

WorkSmarts Virtual Seminar

Navigating the Intersection of FMLA Leave and ADA Accommodations

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Agenda

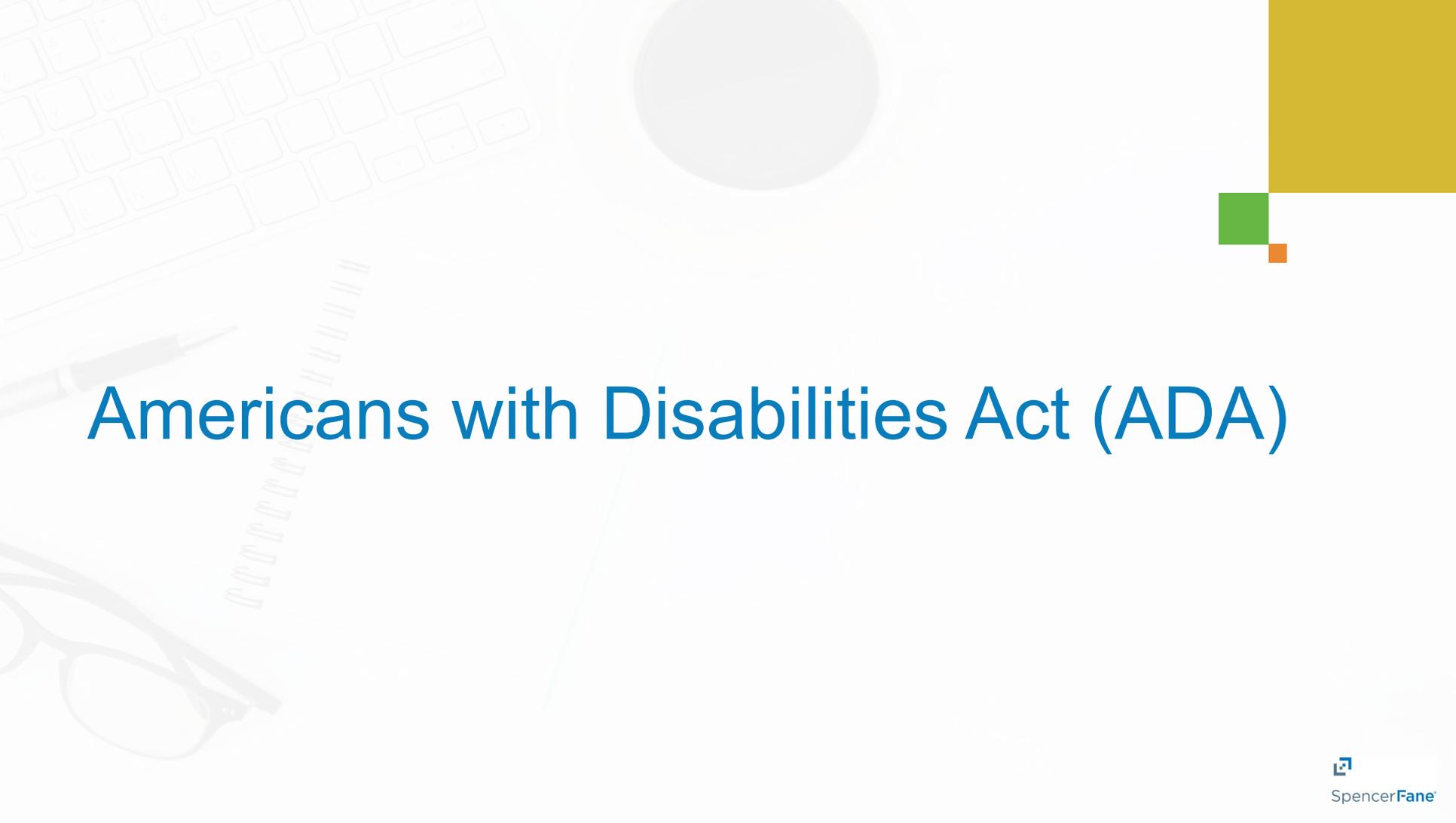
Overview of ADA and FMLA

Overlap of law and procedures

Standard Practice

Common Pitfalls

Mythbusters | Hypotheticals



Americans with Disabilities Act (ADA)



ADA

- 15 + employees
- Prohibits discrimination against applicants and employees who are “qualified individuals with a disability.”
- “Disability” means the person has an impairment that substantially limits one or more major life activities, a record of such an impairment, or is regarded by the employer as having such an impairment.
- Eligibility hinges on employee being a “qualified individual with a disability.”



