THE INTRICACIES OF POLYGRAPH EXAMINATIONS, ECONOMIC LOSSES AND INDEPENDENT CONTRACTORS

Fred J. Naffziger*

The lie detector, or in the vernacular of some in the criminal field, *the box*, is an invention of the 1930s that generates some controversy. At one end of the spectrum are those who rely upon it as the ultimate determiner of the truth of the spoken word. At the other are those who perceive it as a modern form of the trial by ordeal of the Middle Ages, a twentieth century form of witchcraft.

In physical form, it is a device to measure certain physiological changes in the individual being tested. Changes in blood pressure and pulse rate are measured in the examinee's upper arm; the rate of respiration is measured via devices at the upper and lower chest; and the rate of perspiration is measured by electrodes attached to two fingers. A pen register simultaneously records the pattern of these changes on paper as the individual answers posed questions. To provide a basis for comparison, the examiner may ask the subject to lie to certain questions. For example, one wearing dark slacks may be instructed to answer "yes" when asked "Are you wearing white slacks?" The examiner also may inquire about irrelevant matters, such as, "Are we in Woodbum, Oregon? Is Mt. Hood visible today?", as opposed to relevant queries, such as "Did you take the money? Did you hide the money in your purse?". Conclusions about test results are usually phrased as either being truthful, deceptive, or inconclusive. Skeptics argue that in addition to veracity of the subject, the test results may be a reflection of the examinee's training and emotional state of mind such as hostility, anxiety, or fear, not to mention the skill level of the examiner. Some opponents would go further and contend that the test only measures the examinee's physiological responses, rather than the truth of the matter asserted.

I. POLYGRAPHS AND THE LAW

A polygraph exam, a synonymous phrase for a lie detector test, is called a polygraph in most statutes. The judicial system's skepticism of polygraph results is reflected in decisions in which, under rules of evidence, polygraph results are not admissible if proper objections are made by opposing counsel.[1] Some states even go further and bar their admission in trials even if stipulated to by the parties.[2]

The admissability of scientific evidence in a trial has long been determined by whether or not the basis for it is "sufficiently established to have general acceptance in the field to which it belongs."[3] The Supreme Court in *Frye* v. *United States*[4] held that the lie

* Professor, Indiana University South Bend; J.D. 1970, A.B. 1967 University of Illinois; 1988 Hague Academy of International Law.

[1] State v. Brown, 687 P.2d 751 (Or. 1984).

[2] State v. Lyon, 744 P.2d 231 (Or. 1987).

[3] Frye v. U.S., 293 F. 1013, 1014 (D.C. Cir. 1923).

4.ld. at 1013.

detector did not meet this standard. This judicial view has stood as an impenetrable bar to the admission of test results throughout the intervening decades, despite the ongoing scientific and psychological advances. However, the Supreme Court may have reopened the issue by overruling the *Frye* standard after seventy years. In *Daubert v. Merrill Dow Pharmaceuticals*[5] the court allowed opinion testimony by a qualified person with regard to "scientific, technical or other specialized knowledge that will assist the trier of fact to understand the evidence determine a fact in issue."[6]

The Supreme Court's view in *Daubert*, and possibly that of the constitution's applicability to lie detectors, should be revealed within the next year because the Court has accepted a case from the U.S. Court of Military Appeals involving the question of polygraph evidence.[7] The question presents itself in constitutional clothing, not merely in evidentiary terms. During a criminal investigation, the Air Force administered a polygraph examination to an airman. In his subsequent court-martial, he sought admission of the results as a defense to some of the charges. When denied, he contended in an appeal that the trial judge's decision denied him his constitutional right to present a full defense. If the Court wishes to avoid the constitutional issues, it may merely decide whether or not *Daubert* permits the introduction of such evidence under the rules of military evidence. Obviously, if the answer is yes, then it will require no great leap of logic for trial judges to begin permitting their admission into both criminal and civil trials at both the federal and state levels.

