

Issue Brief

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**POLYGRAPH TESTING:
EMPLOYEE AND EMPLOYER RIGHTS**

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POLYGRAPH TESTING:
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SUMMARY

Polygraph testing of employees has existed for many years, but in the most recent decade its use by employers has increased dramatically. According to a Nov. 26, 1986 New York Times article, approximately two million private sector job applicants and employees underwent polygraph tests in 1985, three times the number who took the test in 1975. Roughly 75% of those tested were job applicants. The American Polygraph Association estimates that fully 98% of polygraph tests are administered in private industry with only 2% of the total administered in the public sector.

In a social climate in which drug use has become very prevalent and many business failures are attributed to employee theft, employers argue that employee testing is necessary to insure that employees are honest and drug free. Employees and unions, however, have objected vociferously to polygraph tests arguing that: the tests are an invasion of employees' privacy; many polygraph testing programs are unfairly and inconsistently applied; and, the scientific validity of the polygraph test is questionable.

There is a lot of skepticism in the scientific community regarding the validity of polygraph tests. Although most polygraph experts agree that polygraph tests are able to measure physiological changes, they disagree on the test's ability to correlate these physiological changes with truth and deception. Estimates of the test's accuracy in correctly detecting guilt range from a low of 35% to a high of 100%. Many experts argue that one serious problem with polygraph tests is that the difficulty in interpreting test data generates a large number of "false positives", i.e., innocent people incorrectly identified as deceitful. However, most agree that the polygraph test is often a successful tool in obtaining confessions.

In the 100th Congress, two bills have been introduced on polygraph tests. H.R. 1212 would prohibit the use of polygraph testing by private employers. H.R. 1212 is a response to employee claims that polygraph tests violate employees' privacy, and also reflects the general skepticism in the scientific community as to whether or not polygraphs are an effective device for assessing truth and falsehood. A second bill, H.R. 1536, would establish minimum standards for polygraph examinations, and would prohibit their use if these standards are not met. This bill is an attempt to address the concerns of individuals and employer representatives who recognize the need for regulation of polygraphs but argue that polygraph tests should not be prohibited because they are important tools in helping employers control the growing problem of drug use and theft among employees. Additionally, the Senate Labor and Human Resources Committee held hearings on polygraphs in the workplace on June 19, 1987. No polygraph legislation has been introduced in the Senate so far this session.

ISSUE DEFINITION

In the 1980s increasing numbers of employers are using polygraph tests to screen job applicants and employees for illegal drug use and to avert potential and deter actual employee theft. Employees, unions and civil libertarians feel these tests are not accurate measures of truth and falsehood, and violate employees' right to privacy. The issue for Congress is whether to prohibit the use of polygraphs by employers, and if so, whether the prohibition should extend only to private employers, or should include public employers as well, or whether to permit polygraph usage under Federal standards and regulations.

BACKGROUND AND ANALYSIS

Overview of Polygraphs

Polygraph tests have become a widely used method of employee screening in recent years. About half of all retail companies reportedly use polygraph tests for pre-employment screening or investigations of employee misconduct. The primary rationale private employers give for testing is to control employee theft. Estimates of the extent of the losses experienced by businesses as a result of such theft range from \$40 to \$50 billion annually. The Small Business Administration estimates that 50% of all business failures are due to theft; and, 60% of business theft is attributable to employees.

The theory behind polygraph tests is that some physiological functions such as heartrate, breathrate, and the presence or absence of perspiration can be correlated with truthfulness or deceit. To perform the test, pneumatic tubes are strapped around the subject's abdomen, a blood pressure cuff is strapped to the subject's arm, and electrodes are attached to two fingers. Employees often view the process of undergoing a polygraph test as quite invasive; and, the questions themselves are frequently perceived to be personal and accusatory.

The two most widespread methods of polygraph testing for employment purposes are the relevant-irrelevant and the control question techniques. The relevant-irrelevant technique relies on the assumption that a guilty person will have stronger physiological reactions when lying in response to a crime-relevant question than when responding truthfully to a crime-relevant or a crime-irrelevant question. However, critics of this test note that some people may find crime-relevant questions distressing and react more strongly to them than to irrelevant questions even if they are innocent of any wrongdoing. Furthermore, there is no systematic way to evaluate the results of a relevant-irrelevant test. This technique is frequently used in pre-employment screening.

