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Employment Practices; prohibitions on lie detector use

NEV. REV. STAT. § 613.— (new).

AB 712 (Thompson); 1989 STAT. Ch. 350

Chapter 350 prohibits any employer¹ from requiring, requesting, suggesting, or causing any employee or applicant to undergo a lie detector test.² Under Chapter 350, an employer is forbidden to refer to any polygraph test results,³ nor may the employer take any adverse action⁴ towards any employee or applicant who refuses to undergo the test.⁵ The employer is also prohibited from taking adverse action because an employee files a complaint, testifies, or exercises any right granted under Chapter 350.⁶

The Labor Commissioner (Commissioner)⁷ is required to issue a notice explaining the employee's rights and remedies under Chapter 350,⁸ and every employer must post this notice.⁹ Chapter 350 permits the Commissioner to fine any employer violating the provisions of

1. Employer is broadly defined by Chapter 350 as any person acting as or for an employer. 1989 Nev. Stat. ch. 350, sec. 2, at 723 (enacting NEV. REV. STAT. § 613.—). Chapter 350 does not apply to any Nevada state agency or division. *Id.* sec. 8, at 724 (enacting NEV. REV. STAT. § 613.—).

2. *Id.* sec. 3, at 723 (enacting NEV. REV. STAT. § 613.—). A lie detector is any device such as a polygraph, or voice or psychological stress evaluator that is used mechanically or electrically by the examiner to formulate an opinion as to the examinee's honesty. *Id.* sec. 2, at 723 (enacting NEV. REV. STAT. § 613.—). Case law is unsettled as to the permissibility of a public employer requiring polygraph testing as a prerequisite to gaining or continuing employment. See generally *Gandy v. State ex rel. Div. of Invest. & Narc.*, 96 Nev. 281, 284, 607 P.2d 581, 584 (tested public employee must first be informed of consequences attendant to polygraph examinations). Cf. 29 U.S.C.A. §§ 2001-2009 (West Supp. 1989) (Federal Employee Polygraph Protection Act).

3. 1989 Nev. Stat. ch. 350, sec. 3, at 723 (enacting NEV. REV. STAT. § 613.—). The employer also cannot inquire or use results of any test of the employee or applicant. *Id.*

4. See *id.* (adverse actions include discharging, disciplining, discriminating in employment, or threatening to take such action).

5. *Id.* Nor may the employer take adverse employment action based on any prior test results. *Id.*

6. *Id.* These provisions apply to any legal proceedings instigated by an employee or applicant. *Id.*

7. See NEV. REV. STAT. §§ 607.005-220 (1987) (creation and powers of the Labor Commissioner).

8. 1989 Nev. Stat. ch. 350, sec. 4, at 723 (enacting NEV. REV. STAT. § 613.—). The Commissioner is also allowed to create any necessary procedures for the operation of Chapter 350. *Id.*

9. *Id.* Posting must be in a conspicuous place accessible to all employees and applicants. *Id.*

Chapter 350.¹⁰ The Commissioner is also permitted to sue to compel compliance with Chapter 350.¹¹ The court may order any appropriate legal or equitable relief to restrain further violations.¹²

An employer violating Chapter 350 is liable to any affected employee or applicant for appropriate legal or equitable relief.¹³ Chapter 350 also provides for class action suits against employers.¹⁴ Any waiver of the rights provided by Chapter 350 is declared void, unless agreed to otherwise as part of a written settlement signed by all parties.¹⁵

Chapter 350 exempts polygraph examinations¹⁶ conducted by an employer to investigate a business injury¹⁷ or economic loss.¹⁸ Chapter 350 allows this exemption only when the investigation concerns property to which the examinee had access and the employer reasonably suspects that the examinee was involved in the loss.¹⁹ In addition, the employer must render a signed statement specifying the particular

10. *Id.* sec. 5, at 723 (enacting NEV. REV. STAT. § 613.____). Fines can only be exacted after notice and an opportunity for a hearing. *Id.* To determine the fine, the previous record of compliance and the gravity of the violation must be reviewed. *Id.* The fine can be in addition to any other remedies under the Act, but may not exceed \$9000 for each violation. *Id.*

