the use of polygraphs has increased dramatically. Immediately before the enactment of the EPPA more than two million tests were administered each year, over ninety percent of them by private employers. Private employers used polygraphs in three ways. Approximately seventy percent of the tests given by private employers were preemployment tests designed to identify job applicants with dishonest tendencies. Roughly fifteen percent of the tests were postemployment screening tests of randomly selected current employees, and fifteen percent were given to current employees in connection with investigations of specific losses resulting from employee theft or other misconduct.

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5. Lie detector is defined by the EPPA to include deceptographs, voice stress analyzers, psychological stress evaluators, or any similar device used to diagnose honesty or dishonesty. \textit{Id.} § 2(3), 102 Stat. at 646.


8. The number of polygraph tests given has tripled in the last ten years. \textit{H.R. Rep. No. 208, 100th Cong., 1st Sess. 3} (1987) [hereinafter \textit{HOUSE REPORT}].


10. \textit{HOUSE REPORT}, supra note 8, at 3.

11. \textit{SENATE REPORT}, supra note 2, at 46.

12. \textit{Id.}
The accuracy of polygraph tests varies depending on the questioning technique used. One technique, the relevant/irrelevant ("R/I") technique, is used for preemployment and random postemployment screening tests. A different technique, the control question ("CQ") technique, is used for specific incident testing. Psychologists have recognized many problems with the R/I technique and generally place little confidence in it. This lack of confidence is supported by the Office of Technology Assessment's ("OTA") finding that no scientific field evidence justifies the use of polygraphs to screen job applicants or randomly screen employees. Thus, it is not surprising that few scientists support the use of polygraphs in screening situations. The CQ technique was developed in response to the problematic R/I technique and has been studied extensively. The OTA Report, which Congress relied upon when drafting the EPPA, concluded that polygraph examiners can detect deception at a rate better than chance when the CQ technique is used to investigate specific incidents. For

13. OFFICE OF TECHNOLOGY ASSESSMENT, SCIENTIFIC VALIDITY OF POLYGRAPH TESTING—A RESEARCH REVIEW AND EVALUATION 25 (1983) [hereinafter OTA STUDY]. One should not attempt to arrive at a single, simple opinion of the validity of polygraphs. Id. at 4.

14. Relevant questions concern past behavior patterns an employer considers important to the hiring decision. These questions are interspersed with irrelevant questions about which the subject would have no motive to lie. Deceptive subjects are assumed to have a greater reaction, as measured by the polygraph instruments, to the relevant questions than to the irrelevant questions. The assumption is that truthful subjects should have an equal response to all questions because they are not lying and have nothing to fear. Id. at 17–18.

15. The relevant questions under the CQ technique address specific incidents. Unlike the R/I technique, this technique also includes deliberately vague control questions which involve deviant acts almost everyone may have committed at some time. It is assumed that almost all subjects will display anxiety when answering these control questions. Examiners then compare subjects' reactions to the relevant questions with their reactions to the control questions. If the reaction is stronger to the relevant questions than to the control questions, the subject is diagnosed as deceptive. Id. at 19.

16. Id. at 17. Because the intent of the various questions is transparent, the relevant questions are likely to be arousing for truthful as well as for deceptive subjects. Also, because the questions are generally not reviewed with the subject before the exam under the R/I method, subjects may be aroused due to surprise or misunderstanding. Finally, subjects' reactions are more likely to be reduced by drugs or personality quirks with the R/I technique than with other techniques. Id.; see also Saxe, Dougherty & Cross, The Validity of Polygraph Testing—Scientific Analysis and Public Controversy, 40 AM. PSYCHOLOGIST 355, 357 (1985).

17. OTA STUDY, supra note 13, at 58. Field studies investigate the use of actual polygraph examinations and constitute the most direct evidence for polygraph test validity. Id. at 47.

18. Id. at 19.

19. Id. at 97. The results of these studies greatly differ due both to methodological variations among studies and to variations in factors such as examiner training, orientation, and experience. Id. at 96.

20. See SENATE REPORT, supra note 2, at 43.

21. OTA STUDY, supra note 13, at 97. The OTA identified six prior reviews of such research, with the validity ranging from 64% to 98% correct detection of guilty subjects. The OTA also
this reason, although significant error rates are possible,22 many employers consider the polygraph useful as an investigative tool.23

B. The Need for Federal Legislation

Widespread abuse of polygraphs by employers, coupled with the lack of adequate legal remedies for job applicants and employees, finally compelled Congress to adopt the EPPA and provide a uniform national standard.24 The primary abuse was that roughly eighty-five percent of the polygraph tests given were screening tests which have no proven validity.25 Other problems resulted from inadequately trained or inexperienced examiners, tests that were too brief, and irrelevant but intrusive personal questions.

Despite these problems, many private employees lacked an adequate legal remedy prior to the enactment of the EPPA.26 Under the federal Constitution and most state constitutions, state action must be involved before due process or privacy provisions apply.27 Constitutional provisions therefore provide little protection for private employees. State laws protect some private employees from polygraph abuse, but not others.28 A few states prohibit private employers from requir-

22. It has been estimated that at least 400,000 honest workers were incorrectly labeled as deceptive each year prior to the EPPA. SENATE REPORT, supra note 2, at 41. The EPPA will eliminate many of these incorrect determinations by eliminating the large majority of polygraph tests. Because there still will be false positives numbering in the thousands, it might have been wise for Congress to ban polygraphs completely. This Comment, however, is limited to interpreting the EPPA as enacted.

