



## EMPLOYMENT LAW FAUX PAS AND PITFALLS

*SAFETY PROS MUST AVOID*

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Indiana Safety Conference - 2016  
Barry S. Spurlock, JD, CSP

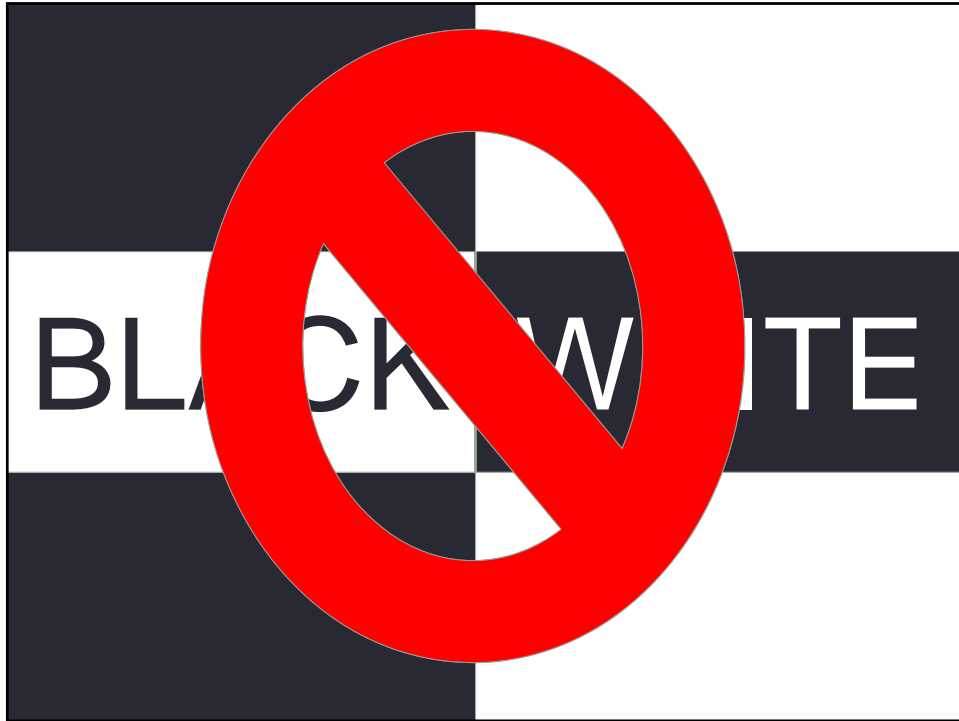


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<http://drhnorway.altervista.org/?p=1206>

Yogi Berra

“We made too many wrong mistakes.”



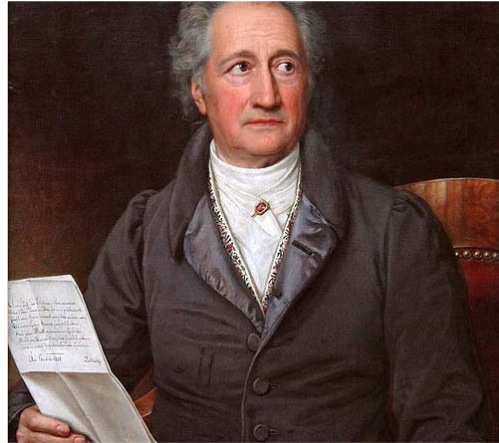
John Dewey

“Failure is instructive. The person who really thinks learns quite as much from his failures as from his successes.”



Johann Wolfgang  
von Goethe

“By seeking and  
blundering we learn.”

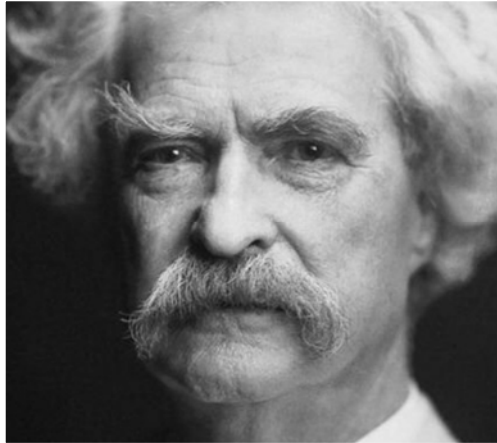


Still...

It is usually cheaper to learn  
from the legal mistakes of others !!