Outside the criminal justice system polygraphs are used by many employers as a screening measure in the pre-employment testing process, as well as in the workplace for random testing or suspected theft situations. Various civil liberties organizations and organized labor opposed many of these uses and attempted to legislatively restrict or abolish the practice. At the state level, these efforts had mixed results. Some states enacted varying regulations for the use of polygraphs, while other state legislatures declined to take steps to restrict that use.

At the federal level, legislation did not emerge from Congress until 1988. The Employee Polygraph Protection Act ("EPPA" or "the Act") extensively restricts the use of polygraphs in the private sector.[8] With the exception of government employees, national security agencies, the FBI, and contractors of these two agencies, the law does not preempt any state or local laws, or collective bargaining agreements that are more restrictive than the federal statute.[9] Despite the questions concerning the reliability of polygraph results and judicial hostility towards them, Congress views them as being sufficiently trustworthy to permit their use in certain important circumstances.

II. THE EMPLOYEE POLYGRAPH PROTECTION ACT OF 1988

This statute was a response to a Congressional conclusion that job applicants and employees were often denied employment opportunities or fired unjustly because of the

[5] 509 U.S. 579(1993).

6. Id.

7. U.S. v. Scheffer, *cert, granted*, 117 S. Ct. 1817 (1997), 44 M.J. 442 (1996)

[8] 29 U.S.C. §§2001-2009 (1988).

[9] *Id.* at §2009.

misuse of polygraph examinations and the inaccuracies inherent in current methods of lie detection. The EPPA prohibits private sector employers from requiring a job applicant or an employee to submit to a polygraph exam.[10] It also bans adverse actions against an applicant or employee who fails or refuses to take a lie detector test, or exercises any right under the EPPA."

The broad definition of polygraph test includes lie detectors, voice stress analyzers, or any mechanical or electrical devices used to render a diagnostic opinion regarding the honesty or dishonesty of an individual.[12] Because the statute does not ban paper and pencil tests of honesty, that is, certain psychological tests, their use by employers has expanded as legal substitutes for testing veracity. [13]

Yet, Congress does not view polygraphs through a public policy prism as being so dangerous as to totally ban their utilization. Exemptions under the law are provided for 1) federal, state and local government employers; 2) security services; 3) firms authorized to manufacture, distribute or dispense controlled substances; 4) the federal government when dealing with outside contractors engaged in national security intelligence or counterintelligence;[14] and 5) employers conducting an ongoing investigation into economic loss or injury to the business.[15] It is this last exemption that is of interest in the employment context and which this article will examine.

The Secretary of Labor administers the statute through the Department's Wage & Hour Division. Civil penalties can go as high as $10,000.[16] There is also a private cause of action, in either the state or federal courts, allowed against an employer.[17] Such claims, however, will be subject to mandatory arbitration under the terms of employment contracts.[18]

A. The Economic Loss Or Injury Exemption

The statute provides that an employer is not prohibited from requesting that an employee submit to a polygraph test if "the test is administered in connection with an ongoing investigation involving economic loss or injury to the employers' business, such as theft, embezzlement, misappropriation, or an act of unlawful industrial espionage or sabotage..."[19]

An employer is defined as "any person acting directly or indirectly in the interest of an employer in relation to an employee or prospective employee."[20] While the meaning of this language has been the subject of litigation, the courts have looked to judicial

[10] *Id.* at §2002(1).

11. *Id.* at §§2002(3)(A), 2002(4).

[12] *Id.* at §2001(3).

[13] The legality of such tests under employment discrimination law and the Fourth Amendment is beyond the scope of this article.

[14] *See* Stehney v. Perry, 101 F.3d 925 (3d Cir. 1996).

[15] 29 U.S.C. §2006(1988).

[16.] *Id.* at §2004(a) & (b).

[17] *Id.* at §2005(c).

