

POLYGRAPH TESTING



WHAT IS A POLYGRAPH TEST?

It is a test used to verify a person's truthfulness and is often called a 'Lie Detector Test.'

IS THERE ANY LAW CONTROLLING USE OF POLYGRAPH IN SOUTH AFRICA?

The application of polygraph testing is a relatively new concept in South Africa, especially in disputes relating to employment relationships. There is no specific labour legislation at this point to control the use of the test or to protect the employee's rights against the abuse of the test.

CAN ONE BE COMPELLED TO UNDERGO A POLYGRAPH TEST?

An employee may not be compelled to undergo a polygraph examination, unless she or he agrees to it or a collective agreement or contract of employment provides for it. The agreement must be in writing.

The individual should be informed that—

- the examinations are voluntary;
- only questions discussed prior to the examination will be used;
- he/she has a right to have an interpreter, if necessary;
- should he/she prefer, another person may be present during the examination, provided that person does not interfere in any way with the proceedings;
- no abuse in whatever way will be allowed;
- no discrimination will be allowed; and
- no threats will be allowed.

WHEN IS THE EMPLOYER PERMITTED TO USE POLYGRAPH?

Generally, employers are permitted to use the polygraph to investigate specific incidents where—

- Employees had access to property which is the subject of the investigation.
- There is a reasonable suspicion that the employee was involved in the incident.
- There has been economic loss or injury to the employer's business like theft of company property.
- The employer is combating dishonesty in positions of trust.
- The employer is combating serious alcohol, illegal drugs or narcotics abuse and fraudulent behaviour within the company.
- The employer is combating deliberate falsification of documents and lies regarding true identity of the people involved.

WHO GETS THE POLYGRAPH TEST RESULTS?

Polygraph results can only be released to an authorised person.

Generally, it is the person who has undergone the polygraph test (examinee), or anyone specifically designated in writing by the examinee; and the person representing the employer or government agency that requested the examination.

WHAT IS THE STATUS OF POLYGRAPH TESTS AT THE CCMA?

Polygraphists have been accepted as expert witnesses whose evidence needs to be tested for reliability. The duty

of the commissioner is to determine the admissibility and reliability of the evidence.

Polygraph tests indicate whether or not the subject has answered the questions truthfully, but are not regarded as being 100% accurate. They 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 the alleged misconduct. In other words, polygraph test results, on their own, are not a basis for proving that someone committed an act or omission as alleged by the employer, but may be used as a factor in determining the probabilities.

Because polygraph tests are regarded as not being entirely reliable, dismissals based **solely** on the result of a polygraph test have generally been found to be unfair.

RELEVANT LEGISLATION

- Labour Relations Act 66 of 1995 as amended