## Mark Twain

“It ain’t what you don’t know that gets you in trouble. It’s what you know for sure that just ain’t so.”



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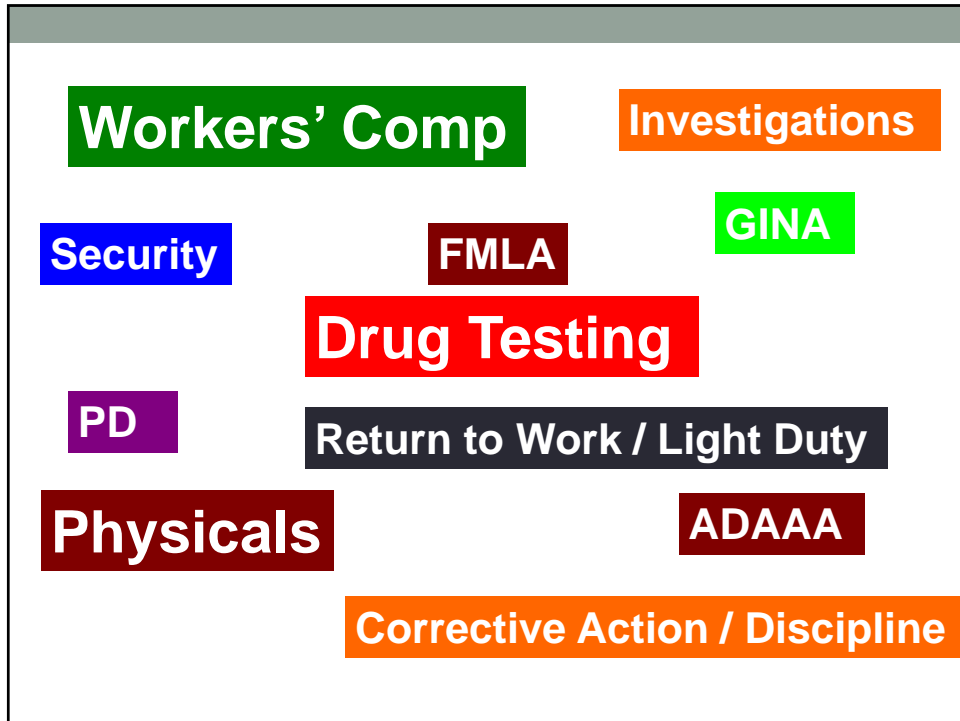
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Photo By: United States Marine Corps - <http://electronixeng.blogspot.com/2013/05/using-lasers-to-find-land-mines-and-ieds.html>

## Liability Relationships (Roughly)

# Employment Law Liabilities

## Discrimination

(Largely Statutory)

## Tort

(Largely Common Law)