23. For instance, the National Restaurant Association stated that it would support the legislation only if specific incident polygraph testing were allowed. 134 CONG. REC. S1797 (daily ed. Mar. 3, 1988).

24. See SENATE REPORT, supra note 2, at 46. Almost fifty bills relating to polygraph testing were introduced from the Ninety-third through the Ninety-ninth Congresses, but none passed. Id. at 44.

25. See supra text accompanying notes 11–12.

26. See SENATE REPORT, supra note 2, at 46.

27. See L. Tribe, AMERICAN CONSTITUTIONAL LAW § 18-1, at 1688–91 (2d ed. 1988); see also, State v. Long, 216 Mont. 65, 700 P.2d 153, 156 (1985) (privacy protection of Montana state constitution is available only if state action is involved and noting same requirement under every other state constitution).

28. This lack of a uniform standard was confusing to employers as well as employees. Thus, one reason for the Act was to provide a uniform national standard to clarify the law and protect employers from the growing number of suits related to polygraphs. HOUSE REPORT, supra note 8, at 6.
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...ing or requesting employees to submit to polygraph tests.29 Other states prohibit compulsory tests, but allow employers to request, and perhaps subtly pressure, employees to submit to tests.30 In the remaining states, employers are not prohibited from requesting or requiring employees to take polygraph tests. These states either have no polygraph laws,31 or merely regulate examiner conduct.

State laws that do restrict polygraphs often provide employees with inadequate protection. The absence of a uniform national standard allowed many employers to circumvent state restrictions by testing employees in neighboring states.32 Also, state laws are often unenforced and many provide no private cause of action to employees.33 Therefore, federal legislation was needed to adequately protect private employees.

II. THE EMPLOYEE POLYGRAPH PROTECTION ACT

A. The General Scope of the EPPA

The EPPA generally prohibits preemployment and random postemployment screening tests, and regulates specific incident tests to eliminate the abuses caused by improper test administration.34 Therefore, in most instances employers are forbidden to require, ask, or cause any employee or applicant to take any form of lie detector test.35 This prohibition, however, is not absolute. The Act carves out exemptions from the prohibition for certain employers.36 These exemptions may not be utilized by some employers, however, because state laws and collective bargaining agreements that more comprehensively restrict employers from administering lie detector tests are not preempted by the Act.37

The Secretary of Labor is responsible for enforcing the Act38 and has issued interim final rules and regulations to enable employers and

31. Seven states, Colorado, Kansas, Missouri, New Hampshire, New York, Ohio, and Wyoming, have no laws regulating or restricting the use of polygraphs.
32. SENATE REPORT, supra note 2, at 43.
33. Id. at 46.
34. Id. at 39.
35. Employee Polygraph Protection Act § 3, 102 Stat. at 646-47.
36. See infra text accompanying notes 42-49 for a description of these exemptions. An employee may waive the rights provided by the EPPA only as part of a settlement of a complaint under the statute. Employee Polygraph Protection Act § 6(d), 102 Stat. at 648.
37. Employee Polygraph Protection Act § 10, 102 Stat. at 653.
38. See id. § 5, 102 Stat. at 647.
polygraph examiners to comply.\textsuperscript{39} Employers who fail to comply may be assessed civil penalties of up to $10,000 for each violation.\textsuperscript{40} The Act also gives employees a private right of action for legal and equitable remedies.\textsuperscript{41}

B. Exemptions from the General Prohibition of Lie Detector Testing

1. Governmental Employer/Federal Contractor Exemptions

Government employers at all levels, federal contractors who contract with private individuals for counterintelligence services, and Federal Bureau of Investigation contractors are completely exempted from the EPPA's prohibition.\textsuperscript{42} Government employers were exempted on the theory that their employees may invoke constitutional protection.\textsuperscript{43} Federal contractors were exempted because of the country's compelling interest in national security.\textsuperscript{44}

2. Private Employer Exemptions

The remaining exemptions allow private employers to use polygraphs if certain requirements are met.\textsuperscript{45} Two of these exemptions are aimed at particular industries. One allows employers who provide security services to protect valuables or public health and safety to request job applicants to submit to polygraph tests.\textsuperscript{46} The other allows employers who manufacture, distribute, or dispense controlled substances to request all job applicants who would have "direct

\textsuperscript{40} Employee Polygraph Protection Act § 6(a)(1), (3), 102 Stat. at 647. The court has discretion on the amount of the penalty depending on an employer's record and the degree of violation. \textit{Id.} § 6(a)(2), 102 Stat. at 647.
\textsuperscript{41} Id. § 6(c)(1), 102 Stat. at 648. Relief may include, but is not limited to, employment, reinstatement, promotion, lost wages and benefits, and attorney fees. \textit{Id.}
\textsuperscript{42} See \textit{id.} § 7(a)-(c), 102 Stat. at 648-49. These exemptions allow any form of lie detector test, not just polygraphs.
\textsuperscript{43} \textit{Senate Report, supra} note 2, at 47; see e.g., Texas State Employees Union v. Texas Dept of Mental Health & Mental Retardation, 746 S.W.2d 203 (Tex. 1987) (mandatory polygraph policy struck down for violating privacy provisions of the Texas Constitution).
\textsuperscript{44} \textit{Senate Report, supra} note 2, at 48.
\textsuperscript{45} Congress gave no rationale for the seemingly double standard that permits the government to use any form of lie detector while permitting private employers to use only polygraphs.
\textsuperscript{46} See Employee Polygraph Protection Act § 7(e), 102 Stat. at 649-50. The rationale for this exemption is very similar to the rationale for the governmental exemptions, as private security firms also fulfill public interest needs. See 133 \textit{Cong. Rec.} H9560-65 (daily ed. Nov. 4, 1987).
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access” to controlled substances to submit to a test.\textsuperscript{47} Under this latter exemption, employers may also test any current employees having “access” to controlled substances as part of an investigation of misconduct that resulted in, or will potentially result in, a loss or injury to the employer.\textsuperscript{48}

