

SUPPORTING STATEMENT
EMPLOYEE POLYGRAPH PROTECTION ACT
REGULATIONS 29 C.F.R. PART 801
OMB CONTROL NUMBER 1235-0005

A. Justification

1. Circumstances Necessitating Information Collection

The Employee Polygraph Protection Act of 1988 (EPPA) prohibits most private employers from using any lie detector tests either for pre-employment screening or during the course of employment. 29 U.S.C. § 2002; 29 C.F.R. §§ 801.1(a), 801.4. Federal, State, and local government employers are exempted from the Act. 29 U.S.C. § 2006(a); 29 C.F.R. §§ 801.1(a), 801.10. EPPA section 7 contains several limited exemptions authorizing polygraph tests under certain conditions, including testing: (1) by the Federal Government of experts, consultants, or employees of Federal contractors engaged in national security intelligence or counterintelligence functions [29 U.S.C. § 2006(b)-(c); 29 C.F.R. § 801.11]; (2) of employees the employer reasonably suspects of involvement in a workplace incident resulting in economic loss or injury to the employer's business [29 U.S.C. § 2006(d); 29 C.F.R. § 801.12]; (3) of some current and prospective employees of certain firms authorized to manufacture, distribute, or dispense controlled substances [29 U.S.C. § 2006(f); 29 C.F.R. § 801.13]; and (4) of some prospective employees of private armored car, security alarm, and security guard firms [29 U.S.C. § 2006(e); 29 C.F.R. § 801.14].

EPPA section 5 requires the Secretary of Labor to promulgate such rules and regulations as may be necessary to carry out the Act and to require the recordkeeping necessary or appropriate for administration of the Act. 29 U.S.C. § 2004(a).

A. Written Notice to Examinee of Polygraph Testing—Ongoing Economic Loss or Injury Investigations, Security Services Industry, and Controlled Substances

EPPA section 7 provides limited exemptions from the general prohibition on polygraph use in private employment settings of current employees during ongoing investigations of an employer's economic loss or injury [29 U.S.C. § 2006(d); 29 C.F.R. § 801.12(a)] or theft or diversion of controlled substances by certain authorized manufacturers, distributors, or dispensers [29 U.S.C. § 2006(f); 29 C.F.R. § 801.13(a)]. With respect to polygraph tests for ongoing investigations of an employer's economic loss, EPPA section 7(d)(4) requires a notice that particularly identifies the specific incident or activities being investigated and the basis for testing particular employees. 29 U.S.C. § 2006(d)(4); 29 C.F.R. § 801.12(a). EPPA section 7 also provides limited exemptions from the general prohibition on polygraph use in private employment settings for pre-employment testing in the security services industry [29 U.S.C. § 2006(e); 29 C.F.R. § 801.14(a)] and security of controlled substances by certain manufacturers, distributors, or dispensers [29 U.S.C. § 2006(f); 29 C.F.R. § 801.13(a)]. A statutory condition of all these exemptions is that the examinee be provided the written notice prescribed by Regulations 29 C.F.R. § 801.23. Regulations 29 C.F.R. § 801.30(a)(1),

(2), and (3) require employers to retain copies of such written notices for a period of three years from the date the polygraph examination is conducted (or from the date the examination is requested, if no examination is conducted).

B. Written Notice to Polygraph Examiner Identifying Persons to be Examined under the EPPA

Regulations 29 C.F.R. § 801.30(a)(4) requires employers to identify, in writing, to the polygraph examiner persons to be examined under EPPA sections 7(d), (e), or (f) and to retain a copy of the notice for a period of 3 years. This requirement ensures the examiner is alerted of the need to follow specific steps required by the Act for tests administered under the various exemptions (*e.g.*, 90-minute minimum duration per test and no more than five tests per day). In addition, this requirement creates a record of job applicants or current employees who have been tested.

C. Written Notice of Test Results Prior to Adverse Employment Action

EPPA section 8(b)(4) provides that, prior to any adverse employment action, the examinee shall be provided with a written copy of any opinion or conclusion rendered as result of a polygraph test and a copy of the questions asked during the test and corresponding charted responses. 29 U.S.C. § 2007(b)(4); 29 C.F.R. § 801.25.

D. Test Results Written Report and Test Record Maintenance

EPPA section 8(c)(2) requires polygraph examiners to set forth any opinions or conclusions regarding polygraph tests in writing and to maintain all opinions, reports, charts, written questions, lists, and other records relating to the test for at least three years. 29 U.S.C. § 2007(c)(2). Moreover, Regulations 29 C.F.R. § 801.30(a)(6) provides that the examiner must maintain a record of the (1) number of tests conducted each day (both those subject to the EPPA and those that are not) and (2) the duration of each test period. Regulations 29 C.F.R. § 801.30(a)(5) provides that the employer retaining the polygraph examiner to administer the tests must also maintain copies for at least three years of all opinions, reports, or other records furnished to the employer by the examiner.

