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Labor

## Senate Passes Bill Limiting Lie Detector Tests

After overcoming resistance from a core group of conservative Republicans, the Senate March 3 passed a bill that would ban most uses of polygraphs by employers in the private sector.

The measure, HR 1212, now goes to a conference with members of the House, which passed a more restrictive version of the bill Nov. 4. The Senate vote was 69-27. (*Vote 43, p. 608; background. Weekly Report p. 265; House action, 1987 Weekly Report p. 2754*)

"This legislation is a fundamental issue of workers' rights," said Edward M. Kennedy, D-Mass., chairman of the Labor and Human Resources Committee and one of two key sponsors of the bill. "We know that in most applications, the devices cannot be trusted. It is time to put an end to their unacceptable misuse."

The other chief sponsor was conservative Orrin G. Hatch of Utah, ranking Republican on the Labor Committee and frequent opponent of such labor-backed measures as HR 1212.

"I am sure that few of my colleagues expected to see, during this Congress, the distinguished senator from Massachusetts and myself standing side by side in support of a labor bill," Hatch acknowledged. "But [this] is a truly unique bill."

He said the measure was an equitable compromise between workers' rights and the concerns of business owners who say the polygraph is useful in fighting theft.

The Reagan administration opposed the House version of the polygraph bill, but did not take a firm position on the Senate bill, which would allow businesses to use polygraphs under certain, strictly defined circumstances.

### Compromise

The bill's basic compromise is that it would ban using polygraphs on employees or job applicants except when an employer was investigating a specific crime and had reason to suspect a particular employee. And in those cases, the test could only be used as supporting evidence, not as

—By Patrick L. Knudsen

the sole grounds for action against the employee. (*Provisions, p. 576*)

Opponents of the bill included Republicans Dan Quayle of Indiana, Strom Thurmond of South Carolina, Thad Cochran of Mississippi and Phil Gramm of Texas. They succeeded in modifying some provisions of the bill.

An amendment by Thurmond, adopted by voice vote, exempted companies that operate armored cars or install security systems at facilities involving public health and safety.

An amendment by Quayle, clarifying that the bill would not prohibit employers from using other means to test job applicants for drug use, was adopted 96-0. (*Vote 35, p. 603*)

But the Senate voted 55-37 to table, or kill, an amendment by Gramm that would have exempted airlines and railroads. (*Vote 38, p. 603*)

Also tabled, by a 56-38 vote, was an amendment by Rudy Boschwitz, R-Minn., that would have allowed an employer to administer a lie detector test if an employee requested one. (*Vote 37, p. 603*)



**"You are talking about 260,000 honest and truthful Americans who are being labeled liars."**

—Sen. Edward M. Kennedy,  
D-Mass.

The opponents of the bill complained because it would put restrictions on private employers that would not apply to state and local governments or the federal government.

"That type of hypocrisy is not unusual, but I think it ought to be pointed out," said Quayle.

Hatch said the exemption was justified because the federal government generally does a better job in using polygraphs, conducting long and thorough tests that cost as much as \$800. By contrast, he said, some private-sector employers conduct "quickie" tests lasting about 15 minutes and costing \$15 to \$25. He said such examinations are less accurate than longer ones.

Hatch also said the federal law should not impose practices on states and local governments. But opponents took that a step further and said states should be the ones to establish regulations governing polygraph use.

The legislation "is an intrusion into an area never delegated to the federal government," said Thurmond.

Kennedy said a federal law was needed because some employers dodge current regulations by conducting polygraph tests on applicants in states where the practice is legal and then sending the new hires to work in states where it is not.

Kennedy said nearly 2 million polygraph tests were administered last year but that the tests are only about 85 percent accurate, meaning many people are incorrectly labeled liars.

"You are talking about 260,000 honest and truthful Americans who are being labeled liars and deceptive, and that is on their record," he said.

He also cited a study by the Office of Technology Assessment that said dishonest people had a good chance of passing polygraph tests because they lack the conscience to generate the physiological responses recorded by polygraphs.

