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TO: Nebraska Public Power District Managers, Cooperative Managers, Jay Holmquist,  
Bob Cooper, Rachael Black and Kristen Gottschalk

FROM: Dave Jarecke

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RE: Use of polygraphs by Public Power Districts

The Federal statute, 29 U.S.C. 2001 – 2009, Employee Polygraph Protection Act, enacted in 1988, provides a floor for protection against the use of polygraphs, as a prerequisite for employment, or requirement, for ongoing employment.

The preemption language of 29 U.S.C. 2009 states:

“Except as provided in subsections (a), (b), and (c) of section 2006 of this title, this chapter shall not preempt any provision of any State or local law or of any negotiated collective bargaining agreement that prohibits lie detector tests or is more restrictive with respect to lie detector tests than any provision of this chapter.”

29 USC 2006 (a) states: “This chapter shall not apply with respect to the United States Government, any State or local government, or any political subdivision of a State or local government.”

While the Federal Act does not apply to political subdivisions; States may regulate the use of polygraphs by political subdivisions.

NEB. REV. STAT. § 81-1932, enacted in 1980, expressly states that mandatory polygraphs shall not be used by employers (including political subdivisions) “unless such employment involves public law enforcement.”

Both, *White v. State*, 248 Neb. 977, 982-83, 540 N.W.2d 354, 357-58 (1995) and *Mathes v. City of Omaha*, 254 Neb. 269, 273, 576 N.W.2d 181, 184 (1998), reference NEB. REV. STAT. § 81-1932. Each involves the use of polygraphs by an employer/state (or political subdivision of the state) after the Federal Act was enacted. Neither case addresses the argument that the Federal Act preempted the Nebraska statute. Both cases provide that mandatory polygraphs are not to be used by employers (including political subdivisions), unless the position involves public law enforcement. The case law



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also makes it highly unlikely that Public Power District positions could qualify as ‘public law enforcement.’

However, the Nebraska statute does permit employers to use polygraphs in limited circumstances where, among other requirements, the employee voluntarily submits to the polygraph. Therefore, a Public Power District can use a polygraph only if the requirements of NEB. REV. STAT. § 81-1932 for the voluntary use of polygraphs are met.

“...This shall not be construed to prohibit such employer from asking an employee or applicant to submit to a truth and deception examination if:

- (1) No questions are asked during the truth and deception examination concerning the examinee’s sexual practices, labor union, political or religious affiliations, or marital relationships;
- (2) The examinee is given written and oral notice that the examination is voluntary and that the examinee may discontinue the examination at any time;
- (3) The employer or prospective employer has the employee or applicant sign a form stating that the examination is being taken voluntarily;
- (4) Questions that are asked prospective employees are job related;
- (5) Prospective employees are not preselected for a truth and deception examination in a discriminatory manner;
- (6) An employee is only requested to submit to a truth and deception examination if such examination concerns itself with a specific investigation;
- (7) The results of a truth and deception examination are not the sole determinant in the termination of employment; and
- (8) All questions that are asked during a truth and deception examination and the responses of the examinee are kept on file by the employer for a period of one year.”