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Guidelines on the use of Polygraph testing in the workplace



There is a common misconception among employers that an employee who fails a polygraph test can be summarily dismissed without any other supporting evidence being presented.

Unfortunately, this is not true; therefore, we will address this topic in the article below.

What is a polygraph test?

A polygraph test is a test/examination used to detect deceit and verify a person's honesty and is referred to more commonly as a 'Lie Detector Test'.

Does labour legislation govern the use of polygraph testing?

Disputes over the use of polygraph testing in an employment context are currently not governed by specific labour legislation. The employee's rights in terms of the abuse of the test are enshrined in and protected by the Constitution (the right to privacy and the right not to incriminate oneself).

Can an employee be forced to undergo a polygraph test?

An employee may not be forced to undergo a polygraph examination. He or she must agree to it in writing or in terms of the provisions of a collective agreement or contract of employment.

It would be advisable to add a clause to the employee's employment contract stipulating the following:

1. The employee agrees to any testing for the purpose of applying rules, policies, etc. which are not discriminatory of nature and are provided for by law, including, but not limited to-
 - blood, urine or breathalyser tests;
 - fingerprint examination;
 - polygraph testing;
 - medical testing, excluding testing prohibited by the Employment Equity Act of 1988.
2. The employee agrees to reasonable searching of his/her person or property as part of access control to the premises of the employer or in the event of reasonable suspicion of misconduct.
3. The employee is aware of and agrees to the monitoring of business vehicles driven by the employee by means of satellite monitoring equipment and surveillance, or the premises of the employer by surveillance or similar equipment.
4. The above permission is granted by the employee on condition that it is necessary for the protection of the employer's business and with due regard to the privacy and other rights enjoyed by the employee.

If due to a contractual obligation on the employee and/or where the employee gives permission for the polygraph test, the employer should nevertheless inform the employee of the following:

- The examinations are voluntary (unless there is a contractual obligation on the employee);
- Only questions discussed prior to the examination will be used;
- He/she has a right to have an interpreter;
- He/she may request that another person be present during the examination, provided that such person does not interfere;
- No abuse, discrimination and/or threats shall be allowed.

When is an employer allowed to use polygraph testing?

In general, employers can use the polygraph test to investigate specific incidents where–

- employees had access to property which is the subject of the investigation;
- there is a reasonable suspicion of the employee's involvement in the incident;
- there has been economic loss or damage to the employer's business;
- the employer is taking action to reduce or prevent dishonesty in positions of trust;
- the employer is taking action to reduce or prevent the abuse of alcohol, illegal drugs or narcotics and fraudulent behaviour within the company;
- the employer is combating deliberate falsification of documents and lies regarding the identity of the people involved.

How does the CCMA view polygraph tests?

Polygraph examiners have been accepted as expert witnesses. The Commissioner should determine the admissibility and reliability of the evidence. Polygraph test results on its own may not be interpreted as implying guilt but should be used to support other evidence that may suggest that the employee concerned is guilty of the alleged misconduct.

It is suggested that the employer investigate a matter as thoroughly and diligently as possible and not rely solely on the result of a polygraph test as an indication of guilt.

In conclusion, ***SERR Synergy*** will be able to assist employers by guiding them during the investigation to acquire evidence of any alleged misconduct to be used in a ***Disciplinary Inquiry in support of the polygraph test results***. With our professional legal assistance, the employee's misconduct will be addressed and resolved in a fair manner.

About the Author: Gerhard Viljoen joined SERR Synergy in June 2016 and is a Legal Advisor at our Pretoria Branch. He is an admitted attorney of the High Court of South Africa and completed his LLB degree, Law School and a post-graduate Certificate in Advanced Labour Law at the University of Pretoria.

Sources:

Relevant legislation: Labour Relations Act 66 of 1995, as amended and sections 14 and 35(3) of the Constitution of South Africa.

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