A third exemption, the ongoing investigation exemption, allows any private employer to request employees to submit to a polygraph test if four conditions are met: (1) the test is part of an ongoing investigation of an economic loss or injury to the employer’s business; (2) the employee had access to the property in question; (3) the employer has a reasonable suspicion that the employee was involved; and (4) the employer provides the employee with a written statement before the test.\textsuperscript{49}

3. Restrictions on Private Employer Exemptions

The EPPA restricts private employers’ ability to take adverse employment action against employees based on permissible polygraph tests. Neither the results of a test nor the refusal to take a test allowed under the security services or drug exemption may be the “sole basis” for adverse employment action.\textsuperscript{50} For a test allowed under the “ongoing investigation” exemption, no adverse employment action may be taken without “additional supporting evidence.”\textsuperscript{51}

\begin{itemize}

This exemption was granted because members of Congress believed that the inordinate amount of internal theft in this industry and the growing drug abuse problem in our society outweighed employees’ privacy needs. 133 CONG. REC. H9572-78 (daily ed. Nov. 4, 1987).

\item[48.] Employee Polygraph Protection Act § 7(f)(2)(B), 102 Stat. at 650. The higher standard of “direct access” requires the prospective applicant to have direct and constant involvement with the substances before a polygraph may be requested. 53 Fed. Reg. 41,501 (1988) (to be codified at 29 C.F.R. § 801). The “access” standard merely requires the current employee to have “infrequent, random, or opportunistic access.” \textit{Id.}

\item[49.] Employee Polygraph Protection Act § 7(d), 102 Stat. at 649; see \textit{supra} note 4 for the full text of this exemption. The regulations issued by the Department of Labor elaborate on these requirements and are essential to a full understanding of them. See 53 Fed. Reg. 41,494 (1988) (to be codified at 29 C.F.R. § 801).

\item[50.] Employee Polygraph Protection Act § 8(a)(2), 102 Stat. at 650–51. There must be at least one other basis for employment decisions in addition to the results of or the refusal to take a polygraph test. Other bases may be that the applicant has inadequate education or lacks the proper experience for the job. 53 Fed. Reg. 41,504 (1988) (to be codified at 29 C.F.R. § 801).

\item[51.] Employee Polygraph Protection Act § 8(a)(1), 102 Stat. at 650. Any confessions during a test or evidence required as a prerequisite to a test under this exemption may constitute the additional supporting evidence of employee guilt necessary for legal termination. 53 Fed. Reg. 41,504 (1988) (to be codified at 29 C.F.R. § 801). Information obtained from the test may be
The procedures for administering polygraph tests are also prescribed by the Act. Examinees have the right to terminate tests at any time, may not be asked irrelevant personal questions concerning religion, racial matters, politics, sexual behavior, or union activities, and must be informed of the legal ramifications of the test. Employers must fully inform examinees of the nature and circumstances of the test and provide them with an opportunity to review, before the test, all questions the examiner will ask. The test must be at least ninety minutes long, and must be given by an examiner who has conducted fewer than five tests that day. All examiners must be licensed by the state in which they operate if that state requires licensing, and must maintain a $50,000 bond or an equivalent amount of professional liability coverage.

III. INTERPRETING THE ONGOING INVESTIGATION EXEMPTION

The ongoing investigation exemption deserves close attention because it may enable any private employer to legally request a polygraph test. Congress, after weighing both employers’ and employees’ needs, decided to allow the use of polygraphs as investigative tools in connection with ongoing investigations of specific incidents. Three factors influenced this policy decision. First, employee theft is a major burden on American businesses. Second, members of Congress were persuaded by the evidence of the polygraph’s increased validity when disclosed only to the subject, the employer, or pursuant to a court order. Employee Polygraph Protection Act § 9, 102 Stat. at 652–53.

52. Employee Polygraph Protection Act § 8(b), 102 Stat. at 651–52.
53. For instance, employees must be informed that their statements may constitute the additional supporting evidence necessary for adverse employment action. Employees must also be informed of the legal rights and remedies available under the Act if the test is not legal. Id. § 8(b)(2)(D)(ii)–(v), 102 Stat. at 651.
54. Id. § 8(b)(2)(B), (E), 102 Stat. at 651–52.
55. Id. § 8(b)(2)(C)(i), 102 Stat. at 652.
56. Id. § 8(c)(1), 102 Stat. at 652. More stringent requirements for examiners, such as successful completion of an approved formal training course and a six month internship, were in the original Senate bill, but were not included in the final draft. See Senate Report, supra note 2, at 34.
57. See supra note 4 for the complete text of the exemption.
focused on specific incidents.\textsuperscript{59} Finally, Congress believed the Act contained ample regulatory measures to limit abuse of tests administered under the exemptions.\textsuperscript{60} Thus, Congress gave private employers permission to continue using polygraph tests as investigative tools and to deter employee theft.\textsuperscript{61}

Four of the elements of the ongoing investigation exemption are ambiguous. These elements are: (1) an “ongoing investigation”; (2) a specific “economic loss or injury”; (3) “access” by the employee; and (4) a “reasonable suspicion” of employee involvement.\textsuperscript{62} The EPPA does not define these elements. The regulations issued by the Department of Labor provide employers with some guidance\textsuperscript{63} but are not comprehensive enough to resolve all possible ambiguities.

