Written Testimony of

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Leave as a Reasonable Accommodation

I. Introduction

Employers are clear that unpaid leave is a form of reasonable accommodation that may need to be provided to qualified employees with disabilities under the Americans with Disabilities Act ("ADA") absent undue hardship. Where employers struggle is determining what limitations they may place on leaves they offer and the extent of the duty to hold an employee's position open during the leave, while still effectively running their businesses. Employers need further guidance and clarification in this area, and specifically, need a better understanding as to the Equal Employment Opportunity Commission's ("EEOC") position on how to administer leave as a reasonable accommodation under the ADA.

As an initial matter, the EEOC offers guidance on leave as a reasonable accommodation under the ADA in four main places - the "EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act" ("RA Guidance"), the "Americans with Disabilities Act: Applying Performance and Conduct Standards to Employees

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with Disabilities" ("Performance and Conduct Standards"), the "EEOC Enforcement Guidance: Workers' Compensation and the ADA" ("Workers' Comp Guidance"), and the "Family and Medical Leave Act, the Americans with Disabilities Act, and Title VII of the Civil Rights Act of 1964" ("ADA/FMLA Fact Sheet"). In some instances, the advice and examples set forth in these tools are inconsistent with one another. In other cases, the guidance offered by the EEOC differs from court decisions on the issue. Finally, the EEOC's recent enforcement in the leave area has, in some cases, gone beyond that which is stated in the EEOC's own guidance and beyond what is required by the statute. As a result of these inconsistencies, employers need better direction regarding the EEOC's stance on leave issues.[2]

Each request for a reasonable accommodation requires a careful, individualized, case-by-case analysis. Thus, trying to reasonably accommodate a disabled employee already requires a complex analysis. The lack of clarity and consistency in the existing guidances on leaves of absence makes the process even more challenging. Therefore, we encourage the EEOC to reconsider and revise certain sections of its existing sources of guidance to: (1) provide additional and more practical examples of the types of leave situations faced daily by employers, (2) provide more concrete answers to some of the leave examples included in the guidance, and (3) consolidate its guidances on the issue of leave as a reasonable accommodation in one place to make the analysis of leave as a reasonable accommodation easier for employers and employees. Our discussion below identifies how we think EEOC guidance needs to be modified.

II. Typical Leave of Absence Process

Before turning to the specific recommendations we have for clarifying leave issues, we believe it is helpful to understand the typical leave of absence process many employers utilize when an employee needs time off from work due to a medical condition or disability.

A. Leave Policies

Many employers have a written leave of absence policy that is published to employees, typically through their employee handbook. If the employer is subject to the provisions of the Family and Medical Leave Act ("FMLA"), it will likewise have a written FMLA policy. Most large employers have both an FMLA policy and a supplemental medical leave of absence policy providing leave beyond the FMLA's mandated 12 weeks of job protected leave.

Generally, leave policies have common features, although the specific details of the programs vary from employer to employer. In terms of eligibility, while the FMLA requires an employee to be employed for at least one year before he or she is entitled to leave as well as other

[2] According to the EEOC's Strategic Plan for Fiscal Years 2007-2012 ("Strategic Plan"), the EEOC's sole purpose is not simply to enforce equal employment laws, but also to educate employers about their responsibilities under the law. Its stated means of doing so includes "[p]romot[ing] clarity and consistency in rights and obligations under the law, particularly in areas of novel or emerging issues, through amicus briefs, regulations, policy guidance, and informational materials." With respect to leave as a reasonable accommodation under the ADA, the Commission needs to promote clarity and consistency for employers and employees alike.

eligibility requirements, many employers understand that a one year period of employment as a condition precedent to taking time off work for medical reasons would result in many productive and valued employees being terminated. As such, employers most often allow employees with less than one year of employment to take a medical leave of absence.

The amount of leave provided through an employer's leave policy varies widely among employers, industries and regions. An employer subject to the FMLA is required to provide 12 weeks of leave due to the employee's own serious health condition to an eligible employee. In our experience, the average employer typically grants somewhere between the statutorily required 12 weeks and 26 weeks of leave. We also work with many employers who provide up to a maximum of 52 weeks of leave.

