

1991 Assembly Bill 377

Date of enactment: April 30, 1992
Date of publication*: May 13, 1992

1991 WISCONSIN ACT 289

AN ACT to repeal 111.381; to amend 111.31 (4) and 111.84 (1) (d); to repeal and recreate 111.37; and to create 111.373 and 111.91 (2) (i) of the statutes, relating to: restricting honesty testing in employment, granting rule-making authority and providing penalties.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. 111.31 (4) of the statutes is amended to read:

111.31 (4) The practice of requiring employes or prospective employes to submit to ~~honesty tests~~ a test administered by means of a lie detector, as defined in s. 111.37 (1) (b), is unfair, the practice of requesting employes and prospective employes to submit to such a test without providing safeguards for the test subjects is unfair, and the use of improper tests and testing procedures causes injury to the employes and prospective employes.

SECTION 2. 111.37 of the statutes is repealed and recreated to read:

111.37 Use of honesty testing devices in employment situations. (1) DEFINITIONS. In this section:

(a) "Employer", notwithstanding s. 111.32 (6), means any person acting directly or indirectly in the interest of an employer in relation to an employe or prospective employe. "Employer", notwithstanding s. 111.32 (6), does not include the federal government.

(b) "Lie detector" means a polygraph, deceptograph, voice stress analyzer, psychological stress evaluator or other similar device, whether mechanical or electrical, that is used, or the results of which are used, to render a diagnostic opinion about the honesty or dishonesty of an individual.

(c) "Polygraph" means an instrument that fulfills all of the following requirements:

1. Records continuously, visually, permanently and simultaneously any changes in cardiovascular, respiratory and electrodermal patterns as minimum instrumentation standards.

2. Is used, or the results of which are used, to render a diagnostic opinion about the honesty or dishonesty of an individual.

(2) PROHIBITIONS ON LIE DETECTOR USE. Except as provided in subs. (5) and (6), no employer may do any of the following:

(a) Directly or indirectly require, request, suggest or cause an employe or prospective employe to take or submit to a lie detector test.

(b) Use, accept, refer to or inquire about the results of a lie detector test of an employe or prospective employe.

(c) Discharge, discipline, discriminate against or deny employment or promotion to, or threaten to take any such action against, any of the following:

1. An employe or prospective employe who refuses, declines or fails to take or submit to a lie detector test.

2. An employe or prospective employe on the basis of the results of a lie detector test.

(d) Discharge, discipline, discriminate against or deny employment or promotion to, or threaten to take any such action against, an employe or prospective employe for any of the following reasons:

1. The employe or prospective employe has filed a complaint or instituted or caused to be instituted a proceeding under this section.

– 2 –

1991 Assembly Bill 377

2. The employe or prospective employe has testified or is about to testify in a proceeding under this section.

3. The employe or prospective employe, on behalf of that employe, prospective employe or another person, has exercised any right under this section.

(3) NOTICE OF PROTECTION. The department shall prepare and distribute a notice setting forth excerpts from, or summaries of, the pertinent provisions of this section. Each employer that administers lie detector tests to its employes shall post and maintain that notice in conspicuous places on its premises where notices to employes and applicants for employment are customarily posted.

(4) DEPARTMENT'S DUTIES AND POWERS. (a) The department shall do all of the following:

1. Promulgate rules that are necessary under this section.

2. Cooperate with regional, local and other agencies and cooperate with, and furnish technical assistance to, employment agencies other than this state, employers and labor organizations to aid in enforcing this section.

3. Make investigations and inspections and require the keeping of records necessary for the administration of this section.

(b) For the purpose of any hearing or investigation under this section, the department may issue subpoenas.

(5) EXEMPTIONS. (a) Except as provided in sub. (6), this section does not prohibit an employer from requesting an employe to submit to a polygraph test if all of the following conditions apply:

1. The test is administered in connection with an ongoing investigation involving economic loss or injury to the employer's business, including theft, embezzlement, misappropriation and unlawful industrial espionage or sabotage.

2. The employe had access to the property that is the subject of the investigation under subd. 1.

3. The employer has a reasonable suspicion that the employe was involved in the incident or activity under investigation.