2. **Use**

The U.S. Department of Labor (DOL), Wage and Hour Division (WHD) uses the subject information collections to ensure individuals subjected to polygraph testing receive the rights and protections contained in the EPPA. Failure to collect the information would prevent employees from knowing their rights and obligations under the EPPA and the WHD from enforcing the provisions of the Act.

3. **Technology**

EPPA section 8(b) and Regulations 29 C.F.R. §§ 801.22-.25 require specific information to be provided to perspective examinees both orally and in writing before taking a polygraph examination permitted under exemptions 7(d), (e), and (f) of the Act. Appendix A of Regulations, 29 C.F.R. Part 801, contains a specific written statement that employers must use to satisfy the EPPA section 8(b)(2)(D) disclosure requirement of setting forth in writing information about the polygraph test. In accordance with the Government Paperwork Elimination Act, the DOL has posted this notice on the Internet in a PDF format for downloading and printing. See <http://www.dol.gov/whd/forms/wh1481.pdf>.

4. **Duplication**

These information collections do not duplicate existing WHD requirements. No similar information is available from any other source.

5. **Minimizing Small Entity Burden**

These information collections do not have a significant impact on a substantial number of small entities.

6. **Consequence of Failing to Collect and Obstacles to Reducing Burden**

These information collections are required only when employers use polygraph tests subject to the EPPA. Less frequent collection would not satisfy the provisions of the Act.

7. **Special Circumstances**

There are no special circumstances associated with these information collections.

8. **Public Participation**

The DOL published a Federal Register Notice on January 27, 2011, inviting public comments about these information collections. 76 Fed. Reg. 4946. The agency received no comments. Routine contacts with the regulated community have not resulted in the DOL becoming aware of any substantive problems or undue burdens.

9. **Payments or Gifts to Respondents**

The DOL offers no payments or gifts to respondents in connection with these information collections.

10. **Assurances of Confidentiality**

EPPA section 9 prohibits disclosure (direct or indirect) of any information obtained during a polygraph test by any person, other than the examinee, except as provided in EPPA sections 9 (b) and (c). 29 U.S.C. § 2008; 29 C.F.R. § 801.35.

11. **Sensitive Questions**

EPPA section 8(b)(1)(C) prohibits a polygraph examinee from being asked any questions dealing with religious beliefs or affiliations; beliefs or opinions regarding racial matters; political beliefs or affiliations; sexual behavior; and beliefs, affiliations, opinions, or lawful activities concerning unions or labor organizations. 29 U.S.C. § 2007(b)(1)(C); 29 C.F.R. § 801.23(a)(3)(vii).

12. **Estimated Annual Respondent Burden Hours**

A. Written Notices to Examinee of Polygraph Testing—Ongoing Investigations, Security Services, Drug Investigations

The DOL estimates 164,000 polygraph tests subject to the EPPA are conducted annually. Appendix A of Regulations, 29 C.F.R. Part 801, contains the wording for a specific written statement that employers must use to satisfy the EPPA section 8(b)(2) (D) disclosure requirement to setting forth, in writing, specific information about the test. The DOL estimates a recordkeeping burden of one minute per notice, for an annual burden of 2733 hours. 164,000 tests x 1 minute.

The DOL estimates 85,000 polygraph examinations involve ongoing investigations subject to EPPA section 7(d)(4) provisions requiring an additional written notice explaining the reasons why the examinee is being tested. The DOL estimates providing this additional information takes approximately one-half hour per notice, for an annual burden of 42,500 hours. 85,000 polygraph exams x ½ hour.

Annual Burden 45,233 Hours.

B. Written Notice to Polygraph Examiner Identifying Persons to be Examined under EPPA—Maintenance of Records Provided by Polygraph Examiner.

The DOL estimates each written notice identifying those persons to be examined under EPPA sections 7(d), (e), or (f) takes approximately 5 minutes, for an estimated annual burden of 13,667 hours. 164,000 x 5 minutes.

The DOL further estimates the filing of each written notice identifying those persons to be examined with the polygraph examiner takes one minute, for an annual burden of 2733 hours. 164,000 tests x 1 minute.

Annual Burden16,400 Hours.

C. Written Notice of Test Results Prior to Adverse Employment Action

The DOL estimates 10 percent of the 164,000 annual polygraph examinations subject to the EPPA (16,400) result in an adverse action requiring a written notice of the test results. Providing the written notice to the examinee takes approximately one minute, since the employer need only provide the examinee with a copy of a record the employer already has. The annual reporting burden of this requirement is 273 hours. 16,400 records x 1 minute.

