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products other than controlled substances might be initiated under section 7(d) of the Act and § 801.12 of this part. However, the exemption in section 7(f) of the Act and this section is limited solely to losses or injury associated with controlled substances.

(g) Polygraph tests administered pursuant to this exemption are subject to the limitations set forth in sections 8 and 10 of the Act, as discussed in §§ 801.21, 801.22, 801.23, 801.24, 801.25, 801.26, and 801.35 of this part. As provided in these sections, the exemption will apply only if certain requirements are met. Failure to satisfy any of the specified requirements nullifies the statutory authority for polygraph test administration and may subject the employer to the assessment of civil money penalties and other remedial actions, as provided for in section 6 of the Act (see subpart E, § 801.40 of this part). The administration of such tests is also subject to State or local laws, or collective bargaining agreements, which may either prohibit lie detector tests, or contain more restrictive provisions with respect to polygraph testing.

[56 FR 9064, Mar. 4, 1991; 56 FR 14469, Apr. 10, 1991]

### § 801.14 Exemption for employers providing security services.

(a) Section 7(e) of the Act provides an exemption from the general prohibition against polygraph tests for certain armored car, security alarm, and security guard employers. Subject to the conditions set forth in sections 8 and 10 of the Act and §§ 801.21, 801.22, 801.23, 801.24, 801.25, 801.26, and 801.35 of this part, section 7(e) permits the use of polygraph tests on certain prospective employees provided that such employers have as their primary business purpose the providing of armored car personnel, personnel engaged in the design, installation, and maintenance of security alarm systems, or other uniformed or plainclothes security personnel; and provided the employer's function includes protection of:

(1) Facilities, materials, or operations having a significant impact on the health or safety of any State or political subdivision thereof, or the national security of the United States, such as—

(i) Facilities engaged in the production, transmission, or distribution of electric or nuclear power,

(ii) Public water supply facilities,

(iii) Shipments or storage of radioactive or other toxic waste materials, and

(iv) Public transportation; or

(2) Currency, negotiable securities, precious commodities or instruments, or proprietary information.

(b)(1) Section 7(e) permits the administration of polygraph tests only to prospective employees. However, security service employers may administer polygraph tests to current employees in connection with an ongoing investigation, subject to the conditions of section 7(d) of the Act and § 801.12 of this part.

(2) The term *prospective employee* generally refers to an individual who is not currently employed by and who is being considered for employment by an employer. However, the term ''prospective employee'' also includes current employees under circumstances similar to those discussed in paragraph (d) of § 801.13 of this part, i.e., if the employee was initially hired for a position which was not within the exemption provided by section 7(e) of the Act, and subsequently applies for, and is under consideration for, transfer to a position for which pre-employment testing is permitted. Thus, for example, a security guard may be hired for a job outside the scope of the exemption's provisions for pre-employment polygraph testing, such as a position at a supermarket. If subsequently this guard is under consideration for transfer or promotion to a job at a nuclear power plant, this currently-employed individual would be considered to be a ''prospective employee'' for purposes of this exemption, prior to such proposed transfer or promotion. However, any adverse action which is based in part on a polygraph test against a current employee who is considered to be a ''prospective employee'' for purposes of this exemption may be taken only with respect to the prospective position and may not affect the employee's employment in the current position.

(c) Section 7(e) applies to certain private employers whose ''primary business purpose'' consists of providing armored car personnel, personnel engaged in the design, installation, and maintenance of security alarm systems, or other uniformed or plainclothes security personnel. Thus, the exemption is limited to firms primarily in the business of providing such security services, and does not apply to firms primarily in some other business who employ their own security personnel. (For example, a utility company which employs its own security personnel could not qualify.) In the case of diversified firms, the term *primary business purpose* shall mean that at least 50% of the employer's annual dollar volume of business is derived from the provision of the types of security services specifically identified in section 7(e). Where a parent corporation includes a subsidiary corporation engaged in providing security services, the annual dollar volume of business test is applied to the legal entity (or entities) which is the employer, i.e., the subsidiary corporation, not the parent corporation.