An increasing numbers of employers have neutral maximum leave policies that set forth a maximum duration of leave regardless of the reasons for leave. Generally, these maximum leave periods vary from 26 to 52 weeks. Some employers include statements in their leave policies that, in accordance with the ADA and applicable law, additional leave may be considered as a reasonable accommodation on a case-by-case basis. Many employers, however, do not include this verbiage, relying instead on their separate ADA/reasonable accommodation policies to put employees on notice of their right to make a request for a reasonable accommodation.

B. Employee Notice and Subsequent Employer Communications

Employees who want to take a leave of absence are required to provide notice as soon as practicable upon learning of the need for leave. Most employers require an employee to fill out a leave of absence request form and to submit a certification from the employee's health care provider confirming the need for leave. Separate and apart from its FMLA obligations, an employer often provides written information to the employee going on leave which details the employee's rights and responsibilities while on a leave of absence. However, the expectation is that is the employee's obligation to keep the employer updated on the employee's status and intent to return to work while the employee is on leave.

C. Return to Work

To the extent the employee is taking FMLA leave, an employer is required to reinstate an employee to the same or equivalent position as long as the employee returns to work within the statutorily protected 12 weeks of leave. In most cases, if the employee cannot return to work within the protected 12 week period, the employer will grant the employee leave time in addition to the statutorily required FMLA leave.

Most employers require employees returning from leave to provide either a medical release from their health care provider or a fitness for duty certification as a condition of reinstatement. In either case, employers understand that an employee does not need a "full release" or a "100% healed" statement to trigger the employer's obligation to return the employee to work.

For FMLA qualifying leaves, upon release to return to work, the employee typically returns to work in the same or equivalent position in accordance with statutory requirements. In the case of an individual whose leave was not covered by the FMLA or who has exhausted FMLA leave, the employee will likewise usually be returned to his or her same position. If the employee's

position was filled because it was an undue hardship to keep the job open, the Human Resources Department will consult with the employee to determine whether any vacant positions for which the employee is qualified exist, and whether the employee can perform the essential functions of the position, with or without accommodation. If no such position is available or the employee refuses a position offered, the employee's employment will be terminated.

Many employers remind employees who are reaching the maximum amount of leave time available that they will be terminated unless they are able to return to work at the end of the maximum leave period. Some employers will specifically advise employees that they should advise the employer if any reasonable accommodation will allow them to return to work prior to termination. When an employee asks for a reasonable accommodation, the employer begins the required interactive process under the ADA with the employee. In the event an employee does not request a reasonable accommodation, he or she is terminated when they reach the maximum amount of leave offered by the employer.

D. Benefits While on Leave

In terms of income replacement, many employers offer short-term disability (STD) or salary continuation programs as well as long-term disability ("LTD") benefits to employees in order to provide some level of salary continuation during a leave.[3] For STD, the length of benefit allotment varies from employer to employer, but is typically based on the individual's length of service. The longer an individual has been employed before using the benefit, the longer the period of paid benefit. The maximum paid benefit for most employers is usually between 13 and 26 weeks, typically because the average LTD policy begins at 13-26 weeks.

The amount of salary continuation benefit to which the employee may be entitled also typically varies among employers, but is usually tied to the length of the leave, as well as length of service. An example of an STD payment chart follows:

Length of Service	100% of Monthly Salary	50% of Monthly Salary
Less than 6 months	1 month	5 months
6 months but less than 3 years	2 months	4 months
3 years but less than 5 years	3 months	3 months
5 years or more	4 months	2 months

There is typically a waiting period of 3-5 business days before payments under a STD program begin. Many employers have paid sick leave policies or paid time off ("PTO") policies to cover these unpaid waiting periods. Once an employee has been on STD between 13 and 26 weeks, he or she typically becomes eligible to apply for long-term disability benefits. Most LTD plans offer salary continuation at 60% of pre-leave salary until the individual is able to return to work or reaches normal retirement age. While dependent on the LTD plan terms, once an employee