[18] Saari v. Smith Barney, 968 F.2d 877 (9th Cir. 1992).

[19] 29 U.S.C. §2006(d) (1988).

[20] M. at §2001(2).

interpretations of the language under the Fair Labor Standards Act ("FLSA"). It has done so because the EPPA defines "commerce" as it is defined in the FLSA.[2'] Under FLSA guidelines courts determine whether or not the alleged employer has some degree of control over the terms and conditions of employment.[22]

B. Access and Reasonable Suspicion

Lie detector tests may not merely be administered to determine whether or not undiscovered theft is occurring. Additionally, it is important to note that, just because an economic loss has occurred, the employer is not free to administer polygraph exams willy, nilly to employees. The statute has two further hurdles that must be overcome prior to subjecting an individual to a test: a) the employee must have had access to the property that is subject to the investigation, and b) there must be a reasonable suspicion that the employee was involved in the incident or activity under investigation.[23]

According to both legislative history and the Department of Labor's published regulations, mere access is not enough to establish reasonable suspicion.[24] Yet, there are limited circumstances where reasonable suspicion may be predicated on access alone. For example, assume that expensive jewelry is missing from a safe. If an employee was observed opening the safe substantially prior to an identified time period, that is reasonable suspicion. Or, if no person other than that particular employee possesses the combination to the safe, and all other possible explanations for a loss are ruled out, then reasonable suspicion may be based upon access.[25]

Access means an employee had the opportunity to cause or assist in causing the economic loss or damage under investigation. This includes not only those in direct physical contact with the property, but also employees that are in a position to divert possession of it. The access requirement is higher for those who are prospective employees in the controlled substance area. To be tested persons in these employment positions must have "direct access" to the manufacture, storage, distribution, or sale of the items.[26] This statutory language would seem to rule out testing for job classifications where the persons would only have random or opportunistic access to the controlled substances.

Reasonable suspicion, according to the legislative history, refers to some observable articuable basis in fact beyond the loss and access required for testing. This could include such factors as the demeanor of the employee or discrepancies which arise during the course of the investigation. The totality of the circumstances surrounding such access, such as its unauthorized or unusual nature, also may constitute an additional factor.[27] Information from a co-worker may be a factor as well. Obviously, this legal standard falls below that of probable cause required under the Fourth Amendment.[28]

[21] *Id.* at §2001(1).

[22] Falk v. Brennan, 414 U.S. 190 (1973).

[23] 29 U.S.C. §2006(d)(2) & (d) (3) (1988).

[24] 29 C.F.R. §801.12(1997).

[25] 29 C.F.R. §801.12(f)(2) (1997).

[26] 29 U.S.C. §2006(2)(A) (1988).

[27] H.R. CONF. REP. NO. 659, 100th Cong., 2d Sess. 12-13 (1988).

[28] 29 C.F.R. §801.12(0(1) (1997).

III. THE TESTING PROCESS

Since this article is primarily focused upon the question of when a test may be given and to whom it may be administered, the requirements for the testing process itself, which are enumerated in the statute,[29] will be briefly addressed. The person to be tested must be given reasonable written notice of the date, time, and location of the test. Also, he or she must be informed of the nature and characteristics of the test and instruments involved, the fact that either party may record the test, that statements made can be used against the employee, and that the refusal to take the test or the results of the test cannot be the sole basis upon which the employee is disciplined. The person being tested has the right to terminate the test at any time. Degrading questions or questions about religion, race, politics, labor activities, and sex are not to be posed. The test must last for a minimum of ninety minutes. There are however, few requirements for the examiner other than the examiner must hold a valid current license if a state licenses polygraph examiners.[30]

A. Use Of Test Results

At first glance, it may seem incongruous that the law does not permit one's refusal to take a test or the results of a test to be the sole basis for an adverse employment action, when the law permits administration of the test.[31] The examiner cannot make a recommendation in this area.[32] What value then does the test have? While it cannot be the *sole* basis, it may be one. Statements made during the test may constitute additional supporting evidence for the decision to discipline an employee or decline to hire an applicant.[33] Sometimes the test subject will admit to illegal acts. Or, the subject may give statements contrary to prior statements he or she has made. Congress clearly wants the employer to weigh the totality of the circumstances and not to permit the results of the lie detector test to make management decisions.