Retaliation

Disability

Genetic  
Information

Invasion of  
Privacy

Retaliation

Defamation

False  
Imprisonment

Workers'  
Comp

OSHA

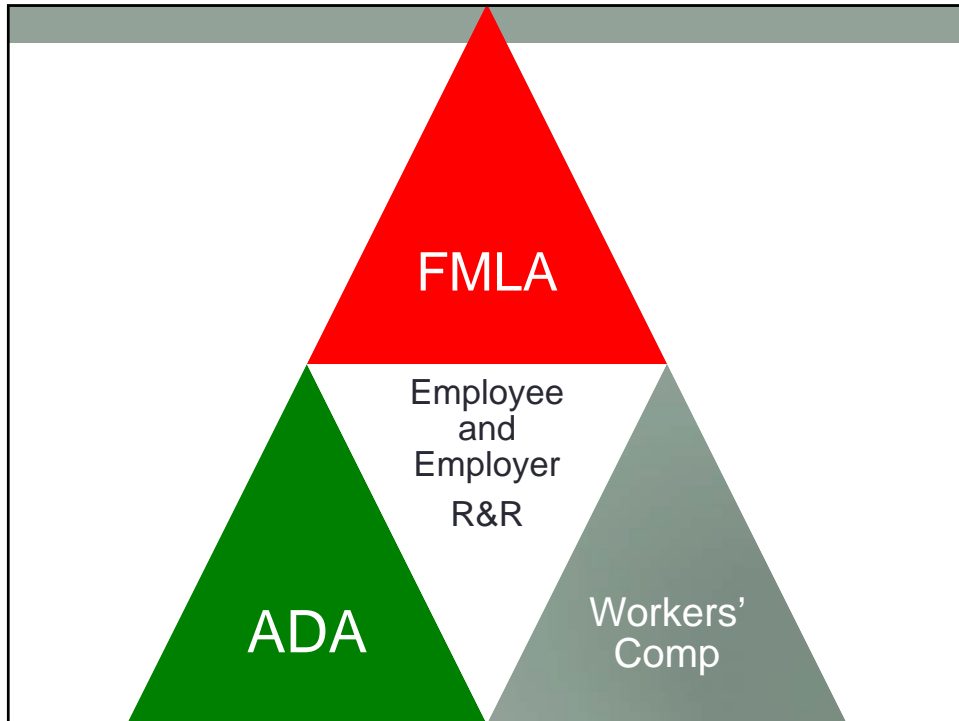
ADA /  
ADAAAA

FMLA

GINA

Slander

Libel



## Types of Employment

- **CONTRACTUAL** Employment
  - Termination of Relationship – For Cause and/or Expiration of Term
  - Consideration
- **AT WILL** Employment
  - Termination of Relationship – Cause Unnecessary and No Definite Term
  - Consideration.... A paycheck...??

## Termination of At Will Employees:

An employee can be fired for a

- \_\_\_\_\_ **Good** \_\_\_\_\_ reason,
- \_\_\_\_\_ **Bad** \_\_\_\_\_ reason, or
- \_\_\_\_\_ **No** \_\_\_\_\_ reason.

(As long as that reason is not \_\_\_\_\_ **illegal** \_\_\_\_\_.)

## Adverse Employment Action

- Materiality is Key
- Termination
- Demotion
- Placement on Leave
- Reduction in Pay
- Change of Shift
- Retraction of Job Responsibilities
- Poor Performance Reviews
- Negative Job Reference

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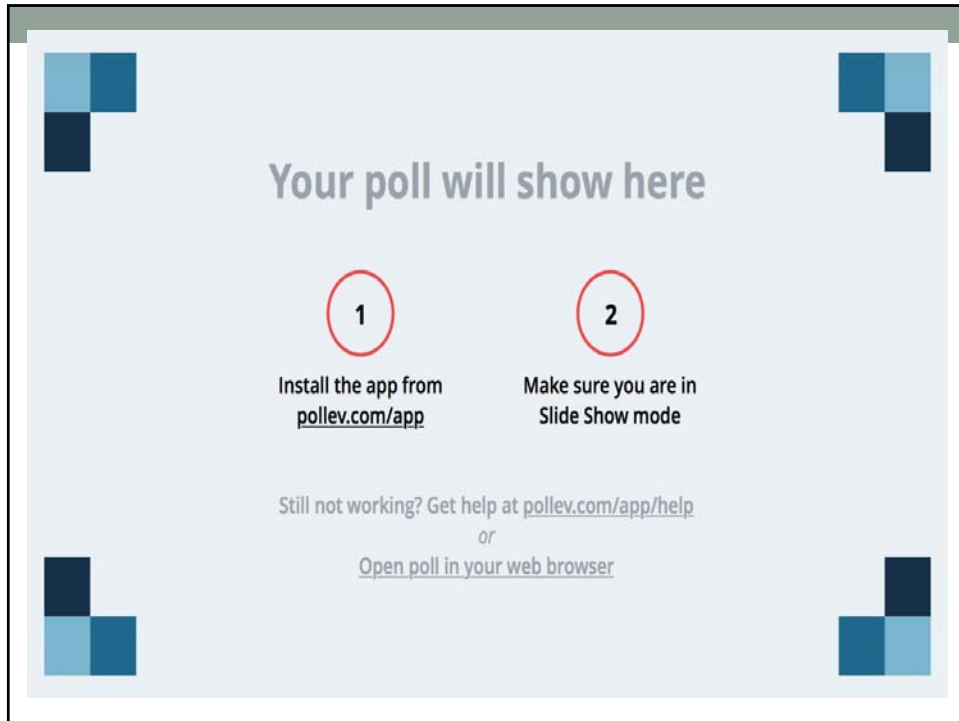
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Justin X. Sample is running late for work – again! While sprinting from his car to the time clock, Justin allegedly slips and falls. Justin clocks in 30 seconds too late, and is terminated because he has now violated the time and attendance policy too many times. Justin pleads for his job with HR manager and his supervisor, and states that had he not tripped over the crumbling sidewalk, he would not have been late.