(d)(1) As used in section 7(e)(1)(A), the terms *facilities, materials, or operations having a significant impact on the health or safety of any State or political subdivision thereof, or the national security of the United States* include protection of electric or nuclear power plants, public water supply facilities, radioactive or other toxic waste shipments or storage, and public transportation. These examples are intended to be illustrative, and not exhaustive. However, the types of ''facilities, materials, or operations'' within the scope of the exemption are not to be construed so broadly as to include low priority or minor security interests. The ''facilities, materials, or operations'' in question consist only of those having a ''significant impact'' on public health or safety, or national security. However, the ''facilities, materials, or operations'' may be either privately or publicly owned.

(2) The specific ''facilities, materials, or operations'' contemplated by this exemption include those against which acts of sabotage, espionage, terrorism, or other hostile, destructive, or illegal acts could significantly impact on the general public's safety or health, or national security. In addition to the specific examples set forth in the Act and in paragraph (d)(1) of this section, the terms would include:

(i) Facilities, materials, and operations owned or leased by Federal, State, or local governments, including instrumentalities or interstate agencies thereof, for which an authorized public official has determined that a need for security exists, as evidenced by the establishment of security requirements utilizing private armored car, security alarm system, or uniformed or plainclothes security personnel, or a combination thereof. Examples of such facilities, materials and operations include:

(A) Government office buildings;

(B) Prisons and correction facilities;

(C) Public schools;

(D) Public libraries;

(E) Water supply;

(F) Military reservations, installations, posts, camps, arsenals, laboratories, Government-owned and contractor operated (GOCO) or Government-owned and Government-operated (GOGO) industrial plants, and other similar facilities subject to the custody, jurisdiction, or administration of any Department of Defense (DOD) component;

(ii) Commercial and industrial assets and operations which—

(A) Are protected pursuant to security requirements established in contracts with the United States or other directives by a Federal agency (such as those of defense contractors and researchers), including factories, plants, buildings, or structures used for researching, designing, testing, manufacturing, producing, processing, repairing, assembling, storing, or distributing products or components related to the national defense; or

(B) Are protected pursuant to security requirements imposed on registrants under the Controlled Substances Act; or

(C) Would pose a serious threat to public health or safety in the event of a breach of security (this would include, for example, a plant engaged in the manufacture or processing of hazardous materials or chemicals but

would not include a plant engaged in the manufacture of shoes);

(iii) Public and private energy and precious mineral facilities, supplies, and reserves, including—

(A) Public or private power plants and utilities;

(B) Oil or gas refineries and storage facilities;

(C) Strategic petroleum reserves; and

(D) Major dams, such as those which provide hydroelectric power;

(iv) Major public or private transportation and communication facilities and operations, including—

(A) Airports;

(B) Train terminals, depots, and switching and control facilities;

(C) Major bridges and tunnels;

(D) Communications centers, such as receiving and transmission centers, and control centers;

(E) Transmission and receiving operations for radio, television, and satellite signals; and

(F) Network computer systems containing data important to public health and safety or national security;

(v) The Federal Reserve System and stock and commodity exchanges;

(vi) Hospitals and health research facilities;

(vii) Large public events, such as political conventions and major parades, concerts, and sporting events; and

(viii) Large enclosed shopping centers (malls).

(3) If an employer believes that ''facilities, materials, or operations'' which are not listed in this subsection fall within the contemplated purview of this exemption, a request for a ruling may be filed with the Administrator. A ruling that such ''facilities, materials, or operations'' are included within this exemption must be obtained prior to the administration of a polygraph test or any other action prohibited by section 3 of the Act. It is not possible to exhaustively account for all ''facilities, materials, or operations'' which fall within the purview of section 7(e) (1) (A). While it is likely that additional entities may fall within the exemption's scope, any such ''facilities, materials, or operations'' must meet the ''significant impact'' test. Thus, ''facilities, materials, or operations'' which would be of vital importance during periods of war or civil emergency, or whose sabotage would greatly affect the public health or safety, could fall within the scope of the term ''significant impact''.