Family and Medical Leave Act (FMLA)

FMLA

- 50 + employees
- Sets minimum leave standards for *eligible* employees for the birth and newborn care of a child, placement of a child for adoption or foster care, to care for an immediate family member with a serious health condition, and for the employee's serious health condition.

FMLA

 “Eligible employee”

 Works for a **covered employer**;

 Has worked for the employer for at least **12 months**;

 Has at least **1,250 hours of service** for the employer during the 12 month period immediately preceding the leave; and

 Works at a location where the employer has at least **50 employees within 75 miles**.

FMLA

“Serious health condition”

- “an illness, injury, impairment, or physical or mental condition that involves . . . [i]npatient care . . . or [c]ontinuing treatment by a health care provider.”



Overlap of law and procedures

Overlap

An FMLA “serious health condition” is not necessarily an ADA “disability.”

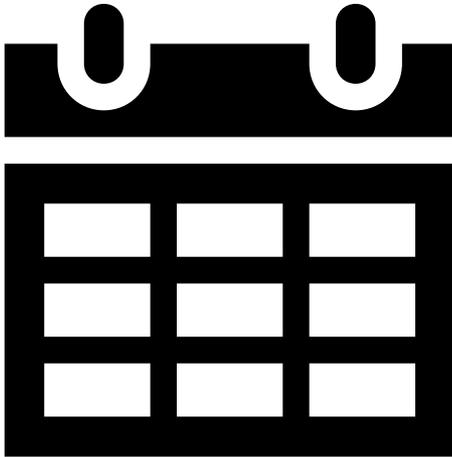
- A “**disability**” under the **ADA** is an impairment that substantially limits one or more major life activities, a record of such an impairment, or being regarded as having such an impairment.
- A “**serious health condition**” under the **FMLA** is an illness, injury, impairment, or physical or mental condition that involves inpatient care or continuing treatment by a health care provider.

Overlap

- Pregnancy might be covered under both FMLA and ADA.
- The FMLA covers work-leave related to pregnancy and the birth of a child.
- ADA does not cover pregnancy *generally* but does cover pregnancy-related impairments



Overlap



- Workers who have used up FMLA leave can still have rights under the ADA if they meet the ADA definition of a person with a disability.
- Accommodation is one such right. Additional leave, beyond the worker's FMLA leave, could be an accommodation that must be provided under the ADA.

Overlap

Regardless of whether FMLA or ADA applies (or both), determining the appropriate form/length of leave or accommodation is a fact-specific inquiry, and employers should engage in the interactive process.

Interactive process:

A **mandatory** duty that requires communication and good-faith *exploration* of possible accommodations between the employer and the employee. See 29 C.F.R. § 1630.2(o)(3).

Purpose: To “identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.”

Overlap

If both FMLA and ADA apply, provide initial twelve weeks of leave under whichever statutory provision provides the *greater* rights to employees.