B. Why Testing Remains Difficult-The Independent Contractor's Presence

Even though the rules outlined above are intricate, an employer may think that it comes within the statutory exceptions and that it can administer a polygraph test to certain employees. It can be important to stop and reflect again, before going forward with the test.

All economic losses do not permit testing. For instance, if employees experience theft of their possessions, the employer cannot test.[34] According to the statute, the employer must suffer the economic loss. Just because the loss occurs on the employer's property or within its plant does not mean that the employer has suffered the loss.

[29] 29 U.S.C. § 2007 (1988)
[30] M. at §2007(5)(1)(A).
[31] *Id.* at §2007(2).
[32] *Id.* at §2007(5)(2)(iii).
[33] *Id.* at §2007(2)(D)(ii).
[34] 29 C.F.R. §801.12(c)(3)

Consider the frequency with which an independent contractor is engaged in activities upon the employer's premise. Building contractors can be on site during construction work. Their existence can generate the presence of architects, building code inspectors, and other personnel. Common carrier employees are on the loading dock picking up goods or making deliveries. The employer may have leased space on the premises to third parties. While this landlord-tenant relationship is frequently obvious, it frequently may be invisible, such as an independently owned shoe department leased within a department store. Economic losses to those contractors or tenants are outside the scope of the statute. The department store owner cannot test its employees because it has not suffered the economic harm. It cannot test the contractor's employees, nor those of the tenant, because they do not constitute its employees and vice-versa; the contractor or tenant cannot test the owner's hirees, because it does not employ them. It may be limited to testing only its employees.

Consider a hospital. Independent contractor physicians possess hospital privileges, and daily enter the premises to engage in the practice of medicine. Because of the nature of their practice, not all are vulnerable to economic loss, such as the family practitioner making rounds, unless he is preyed upon in the halls by a pickpocket, or robbed in the parking lot. But some are. Most hospitals have a surgery locker room for physicians to change clothes and place their financial and medical valuables for and during the surgical procedures. Or, they may park valuable cars that can contain items of substantial value in a parking garage maintained by the hospital corporation. If one of these physicians is a victim of theft, the administrator is precluded from testing hospital employees.

In an actual case, surgery personnel utilizing a locker room experienced thefts upon eight occasions over several years. Under the statute the hospital cannot initiate a general investigation of these ongoing thefts. Upon the report of a ninth incident, the theft of two hundred dollars from a physician's locker, human resources began an investigation. A general meeting among some employees who had access to the locker room was conducted. Each of these individuals was then individually escorted to the locker room where their lockers and personal effects were searched. Each was then questioned about his whereabouts during the time of the theft. Each was asked about his willingness to take a lie detector test.

Only one individual indicated his opposition to taking a lie detector test. That individual was the sole one discharged. He sued based upon, among other theories, a violation of his rights under the EPPA. The hospital's response, in moving for a summary judgment, was that it qualified for the ongoing investigation exemption under the law, that the person had access to the stolen property, and it possessed a reasonable suspicion that he was involved in the theft. The trial judge denied the motion,[35] concluding that the hospital could not demonstrate that it suffered an economic loss to its business due to the theft from the doctors. The main business purpose of the hospital is the provision of patient care. It suffered neither a direct nor an indirect loss to that business.