The first part of this analysis will reveal some specific ambiguities in the elements of the ongoing investigation exemption, and resolve them by referring to the legislative history and the regulations. The second part of the analysis, by examining the purposes of the Act and the impact of various constructions, reveals why courts may want to construe any other ambiguities broadly in order to avoid employer liability.

\section*{A. Ambiguities in the Ongoing Investigation Exemption

\subsection*{1. Tests Must be Given as Part of Ongoing Investigations

The EPPA requires that every test administered under the ongoing investigation exemption be given “in connection with an ongoing investigation involving economic loss or injury to the employer's business.”\textsuperscript{64} Neither the Act nor the legislative history precisely defines an ongoing investigation. One Labor Department regulation, which finds support in the Senate Report, requires that investigations be of specific incidents or activities.\textsuperscript{65} Because this guideline prevents “continuous

\begin{footnotesize}
\textsuperscript{60} Senate Report, supra note 2, at 48; 133 Cong. Rec. H9580 (daily ed. Nov. 4, 1987); see also Employee Polygraph Protection Act § 8, 102 Stat. at 650-51.
\textsuperscript{61} Senate Report, supra note 2, at 46.
\textsuperscript{62} These four elements are contained in the first three provisions of the exemption. Once these elements are satisfied, employers must comply with the fourth provision by providing examinees with a written statement before testing them. See Employee Polygraph Protection Act § 7(d)(4), 102 Stat. at 649.
\textsuperscript{64} See supra note 4 (quoting the ongoing investigation exemption).
\end{footnotesize}
investigations, employers may not request polygraph tests merely because a shortage is discovered during regular inventory counts.  

Some factual situations, however, will fall somewhere between shortages discovered in regular inventory counts and immediately recognizable thefts of large-ticket items. If employers suspect petty thefts are occurring, but exact times when the items were taken cannot be pinpointed, they might set up special procedures to count inventory at shorter than normal intervals to increase the odds of detection. Neither the legislative history of the Act nor the regulations indicate whether this practice would meet the ongoing investigation element. Due to the general policy reasons discussed later in the analysis, however, courts should resolve this ambiguity in favor of employers and avoid imposing liability.

2. *Economic Loss or Injury*

The ongoing investigation exemption further requires that there be an "economic loss or injury to the employer's business." This element is more clearly stated than the others, but at least one ambiguity needs to be resolved: whether the employee's act must cause the employer to suffer an immediate loss or injury, or whether the

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67. See infra notes 98–115 and accompanying text.
68. Allowing polygraph testing under these circumstances will not decrease the reliability of the tests because the CQ technique still may be utilized and examinees still may be asked about specific incidents. See supra notes 15–23 and accompanying text for a full discussion of the CQ technique.
70. Two substantial limits inherent in the economic loss or injury element are indicated by the legislative history and the regulations. First, the loss or injury must be the result of an intentional wrongdoing. 53 Fed. Reg. 41,500 (1988) (to be codified at 29 C.F.R. § 801). Therefore, losses stemming from unintentional acts, such as automobile or workplace accidents, do not satisfy this element. Id.; see also CONFERENCE REPORT, supra note 69, at 12. Second, the Act also requires that the loss or injury be "to the employer's business." Employee Polygraph Protection Act § 7(d)(1), 102 Stat. at 649. The Administration made a plea to Congress to expand the ongoing investigation exemption to allow investigation of serious workplace problems that threaten not only material loss to employers, but also the health, safety, or well-being of other employees. 134 CONG. REC. S1797 (daily ed. Mar. 3, 1988). Congress, however, made no amendment to the Act in response to the plea. Therefore, although misconduct by employees against coworkers indirectly may cause losses to employers in the form of increased insurance premiums or higher turnover rates, such actions should not be found to satisfy this element.
employee's act must merely create the possibility of loss or injury to
the employer at some future date.

Nothing in the Act or the regulations requires employers to demon-
strate an immediate loss or injury. Some incidents of employee mis-
conduct should be vigorously investigated by employers even though
they may realize a short-term economic gain.\textsuperscript{71} For example, if a bro-
ker in an investment firm violates insider trading laws, the employer
may receive a short-term gain in the form of increased commissions.
The employer, however, also risks a loss resulting from liability for the
employee's actions\textsuperscript{72} or damage to the employer's reputation. In the
absence of a specific requirement that any loss be immediate, and
because employers are often in an excellent position to detect certain
white collar crimes committed by employees, courts should not inter-
pret this element to require proof of an immediate loss or injury to the
employer.

3. Access to the Property

The ongoing investigation exemption also requires that employees
have "access to the property that is the subject of the investiga-
tion"\textsuperscript{73} before testing is permissible. Although the term "access" is not
defined by the statute, legislative history and the regulations provide
some guidance.\textsuperscript{74} One regulation concerning the ongoing investigation
exemption defines access as "the opportunity...to cause, or to aid or
abet in causing, the specific economic loss or injury."\textsuperscript{75} Thus, direct
physical contact with the property by the employee is not a necessary
element of access.\textsuperscript{76}

An ambiguity left unresolved by the regulations is whether mere
physical opportunity to enter an area satisfies the access element, or
whether employees must also have authorization to enter the area.