[3] In addition, most employers will require, or an employee will elect, to use any accrued paid time, such as sick days, vacation, personal days, PTO (Paid Time Off) during periods of unpaid leave.

receives LTD benefits, termination does not affect the employee's continuing receipt of LTD benefits. [4]

In terms of health insurance benefits, many employers continue to provide employees on leaves of absence with medical benefits. For employees on FMLA leave or other paid leaves of absence, there is typically no disruption in the process of paying for such benefits as premiums continue to be deducted from the employee's regular paycheck. Employees on unpaid leaves of absences, on the other hand, are typically required to make arrangements to pay for their portion of any premiums due. Most employees on extended leaves of absence (more than 5 business days) stop accruing other benefits, such as vacation and sick time, until they return from leave.

E. Leave Administration

Depending on the size of the employer, leaves of absence are most often administered in-house, typically in the Human Resources Department. Larger employers, however, now increasingly employ individuals whose sole responsibility is to manage medical leaves, regardless of whether they are ADA and/or FMLA leaves. Other employers are now outsourcing their leave administration to third-party administrators who specialize in managing the leave of absence process. We believe that employers are spending an increasing amount of resources in managing leaves due to not only the complexity of situations presented but also because of the uncertainty of legal compliance.

F. Impacts of a Leave of Absence on the Employer

There are direct costs employers face when employees are absent from work – paid time off for the absent employee, overtime for remaining employees covering the work of an absent employee, costs to engage temporary employees. According to surveys conducted by Mercer, unplanned employee absences cost organizations approximately nine percent of their base payroll on average – more than half the cost of healthcare benefits. (Mercer 2008 Survey on the Total Financial Impact of Employee Absences; Mercer 2010 Survey on the Total Financial Impact of Employee Absences). Of course, that constitutes just the measurable costs. The intangible costs include:

- Significant losses in productivity because work is completed by less effective, temporary workers or last-minute substitutes, or overtired, overburdened employees working overtime who may be slower and more susceptible to error;
- Lower quality and less accountability for quality;
- Lost sales;

[4] A study by Mercer, a global Human Resources consulting firm, indicates that, in most cases, employers require an individual to remain on the payroll in order to receive STD and LTD benefits. Mercer Health, Productivity, and Absence Management Programs 2006 Survey Report. In most cases, however, once LTD benefits begin, the employee may be terminated without any interruption in LTD benefits.

- Less responsive customer service and increased customer dissatisfaction;
- Deferred projects;
- Increased burden on management staff required to find replacement workers, or readjust workflow or readjust priorities in light of absent employees;
- Increased stress on overburdened co-workers; and
- Lower morale.

(Mercer Health, Productivity, and Absence Management Programs 2006 Survey Report; Mercer 2010 Survey on the Total Financial Impact of Employee Absences). Survey results indicate that when an employee takes a medical leave, he or she is typically replaced by a more expensive employee. (Mercer 2010 Survey on the Total Financial Impact of Employee Absences). The replacement output, however, does not match the increased price tag. In fact, replacement workers are only 79% as efficient. (Mercer 2010 Survey on the Total Financial Impact of Employee Absences). With the cost of leaves of absence so high, it is no wonder that employers constantly seek ways to minimize their impact while still complying with the law. It is because of these tangible and intangible costs that leave as an accommodation is such a hot-button issue for employers. Moreover, when leave is taken on an unplanned basis, the difficulties faced by employers increase due to the unpredictable nature of the absences.

III. Leave Issues

A. Undue Hardship

In order to deny leave as a reasonable accommodation or fill an employee's job who is on leave, an employer must prove undue hardship. Employers must evaluate whether an accommodation is significantly difficult or expensive, including whether an accommodation is disruptive to the workforce or would "fundamentally alter the nature or operation of the business. (Small Employers Guide, Undue Hardship; RA Guidance, Undue Hardship). Factors to consider in determining whether an undue hardship exists include: (1) the nature and cost of the accommodation; (2) the overall financial resources of the business; (3) the overall number of individuals employed by the employer; (4) the effect the accommodation would have on the resources of the business; and (5) the impact the accommodation would have on the business. 29 C.F.R. §1630.2(p)(2).