"If you are an altar boy, you would probably fail" a polygraph test, Kennedy said. "But who passes it? The psychopaths, the deceptive ones."

Before passing HR 1212, the Senate substituted the text of its own polygraph bill, S 1904.

# Major Provisions of Polygraph Protection Act

The Senate March 3 passed the Polygraph Protection Act of 1987, HR 1212, which would ban or strictly limit the use of lie detectors by private-sector employers. (*Story, p. 575*)

As passed by the Senate, the bill would:

## Definitions

- Define a "lie detector test" as any examination using any polygraph, deceptograph, voice-stress analyzer, psychological-stress evaluator or any other similar mechanical, electrical or chemical device the results of which are used to reach an opinion about the honesty or dishonesty of an individual.
- Define a "polygraph" as an instrument that records "continuously, visually, permanently and simultaneously changes in the cardiovascular, respiratory and electrodermal patterns" of the examinee.

## Prohibitions

- Prohibit employers from requiring, requesting, suggesting or causing an employee or applicant to take a lie detector test, but allow employers to use other scientifically valid tests to determine whether a job applicant uses controlled substances.
- Prohibit employers from using, accepting or referring to a lie detector test taken by an employee or applicant.
- Prohibit employers from discharging, dismissing, disciplining or denying employment or promotion to an employee on the basis of a lie detector test; because the employee refuses to take such a test; because the employee has filed a complaint or has started a lawsuit under provisions of this act; because the employee has or is about to testify in such a lawsuit; or because the employee exercised any other right provided under this act.

## Secretary of Labor

- Require the secretary of labor to have printed and distributed a notice explaining provisions of the act, and require employers to post the notice.
- Require the secretary of labor to issue rules and regulations needed to carry out the act within 120 days of enactment of the legislation.
- Require the secretary to work with regional, state and local agencies, labor organizations and employment agencies to help in carrying out the provisions of the act.
- Require the secretary to conduct investigations and inspections and to mandate record keeping to assure the provisions are carried out.
- Grant the secretary authority to subpoena witnesses for investigations or hearings under the act.
- Require that the secretary establish standards governing persons who are qualified to conduct polygraph tests.

## Enforcement

- Provide a civil penalty of up to \$10,000 for violating provisions of the act.
- Allow the secretary of labor to seek injunctions or restraining orders to prevent a violation of the act.
- Make an employer who violates the act liable to the employee or applicant affected. Relief to the employee or applicant could be through employment, reinstatement, promotion or the payment of lost wages and benefits.

- Allow such an action to be brought in federal or state court by one or more employees. The court could allow the winning party in such an action, other than the United States, reasonable attorneys' fees.
- Prohibit a waiver of rights and procedures of the act unless part of a written settlement of pending action or complaint, signed by all parties involved.

## Exemptions

- Exempt employees of federal, state or local governments or their subdivisions.
- Exempt experts or consultants under contract to the Department of Energy who work with atomic-energy defense activities or employees of the department or of such a contractor.
- Exempt experts or consultants to the Department of Energy who work in connection with atomic-energy defense activities or employees of the department or of such a contractor.
- Exempt other contractors to the Department of Energy who require security clearances.
- Exempt persons employed by or assigned to the National Security Agency (NSA) or the CIA.
- Exempt employees of a contractor to the NSA or CIA.
- Exempt applicants for a job with the NSA or CIA.
- Exempt employees assigned to an area where "sensitive cryptologic information" is handled by the NSA or CIA.
- Exempt employees of a contractor to the FBI.
- Exempt employees of armored car firms and companies dealing in installation of security systems for facilities affecting the public health and safety.