Justin leaves and simmers over what he perceives as an injustice. He later files a discrimination complaint with OSHA.



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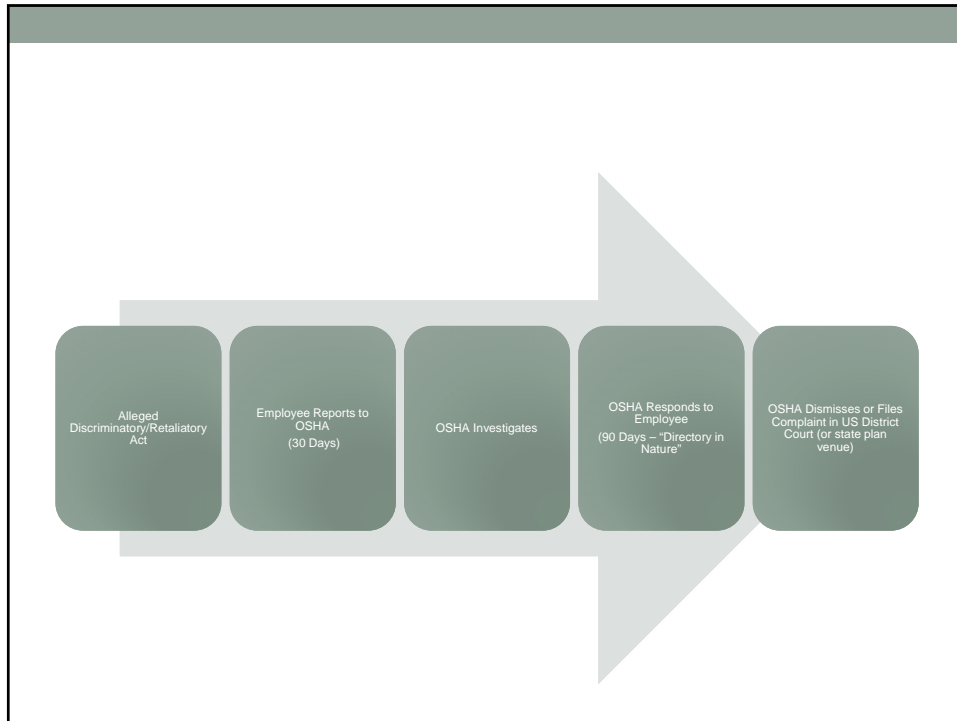
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## Section 11(c) Highlights

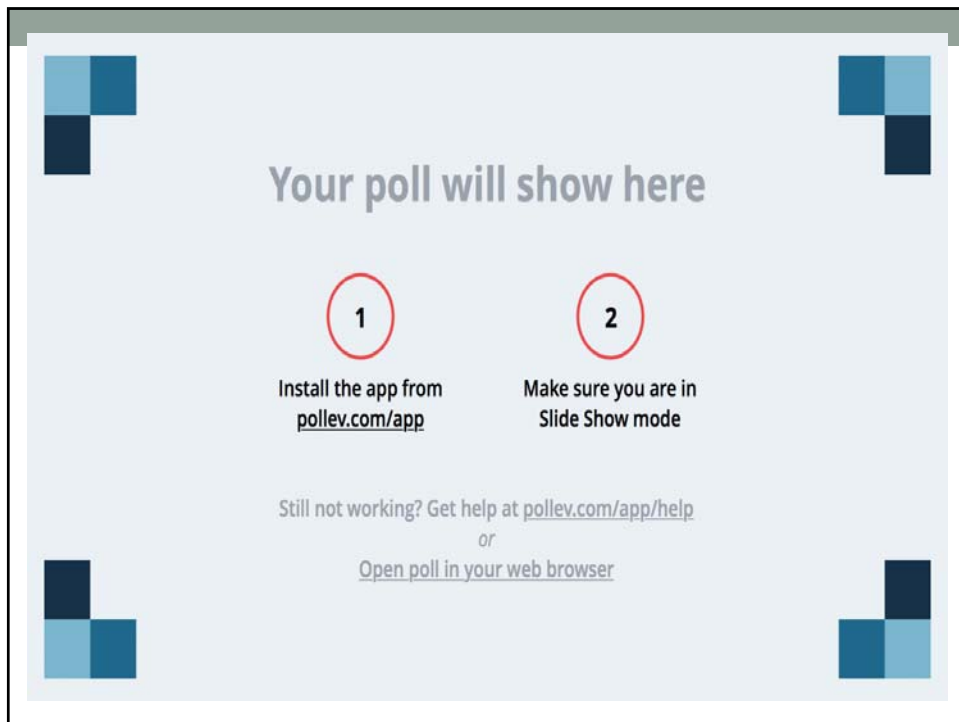
An employer may not discharge or in any manner discriminate because the employee has:

- Filed A Complaint With OSHA
- Instituted A Proceeding Under the Act
- Testified
- **Exercised A Right** Afforded By the Act



Suzy Q works for XZY Corp., and sustains a laceration while handling parts. The laceration requires stitches and warrants a claim for workers' compensation benefits. Despite a written, posted rule and work instructions requiring cut resistive gloves, Suzy Q failed to wear hers; just like many of her co-workers. Suzy's supervisor is aware of the non-compliant culture.

Justin X Sample, XYZ's Corporate Director, recently sent down an edict directing all supervisors to issue disciplinary action for all employees who fail to wear PPE. Accordingly, Suzy is written up. Furthermore, the HR manager at Suzy's plant instructs the workers' comp TPA to deny her workers' comp claim, and "roll the dice" that Suzy will simply accept the denial. The HR director also told Suzy that the company was not going to pay her workers' comp claim.



## Workers' Comp Retaliation / Discrimination: CoA Elements....Generally

- Employee Makes Claim/ Engages in Protective Activity
- Employer Knowledge/ Employer Relationship
- Adverse Employment Action
- Causal Connection (Substantial Motivating Factor)

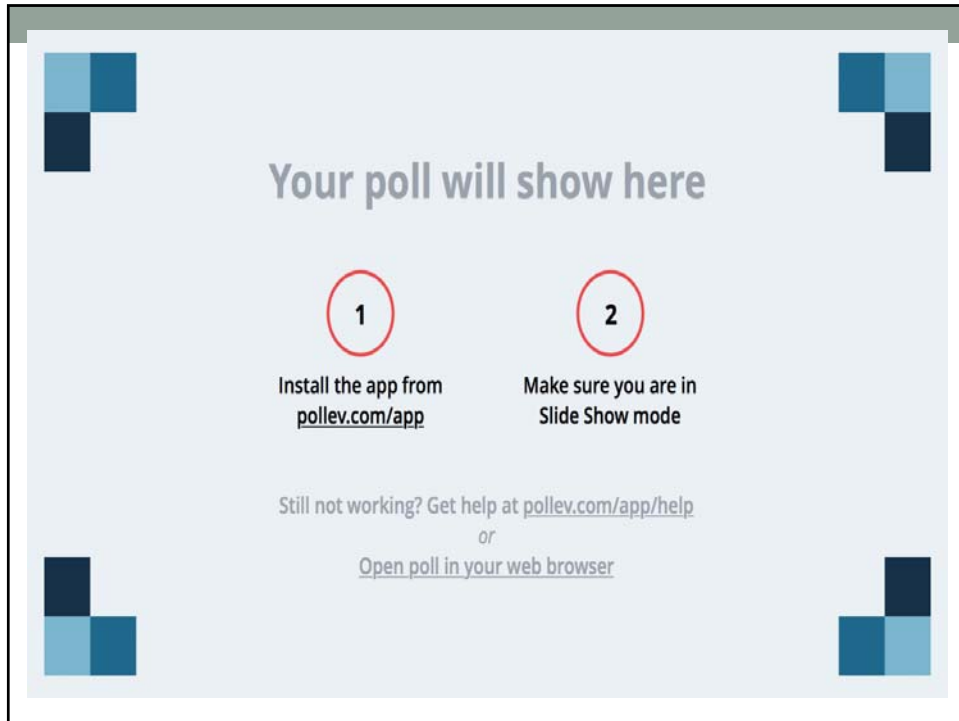
## Keys to Avoiding Retaliation Faux Pas

- Departmental Communication and Leadership Training
- Comprehensive Investigation of All Facts
- Consistency in Disciplinary Action
- Clarity in Disciplinary Action
- Exercising Good Faith in Administering Workers' Compensation

## XYZ Corp Scenario – Key Facts

- @ Interview candidate is presented with the essential functions of job
- Applicant asked if she/he can perform with or w/out a reasonable accommodation
- If yes, candidate is sent for pre-employment physical w/ organization's physician
- Physical based off job-specific, essential functions as analyzed by Company A and Company A's Doctor.