The control question technique was developed to try and correct some of the weaknesses of the relevant-irrelevant test. The control question method is most often used in investigations of possible employee wrongdoing. The control questions are very general questions about crimes similar to the one under investigation. For example, in an investigation of a theft, a control question might be: "Did you ever take anything that

didn't belong to you before you were 25?" Since most people will feel compelled to say they haven't even if they have, control questions generally elicit strong physiological responses. If the subject reacts more strongly to the control question than to the questions about the specific crime under investigation, he/she is considered to have answered the crime-related questions truthfully.

There is a great deal of dispute among experts in the field regarding the accuracy of polygraph tests, with many experts arguing that the accuracy of the test is unacceptably low. Estimates of the polygraph test's accuracy in correctly detecting guilt range from a low of 35% to a high of 100%. A 1983 Office of Technology Assessment report found meaningful evidence of polygraph validity to exist only in cases where the test was used in criminal investigations.

Experts have also argued that the test is not really a "lie detector"; rather it measures physiological stress that may occur when a person is lying. However, stress may also occur when an individual is nervous or feels his/her honesty or integrity is being challenged. Paradoxically, those people most comfortable with lying may be more likely to fool the machine since they will not necessarily undergo stress if they do lie. In a Bureau of National Affairs report on polygraphs one expert stated: "The polygraph cannot distinguish real from irrational guilt, nor guilt from fear, nor fear from righteous indignation.... I think the polygraph test victimizes innocent people who are unsophisticated but that it errs in the direction of passing liars who know how to beat it."

Federal and State Laws

Legislation that would prohibit the use of polygraphs by private employers has been introduced in the 100th Congress. According to William Hartsfield, in a November 1985 Labor Law Journal article, forty-one States have legislation regarding polygraphs. Eleven States prohibit polygraph testing, twenty-one States require that the polygraph test be voluntary, and nine require the polygrapher to be licensed.

Generally, public employees are excluded from protection under these laws. The rationale for this exclusion is as follows: since some public employees have access to confidential Government documents, polygraph testing is necessary to locate employees who may have compromised these materials, and to discourage other employees from doing so. The polygraph is widely used in the military as a screening device. In 1983, the Department of Defense conducted 10,502 polygraph tests. Additionally, both the Central Intelligence Agency and the National Security Agency require job applicants to submit to a pre-employment polygraph test. The U.S. Postal Service also makes frequent use of the polygraph, but only for investigations of alleged employee misconduct.

Although some courts have allowed the introduction of polygraph evidence, most have rejected the introduction of such evidence on the grounds that it does not meet the Frye v. U.S., 293 F. 1013 (1923) standard requiring that a test be generally accepted by the scientific

community before results from such a test may be admitted as evidence. Additionally, the test has been held to unduly influence juries.

Public employees forced to undergo polygraph tests may have recourse to certain constitutional protections. Since these protections cover only governmental actions, in most cases they are not relevant for private employees. The American Civil Liberties Union has argued that the polygraph test violates the Fourth Amendment U.S. constitutional guarantee of freedom from unreasonable searches, the Fifth Amendment protection against self-incrimination, and, deprives the accused of their rights under the Sixth Amendment to confront and cross examine their accusers.

Employees also have certain rights under common law. An employee may argue for example, that his firing violated one of the exceptions to the common law doctrine called "employment at will." This doctrine allows employers to fire employees for any reason. One of the exceptions to this doctrine is for discharges that violate "public policy." At least two State courts have ruled that polygraph testing does violate public policy. Additionally, an employee could bring a defamation suit against an employer if he could demonstrate his innocence and show that the employer made public the results of the polygraph test.