As will be explained in the sections below related to particular issues associated with leaves of absence as a reasonable accommodation, many of the accommodations deemed potentially reasonable by the EEOC are viewed as hardships by employers. Yet, many employers believe the bar for proving that such hardships are "undue" is set too high to make it worthwhile to utilize the defense. This belief is spurred by the impression within the employer community that the EEOC focuses more on financial hardship than the effect leaves of absence have on the operations of the employer's business. The EEOC's focus on finances, however, is misplaced. Nearly all employers - regardless of size - realize that proving undue hardship based on financial impact is a losing proposition. Instead, their real hardship is measured by the impact a leave of absence has on their business. Employers need more guidance on how the EEOC will assess

when the typical but significant disruptions caused by leaves of absences - *e.g.*, lower quality, lower productivity, lower customer service, lost sales, and increased burden on already over-worked co-workers - constitute undue hardship.

To the extent the issue of undue hardship is relevant to the leave topics discussed below, our further analysis is set forth within the respective sections. As indicated above, any such discussion assumes that any direct cost associated with leave as a reasonable accommodation will *not* be considered an undue hardship and instead focuses on the indirect costs associated with the disruption to the business caused by the leave.

B. Neutral Maximum Leave Policies

1. General Discussion

One way employers attempt to control or manage the impact of employee leaves of absence on their business is to institute a neutral maximum leave of absence policy that sets a maximum duration for which an employee can be away from work. The reason for leave under these neutral policies typically does not matter – once the maximum amount of leave is reached, the employee is discharged. The intent of these neutral leave programs is to provide employers with some level of control over their ability to manage their headcount and business operations. Employers know in advance how much time off an employee may take, and can track when an employee approaches that maximum in order to provide it an opportunity to begin planning coverage/replacement options sooner.

Employers also implement these neutral maximum leave policies in an effort to provide a way to make non-discriminatory discharge decisions.[5] These policies obviously apply to employees with disabilities who are on leave. As a general proposition, "[l]eave policies or benefit plans that are uniformly applied do not violate this part [Title I] simply because they do not address the special needs of every individual with a disability." 29 C.F.R. §1630, App.

In the last few years - and much to employers' surprise - the EEOC has brought these neutral maximum leave policies under fire, deeming them inflexible and contrary to the ADA. The EEOC points to the text of the ADA and its regulations, which provide that a reasonable accommodation may include appropriate adjustments or modifications of policies for individuals with disabilities. 42 U.S.C. §12111(9)(b); 29 C.F.R. §1630.2 (o)(2)(ii). The EEOC's RA Guidance interprets this statutory provision to mean that employers may have to modify leave policies, including "no fault" or maximum leave policies, as a reasonable accommodation and notes that such modification may include extending periods of unpaid leave beyond that which is offered through an employer's standard leave policy, as long as doing so does not impose an undue hardship on the employer. (RA Guidance, Question 17. *See also*, Performance and

[5] These policies are also sometimes used by employers to provide a defense against workers' compensation retaliation claims. Where all employees are provided the same amount of leave and therefore, are treated equally, an employee with a workplace injury has no claim of retaliation. By requiring employers to stray from their universally applied neutral policy, the defense is diluted, placing employers at risk of increased litigation.

Conduct Standards, Question 19). No real guidance, however, is provided in terms of what satisfies the requirement to modify a workplace policy, let alone a neutral maximum leave policy.