4. The employer executes a statement, provided to the examinee before the test, that sets forth with particularity the specific incident or activity being investigated and the basis for testing particular employes; that is signed by a person, other than a polygraph examiner, authorized legally to bind the employer; that is retained by the employer for at least 3 years; and that identifies the specific economic loss or injury to the business of the employer, indicates that the employe had access to the property that is the subject of the investigation and describes the basis of the employer's reasonable suspicion that the employe was involved in the incident or activity under investigation.

(b) Except as provided in sub. (6), this section does not prohibit the use of polygraph tests on a prospective employe who, if hired, would perform the employer's primary business purpose if the employer's primary busi-

ness purpose is providing security personnel, armored car personnel or personnel engaged in the design, installation and maintenance of security alarm systems and if the employer protects any of the following:

1. Facilities, materials or operations that have a significant impact on the public health, safety or welfare of this state or the national security of the United States, including facilities engaged in the production, transmission or distribution of electric or nuclear power; public water supply facilities; shipments or storage of radioactive or other toxic waste materials; and public transportation.

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

(c) Except as provided in sub. (6), this section does not prohibit the use of a polygraph test by an employer that is authorized to manufacture, distribute or dispense a controlled substance listed in schedule I, II, III, IV or V under ch. 161 if the test is administered to a prospective employe who would have direct access to the manufacture, storage, distribution or sale of the controlled substance or to a current employe if the test is administered in connection with an ongoing investigation of criminal or other misconduct that involves, or potentially involves, loss or injury to the manufacture, distribution or dispensing of the controlled substance by that employer and the employe had access to the person or property that is the subject of the investigation.

(6) RESTRICTIONS ON USE OF EXEMPTIONS. (a) The exemption under sub. (5) (a) does not apply if an employe is discharged, disciplined, denied employment or promotion or otherwise discriminated against on the basis of an analysis of a polygraph test chart or a refusal to take a polygraph test without additional supporting evidence. The evidence required by sub. (5) (a) may serve as additional supporting evidence.

(b) The exemptions under sub. (5) (b) and (c) do not apply if an analysis of a polygraph test chart is used, or a refusal to take a polygraph test is used, as the sole basis upon which an adverse employment action described in par. (a) is taken against an employe or prospective employe.

(c) The exemptions under sub. (5) (a) to (c) do not apply unless all of the following requirements are fulfilled:

1. Throughout all phases of the test the examinee is permitted to end the test at any time; the examinee is not asked questions in a manner that degrades, or needlessly intrudes on, the examinee; the examinee is not asked any question about religious beliefs or affiliations, political beliefs or affiliations, sexual behavior, beliefs or opinions on racial matters, or about beliefs, affiliations, opinions, or lawful activities regarding unions or labor organizations; and the examiner does not conduct the test if there is sufficient written evidence provided by a physician that the examinee is suffering from a medical or psy-

1991 Assembly Bill 377

chological condition or undergoing treatment that might cause abnormal responses during the testing.

2. Before the test is administered the prospective examinee is provided with reasonable oral and written notice of the date, time and location of the test, and of the examinee's right to obtain and consult with legal counsel or an employe representative before each phase of the test; is informed orally and in writing of the nature and characteristics of the tests and of the instruments involved; is informed orally and in writing whether or not the testing area contains a 2-way mirror, a camera or any other device through which the test can be observed; is informed orally and in writing whether or not any device other than the polygraph, including any device for recording or monitoring the test, will be used; is informed orally and in writing that the employer or the examinee may, after so informing the examinee, make a recording of the test; is read and signs a written notice informing the examinee that the examinee cannot be required to take the test as a condition of employment, that any statement made during the test may constitute additional supporting evidence for the purposes of an adverse employment action under par. (a), of the limitations on the use of a polygraph test under this subsection, of the legal rights and remedies available to the examinee under this section and ss. 905.065 and 942.06, of the legal rights and remedies available to the examinee if the polygraph test is not conducted in accordance with this section and of the legal rights and remedies of the employer under this section; is provided an opportunity to review all questions to be asked during the test; and is informed of the right to end the test at any time.

3. The examiner does not ask the examinee any question during the test that was not presented in writing for review to the examinee before the test.

4. Before any adverse employment action, the employer interviews the examinee on the basis of the results of the test; provides the examinee written copies of any opinion or conclusion rendered as a result of the test, the questions asked during the test and the corresponding charted responses; and offers the examinee the opportunity to explain any questionable responses or to retake the examination or both. If the subsequent responses or the reexamination clarify any questionable response, the results of the initial tests shall not be reported further and shall be removed, corrected or clarified in the employe's personnel records under s. 103.13 (4).