(e)(1) Section 7(e)(1)(B) of the Act extends the exemption to firms whose function includes protection of ''currency, negotiable securities, precious commodities or instruments, or proprietary information''. These terms collectively are construed to include assets primarily handled by financial institutions such as banks, credit unions, savings and loan institutions, stock and commodity exchanges, brokers, or security dealers.

(2) The terms ''currency, negotiable securities, precious commodities or instruments or proprietary information'' refer to assets which are typically handled by, protected for and transported between and among commercial and financial institutions. Services provided by the armored car industry are thus clearly within the scope of the exemption, as are security alarm and security guard services provided to financial and similar institutions of the type referred to above. Also included are the cash assets handled by casinos, racetracks, lotteries, or other businesses where the cash constitutes the inventory or stock in trade. Similarly, security services provided to businesses engaged in the sale or exchange of precious commodities such as gold, silver, or diamonds, including jewelry stores that stock such precious commodities prior to transformation into pieces of jewelry, are also included. The term ''proprietary information'' generally refers to business assets such as trade secrets, manufacturing processes, research and development data, and cost/pricing data. Security alarm or guard services provided to protect the premises of private homes, or businesses not primarily engaged in handling, trading, transferring, or storing currency, negotiable securities, precious commodities or instruments, or proprietary information, on the other hand, are normally outside the scope of the exemption. This is true even though such places may physically house some such assets. However, where such security alarm or guard service is specifically designed or limited to the protection of

the types of assets identified above, whether located in businesses or residences, or elsewhere, the security services provided are within the scope of the exemption. For example, a security system specially designed to protect diamonds kept in a home vault of a diamond merchant would be within the exemption. However, a security system installed generally to protect the premises of the home of the same merchant would not be within the exemption. A guard sent to a client firm to secure a restricted office in which only proprietary research data is developed and stored is within the scope of the exemption. Another guard sent to the same firm to protect the building entrance from unwanted intruders is not within the scope of the exemption even though the building contains the restricted room in which the proprietary research data is developed and stored, since the security system is not specifically designed to protect the proprietary information.

(f) An employer who falls within the scope of the exemption is one ''whose function includes'' protection of ''facilities, materials, or operations'', discussed in paragraph (d) of this section or of ''currency, negotiable securities, precious commodities or instruments, or proprietary information'' discussed in paragraph (e) of this section. Thus, assuming that the employer has met the ''primary business purpose'' test, as set forth in paragraph (c) of this section, the employer's operations then must simply ''include'' protection of at least one of the facilities within the scope of the exemption.

(g)(1) Section 7(e) (2) provides that the exemption shall not apply if a polygraph test is administered to a prospective employee who would not be employed to protect the ''facilities, materials, operations, or assets'' referred to in section 7(e) (1) of the Act, and discussed in paragraphs (d) and (e) of this section. Thus, while the exemption applies to employers whose function ''includes'' protection of certain facilities, employers would not be permitted to administer polygraph tests to prospective employees who are not being employed to protect such functions.

(2) The phrase ''employed to protect'' in section 7(e)(2) has reference to a wide spectrum of prospective employees in the security industry, and includes any job applicant who would likely protect the security of any qualifying ''facilities, materials, operations, or assets.''

(3) In many cases, it will be readily apparent that certain positions within security companies would, by virtue of the individual's official job duties, entail ''protection''. For example, armored car drivers and guards, security guards, and alarm system installers and maintenance personnel all would be employed to protect in the most direct and literal sense of the term.

(4) The scope of the exemption is not limited, however, to those security personnel having direct, physical access to the facilities being protected. Various support personnel may also, as a part of their job duties, have access to the process of providing security services due to the position's exposure to knowledge of security plans and operations, employee schedules, delivery schedules, and other such activities. Where a position entails the opportunity to cause or participate in a breach of security, an employee to be hired for the position would also be deemed to be ''employed to protect'' the facility.