\textsuperscript{71} Senate Report, supra note 2, at 48; Conference Report, supra note 69, at 12.
\textsuperscript{72} See Insider Trading and Security Fraud Enforcement Act of 1988, Pub. L. No. 100-704,
§ 21A(a)(3), 102 Stat. 4677, 4678. A similar instance would be if an employee steals a trade
secret from a competitor to impress his or her employer. Although the theft may result in a
short-term gain for the employer, the employee's illegal act still should meet the "injury"
requirement.

\textsuperscript{73} Employee Polygraph Protection Act § 7(d)(2), 102 Stat. at 649.
\textsuperscript{74} The term "access" also is used in the drug exemption. Prospective employees must have
"direct access," while current employees only must have "access." Id. § 7(f)(2)(A), (B), 102
Stat. at 650.

\textsuperscript{76} Id. For example, knowledge of the combination of a safe constitutes "access" because it
provides an opportunity to take the property contained in the safe. Access to inventory records
also meets the requirement because it enables one to alter inventory records, which may aid and
abet the actual thief. Id.
The regulation defining access under the ongoing investigation exemption indicates that physical opportunity alone, although not necessary, is sufficient to satisfy this element.\textsuperscript{77} The regulations, however, give examples indicating that the Department of Labor could interpret access more narrowly to also require employer authorization.\textsuperscript{78}

This latter interpretation is not supported by the legislative history. The conference committee, while discussing the "reasonable suspicion" element, stated that access alone does not give rise to a reasonable suspicion of employee misconduct.\textsuperscript{79} The committee went on to say, however, that the "unauthorized or unusual" nature of the access may be grounds for reasonable suspicion.\textsuperscript{80} The conference committee's statement strongly implies not only that access may exist without authorization, but also that access without authorization gives employers more justification to test an employee. Thus, testing should not be precluded simply because employees do not have authorized access to the property in question.

Interpreting the access element to require authorization would be unfair for two additional reasons. First, the authorization requirement is not explicitly stated as a rule, but is only implied in examples. If the Department of Labor intends to interpret access in this manner, it should expressly state this intention instead of forcing employers to guess how the term will be interpreted.\textsuperscript{81} Second, the Department's implied interpretation requiring authorization does not correspond to the ordinary meaning of access.\textsuperscript{82} Many judges have approved of the "meaning" criterion as a general standard for interpreting statutes.\textsuperscript{83} The Department's "opportunity to cause" definition of access given in

\textsuperscript{77} See id.

\textsuperscript{78} The regulation concerning the ongoing investigation exemption states as an example that "all employees working in or with authority to enter a warehouse storage area have 'access' to the property." \textit{Id.} (emphasis added). An example given in the regulations concerning the drug exemption provides an even stronger indication, stating that personnel whose duties do not permit or require entrance into an area do not have access. \textit{Id.} at 41,501.

\textsuperscript{79} \textit{CONFERENCE REPORT}, \textit{supra} note 69, at 13. For an explanation of the reasonable suspicion element, see \textit{infra} text accompanying notes 87-97.

\textsuperscript{80} \textit{CONFERENCE REPORT}, \textit{supra} note 69, at 13 (emphasis added). This language is also contained in the regulations. 53 Fed. Reg. 41,500 (1988) (to be codified at 29 C.F.R § 801).

\textsuperscript{81} This unfairness is compounded by the fact that the example most indicative that the Department may require authorization is in the regulations dealing with the drug exemption, and not in the regulations dealing with the ongoing investigation exemption. See \textit{supra} note 78 and accompanying text.

\textsuperscript{82} Something is "accessible" if it "can be got" or is "obtainable." \textit{WEBSTER'S NEW WORLD DICTIONARY} § (2d college ed. 1986).

\textsuperscript{83} See 2A \textit{SUTHERLAND STATUTORY CONSTRUCTION} § 45.07, at 29 (Singer 4th ed. 1984) [hereinafter \textit{SUTHERLAND}]. Statutory terms should be interpreted according to what the general public will understand them to mean. \textit{Id.} § 45.08, at 31.
the regulations meets this criterion because it corresponds with how the general public would ordinarily interpret the term. In contrast, the Department's examples indicate that employees who are not authorized to enter an area do not have access to the property within the area. This latter interpretation does not correspond to the ordinary meaning of access and therefore violates the "meaning" criterion.\textsuperscript{84} The Department's interpretation is also contrary to common sense, because dishonest employees are unlikely to be deterred by a lack of authorization if they have a physical opportunity to take the property in question.

Thus, employers should not be held to violate the Act for testing employees who have "opportunistic" but not "authorized" access. The legislative history contradicts the Department's interpretation of access, and employers could be subjected to severe monetary penalties simply because they could not sort out the Department's vague and conflicting examples.\textsuperscript{85} Courts should not be bound by an example that can only be found in a regulation unrelated to the ongoing investigation exemption.\textsuperscript{86}

4. \textit{Reasonable Suspicion}

A fourth element of the ongoing investigation exemption requires employers to have a "reasonable suspicion that the employee was involved" in the misconduct before polygraph testing is permissible.\textsuperscript{87} Although the legislative history does not reveal the purpose of this element, it no doubt is intended to prevent the unreasonable physical and psychological intrusions that result from random testing. When construing this element, courts will not be able to look to other federal

\textsuperscript{84} For example, if money is missing from an employer's safe, and the safe combination is found in the suspected employee's pocket, the employer surely will believe that the employee had "access" to the property despite the employee's lack of authorization.

