



SmartMoves
Human Capital

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Directors:

PM Grose, RM Lally

Company Registration

No. 2013/016105/07

Website:

www.smartmoveshc.co.za

Email:

info@smartmoveshc.co.za

phil@smartmoveshc.co.za

rita@smartmoveshc.co.za

Telephone Number:

+27 11 781 2357

Phil: +27 83 625 6186

Rita: +27 82 577 0025

Polygraph Testing in the Workplace

A polygraph, commonly referred to as a lie detector, is a device that measures a person's physiological responses – such as blood pressure, pulse, respiration and skin conductivity – while answering questions.

It has increasingly been used by South African employers, particularly in the retail and security industries, to investigate alleged dishonesty. While there is no specific legislation governing the use of polygraph testing in South Africa, there are a number of guidelines to keep in mind when doing so.

Polygraph testing can be used to investigate specific incidents where the company has experienced an economic loss or damage to the business; to combat dishonesty in employee positions of trust; to combat serious alcohol or narcotics abuse; in cases where the employee has access to company property; and where there is reasonable suspicion of dishonesty or fraudulent behaviour.

However, the constitutional rights of the employee must be protected during the process. These include a person's right to dignity; the right to security over one's body, including the right not to be subjected to medical or scientific experiments without giving informed consent; the right to privacy including communications and body searches; the right to fair labour practices; the right to fair proceedings; and the right not to incriminate oneself. In order to uphold these rights, the test must be conducted with the employee's voluntary, informed written consent. The test should also be administered in private by a qualified professional who is registered with an accredited polygraph association, and access to the results should be limited to authorised persons only. To ensure judicial fairness, all employment contracts should include a clause that explicitly refers to the possibility of polygraph testing. Employees should voluntarily submit to testing without intimidation, threats or abuse. Only questions discussed prior to the test are to be used. The process should not discriminate – employees at all levels must be subject to the same terms and conditions.

It is crucial to note that polygraph testing is controversial and therefore the results are only admissible if supported by corroborating evidence. In other words, polygraph results indicating deception cannot be the only evidence of guilt. So, in the context of dismissal, these results do not in themselves prove complicity in misconduct, and dismissal on this basis would be substantively unfair. When used to assess candidates for hire or promotion, it would also be unfair to eliminate an applicant solely based on their polygraph result.

Until the South African government enacts legislation that deals specifically with this topic employers should be mindful of their employees' rights and adhere to these guidelines when conducting polygraph testing.

Political Parties and Labour Relations

Political parties and trade unions have been strongly affiliated throughout South Africa's history. Until recently this connectedness had little impact on day to day labour relations in the country. However recent incidents reported in the media, involving the Economic Freedom Fighters (EFF) in labour disputes, are of interest.

The EFF, as a political party, is not entitled to organise employers in the workplace in matters concerning the employment relationship. This is the role of unions. The Labour Court recently ruled that should the EFF wish to do so, it must register as a trade union and comply with the Labour Relations Act and the regulations of the Registrar of Labour. While the court ruling creates a separation of roles, it also allows for some involvement of political parties in labour relations. Namely, under the new CCMA rules, political parties could theoretically represent an employee at an arbitration hearing if the representative met the Commissioner's requirements. Under the old rules only a union official, a fellow employee, a director, or in certain circumstances, a legal practitioner, could represent the employee or employer. Now the Commissioner may permit a person who is not listed in the rules as being permitted to represent a party, to apply to be allowed to do so. In addition, the Court was of the opinion that political parties can receive immunity for furthering the efforts of protected strikes. Equally, political parties can also be held liable for inciting unprotected strikes in terms of the Labour Relations Act.

References

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