Arbitration

Arbitrators generally follow the courts in the area of polygraph admissibility, and exclude polygraph tests as evidence. However, some arbitrators admit the test as evidence if it was submitted voluntarily, and is only being introduced as corroborating evidence. Arbitrators have generally not allowed employees who refuse to take a polygraph exam to be penalized. Thus, most arbitrators would not uphold a discharge based on an employee's refusal to submit to such an exam. However, some arbitrators have accepted as valid, pre-employment waivers, in which job applicants agree to submit to polygraph tests. Thus, if an employee has signed such a waiver, the arbitrator may permit the employer use of polygraph tests. See Britt Liddicoat, Polygraph Testing of Employees in Private Industry, CRS Report 85-929, for a discussion of relevant arbitration awards.

H.R. 1212: Pro and Con

H.R. 1212 would prohibit the use of lie detector tests (including polygraphs, the voice stress analyzer, and other similar devices) by private employers involved in commerce or the production of goods for commerce. Federal, State and local governments and certain employees and contractors involved in work related to national defense are excluded from the provisions of the bill.

Proponents of prohibiting polygraphs argue that: (1) polygraphs violate employee privacy; (2) polygraphs are not accurate methods of determining guilt or innocence; (3) no studies have shown that business losses are greater in States which do not allow polygraphs; and, (4) the difficulty in interpreting polygraph data may lead to an unacceptable

number of "false positives," -- i.e. finding innocent people to be deceitful.

This problem of false positives was examined by Edward Katkin of the American Psychological Association in written testimony offered at hearings on H.R. 1212. Katkin set up a hypothetical employment testing situation in which 1000 employees are tested. He assumed an 85% accuracy rate for the test, and assumed that 10% of the employees being tested were dishonest. Therefore, he argued, although the test would accurately identify 85 of the dishonest employees, it would also identify 135 (15%) of the honest employees as dishonest. Thus he noted, 220 suspects are identified, of whom 61% are innocent. However, he added, if the accuracy rate of the test were lower or the honesty rate higher, even more employees would be falsely accused. Conversely if the percentage of honest people in the tested population were small you would get a significant number of false negatives, i.e., people who are dishonest passing the test.

Opponents of prohibiting polygraphs argue that: (1) employee theft and illegal drug use have become such serious problems that polygraph screening is necessary for employers to obtain a trustworthy and productive workforce; (2) many employees guilty of wrongdoing confess during the course of a polygraph test, making it a very effective policing device; (3) since polygraph tests are generally only used as corroborating evidence of guilt, employees are unlikely to be wrongly accused; and, (4) if polygraph tests are not accurate measures of guilt or innocence, this legislation should also prohibit the government from using polygraphs to screen employees and job applicants.

LEGISLATION

99th Congress

H.R. 1524 (Williams et al.)

Polygraph Protection Act of 1985. Introduced Mar. 7, 1985; referred to Committee on Education and Labor. Passed House with amendments Mar. 12, 1986. Received in the Senate Mar. 13, 1986; referred to Committee on Labor and Human Resources.

S. 1815 (Hatch et al.)

Polygraph Protection Act of 1985. Introduced Oct. 31, 1985; referred to Committee on Labor and Human Resources. Hearings held April 23, and markup May 20, 1986. Ordered reported without amendment June 25, 1986. Reported to Senate and placed on Senate Legislative Calendar Sept. 17, 1986.

100th Congress

H.R. 1212 (Williams et al.)

Employee Polygraph Protection Act. Introduced Feb. 24, 1987; referred to Committee on Education and Labor. Hearings held by the Subcommittee on Employment Opportunities Mar. 5, 1987. Executive comment was requested from the Department of Labor Mar. 23, 1987. Committee

consideration and markup session held June 10, 1987. Amended version of H.R. 1212 ordered reported June 10, 1987. Reported, amended, July 9, 1987.

H.R. 1536 (Young et al.)

Polygraph Reform Act of 1987. Introduced Mar. 10, 1987; referred to Committee on Education and Labor. Referred to subcommittees Mar. 30, 1987.

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U.S. Congress. Senate. Committee on Labor and Human Resources. Polygraph Protection Act of 1985. Hearing, 99th Congress, 2d session. Apr. 23, 1986. Washington, U.S. Govt. Print. Off., 1986. 524 p.

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CRS Report 78-194 A

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