The hospital tried to avoid this problem by arguing it came within a regulation of

[35] Lyle v. Mercy Hospital Anderson, 876 F. Supp. 157 (S.D. Ohio 1995).

the Labor Department[16] which describes the resident of an apartment complex experiencing a theft at the hands of an apartment employee. A test can be requested of the apartment employee, other requirements being met, since an indirect loss or injury is done to the apartment's business because of the employee's responsibility with respect to the tenant's apartment. The court regarded the situations as not being analogous because the hospital was emphasizing its role as manger of the health care complex, rather than its business of patient care. Of course, if the doctor whose property was stolen was an agent of the hospital, and the hospital had a fiduciary duty to reimburse him for the loss, then the hospital would suffer the required economic loss.

The court also noted that, even if the hospital did qualify for the ongoing investigation exception, it had failed to provide the employee with his statutorily provided procedural safeguards. Even if one successfully navigates the requirements of qualifying to request the administration of the test, there remain procedural rights of the potential test subject. Although only touched upon in this article, these rights and employer responsibilities are intricate.

Health care providers are particularly susceptible to problems in this area due to the large amount of work done on site by independent contractors. In some medical areas entire departments are contracted out. An independent emergency room staffing industry has developed and it is not unusual for a separate company to be managing and staffing the hospital's emergency room. This arrangement also exists with some radiography, pharmacy, cafeteria or laboratory facilities. Temporary service agencies may be supplying nurses or technicians to cover staffing gaps. Sophisticated equipment, such as magnetic resonance imaging machines, may be serviced regularly by employees of the manufacturer. As discussed previously, whenever employees of these entities are the victims of theft, testing by the hospital is not the proper prescription. And, when the statutory requirements are complied with, testing can be prescribed only if the health care entity bears the loss. Yet, several issues remain due to the unique nature of the industry's clients.

Consider losses suffered by patients due to theft. Suppose that while occupying a hospital room, a patient has some personal items stolen. If the suspected thief is not an employee of the hospital, mandatory testing is not an option for the reasons discussed previously. If the suspect is an employee, may the hospital require the person to undergo a polygraph examination? This would appear to be analogous to the apartment tenant theft where the Labor Department Regulation allows testing of the apartment employee.[37] While the analogy was rejected in circumstances involving the surgeon, here the patient plays the role of a tenant, albeit also a recipient of patient care. The patient is being billed a very substantial amount for a room charge. There are separate billings from the physicians for their respective services, although some of the patient care is derived from nurses and technicians whose fees are built into the daily room charge.

Another factor that may play a role in such an incident may be the hospital's advisory, if any, to patients that they not bring items of monetary value with them when they are to be admitted. If there is such advice provided, and the patient ignores the warning, it may no longer be sufficiently similar to an apartment complex s responsibility

[36] 29 C.F.R. §801.12(c)(1)(iv) (1997).

[37] *Id.*

towards the apartment occupant's goods. The corresponding responsibility of the hospital and its need to test would appear to be greatly reduced. Certainly under the law of bailments the hospital cannot be construed as the bailee of the items which owes a duty of care towards the patient's goods. The rationale outlined previously would appear to be inapplicable to medical emergency situations. Individuals come to the emergency room seeking treatment without having undergone any pre-admission processing. Upon occasion they are brought to the hospital, via an ambulance, in an unconscious state.

Individuals entering into a medical care facility to visit a patient, and who while on the premises suffer a theft, would not appear to provide justification for the facility to test its employees over the loss. In no way has the hospital suffered the loss. It is probably too much of a legal stretch to speculate as to possible tort liability of the hospital to the visitor, that is, negligence in failing to maintain a safe and secure environment for visitors, as constituting a potential loss to the hospital. And, the statute speaks of *economic loss or injury* rather than possible loss. However, the apartment analogy may fit in certain hospital visitor situations. In what has become an extremely competitive health care marketplace, hospitals have devised a variety of practices to make themselves attractive to prospective patients. One tactic is to make available hospital-owned temporary living accommodations to relatives and friends of patients. The provision of such a room does carry a charge.

