§ 801.24 Rights of examinee—actual testing phase.

(a) The actual testing phase refers to that time during which the examiner administers the examination by using a polygraph instrument with respect to the examinee and then analyzes the charts derived from the test. Throughout the actual testing phase, the examiner shall not ask any question that was not presented in writing for review prior to the testing phase. An examiner may, however, recess the testing phase and return to the pre-test phase to review additional relevant questions with the examinee. In the case of an ongoing investigation, the examiner shall ensure that all relevant questions (as distinguished from technical baseline questions) pertain to the investigation.

(b) No testing period subject to the provisions of the Act shall be less than ninety minutes in length. Such “test period” begins at the time that the examiner begins informing the examinee of the nature and characteristics of the examination and the instruments involved, as prescribed in section 8(b)(2)(B) of the Act and §801.23 (a)(2) of this part, and ends when the examiner completes the review of the test results with the examinee as provided in §801.25 of this part. The ninety-minute minimum duration shall not apply if
§ 801.25 Rights of examinee—post-test phase.

(a) The post-test phase refers to any questioning or other communication with the examinee following the use of the polygraph instrument, including review of the results of the test with the examinee. Before any adverse employment action, the employer must:

1. Further interview the examinee on the basis of the test results; and
2. Give to the examinee a written copy of any opinions or conclusions rendered in response to the test, as well as the questions asked during the test, with the corresponding charted responses. The term “corresponding charted responses” refers to copies of the entire examination charts recording the employee’s physiological responses, and not just the examiner’s written report which describes the examinee’s responses to the questions as “charted” by the instrument.

§ 801.26 Qualifications of and requirements for examiners.

(a) Section 8 (b) and (c) of the Act provides that the limited exemption in section 7 (d) of the Act for ongoing investigations, and the security service and controlled substances exemptions in section 7 (e) and (f) of the Act, shall not apply unless the person conducting the polygraph examination meets specified qualifications and requirements.

(b) An examiner must meet the following qualifications:

1. Have a valid current license, if required by the State in which the test is to be conducted; and
2. Carry a minimum bond of $50,000 provided by a surety incorporated under the laws of the United States or of any State, which may under those laws guarantee the fidelity of persons holding positions of trust, or carry an equivalent amount of professional liability coverage.

(c) An examiner must also, with respect to examinees identified by the employer pursuant to § 801.30(c) of this part:

1. Observe all rights of examinees, as set out in §§ 801.22, 801.23, 801.24, and 801.25 of this part;
2. Administer no more than five polygraph examinations in any one calendar day on which a test or tests subject to the provisions of EPFA are administered, not counting those instances where an examinee voluntarily terminates an examination prior to the actual testing phase;
3. Administer no polygraph examination subject to the provisions of the Act which is less than ninety minutes in duration, as described in § 801.24(b) of this part;
4. Render any opinion or conclusion regarding truthfulness or deception in writing. Such opinion or conclusion must be based solely on the polygraph test results. The written report shall not contain any information other than admissions, information, case facts, and interpretation of the charts relevant to the stated purpose of the polygraph test and shall not include any recommendation concerning the employment of the examinee; and
5. Maintain all opinions, reports, charts, written questions, lists, and other records relating to the test, including statements signed by examinees advising them of rights under the Act (as described in § 801.23(a)(3) of this part) and any electronic recordings of examinations, for at least three years from the date of the administration of the test. (See § 801.30 of this part for recordkeeping requirements.)

Subpart D—Recordkeeping and Disclosure Requirements

§ 801.30 Records to be preserved for 3 years.

(a) The following records shall be kept for a minimum period of three years from the date the polygraph examination is conducted (or from the date the examination is requested if no examination is conducted):

1. Each employer who requests an employee to submit to a polygraph examination in connection with an ongoing investigation involving economic loss or injury shall retain a copy of the statement that sets forth the specific