11. *Id.*

12. *Id.* Relief includes temporary or permanent restraining orders or injunctions, ordering employment of an applicant, reinstatement or promotion of an employee, and recovery of back pay and benefits. *Id.*

13. *Id.* sec. 6, at 724 (enacting NEV. REV. STAT. § 613.____). Relief includes issuance of temporary or permanent restraining orders or injunctions, ordering employment of an applicant, reinstatement or promotion of an employee, and recovery of back pay and benefits. *Id.* See *Molush v. Orkin Exterminating Co., Inc.*, 547 F.Supp 54, 115 L.R.R.M. 4940 (E.D. Pa., 1982) (dismissal for failure to undergo polygraph test gives rise to a valid cause of action for tortious discharge).

14. 1989 Nev. Stat. ch. 350, sec. 6, at 724 (enacting NEV. REV. STAT. § 613.____) (permitting the award of reasonable costs to the prevailing party). Suit must be brought within three years from the date of the alleged violation. *Id.*

15. *Id.* sec. 7, at 724 (enacting NEV. REV. STAT. § 613.____). Chapter 350 declares a waiver of these rights is against public policy. *Id.* See generally NEV. CONST. art. 1, § 9 (liberty of speech and the press); Comment, *Privacy: The Polygraph in Employment*, 30 ARK. L. REV. 35, 41 (1976).

16. A polygraph is a device that visually, permanently and simultaneously monitors cardiovascular and respiratory activity and skin resistance changes to aid an examiner in formulating an opinion as to the truthfulness of the examinee's statements. 1989 Nev. Stat. ch. 350, sec. 2, at 723 (enacting NEV. REV. STAT. § 613.____). Compare *id.* with *id.* sec. 2, at ____ (enacting NEV. REV. STAT. § 613.____) (lie detectors include polygraph instruments as well as other instruments).

17. Business injury includes theft, embezzlement, misappropriation, or any unlawful espionage or act of sabotage. *Id.* sec. 9, at 724 (enacting NEV. REV. STAT. § 613.____).

18. *Id.* The exempted conduct must be part of an ongoing investigation. *Id.* Cf. 29 U.S.C.A. § 2006 (West Supp. 1989) (exemptions from Employee Polygraph Protection Act similar to language of Chapter 350).

19. 1989 Nev. Stat. ch. 350, sec. 9, at 724 (enacting NEV. REV. STAT. § 613.____).

loss or injury, the examinee's access, and the employer's reasonable suspicion of the examinee's involvement.²⁰ Chapter 350 also permits polygraph examinations for applicants of employment in security positions.²¹ Another exemption provided by Chapter 350 is for examinations of applicants seeking employment in a business that manufactures, distributes, or dispenses controlled substances.²²

Chapter 350 requires all exempted examinations to be conducted by licensed polygraphic examiners.²³ Finally, Chapter 350 provides that the employer cannot use the results of the test, or a refusal to take the test, as the sole basis for adverse employment action to the employee or applicant.²⁴

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20. *Id.* The employer must keep the statement for three years. *Id.*

21. *Id.* Security situations include protection of facilities, materials, or operations that are significant to the health and safety of Nevada, and other customary security employment. *Id.*

22. *Id.* Testing is only permitted if the applicant will have access to the controlled substance, or for an employee involved in an ongoing investigation of misconduct concerning the controlled substance. *Id.* See NEV. REV. STAT. § 0.031 (1987) (definition of controlled substance).

23. 1989 Nev. Stat. ch. 350, sec. 9, at 724 (enacting NEV. REV. STAT. § 613.____). The test may also be conducted by an examiner who is exempt from licensing requirements. *Id.* See NEV. REV. STAT. §§ 648.060-.149 (1987) (procedures for examiner licensing).

24. 1989 Nev. Stat. ch. 350, sec. 9, at 724 (enacting NEV. REV. STAT. § 613.____).