Is It Legal to Make Employees Take a Lie Detector Test?



Studies show that the average person lies 4 times a day, or 1,460 times per year. Leaving aside what it says about human character, this proclivity to tell lies may have direct and disturbing implications for your business when that “average person” is a job applicant or employee—especially if the position involved calls for special honesty, integrity and trust. The good news is that lie detector tests enable you to determine, with a reasonable degree of scientific reliability, whether a person is lying to you. The bad news is that using them on job applicants and employees may get you into legal trouble.

Lie Detectors in the Workplace

The theory behind lie detector technology is that people experience involuntary physiological changes when they tell a lie that don’t occur when they tell the truth. Lie detector devices can detect these changes in a person you ask to respond to a question or statement. The most commonly used lie detectors are polygraphs that measure heart rate, blood pressure, respiration, perspiration, skin conductivity and other physical factors. In essence, the device detects not the actual lie but the fear, stress and anxiety the person feels when telling it.

There remain doubts as to the scientific validity of polygraphs and other lie detector tests (which we’ll refer to collectively as “lie detectors”). For that reason, you’re not allowed to use the results of lie detectors as evidence in a court or legal proceeding. But while not reliable enough for courtrooms, you can still use them in other settings where “reliable enough” is adequate. One of those other settings may be the workplace.

While not widely used, some employers ask job applicants to take lie detector tests as part of pre-employment screening—not as a matter of routine but for certain special positions such as jobs involving:

- Carrying a firearm;
- Access to state secrets or other highly sensitive information; or
- Handling large sums of money.

More controversially, employers could also require current employees to take a lie detector test as part of a disciplinary investigation, such as a sexual harassment complaint or a case of suspected theft.

Is It Legal for Employers to Use Lie Detectors on Employees?

The legality of using lie detectors depends on which jurisdiction you're in. Canadian workplace lie detector laws—or lack thereof—fall into 1 of 3 patterns:

1. The Red-Light Jurisdictions

Employment standards laws in Ontario and New Brunswick expressly ban employers from using lie detector tests for employment-related purposes. Specifically, they make it illegal to:

- Ask, require, influence or enable an employee or job applicant (which we'll refer to collectively as "employee") to take a lie detector test;
- Tell an employer that an employee has taken a lie detector test; and
- Disclose the results of a lie detector test taken by an employee to an employer.

Employers who violate these provisions face the risk of penalties and civil lawsuits for damages.

2. The Yellow-Light Jurisdictions

Outside of Ontario and New Brunswick, employment standards laws don't address lie detectors. However, 4 different jurisdictions—Federal, Alberta, BC, Québec—have adopted personal privacy laws that cover the employment relationship and limit an employer's right to collect, use and disclose an employee's protected personal information. These laws may be interpreted as banning employers from:

- Requiring employees to take a lie detector test;
- Using the results of such tests to make decisions affecting the employee's employment; and
- Disclosing the results of a lie detector test to another employer.

While employees can consent to the collection, use and disclosure of their protected information, consent must be completely voluntary and not in any way coerced. "Asking" job applicants and employees involved in disciplinary proceedings to take a lie detector test would likely stretch the principle of voluntary consent to the breaking point.

3. The Greenish-Yellow Light Jurisdictions

In Manitoba, Newfoundland, Nova Scotia, Prince Edward Island, Saskatchewan and the 3 territories, there's no employment standards, personal privacy or other legislation that expressly bans the use of lie detector tests in the workplace. However, that's not exactly a green light. Asking or requiring employees to take a lie detector test, using the results of such a test to make employment decisions and/or disclosing them to another employer may violate employees' privacy rights under other laws, including: the collective agreement or individual employment contract if the employee doesn't belong to a union.

Employees may also have personal privacy rights, aka, reasonable expectations of privacy, under what's called "common law," or non-statutory law that comes from court cases. The leading case is a 2012 ruling called *Jones v. Tsige*, (2012 ONCA 32 (CanLII)), in which the highest court of Ontario recognized a new privacy tort called "intrusion upon seclusion" and awarded a bank employee $10,000. To make out a case, workers must show not simply that the employer invaded their privacy, but that the

conduct was intentional or reckless and such that a reasonable person would consider highly offensive and causing distress, humiliation or anguish.