(i) For example, in the armored car industry, the duties of personnel other than guards and drivers may include taking customer orders for currency and commodity transfers, issuing security badges to guards, coordinating routes of travel and times for pick-up and delivery, issuing access codes to customers, route planning and other sensitive responsibilities. Similarly, in the security alarm industry, several types of employees would have access to the process of providing security services, such as designers of security systems, system monitors, service technicians, and billing clerks (where they review the system design drawings to ensure proper customer billing). In the security industry, generally, administrative employees may have access to customer accounts, schedules, information relating to alarm system failures, and other security information, such as security employee absences due to illness that create ''holes'' in a security plan. Employees

of this type are a part of the overall security services provided by the employer. Such employees possess the ability to affect, on an opportunistic basis, the security of protected operations, by virtue of the knowledge gained through their job duties.

(ii) On the other hand, there are certainly some types of employees in the security industry who ''would not be employed to protect'' the facilities or assets within the purview of the exemption, and who would not be in the process of providing exempt security services. For example, custodial and maintenance employees typically would not have access, either directly or indirectly as a part of their job duties, to the operations or clients of the employer. Any employee whose ''access'' to secured areas or to sensitive information is on a controlled basis, such as by escort, would also be outside the scope of the exemption. In cases where security service companies also provide janitorial, food and beverage, or other services unrelated to security, the exemption would clearly not extend to any employee considered for employment in such activity.

(5) The phrase ''employed to protect'' includes any job applicant who, if not hired specifically to protect the listed facilities or assets, would likely be so employed, as through a systematic assignment process, such as rotation of work assignments or selection from a pool of available employees, even if selection for such work is unpredictable or infrequent. A prospective employee whose job assignment to perform qualifying protective functions would be made by selection from a pool of available employees (all of whom have an equal chance of being selected), or an employee who is to be rotated through different job assignments which include some qualifying protective functions, is included within the exemption. However, if there is only a remote possibility that a prospective employee, if hired, would perform exempt protective functions, such as on an emergency basis, or if a prospective employee by reason of his or her position, qualifications, or level of experience or for other reasons, would when hired, not ordinarily be assigned to protect qualifying facilities, such an employee would be deemed to have not been hired to protect such facilities and would be excluded from the exemption.

(h) Polygraph tests administered pursuant to this exemption are subject to the limitations set forth in sections 8 and 10 of the Act, as discussed in §§ 801.21, 801.22, 801.23, 801.24, 801.25, 801.26, and 801.35 of this part. As provided in these sections, the exemption will apply only if certain requirements are met. Failure to satisfy any of the specified requirements nullifies the statutory authority for polygraph test administration and may subject the employer to the assessment of civil money penalties and other remedial actions, as provided for in section 6 of the Act (see subpart E, § 801.42 of this part). The administration of such tests is also subject to State or local laws, or collective bargaining agreements, which may either prohibit lie detectors test, or contain more restrictive provisions with respect to polygraph testing.

## Subpart C—Restrictions on Polygraph Usage Under Exemptions

### § 801.20 Adverse employment action under ongoing investigation exemption.

(a) Section 8(a) (1) of the Act provides that the limited exemption in section 7(d) of the Act and § 801.12 of this part for ongoing investigations shall not apply if an employer discharges, disciplines, denies employment or promotion or otherwise discriminates in any manner against a current employee based upon the analysis of a polygraph test chart or the refusal to take a polygraph test, without additional supporting evidence.

(b) ''Additional supporting evidence'', for purposes of section 8(a) of the Act, includes, but is not limited to, the following:

(1)(i) Evidence indicating that the employee had access to the missing or damaged property that is the subject of an ongoing investigation; and

(ii) Evidence leading to the employer's reasonable suspicion that the employee was involved in the incident or activity under investigation; or