Annual Burden 273 Hours.

D. Written Report of Test Results and Maintenance of Test Record—Polygraph Examiner

The DOL associates no reporting burden with the requirement for polygraph examiners to furnish any opinion or conclusions regarding the polygraph test in writing, since they routinely provide such a report—notwithstanding the EPPA requirement. A polygraph examiner also routinely maintains opinions, conclusions, reports, charts, written questions, lists, and other records relating to a test; thus, the only burden for this requirement is the filing of these records. The DOL estimates this recordkeeping burden is one minute per polygraph test, for an annual burden of 2733 hours. 164,000 x 1 minute. The DOL also estimates the burden for filing records of the number of tests conducted each day and the length of each test takes to be ½ minute per test, for a burden of 1367 hours. 164,000 tests x ½ minute. 2733 hours +1367 hours = 4100 burden hours for polygraph examiners.

Regulations 29 C.F.R. § 801.30(a)(6) also requires the employer to maintain records furnished by the polygraph examiner for three years. This adds an additional recordkeeping burden of one minute per test for the filing of these records, for an annual burden of 2733 hours. 164,000 tests x 1 minute.

Annual Burden 6833 Hours.

TOTAL ANNUAL EPPA REPORTING AND RECORDKEEPING BURDEN 68,739 Hours.

Without the availability of specific data for those employers who complete these information collections, the DOL has used the March 2011 average hourly rate for production or nonsupervisory workers on nonfarm payrolls of \$22.87 to compute employer costs for the value of their time. (See DOL, Bureau of Labor Statistics (BLS), Employment Situation, March 2011, Table B-3, p. 27, http://www.bls.gov/news.release/archives/empsit_04012011.pdf).

64,639 Employer Hours x \$22.87 \$1,478,294.

Because the agency has no specific data on earnings for the polygraph examiner, the Department has used the May 2010 median hourly earnings for detectives and criminal investigators (\$33.08) to estimate earnings of polygraph examiners and to determine polygraph examiners' respondent costs. (See DOL, BLS, Occupational Employment and Wages, 2010, Table 1, http://www.bls.gov/news.release/archives/ocwage_05172011.pdf).

4100 Polygraph Examiner Hours x \$33.08 \$135,628.

TOTAL RESPONDENT HOURS BURDEN COST \$1,613,922.

13. **Estimated Annual Respondent Capital/Start-Up/Operation/Maintenance Costs**

No system or technology acquisition is required in order to satisfy these third-party notification and recordkeeping requirements; therefore, respondents incur no maintenance or operations costs for these information collections.

14. **Estimated Annual Federal Costs**

The annualized Federal costs involve the printing/reproduction and mailing of 164,000 forms.

Printing or reproduction of 164,000 copies x \$.03 per copy \$4920.

Mailing 164,000 forms x (\$.44 postage + \$.03 per envelope) \$77,080.

TOTAL FEDERAL COST \$82,000.

15. **Reasons for Program Changes or Adjustments Affecting Public Burdens**

The DOL is revising the format of Form WH-1481 to show the WHD logo and update the OMB Control Number. The DOL does not believe these cosmetic changes affect the public burden; however, as these are considered formatting issues, this submission is characterized as a revision. The DOL has also further disaggregated burden in ROCIS and refined its estimates to calculate the employer recordkeeping burden transactions. The Notice to Polygraph Examiner Identifying Persons to be Examined information collection data entries previously counted providing the notice to the examiner and maintaining a record of the results of the examination as a single action that took 7 minutes to complete. The DOL now believes a better characterization would be counting providing the notice to the examiner as one action that takes 6 minutes and maintaining a record of the examination results as a second action that takes 1 minute. The number of annual responses is increasing by 164,000, because the DOL now counts maintaining a record of the notice to the polygraph examiner as a separate event from maintaining an equal number

of examination results. While the number of responses is increasing, total annual burden hours is unchanged because the prior calculation included all burden hours for both events. For the data entries, this has resulted in a shifting of the burden hours from the “Notice to Polygraph Examiner Identifying Persons to be Examined” information collection to a new “Test Results Written Report and Test Record Maintenance—Employer” information collection (no net change) and an increase of 164,000 responses (from 593,400 to 757,400). Federal costs increased, due to higher postage costs.

16. **Publishing Data From Information Collection**

The DOL does not publish this information.

17. **Display of OMB Approval Expiration**

The DOL will display the expiration date on Form WH-1481.

18. **Exceptions to Certification Statement**

The DOL is not requesting an exception to the certification requirements for paperwork submissions.

B. STATISTICAL METHODS

This information collection does not employ statistical methods.