\textsuperscript{85} See infra note 104 for a discussion of the possible damages.

\textsuperscript{86} Legislative regulations such as these have the force of law, State v. Department of Health & Human Servs., 670 F.2d 1262, 1281-82 (3d Cir. 1981), and courts may invalidate them only if they are patently arbitrary and capricious. United Mine Workers v. Kleppe, 561 F.2d 1258, 1263 (7th Cir. 1977). However, the authorization requirement is not stated as a regulation but is merely conveyed in an example to display the agency's interpretation of its own regulation. Although it is settled law that great deference is to be given to agency interpretations of their regulations, the primary rationale for this doctrine is to defer to an agency's expertise. Southern Mut. Help Ass'n v. Califano, 574 F.2d 518, 526 (D.C. Cir. 1977). Agency interpretations are given much less weight when they do not concern an issue particularly within the agency's field of expertise. \textit{Id}. As the Department of Labor has no special expertise to interpret the term "access," courts should not feel bound by the agency's example.

If courts believe that they are bound, the regulations should be changed or clarified by the Department to adequately notify employers how the term will be interpreted.

\textsuperscript{87} Employee Polygraph Protection Act § 7(d)(3), 102 Stat. at 649.
statutes because the term "reasonable suspicion" is not used in any other federal statute. Case law discussing the fourth amendment of the United States Constitution, however, could provide some guidance to the courts.

The fourth amendment generally precludes arrests or searches of citizens unless there is "probable cause" that would lead a reasonable person to believe that the suspect had committed a crime. Although courts have interpreted the term "reasonable grounds" in criminal statutes to be the equivalent of probable cause as used in the fourth amendment, it would be erroneous to similarly construe the reasonable suspicion element of the EPPA. Cases dealing with the fourth amendment have specifically used the term reasonable suspicion as a distinct and less demanding legal standard than probable cause.

Other indicia demonstrate that reasonable suspicion is distinguishable from probable cause. Although Congress has used the terms "probable cause" and "reasonable grounds" in other federal statutes, the EPPA is the only federal statute to use the term "reasonable suspicion." Therefore, it is logical to infer that reasonable suspicion was intended to mean something other than probable cause or reasonable grounds. A review of the EPPA's legislative history reveals a striking similarity between the definition of reasonable suspicion given by the conference committee and the definitions expressed in fourth amendment case law.

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The Senate Report also acknowledged that the EPPA offered less protection to employees than is given to criminal suspects by the fourth amendment.

88. See, e.g., Wong Sun v. United States, 371 U.S. 471, 479 (1963). The fourth amendment provides that "[t]he right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause . . . ." U.S. Const. amend. IV.


90. Probable cause is not an absolute requirement for a valid search. The fundamental command of the fourth amendment is that searches be "reasonable," and in some cases a warrant and probable cause are not required. Reasonableness is determined by balancing the interests of the parties, and in some circumstances searches may be based on reasonable suspicions that do not rise to the level of probable cause. New Jersey v. T.L.O., 469 U.S. 325, 340-41 (1985) (emphasis added) (school officials may search a student's purse if justified by reasonable suspicion, despite lack of probable cause).

91. The Conference Committee intended the terms to refer to "some observable, articulable basis in fact," Conference Report, supra note 69, at 13, and the Department of Labor adopted this definition in the regulations. 53 Fed. Reg. 41,500 (1988) (to be codified at 29 C.F.R. § 801). Case law has similarly defined the terms. E.g., United States v. Place, 462 U.S. 696, 702 (1983) ("reasonable, articulable suspicion, premised on objective facts"); Hunter v. Auger, 672 F.2d 668, 674 (8th Cir. 1982) ("specific objective facts and rational inferences").

92. See Senate Report, supra note 2, at 48-49.
Assuming that courts accept reasonable suspicion as a standard distinct from probable cause, they must still determine whether employers have satisfied this element. Some courts have interpreted the reasonable suspicion standard to be easily satisfied. The regulations, however, partially offset this interpretation by requiring employers to bear the burden of proving that a reasonable suspicion exists. Employers must also give employees a written statement of the basis for suspicion before conducting polygraph tests. The legislative history and the regulations provide examples of what may satisfy the reasonable suspicion element. Information from a coworker, the demeanor of the employee, and inconsistent statements by an employee are all grounds for reasonable suspicion. Mere access to the property in question does not constitute a sufficient basis for suspicion. Unusual circumstances surrounding the access, however, such as its unauthorized nature, may go towards proving reasonable suspicion. These examples indicate that proving reasonable suspicion was not intended to be a particularly onerous task for employers. Therefore, if employers have a clearly articulated reason to suspect an employee and can reduce it to writing, they should be found to have satisfied this element, even if their suspicion falls short of probable cause.

B. Ambiguities in the Ongoing Investigation Exemption Should Be Broadly Construed

Some ambiguities in the ongoing investigation exemption cannot be resolved by examining specific statements in the legislative history or the regulations. Therefore, courts may have to consider generalized arguments such as the legislative intent of the exemption, the impact a narrow or broad construction will have on employers and employees.