5. The examiner does not conduct and complete more than 5 polygraph tests on any day and does not conduct any polygraph test that lasts for less than 90 minutes.

6. The test is administered at a reasonable time and location.

(d) The exemptions under sub. (5) (a) to (c) do not apply unless the individual who conducts the polygraph test satisfies all of the following requirements:

1. Maintains at least a \$50,000 bond or an equivalent amount of professional liability coverage.

2. Renders no opinion or conclusion about the test unless it is in writing and based solely on an analysis of polygraph test charts, does not contain information other than admissions, information, case facts and interpretation of the charts relevant to the purpose and stated objectives of the test, and does not include any recommendation concerning the employment of the examinee.

3. Maintains all opinions, reports, charts, written questions, lists and other records relating to the test for at least 3 years after administration of the test.

(7) **DISCLOSURE OF INFORMATION.** No person other than the examinee may disclose information obtained during a polygraph test, except that a polygraph examiner may disclose information acquired from a polygraph test to the examinee or any other person specifically designated in writing by the examinee.

(8) **ENFORCEMENT PROVISIONS.** (a) In addition to the rights, remedies and procedures under ss. 111.375 and 111.39, any employer who violates this section may be required to forfeit not more than \$10,000.

(b) The rights, remedies and procedures provided by this section may not be waived by contract or otherwise, unless that waiver is part of a written settlement agreed to and signed by the parties to an action or complaint under this section.

SECTION 3. 111.373 of the statutes is created to read:
111.373 Local ordinance; collective bargaining agreements. Section 111.37 does not do any of the following:

(1) Prevent a county, city, village or town from adopting an ordinance that prohibits honesty testing, restricts the use of honesty testing to a greater extent than s. 111.37 or provides employes with more rights and remedies with respect to honesty testing than are provided under s. 111.37.

(2) Supersede, preempt or prohibit provisions of a collective bargaining agreement that prohibit honesty testing, restrict the use of honesty testing to a greater extent than s. 111.37 or provide employes with more rights and remedies with respect to honesty testing than are provided under s. 111.37.

SECTION 4. 111.381 of the statutes is repealed.

SECTION 5. 111.84 (1) (d) of the statutes is amended to read:

111.84 (1) (d) To refuse to bargain collectively on matters set forth in s. 111.91 (1) with a representative of a majority of its employes in an appropriate collective bargaining unit. Where the employer has a good faith doubt as to whether a labor organization claiming the support of a majority of its employes in appropriate collective bargaining unit does in fact have that support, it may file with the commission a petition requesting an election as to that claim. It is not deemed to have refused to bargain until an election has been held and the results

thereof certified to it by the commission. A violation of this paragraph includes, but is not limited to, the refusal to execute a collective bargaining agreement previously orally agreed upon.

SECTION 6. 111.91 (2) (i) of the statutes is created to read:

111.91 (2) (i) Honesty testing requirements that provide fewer rights and remedies to employes than are provided under s. 111.37.

SECTION 7. Nonstatutory provisions; rule making and report to legislature. (1) **RULE MAKING.** The department of industry, labor and human relations shall submit in proposed form the rules required under section 111.37 (4) (a) 1. of the statutes, as affected by this act, to the legislative council staff under section 227.15 (1) of the statutes no later than the first day of the 4th month after the effective date of this subsection.

(2) **REPORT TO LEGISLATURE.** Two years after the effective date of this subsection, the department of indus-

1991 Assembly Bill 377

try, labor and human relations shall submit a report to the chief clerk of each house of the legislature for distribution to the appropriate standing committees in the manner provided under section 13.172 (3) of the statutes regarding the number of complaints filed and hearings held under section 111.37 of the statutes, as affected by this act, for each of the 2 years after the effective date of this subsection and comparing those figures to the number of complaints filed and hearings held under section 111.37, 1989 stats., for each of the 2 years preceding the effective date of this subsection.

SECTION 8. Initial applicability. This act first applies to honesty testing of employes covered on the effective date of this SECTION by a collective bargaining agreement, containing provisions that are inconsistent with this act, conducted on the day that that collective bargaining agreement expires or is extended, modified or renewed and first applies to honesty testing of other employes on the effective date of this SECTION.