While developing Company A's physicals, Company A's doctor added a lifting requirement of 20 pounds for the widget press operator. The widget press operator seldom if ever lifts more than 15 pounds. The doctor felt this additional 5 pounds is a good safety factor.

Suppose a candidate with a 15 pound permanent lifting restriction is denied employment.

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## ADA / ADAAAA

- Americans with Disabilities Act (Amendments Act)
- Title I Protects Against Discrimination in Employment
- Means of Discrimination
  - Failure to Make A Reasonable Accommodation
  - Regarded As
  - History Of

## ADA “Pre-Employment” Parameters: Inquiries

- Pre-Employment/Employment Default:
  - Unlawful to Inquire About Disability/Extent of Disability
  - Unlawful to Conduct/Require Medical Examinations
- Inquiries Only Permitted If:
  - **Job Related**
  - **Consistent with Business Necessity**

*42 U.S.C.A. § 12112 and 29 CFR §1630.14, 11*

## ADA “Pre-Employment” Parameters: Physicals

- Conducted After Employment Offer is Extended
- All Entering Employees Are Subjected To Exam Regardless of Disability
- Separate Forms and Confidential Medical Files
- Sensory, Manual & Speaking Skills Tests Must Measure Skills They Are Purported to Measure

*42 U.S.C.A. § 12112 and 29 CFR §1630.14, 11*

## BFOQ Defenses for Title VII and Other Employment Discrimination Claims

- Bona Fide Occupational Qualification
- Title VII: Sex, Religion, National Origin
- ADEA: Age Discrimination in Employment Act
- BFOQ Defense Requirements: Age Example
  - 1. Reasonably Necessary to Essence of the Business, AND
  - 2. All or Substantially All Excluded Are Indeed Disqualified, OR
  - 3. Age is the Only Way to Ascertain a Disqualifying Trait for Some.
- Very Narrow
- Heavy Burden for Employers

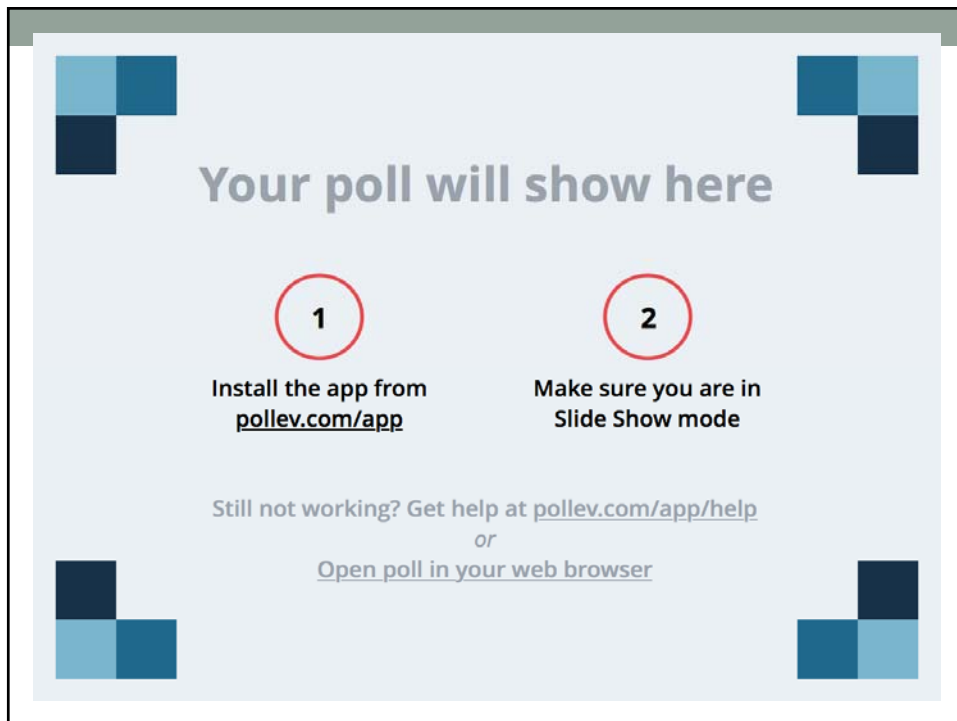
XYZ Corp

Post-Offer  
Pre-  
Employment  
Physical

Health History  
Questionnaire

- Designed by XYZ's Independent Physician
- Thorough
- Asks About
  - Employee's medical history,
  - Employee's family medical history, of many relevant,
  - Job-related (business necessity) injuries and illnesses,
  - Existence of heart disease, hypertension, cancer, tuberculosis, diabetes, arthritis, etc.