93. A police officer was found to have reasonable suspicion to stop a truck and investigate because the truck appeared to be heavily loaded down, was in an area known for drug trafficking, and the windows of the canopy were covered with heavy quilts rather than curtains. United States v. Sharpe, 470 U.S. 675, 683 (1985).
95. Employee Polygraph Protection Act § 7(d)(4), 102 Stat. at 649. Thus, inarticulable hunches should not constitute reasonable suspicion under the EPFA. As one court has eloquently stated, reasonable suspicion may not be the product of "mere whim, caprice, or idle curiosity." People v. Ingle, 36 N.Y.2d 413, 330 N.E.2d 39, 44, 369 N.Y.S.2d 67, 74 (1975).
96. 53 Fed. Reg. 41,500 (1988) (to be codified at 29 C.F.R. § 801); see also CONFERENCE REPORT, supra note 69, at 13.
98. One such instance is whether special inventory procedures satisfy the "ongoing investigation" element. See supra notes 64–68 and accompanying text.
and the effect a particular construction will have on the future use of the exemption.

1. A Broad Reading of the Ambiguous Prerequisites Most Effectively Harmonizes the Various Intentions of Congress

The primary goal of statutory construction is to ascertain and effectuate the intentions of the legislature. Congress' purpose when enacting the general prohibition on polygraphs undoubtedly was to protect employees' rights. Another reason for the prohibition was to protect employers from the growing number of lawsuits related to polygraph testing. If these were the only intentions of Congress, however, these intentions would have been best served by an absolute ban on all polygraph tests. But instead of implementing an absolute ban, Congress balanced employees' rights against employers' need to fight internal theft and determined that the ongoing investigation exemption was necessary to provide employers with a tool to fight this theft.

To prevent the imposition of liability on employers who in good faith attempt to comply with the EPPA, courts could broadly construe the ambiguities in the ongoing investigation exemption. Although a broad construction would impinge somewhat on the protection offered to employees under the Act, this impingement would be minimal in light of the fact that only a small portion of pre-EPPA polygraph tests were related to specific incidents. In contrast, a narrow construction of the ongoing investigation exemption could greatly frustrate the legislature's intent to provide employers with a tool to fight employee theft. The number of good faith violators of the Act would immediately increase with a narrow construction. As employers learn of these unintentional violations and the substantial damages incurred as...

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100. HOUSE REPORT, supra note 8, at 6, 8.
101. The Senate Report indicates that business users of the polygraph made a plausible argument that the threat of a polygraph test acts as a deterrent to employee theft and that the ongoing investigation exemption is meant to preserve this use of the test. See SENATE REPORT, supra note 2, at 46.
102. See supra notes 11–12 and accompanying text for statistics concerning the various uses of polygraph tests before the Act.
103. The number of good faith violators also may be increased because the employer has the burden of proving "reasonable suspicion," 53 Fed. Reg. 41,500 (1988) (to be codified at 29 C.F.R. § 801), and probably the other requirements as well. See United States v. First City Nat'l Bank of Houston, 386 U.S. 361, 366 (1967) (one who claims the benefits of an exception to a statutory prohibition generally must carry the burden of proof on the issue).
a result, they are likely to conclude that the exemption is too risky to use at all. A narrow construction of the exemption would also frustrate the legislature's intent to protect employers from the increasing number of lawsuits concerning polygraphs. Such a construction would increase the number of good faith violators, thereby increasing the number of legal actions against employers. This is precisely contrary to what Congress wanted. A broad reading of the elements of the ongoing investigation exemption would therefore most effectively harmonize Congress' intentions to protect employees, provide employers with a tool to fight internal theft, and clarify the legality of polygraph tests to decrease the number of lawsuits against employers.

2. The Remedial Nature of the EPPA Does Not Require Courts To Construe the Exemption Narrowly

Because the EPPA fits the description of a remedial statute, plaintiffs will undoubtedly argue that the ongoing investigation exemption should be narrowly construed. Statutory construction rules state that remedial statutes should be interpreted broadly, with any exemptions therefore narrowly construed. Maxims of narrow and broad statutory construction, however, are subordinate to the general principle that statutes should be construed to accomplish legislative

104. Although the civil penalties may be decreased substantially for employers who act in good faith, 53 Fed. Reg. 41,507 (1988) (to be codified at 29 C.F.R. § 801), private civil suits could create substantial liability for employers. Although similar federal statutes often do not allow the recovery of compensatory damages such as emotional distress, Vazques v. Eastern Air Lines, Inc., 579 F.2d 107 (1st Cir. 1978) (construing Age Discrimination in Employment Act of 1967, 29 U.S.C. § 626(b) (1982)), violations of the EPPA may. The enforcement provisions of the Act were not intended to deprive employees of any remedy available to them prior to the Act. CONFERENCE REPORT, supra note 69, at 14.

Under state law, damages for emotional distress are recoverable for wrongful discharge in violation of public policy because wrongful discharge is an intentional tort. See, e.g., Cagle v. Burns & Roe, Inc., 106 Wash. 2d 911, 918, 726 P.2d 434, 437 (1986). Furthermore, the employees only need to show they have suffered emotional distress, not that their employer intended the distress or could have foreseen it. 106 Wash. 2d at 919–20, 726 P.2d at 438–39. State anti-polygraph statutes have already been recognized as statements of public policy, Moniodis v. Firestone Tire & Rubber Co., 611 F.2d 1363, 1366 (3d Cir. 1979), and employees have won large awards for emotional distress against employers who violated such statutes. Moniodis v. Cook, 64 Md. App. 1, 494 A.2d 212 (1985) (awarding employee who was terminated for refusing to submit to a test $300,000 as compensation for wrongful discharge and infliction of emotional distress), cert. denied, 304 Md. 631, 500 A.2d 649. It is quite possible, therefore, that good faith violators of the EPPA still could face substantial liability.