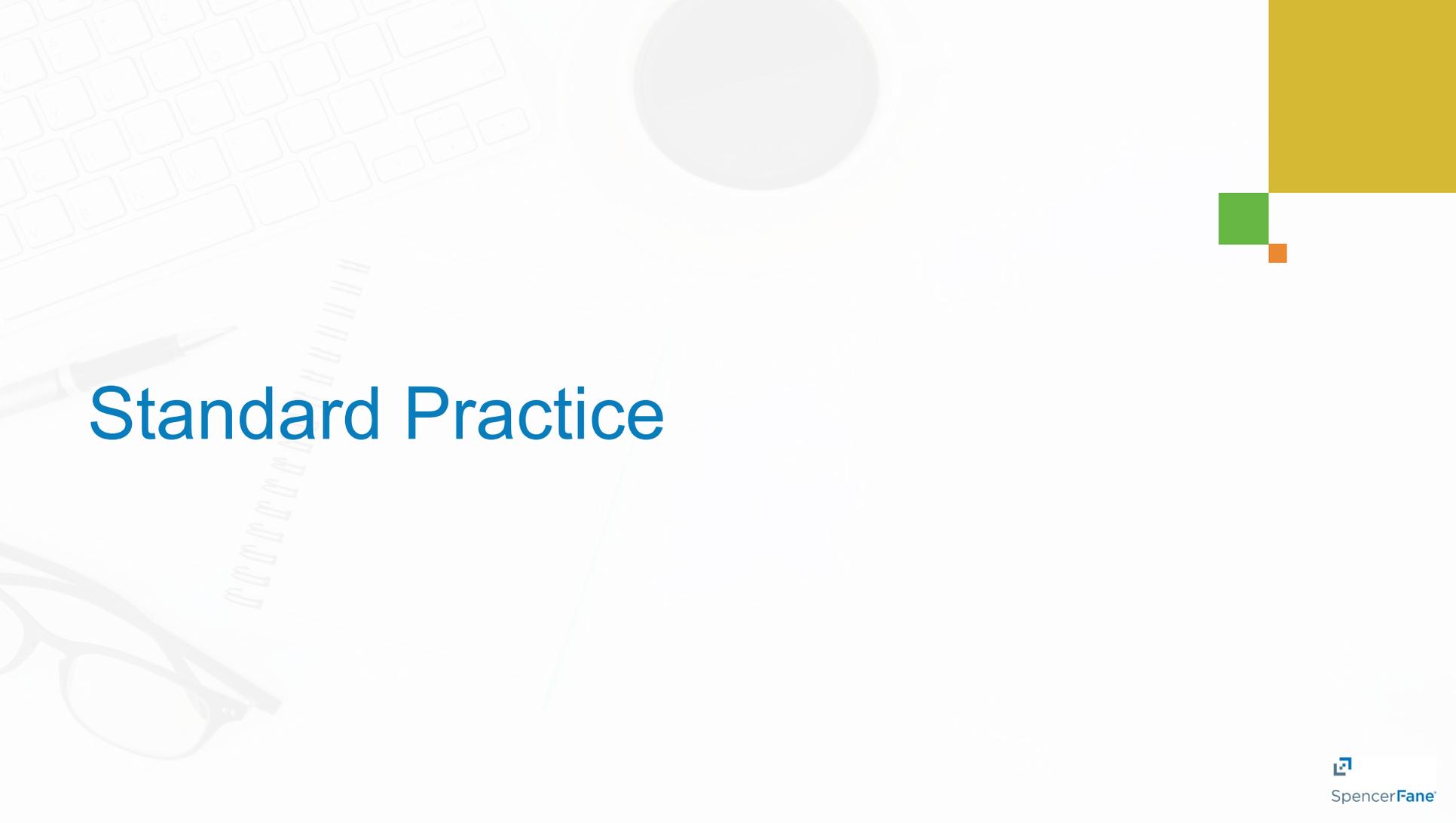
Example: Returning to an “equivalent” or “original” position after leave

Guidance from EEOC

“[I]f an employee uses the full 12 weeks of FMLA leave for her disability but still needs five additional weeks of leave... the employer must provide the additional leave as a reasonable accommodation unless the employer can show that doing so will cause an undue hardship.”

The Commission takes the position that compliance with the FMLA does not necessarily meet an employer’s obligation under the ADA, and the fact that any additional leave exceeds what is permitted under the FMLA, by itself, is not sufficient to show undue hardship.”





Standard Practice

Determine employee's rights under *all* relevant statutes

- Treat as a request for reasonable accommodation under ADA **and** request for FMLA leave
- Engage in interactive process
- Analyze eligibility and coverage under both statutes separately
- Employer may require FMLA certification and then make additional disability-related inquiries if necessary
 - Exception- if the employee states that s/he only wants to invoke rights under the FMLA, the employer should not make additional inquiries related to ADA coverage

If both apply, default to the *greatest* benefit to employee

If both FMLA and ADA apply, think which law would provide the most benefit.