Suppose Justin X. Sample, a candidate for a box handler position is denied employment because he has Spurlock Syndrome, a serious debilitating spine disorder that makes him highly susceptible to back injury.



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**EEOC v. Fabricut, Inc.** ,13-CV-248-CVE-PJC (U.S. District Court for the Northern District of Oklahoma). (\$50K Settlement)

**EEOC v. Founders Pavilion, Inc.**, 13-CV-01438 (U.S. District Court for the Western District of N.Y.). (\$370K Settlement)

### **Genetic Information Nondiscrimination Act** (Title II)

- Employers Covered Under Civil Rights Act w/  $\geq 15$  Employees
- Prohibits:
  - Any Discrimination Based on Genetic Information, Including:
    - Hiring
    - Firing
    - Pay
    - Job assignments
    - Promotions
    - Other Adverse Actions
  - **Requesting “Genetic Information”**
    - Disclosure of Genetic Information
- Applies to Applicants and Current Employees

## What is “genetic information” under GINA?

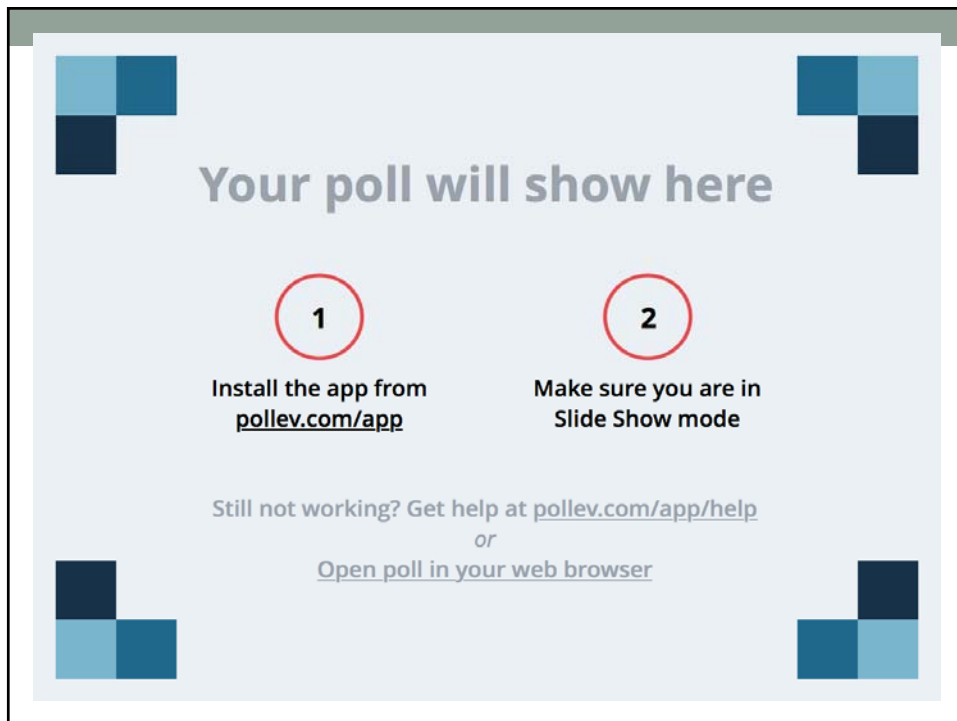
- Genetic Tests of the Employee
- Genetic Tests of the Employee’s Family
- Family Medical History (“information about the manifestation of a disease or disorder in an individual’s family members”)

## Exceptions to Acquiring “Genetic Information”

- Inadvertent Acquisition
- Voluntary Disclosure Through Health Services Such as Wellness Programs
- Acquired Through Commercially and Publicly Available Sources
- FMLA Certification
- Genetic Monitoring Programs Required By Law
- Law Enforcement Quality Control

Disclaimers/disclosures/warnings may be needed for “safe harbor.”