There exists yet another variation on the patient-visitor categories. Again, as a marketing device, some hospitals provide suites that may be occupied by the patient, members of the patient's family, or guests of the patient throughout the duration of medical treatment. This is a frequently advertised service to attract maternity patients. If an occupant of one of these suites, other than the actual patient, is a victim of theft, can a suspected hospital employee be tested? If there is no charge for their occupancy of the suite, testing would not be legitimate. When there is an additional room fee for occupants, we may be back to the apartment situation under the Labor Department's regulation. Because of the wide variety of factual situations that can arise in the health care arena, litigation under the EPPA will probably be decided upon a case-by-case basis.

Due to the need to have immediate access to a wide inventory of drugs, health care facilities can be expected to have pharmacological products on site. These will range from over-the-counter products, like aspirin, to narcotics on the opposite end of the spectrum. The presence of drugs makes the testing question more intricate. There are special rules under the statute concerning a *controlled substance,* that is, a drug that requires prescription by a physician. As mentioned previously, there is an exemption to the ban on testing prospective employees if they would have "direct access" to the manufacture, storage, distribution, or sale of any such controlled substance.[38] Interestingly, in connection with an investigation of misconduct involving controlled substances, the immediately following statutory language dealing with testing current employees, permits testing where the employee had access to the person or property subject to the investigation. The word *direct* is absent. Such a semantic difference can make statutory interpretation difficult. One can make the logical argument that a hospital can only administer a pre-employment polygraph test to a prospective member of the nursing staff

[38] 29 U.S.C. §2006(f)(2)(A) (1988).

[39] *Id.* at §2006(f)(B)(ii).

who will have direct access to a controlled substance, yet test any member of the nursing staff that has *access* to such drugs, when there is a drug shortage. A nurse that receives drugs directly from the pharmacist for administration to a patient will have direct access and this may only constitute one nurse vis-a-vis that specific unit per work shift. Yet, those nurses having access may be every nurse in that hospital unit. Suppose the administration of the drugs is interrupted by an emergency, the drugs are left unattended on a medical tray, and when the nurse returns, the drugs are no longer there. Or, it is possible that instead of following instructions to immediately swallow the pills, the patient places them on the tray for later or no consumption at all, and they then disappear. In the latter two circumstances, a large number of employees can fall into the access category.

IV. LIABILITY OF THE EXAMINER

It is a natural inquiry to ask what liability, if any, the operator of the polygraph machine bears when the test results are a factor in the equation that leads to a decision to discharge an employee. On the one hand, it would seem fair to regard the operator as a mere agent of the employer-principal. Controlled by the employer with respect to performing an assigned task and asking questions supplied by the employer, it would appear that such a person is merely doing the specified work of a principal. Of course, if the examiner's conduct would be tortious, the examiner-servant would have joint and several liability with the employer-master under the doctrine of *respondeat superior*.[40] An examiner's diversion from the specified list of allowable questions into improper inquiries about the private sex activities of the examinee, striking an uncooperative examinee, or discussing the results of the exam with individuals lacking privilege to its contents are three scenarios that could rise to the level of a tort. This raises the additional question as to whether the master successfully could argue that the examiner's conduct falls outside the course and scope of employment, thereby relieving it of liability. While debateable, such an argument would probably fail in each of the three instances previously discussed.[41] Of course, if the employer-master has ratified the examiner's conduct, the employer will bear liability.[42]

Most employers, lacking a polygraph machine in their inventory of equipment, and the human resource department being unprepared to adequately prepare, administer, and evaluate the results of such tests, will turn to an outside concern to fulfill its needs. Rather than controlling the examiner, the employer will look to it for guidance. In addition to not being closely controlled in the test design, administration and analysis of the exam, the polygraph examiner is one whose occupation is distinct. The work is usually completed without close supervision while utilizing skills and specialized tools of a particular occupation. The examiner is likely to be engaged for a relatively short period of time to perform a task that is not a part of the employer's normal business activity, be paid by the job rather than by time, and the likely expectation of both parties is that they

[40] For a good discussion of the rationale underlying respondeat superior see Mary M. v. City of Los Angeles, 814 P.2d 1341 (Cal. 1991).