- Example: If an employee covered by both the FMLA and the ADA returns to work, is the employer required to return her to her original position?
 - YES, absent undue hardship
 - **AND** the employee is entitled to have the employer maintain group health plan coverage under the FMLA, notwithstanding an employer policy that part-time employees do not receive health insurance.

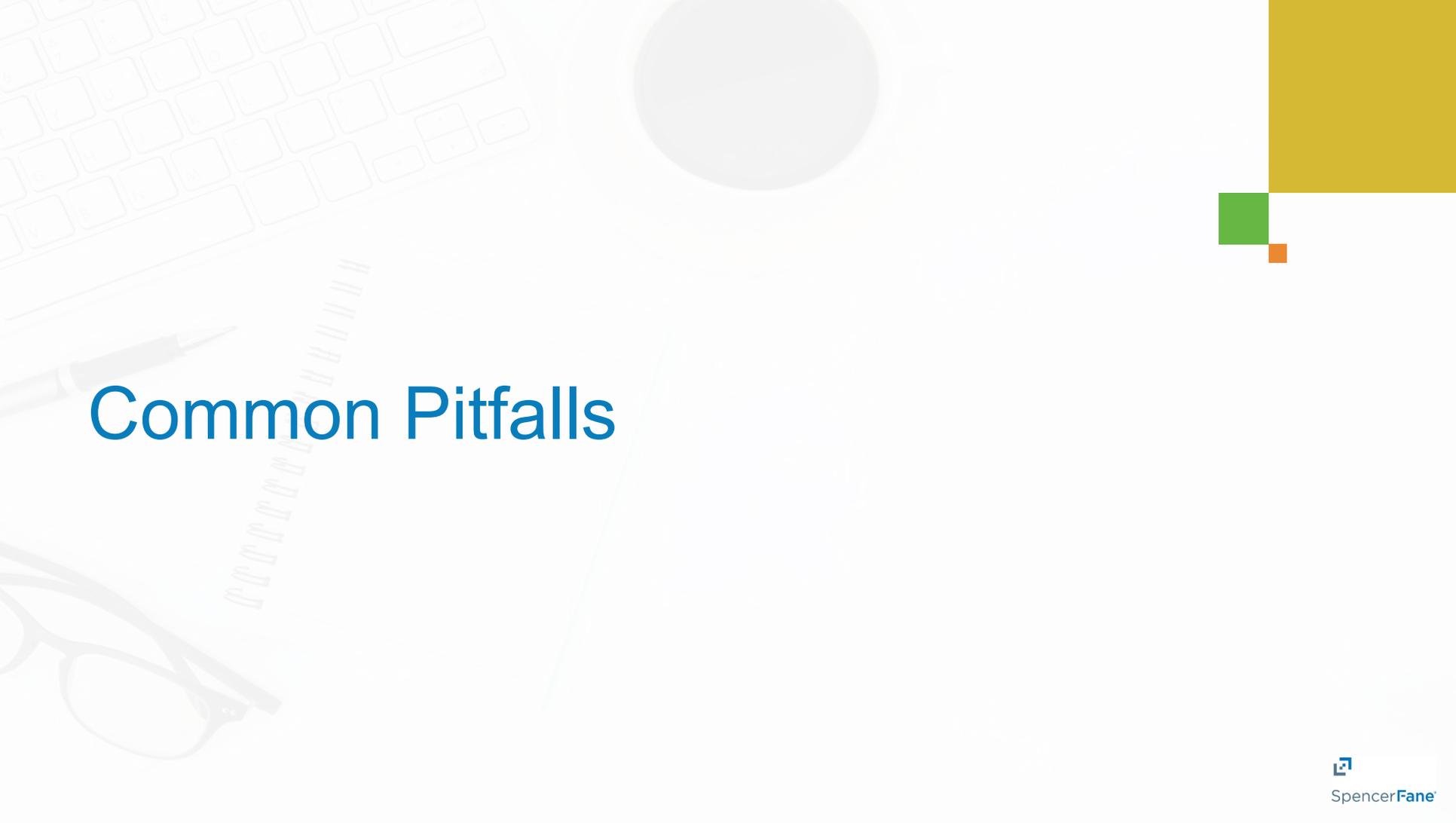
If *not* FMLA, leave may still be appropriate under ADA

If FMLA does not apply, consider providing leave as a reasonable accommodation under ADA

- A qualified individual with a disability is entitled to additional leave beyond the twelve weeks permitted under the FMLA, barring undue hardship.
- Maximum leave policies and “no fault” attendance policies may violate the ADA if applied to an employee with a disability who needs additional leave.

