

Short notes on:

Polygraph Testing: Are Employees obligated to undergo testing?

What is a polygraph test and does South African Labour Law regulate polygraph testing?

A polygraph test is a test frequently used by Employers to verify an Employee's truthfulness and is commonly called a 'Lie Detector Test.' There is no specific labour legislation at this point to control the use of the test or to protect the employee's right against the abuse of the test. However, contracts of employment as well as internal disciplinary hearings may provide for the utilization of polygraph testing as part of the disciplinary hearing process or investigations prior to a disciplinary hearing.

Are Employees obligated to subject themselves to Polygraph Testing?

An Employee may not be compelled to undergo a polygraph examination, unless she or he agrees to it by way of a collective agreement with the Employee's union or the Employee's contract of employment or internal disciplinary code of the Employer which the Employee has agreed to abide by as part of their appointment and contract of employment. According to the Commission for Conciliation, Mediation and Arbitration ("the CCMA") any agreement providing for the use of polygraph testing must be in writing.

Furthermore, the CCMA states that the Employee should be informed of the following when Polygraph Testing is conducted:

- a) the Polygraph Testing is voluntary and the Employee has consented to be tested as per agreements mentioned hereinabove in writing;
- b) only questions discussed prior to the examination will be used;
- c) the Employee has a right to have an interpreter, if necessary;

- d) should the Employee prefer it, the another Employee or Representative may be present during the examination, provided that Employee or Representative does not interfere in any way with the Polygraph Testing proceedings;
- e) no abuse of Polygraph Testing in whatever way will be allowed;
- f) no discrimination will be allowed;
- g) no threats will be allowed.

When can an Employer utilize Polygraph Testing?

Most frequently, Employers use polygraph testing to investigate specific incidents where Employees had access to property which is the subject of a investigation and there is a reasonable suspicion that the Employee was involved in the incident. Further, polygraph testing is also commonly utilized when there has been economic loss or injury to the Employer's business, for example theft or misuse of the Employer's property. Polygraph Testing is also used when the Employer is combating dishonesty in positions of trust i.e. where there is possible breakdown in trust with a senior Employee. Finally, but not exhaustively, polygraph testing is used when the Employer is battling serious alcohol, illegal drugs or narcotics abuse and fraudulent behaviour by Employees and where the Employer is contesting falsification of documents and fraud.

Can the results of the Polygraph Test be made public?

According to the CCMA, the results of a polygraph test can only be released to an authorised person. Generally, an authorized person is the person who has undergone the polygraph test (examinee), or anyone specifically designated in writing by the examinee or the Employer's representative that requested the examination.

Does Polygraph Testing hold any weight at the CCMA?

On a case by case basis, Polygraph Testing and its results has been accepted as evidence at the CCMA and the individual tasked with conducting the polygraph test would be called as an expert witnesses whose evidence would be needed to ascertain the reliability of the result of the test. The duty of the Commissioner at the CCMA is to determine the admissibility and reliability of the evidence. According to the CCMA, polygraph tests may not be interpreted as implying guilt but may be used to support other available evidence that suggests that the Employee concerned did indeed commit an alleged misconduct. In other words, polygraph test results, on their own, are not a basis for proving that an Employee is guilty of an offence.

Conclusion

When conducting Polygraph Testing, the Employer must ensure a written agreement exists which states unequivocally that the Employee consents to be testing and further there is no interference with the test in order for the results thereof to be submitted as supporting evidence to the CCMA should a dispute arise between Employer and Employee.