

## **Employee Polygraph Protection Act (EPPA) Requirements**

**There are five general requirements under the ongoing investigations exemption:**

1. Economic loss or injury to the employer's business

The test must be administered in connection with an ongoing investigation involving economic loss or injury to the employer's business, such as, theft, embezzlement, misappropriation, an act of unlawful industrial espionage or sabotage, check kiting, money laundering, or the misappropriation of confidential or trade secret information. In addition, instances such as theft from property managed by an employer or property held by an employer as a fiduciary or custodian, would meet the required injury standard. Further, the economic loss must result from intentional wrongdoing, and not unintentional or accidental losses. It is the business of the employer that must suffer the economic loss or injury. Thus, according to the Department of Labor, a theft committed by one employee against another employee of the same employer does not satisfy the requirement. In addition, the ongoing investigation exemption does not allow a EyeDetect test to be used to determine whether an employee has used drugs or alcohol, or has engaged in misconduct other than misconduct causing economic loss or injury to the employer's business.

2. Access

Only employees who have access to the property that is the subject of the investigation may be EyeDetect tested. The term "access", however, includes more than direct or physical contact during the course of employment. Generally, all employees who have the ability to divert possession or otherwise affect the disposition of the property that is the subject of the investigation, will be deemed to have "access" under the ongoing investigation exemption.

3. Reasonable Suspicion

In addition to access, there must be a basis for "reasonable suspicion" that the employee to be EyeDetect tested was involved in the incident or activity under investigation. The phrase "reasonable suspicion" simply means that the employer must have an articulable basis to believe that the employee was involved in or responsible for the economic loss or injury. The employer's suspicions must not be based on whimsical or arbitrary factors, such as the race or ethnicity of the employee. Information from a co-worker, or information derived from an employee's behavior, demeanor, or conduct, may be factors in forming a "reasonable suspicion." Additionally, inconsistencies between facts, claims or statements that surface during an investigation can serve as a

basis for “reasonable suspicion.” The watchword is “reasonable,” and so long as the employer can describe and articulate a reasonable basis for his suspicions, this requirement will be satisfied.

#### 4. Special 48-Hour Notice

Before an employer may administer a EyeDetect examination to an employee under the ongoing investigations exemption, the employer must execute a statement that sets forth with particularity the specific incident being investigated, indicates that the employee has access to the property that is the subject of the investigation, and describes the basis of the employer's reasonable suspicion that the employee was involved in the incident or activity under investigation. This statement must be provided to the examinee at least 48-hours before the test; it must be signed by any person legally authorized to bind the employer; and it must be retained by the employer for at least three years.

#### 5. Section 8 Procedures

In addition to all of the above, employers must comply with the restrictions, procedures, notices, and examinee "rights" which are spelled out in section 8 of EPPA and described more fully in the Consent/Release for EyeDetect Detection of Deception Examination Release Form.