Note: Analyzing medical leave is inherently fact-specific and there are no bright-line rules. When in doubt, you should contact your company’s attorney.

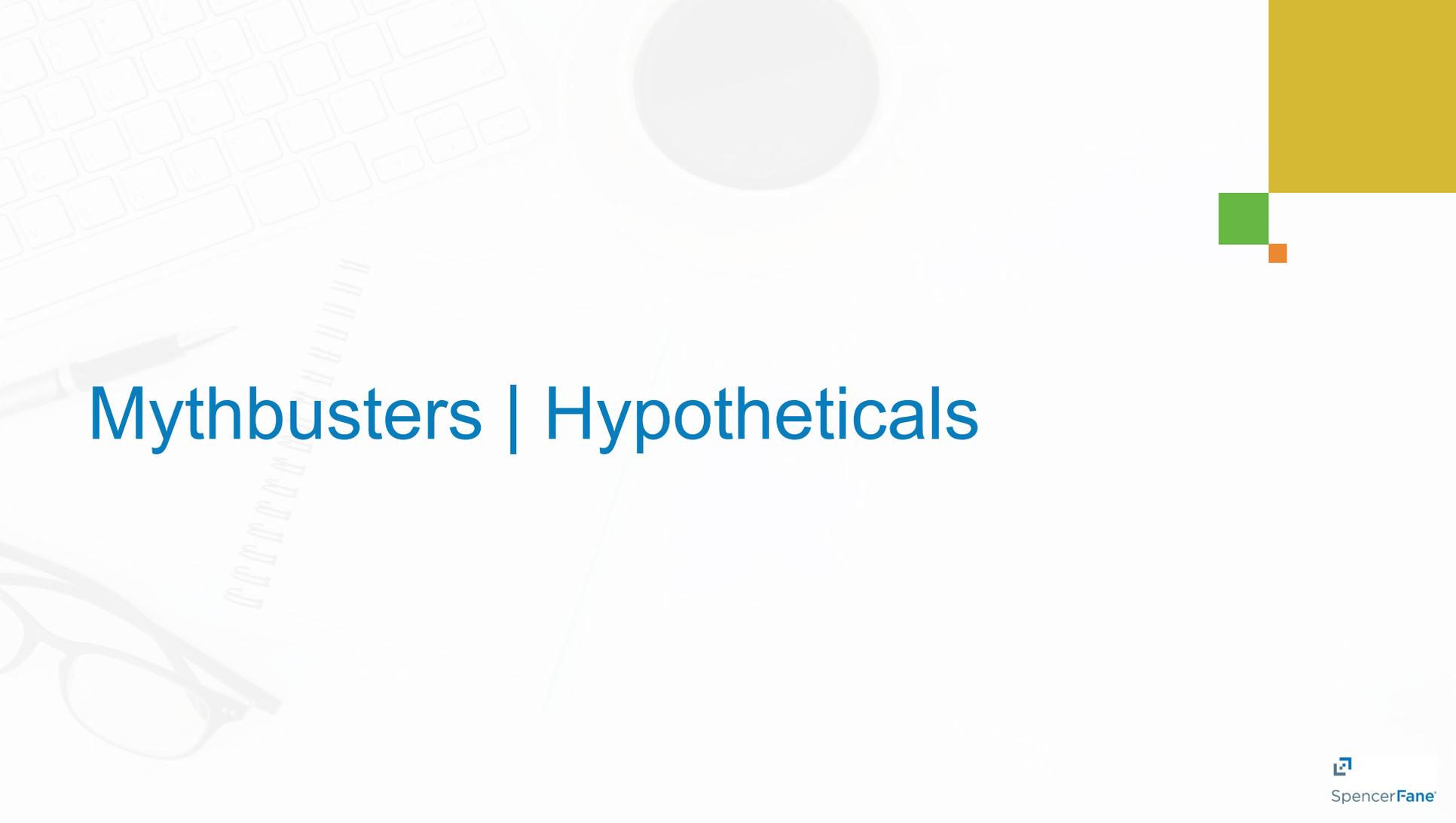
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Common Pitfalls

Common Pitfalls

- 100% healed policies
- No-fault leave policies
- Inconsistently requiring medical documentation
- Uninformed/Uneducated managers
- Assuming leave is the only accommodation
 - Light duty
 - Indefinite leave



Mythbusters | Hypotheticals



Question

Which of the following is a request for an accommodation that triggers the duty to engage in the interactive process?