## Ongoing Investigations

- Allow an employer to request a lie detector test of an employee if the following conditions were met:
  - The test were administered in connection with an investigation of a crime at the business, such as theft, embezzlement, misappropriation, unlawful industrial espionage or sabotage.
  - The employee had access to the property that is the subject of the investigation.
  - The employer had a reasonable suspicion that the employee was involved in the incident.
  - The employer filed a report of the incident to the appropriate law-enforcement agency.
  - The employer filed a claim with its insurance agent, unless self-insured.
  - The employer filed a report of the incident with the appropriate government regulatory agency or issued a written, legally binding statement that described the incident, explained why particular employees were to be tested, was furnished to the employee or employees on request and was retained in the employer's files for at least three years. The statement also would have to identify the specific loss or injury, show that the employee to be tested had access to the property and state the employer's reason for suspecting the employee.
  - Employers who administer lie detector tests as part of an ongoing investigation would still be required to comply with all applicable state and local laws or collective-bargaining agreements that limit the use of polygraphs.

Polygraphs administered as part of an ongoing investigation could not be the sole reason for dismissing, disciplining or discriminating against an employee. Test results could be used only as supporting evidence in a crime.

## Testing Procedures

- Provide that before a polygraph test is administered, the person to be examined:
  - Must be given reasonable notice of the time, date and place of the test and his or her right to obtain a lawyer or employee representative for advice.
  - May not be subjected to harassing questioning.
  - Must be informed about the polygraph device to be used and the nature of the test.
  - Must be told whether the testing area contains a two-way mirror, a camera or any other observation device.
  - Must be told whether any other recording device will be used. A recording may be made if the employee and employer both are aware of it.
  - Signs a written notice saying that the test cannot be given as a condition of employment; stating that anything the employee says during the test may constitute supportive evidence in an investigation; describing the limitations imposed by the act on polygraph use; describing the employee's legal rights and remedies if the test is not conducted as prescribed by the act.
  - Must be given an opportunity to review all questions to be asked during the test and be told of his or her right to end the test at any point.
- Provide that during the actual test:
  - The person examined could not be asked any questions concerning religious beliefs or affiliations, racial beliefs or opinions, political beliefs or affiliations, sexual behavior or beliefs, affiliations or opinions regarding unions or labor organizations.
  - The examinee may end the test at any time.
  - The examiner may not ask questions in a manner that is degrading or intrusive.
  - The examiner may not conduct the test when there is written evidence by a doctor that the examinee has a medical or psychological condition, or is undergoing medical treatment, that could affect the outcome.
  - The examiner does not conduct and complete more than five polygraph tests on the day on which the test is given.
  - The test is no less than 90 minutes long.
- Require that after the test, and before any action is taken against an employee, the employer must:
  - Further interview the examinee about the results of the test.
  - Provide the examinee with a written copy of any opinion or conclusion based on the test results.
  - Provide the examinee with a written copy of the test results and the responses.

## Qualifications of Examiner

- Require that the examiner:
  - Be at least 21 years old.
  - Comply with all of the licensing and regulatory laws in the state in which the test is given.
  - Successfully complete a formal polygraph training program approved by the secretary of labor or the state in which the test is conducted.
  - Complete a six-month polygraph internship.



An FBI official administers a lie detector test.

- Maintain a minimum of \$50,000 bond or an equal amount of professional liability coverage.
- Can use an instrument that records "continuously, visually, permanently and simultaneously changes in the cardiovascular, respiratory and electrodermal patterns."
- Base an opinion on an evaluation of the physiological responses recorded.
- Render an opinion or conclusion about the test in writing, and only on the basis of an analysis of the polygraph charts, containing no information except admissions, information, case facts and interpretation of the charts relevant to the objectives of the test. The opinion cannot include a recommendation about the employment status of an employee.
- Maintain all records and written documents about the test for at least three years.

## Disclosure

- Prohibit the disclosure of information obtained during a polygraph examination. However, information could be given to the person who took the test, or that person's designee; to the employer who requested the test; or to an authorized person or government agency with a warrant for the information.

## Miscellaneous

- Mandate that the act would not pre-empt state or local laws or collective-bargaining agreements that are more restrictive. The act would be effective six months after enactment.