[41] For a discussion of what comes within the scope of employment see RESTATEMENT (SECOND) OF AGENCY § 228(1958).

[42] *Id.* at §82 (defining ratification).

are not creating a master-servant relationship. Thus, it is reasonable to expect that, in the typical circumstance, the polygraph examiner will be an independent contractor.[43] Under traditional agency law analysis, the presence of the independent contractor would excuse the employer-principal from most instances of liability, due to its lack of control. This would seem to open the door to lawsuits against the examiner, and possibly its servants, by an allegedly wronged employee-examinee. Yet, the opening in the door is not very wide. The EPPA does not follow agency law in this regard and imposes liability upon the employer if the statutory mandates are not followed.

Not surprisingly, when a job applicant is denied a job subsequent to the administration of a polygraph examination, or an employee is discharged after the administration of a lie detector test, the person will seek to include the polygrapher as a defendant in any litigation. On the surface, the polygraph company and its employees would seem to be excluded as eligible defendants. That is so since the EPPA imposes liability upon an *employer* and the lie detector company ordinarily does not occupy an employer-employee relationship vis-a-vis the examinee. However, ambiguity is introduced by the Congressional definition of employer as covering "any person acting directly or indirectly in the interest of an employer in relation to an employee or prospective employee."[44] Arguably, the examiner is acting in the interest of the employer; is that not why the employer engaged the examiner? Yet, elsewhere EPPA uses the term *examiner*, which infers that such a person differs from an employer.

The statute does not continue with a definition of examiner. When statutory language is ambiguous, courts are to defer to any reasonable construction of the statute by the implementing agency, unless legislative history shows with "sufficient clarity that the agency construction is contrary to the will of Congress."[45] The EPPA's legislative history is silent on this point.

In three cases, courts have indicated that dismissal of the polygraph testing company and the actual test examiner as defendants is appropriate where they neither choose which employee to be examined, nor supplied the criteria for choosing employees.[46] These decisions are based upon the Department of Labor's regulations, the relevant enforcement agency, which exclude them if their sole purpose was the administration of the test. "A polygraph examiner either employed for or whose services are otherwise retained for the sole purpose of administering polygraphs ordinarily would not be deemed an employer with respect to examinees."[47]

The Fair Labor Standards Act defines "employer" to include "any person acting directly or indirectly in the interest of an employer in relation to an employee...,"[48] which is almost the exact definition in the EPPA. Also, the EPPA does state that its definition of commerce is the same as that of the FLSA. As a matter of statutory interpretation, it is

43.See id. at §220(2) for a list of factors to weigh in making the distinction between independent contractor and servant status.

[44] 29 U.S.C. §2001(2) (1988).

[45] Japana Whaling Ass'n v. American Cetacean Society, 478 U.S. 221, 233 (1986)

[46] Rubin v. Toumeau, 797 F. Supp. 247 (S.D. N Y. 1992); Fallin v. Mindis Metals, Inc., 865 F. Supp. 834 (N.D.Ga. 1994); Kluge v. O'Reilly Automotive Inc., No. 94-2159, 1994 WL409575(D Kan Aue 3 I994i

[47] 29 C.F.R. §801.2(c) (1997).

[48] 29 U.S.C. §203(d) (1988).