- A. Employee tells supervisor, “I’m having trouble getting to work at my scheduled start time because of medical treatments I’m undergoing.”
- B. Employee tells supervisor, “I need 8 weeks off to get treatment for a back problem.”
- C. New Employee mentions to employer that her wheelchair cannot fit under the desk in her office, but did not ask for a desk that was wheelchair accessible when she applied for the job.
- D. Employee has been out of work for six months due to workers comp. injury. Employee’s doctor sends employer a letter stating that employee is released to return to light duty position.
- E. All of the above.

Question

Which of the following is a request for an accommodation that triggers the duty to engage in the interactive process?

- A. I need some family time
- B. I need an adjustment because of my daily meeting.
- C. I need an adjustment because my driver's license is suspended.
- D. My pastor says I need to walk away from conflict.
- E. None of the above.

What about these?

- “My Doctor says I need home or family time.”
- “I need an adjustment to attend my Alcoholics Anonymous meeting.”
- “I need an adjustment because my driver’s license is suspended because of my seizures.”
- “I need less stress.”
- Employee’s social worker sends letter to employer saying employee needs to walk away from conflict.

Hypothetical

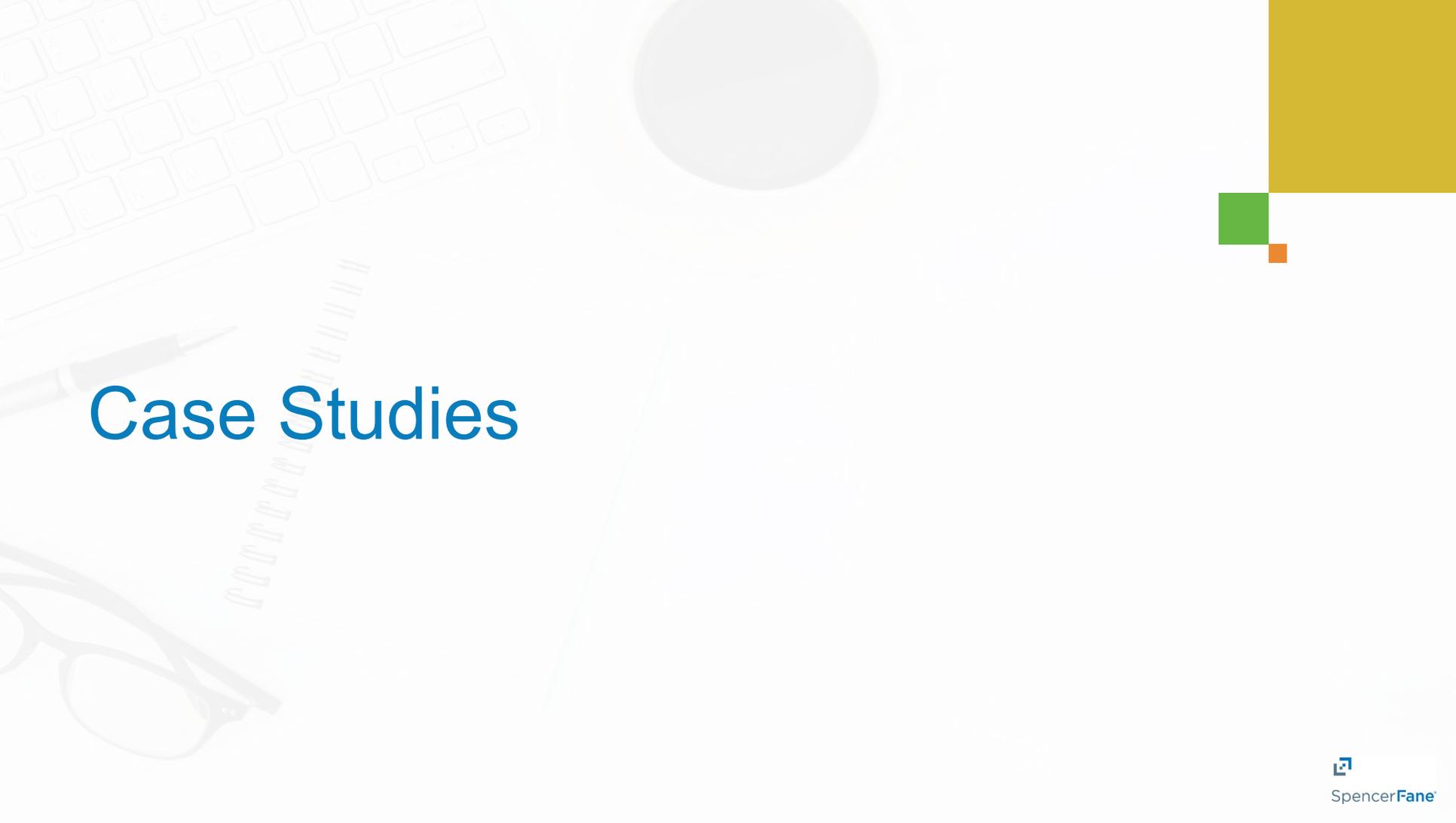
- A clerk has been out on medical leave for 16 weeks for surgery to address a disability.
- The employee's doctor releases him to return to work but with a 20-pound lifting restriction.
- The employer refuses to allow the employee to return to work with the lifting restriction, even though the employee's essential and marginal functions do not require lifting 20 pounds.