105. See supra note 100 and accompanying text.

106. A remedial statute is intended to afford a private remedy to a person injured by a wrongful act. BLACK'S LAW DICTIONARY 672 (abr. 5th ed. 1983).

107. E.g., Staten Island Rapid Transit Operating Auth. v. ICC, 718 F.2d 533, 541 (2d Cir. 1983).
Because a narrow reading of this exemption would substantially undermine its purpose, and a broad reading would impinge only marginally on Congress' intention to protect employees,\(^{109}\) the rule of narrowly construing exemptions to remedial statutes should not be applied to the ongoing investigation exemption.

Additionally, a narrow construction of the exemption would harm employers considerably more than it would benefit employees. The potential harm to good faith employers from a narrow construction is substantial considering the liabilities that may be incurred.\(^{110}\) In contrast, for two reasons, a narrow construction would not substantially increase the protection offered to employees by the Act. First, a narrow construction of the exemption is unlikely to substantially reduce the number of tests because specific incident testing was not widespread before the EPPA was enacted.\(^{111}\) Second, the arguably permissible tests eliminated by a narrow construction would be no less reliable than tests clearly legal under the exemption because the more reliable CQ technique could still be utilized.\(^{112}\) Therefore, courts should not construe the exemption narrowly solely because of the remedial nature of the Act. Instead, if ambiguities cannot be resolved by reference to legislative history or the regulations, courts should construe them broadly to avoid the unfairness to employers that could result from a narrow construction.

3. A Broad Reading of the Ongoing Investigation Exemption Will Not Defeat the Purposes of the EPPA

A broad construction of the ongoing investigation exemption will not lead to abusive practices by employers. The primary risk of abuse inherent in a broad construction of the exemption is that employers will attempt to use the exemption as a pretext for random postemployment testing. Congress intended the prerequisites of the exemption to prevent this practice. A broad construction of these prerequisites, however, will not encourage employers to attempt to continue random

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\(^{108}\) Derengowski v. United States, 404 F.2d 778, 780 (8th Cir. 1968) (maxim of strict construction may not be used to defeat the legislative intent), cert. denied, 394 U.S. 1024 (1969). See generally SUTHERLAND, supra note 83, § 58.01, at 705–06.

\(^{109}\) See supra text accompanying notes 102–04.

\(^{110}\) See supra note 104 for a discussion of damages.

\(^{111}\) See supra text accompanying notes 11–12 for the statistics on polygraph use before the Act. Also, the prohibition of preemployment and random postemployment screening tests probably will not increase employers' desire to employ specific incident testing. See infra note 113 and accompanying text.

\(^{112}\) This statement assumes that a specific incident truly exists. See supra notes 15–23 and accompanying text for a description of the CQ technique.
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postemployment testing. Because random testing of current employees was not extremely popular with employers before the Act,\(^\text{113}\) it is unlikely that a broad construction of the exemption will cause many employers to risk liability in order to continue random testing. The possible magnitude of this liability further decreases the probability that employers will attempt to use this exemption as a pretext for random postemployment testing.\(^\text{114}\) In addition, a broad construction of the ongoing investigation exemption will in no way affect the many restrictions in the Act that attempt to curb abuses resulting from improper testing procedures.\(^\text{115}\)

IV. CONCLUSION

The EPPA generally prohibits employers from requesting employees to submit to lie detector tests. The ongoing investigation exemption, however, allows private employers to request employees to undergo a polygraph test as part of an ongoing investigation of a specific economic loss or injury. The employee to be tested must have had access to the property, and the employer must have a reasonable suspicion that the particular employee was involved. The Act, however, does not expressly define these elements. A few of the ambiguities that may arise can be resolved by referring to the legislative history and the regulations. To resolve other ambiguities, however, courts will need to look at more generalized policy arguments.

For several reasons, these arguments should lead courts to construe the ongoing investigation exemption broadly and avoid imposing liability on employers who make a good faith effort to comply with the Act. First, the protection provided to employees by the Act will be only marginally decreased by a broad construction of the exemption. Specific incident testing is not in widespread use by employers, and many of the tests will either be clearly illegal or legal and therefore not affected by a broad construction. Second, if the exemption is not construed broadly, the purpose of the exemption, to provide employers with a tool to fight internal theft, will be undermined because employers may feel it is too risky to use the exemption. Third, the arguably legal tests allowed by a broad construction must conform to the same

\(^{113}\) One reason why random testing was not widespread before the EPPA may have been because of the substantial use of preemployment screening, now banned under the EPPA. An equally plausible explanation, however, is that employers hesitate to randomly test current employees to avoid hostility and to ensure a favorable working environment. Note, The Working Man's Nemesis—The Polygraph, 6 N.C. CENT. L.J. 94, 102 (1974).

\(^{114}\) See supra note 104.

\(^{115}\) See Section II(B)(3) for a full discussion of these procedural requirements.
procedural standards as all other legal tests and therefore will be just as accurate. Finally, if the exemption is not construed broadly, the exemption could create a trap for employers. It would not be fair to give employers permission to use polygraphs and then narrowly construe any ambiguities so that employers attempting in good faith to comply with the Act are subject to large damage assessments.

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