[49] *Id.* at §2001(1) (1988).

reasonable to presume that Congress had knowledge of how the courts have been interpreting the FLSA's language when it incorporates it into a later statute.[50] Further, they have been interpreting *employer* in an expansive manner.[51] The economic reality of the relationship between the alleged employer and alleged employee is the focus of the inquiry. Or put another way, the alleged employer must have some degree of control over the terms and conditions of employment.[52]

Three federal district courts have taken the position that, as a matter of economic reality, when the examiner solely administers the polygraph at the direction of the employer, it is not exerting control over the employee in the interest of the employer.[53] If the examiner plays a role in selecting the employees to be subjected to the test, or advises the employer on compliance with the EPPA's mandates, these same courts say that such behavior does constitute acting in the interest of the employer, thereby subjecting them to a lawsuit.[54] In *Rubin v. Tourneau*,[55] the court declined to dismiss the action against the examiner stating that at that juncture of the litigation, the role played by the examiner was unclear. In the other two cases, the courts granted the examiners' motion to dismiss on grounds that they only administered the examinations. In denying an examiner's motion for summary judgment, one court based its refusal upon grounds that the plaintiff might be able to show that the examiner exerted some control over the employer's compliance with the EPPA.[56]

With Americans proclivity to sue everyone in sight, it should not astonish one that many plaintiffs attempt to bring everyone into such actions.[57] A union, representing workers under a collective bargaining agreement with a hotel, was able to extricate itself from EPPA litigation on grounds that it was not an employer because, as a matter of economic reality, it exercised no degree of control over the employer's actions under the EPPA. Actually, it had represented the worker in an arbitration hearing to regain his job.[58]

Further, there are several cases that bring up the issue of wrongful discharge under state law and its interplay with the EPPA. One decision, construing North Carolina law, states that there is no state law action for wrongful discharge when a private cause of action exists under the EPPA.[59] There are few appellate court decisions on the EPPA. The Tenth Circuit, however, has ruled that an employer's legal exercise of its rights under the EPPA does not violate New Mexico public policy, and a legal discharge under the statute is not wrongful.[60]

[50] Lorillard v. Pons, 434 U.S. 575, 581 (1978).

[51] Falk v. Brennan, 414 U.S. 190, 195 (1973).

[52] Bonnette v. Calif. Health & Welfare Agency, 704 F. 2d 1465 (9th Cir. 1983).

[53] *See* cases cited *supra* note 46.

[54] *Id.*

[55] 797 F. Supp. 247 (S.D.N.Y. 1992).

[56] James v. Professionals' Detective Agency, Inc., 876 F. Supp. 1013 (N. D. 111. 1995).

[57] *See* Raines v. Shoney's Inc., 909 F. Supp. 1070 (E. D. Tn. 1995) where the plaintiffs not only sued the direct employer-franchisee, but also the national franchisor and members of the city s police force.

[58] Canto v. ITT Sherator Corp., 865 F. Supp. 927 (D. D.C. 1994). A typical illustration of unsuccessful litigation against an employer in an economic loss case is Suttle v. Dominion Bank of Middle Tennessee, No 93-0173, 1993 WL 415691 (Tenn. App. Oct. 13, 1993).

[59] Williams v. Vogler, No. 91-0637, 1992 WL 402900 (M.D.N.C. Mar. 6, 1993).

[60] Zaccardi v. Zale Corp., 856 F.2d 1473 (10th Cir. 1988).

V. FINAL THOUGHTS

Congress has significantly limited the ability of an employer to legally administer lie detector exams. In the private sector, one must not only have suffered an economic loss, but also the employees must have had access to the property and grounds for reasonable suspicion pointing to the individuals must exist. When the loss is to an independent contractor or a fellow employee on the employer's premise, testing will normally not be allowed. Finally, there are many procedural rules which must be complied with in order for the testing to be legal.

When the legal complexity and the monetary cost of EPPA compliance is fully explained to a client, the attorney may hear a simple question, "Can I just fire the suspected individuals?" The answer is "yes" in employment at-will situations. By avoiding the legal quagmire of lie detector tests, the answer is beautiful in its simplicity. The obvious risk is that, innocent as well as guilty, employees may be discharged. Thus, the fairness of the answer will continue to be the subject of debate.