Hypothetical

- An employee with a disability has been out on leave for three months. The employee's doctor releases her to return to work but imposes a medical restriction requiring her to take a 15-minute break every 90 minutes.
- When the employer asks the purpose of the break, the doctor explains that the employee needs to sit for 15 minutes after standing and walking for 90 minutes. The employer asks if the employee could do seated work during the break; the doctor says yes.
- The employer rearranges when certain marginal functions are performed so that the employee can perform those job duties when seated and therefore not take the 15-minute break.

Hypothetical

- A medical assistant in a hospital required leave as a reasonable accommodation for her disability. Her doctor clears her to return to work but requires that she permanently use a cane when standing and walking.
- The employee realizes that she cannot perform significant parts of her job while using a cane and requests a reassignment to a vacant position for which she is qualified.
- Hospital terminates employee rather than reassigning her to vacant position.



Case Studies

EEOC v. Interstate Distributor Co., JVR No. 1301220014 (D. Co. Nov. 8, 2012)

- In 2012, a jury returned a \$4,850,000 verdict against a trucking company for instituting a policy that required employees to return to work after twelve weeks of leave with no medical restrictions in place. *EEOC v. Interstate Distributor Co., JVR No. 1301220014* (D. Co. Nov. 8, 2012). The suit was filed by the EEOC, which alleged that the employer's policy had led to qualified individuals not receiving reasonable accommodations under the ADA.

Hill v. Asian American Drug Abuse Program, Inc No. BC582516 (Cal. Sup. Ct. Jan. 19, 2018).

- An employee who broke her arm took leave under the California Family Rights Act (CFRA), a state analogue of the FMLA. While on leave, she began receiving treatment for major depressive disorder and requested additional leave. Rather than granting the leave, her employer terminated her when she failed to return to work at the conclusion of the 12-week statutory period. Hill was awarded \$4,572,835 in damages after her employer failed to restate her.

Robert v. Board of County Commissioners of Brown County, Kansas, 2012 WL 3715311 (10th Cir., August 29, 2012)

- Robert was a 10-year employee of Brown County, Kansas
- Responsible for supervising adult criminal offenders. The essential functions of her job required her to perform “considerable fieldwork,” visit less-than-desirable environments, and face potentially dangerous situations in field and office contacts
- Back pain confined Roberts to a wheelchair in 2004, she had surgery in April 2004. Back to work in July/August 2004.
- Back pain resurfaced in 2006, second surgery in April 2006.
- In July 2006, doctor’s report could not clarify when Roberts would walk again or return to work.