Joe sustained a compensable workers' comp claim that has warranted him being off work and receiving TTD benefits for 13 weeks. His physician has indicated he may be able to return to regular work in eight more weeks. The company needs someone to fill Joe's spot, and decided to terminate him and hire a replacement. In Joe's state, employers are not prohibited from replacing employees on leave for workers' compensation benefits.



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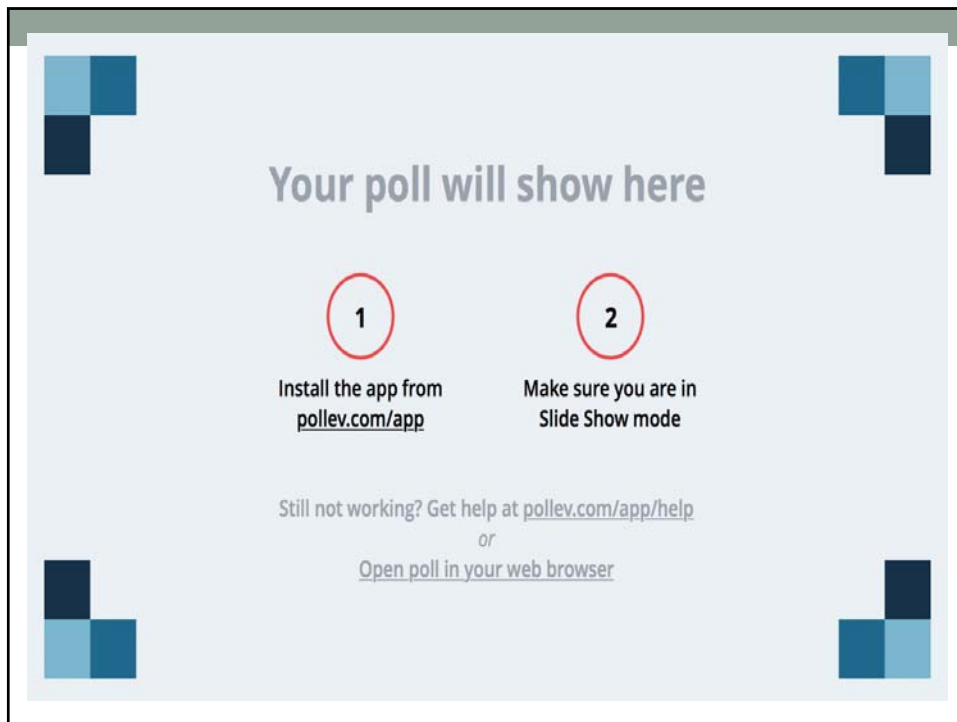


## Keys to Avoiding Common ADA/GINA Faux Pas in Hiring

- Ensure Hiring Physicals are Post-Offer
- Carefully and Accurately Evaluate Essential Job Functions
- Be Involved with and Watchful of Third Parties Who Assisting In Process
- Avoid Collection and Possession of “Genetic Information”

## Scenario: Key Facts

- Company A has policy that provides for light/modified duty accommodations.
- The policy restricts the availability of such to “work-related” injuries/illnesses.
- The policy is strictly and consistently enforced.
- Suzy Q is six months pregnant and is suffering complications that prohibit her from performing her normal work.
- Suzy Q requests light duty work.
- The employer denies Suzy Q citing its policy.



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Young v. UPS, 135 S. Ct. 1338,  
191 L. Ed. 2d 279 (2015).

## Keys to Avoiding the Workers' Comp/FMLA/ADA Interplay Faux Pas

- Coordinate Efforts with Human Resources
- Understand Definitions:
  - Disability – ADA
  - Serious Health Condition – FMLA
- Watch for Additional Leave as an Opportunity /Obligation for a Reasonable Accommodation
- Ensure FMLA Notifications are Sent
- Communicate with Injured Employees

## Keys to Avoiding Drug Testing Faux Pas

- Evaluate State Laws
- Ensure Triggers Are Consistently Followed (pre-employment, random, post accident)
- Train and Corroborate on Reasonable Suspicion
- Ensure Random is Random
- Demand High Quality Testing
- Evaluating Testing Facilities and MROs

## Keys to Avoiding Defamation Faux Pas

### Elements of Defamation

- False/Defamatory Statement
  - Unprivileged Publication
  - Negligence
  - Harm/Damage
- Maintain Confidentiality
  - Avoid Opinion Statements Concerning Drug Testing, Workers' Comp, etc.

## QUESTIONS?

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