Robert v. Board of County Commissioners of Brown County, Kansas, 2012 WL 3715311 (10th Cir., August 29, 2012)

- County voted to terminate Roberts at end of July 2006 because it was under the impression she wouldn't be able to return to work for at least another month but possibly longer and would still need to avoid several of her supervision responsibilities.
- 10th Circuit upheld termination – no violation of ADA or FMLA.
- ADA: Roberts could not provide estimated date of return or that she could perform essential functions when she returned
- FMLA: Roberts was unable to perform the essential functions of her position at expiration of FMLA term

What does *Roberts* teach us?

- Job descriptions and/or clear job responsibilities, functions, duties play an integral part in a court's analysis of whether an employee is "qualified," or s/he can perform the essential functions of the job.
- The inquiry is *very* fact specific and requires the employer to consider the nature and duration of the employee's health condition.
- Indefinite leave is not required, and courts recognize that there are limitations.

Circuit Splits – leave and reasonable accommodation

- *Severson v. Heartland Woodcraft, Inc.*, 872 F.3d 476, 479 (7th Cir. 2017)
 - The FMLA, not ADA governs long-term leave
 - “A medical leave spanning multiple months does not permit the employee to perform the essential functions of his job. To the contrary, the inability to work for a multi-month period removes the person from the class protected by the ADA.”
- *Echevarria v. AstraZeneca Pharm. LP*, 856 F.3d 119 (1st Cir. 2017)
 - Amount of leave is *always* a case-by-case determination
 - Multi-month leave may be a reasonable accommodation – no bright line rule
- *Cline v. Clinical Perfusion Sys., Inc.*, 92 F.4th 926, 933 (10th Cir. 2024)
 - Reaffirmed 2014 case (*Hwang*) in which 10th Circuit considered a leave of absence exceeding six months as per se unreasonable.**

Lapham v. Walgreen Co., 88 F.4th 879 (11 Cir. 2023)

*has been appealed to SCOTUS

- Lapham's son had epilepsy, and she intermittently took FMLA leave to care for him.
- Lapham received poor to average performance reviews, which led to a PIP in January 2017.
- Lapham requested FMLA leave on February 16, 2017, but it was lost in communication and not processed until April 7, 2017.
- Between February and April, employer continued to gather performance-based data and terminated her employment on April 13, 2017.
- Employer also denied FMLA request based on termination.

Lapham v. Walgreen Co., 88 F.4th 879 (11 Cir. 2023)

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- 11th Circuit upheld termination because Lapham could not prove that her termination was *because* of her leave request.
- Different than 6th Circuit “motivating factor” standard.

What does *Lapham* teach us?

- The process for requesting leave (FMLA or ADA) should be clear and streamlined. Nothing should get lost in your system for 3 months.
- Train supervisors to avoid consideration of leave in evaluations, annual reviews, and decision to take adverse employment actions.
- Maintain consistency in evaluation of leave requests.

Huber v. Westar Foods, Inc., 106 F.4th 725 (8th Cir. 2024).

- Rehearing granted and opinion vacated, August 21, 2024
- Hardee's employee who is diabetic
- Several instances of employee leaving work without notice or not showing up for work without calling in – violations of company “call-in” policy
- Employee woke up one morning, suffering from hypoglycemia. Did not call into work but drove to hospital and received treatment. Did not call in next day at start of shift when she was resting.
- Emailed supervisor and HR next day to request FMLA leave.
- Westar denied FMLA leave and terminated her for continued violation of call-in policy. Employee sued.

Huber v. Westar Foods, Inc., 106 F.4th 725 (8th Cir. 2024).

- District Court granted summary judgment in favor of Westar – no violation of FMLA or ADA/state discrimination law.
- 8th Circuit reversed and sent it back for trial –
 - ADA: Genuine question as to whether her diabetic episode (disability) was the basis for her firing because question of fact whether she could call in to notify or was too ill.
 - ADA: Genuine questions regarding discriminatory animus of decision makers
 - FMLA: Genuine question as to timing of her request and whether employee called as soon as practicable, or whether casual connection between diabetic episode and failure to follow call-in policy

Questions?



Thank You!



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