The case law is extremely undeveloped on the maximum leave issue, but what exists establishes that a universally applied maximum leave policy is not, *per se*, violative of the ADA. *See e.g., Gantt v. Wilson Sporting Goods Co.*, 143 F.3d 1042 (6th Cir. 1998) (a uniformly and consistently applied leave policy does not violate the ADA as a matter of law). Existing case law is generally not instructive because it does not address *how* an employer should "modify" maximum leave policies and does not specifically address modification of the policy as a reasonable accommodation. For instance, in *Kleiber v. Honda of America Mfg., Inc.*, 420 F.Supp.2d 809 (S.D. Ohio 2006), the court granted summary judgment in favor of the employer and found "[a]n employer does not violate the ADA by terminating an employee in accordance with a leave of absence policy which does not distinguish between disabled and non-disabled employees." This holding, however, arose in determining whether the plaintiff had established pretext for his discharge - not in the reasonable accommodation context.[6] *See also, E.E.O.C. v. Beall Concrete Enterprises Inc.*, 2008 WL 877769 (N.D. Tex. Mar. 15, 2008) (court granted summary judgment in favor of employer; although the holding was based primarily on the court's finding that plaintiff was not disabled, the court made a separate finding that a uniformly and consistently applied maximum leave policy does not violate the ADA as a matter of law, and since the plaintiff failed to present evidence that the policy was applied inconsistently, summary judgment was warranted). In *White v. Honda of America Mfg., Inc.*, 191 F.Supp.2d 933 (S.D. Ohio 2002), on the other hand, the court denied summary judgment in favor of the employer, finding that issues of material fact existed as to whether an extension of medical leave beyond the 12-month maximum would be objectively reasonable. Despite the employer's uniform application of the neutral maximum leave policy, the court found an individualized assessment as to the reasonableness of the requested extension of the leave necessary. *Id*.

In the midst of this confusion, the EEOC has begun aggressively litigating against employers with neutral maximum leave policies. In the last few years, the EEOC has filed several high-profile lawsuits, including:

- *EEOC v United Road Towing Inc.*, No. 10-cv-06259 (N.D. Ill.) (failure to provide reasonable accommodations by terminating disabled employees after exhausting 12 weeks of Family and Medical Leave Act (FMLA) leave and refusing to re-hire employees once they were finally released to return to work);

- *EEOC v. IPC Print Services*, No. 10-886 (W.D. Mich.) (failure to provide reasonable accommodations by terminating an employee rather than granting him a part-time schedule because he had exceeded the maximum hours of leave allowed under company policy);

[6] In a separate, but related context, the *Kleiber* court did find that "[r]easonable accommodation does not require an employer to wait indefinitely for an employee's medical condition to be corrected." *Kleiber*, 420 F.Supp.2d at 824.

- *EEOC v. Princeton HealthCare System*, No. 10-4216 (D. NJ) (failure to provide reasonable accommodations by terminating employees after either seven days or 12 weeks, depending on eligibility for FMLA);

- *EEOC v. UPS*, Case No. 09-5291 (N.D. Ill) (failure to provide reasonable accommodations by terminating an employee for exceeding 12-month leave policy);

- *EEOC v. Denny's, Inc.*, No. 06-2527 (D. Md.) (failure to provide reasonable accommodations by terminating a nationwide class of disabled employees at the end of the company's pre-determined maximum leave limit).

Perhaps more troubling for employers than the outbreak of pending litigation is the EEOC's position on these policies as reflected in recent consent decrees. The most significant of these cases was in September 2009 and resulted in a $6.2 million settlement against Sears, Roebuck & Co. (*EEOC v. Sears Roebuck & Co.*, No. 04 C 7282 (N.D. Ill.). In the *Sears* case, the EEOC initiated a class action lawsuit claiming the retailer's policy of terminating employees on leave due to workers' compensation injuries in excess of the company's one-year maximum leave period violated the ADA. In particular, the EEOC claimed that Sears refused to extend leave as a reasonable accommodation and refused to allow disabled employees to return to work in available positions which could be performed with or without reasonable accommodation.

As part of the settlement agreement, the EEOC required Sears to make significant changes to its workers' compensation leave policy, as well as undertake substantial tracking and recordkeeping responsibilities. For example, Sears must notify employees nearing the end of their maximum leave benefit,[7] in writing, of their right to request a reasonable accommodation that may include, but is not limited to: modified duty, part-time work, reassignment to a different position, additional leave, assistive devices, and possible transfer/relocation to another store location/business unit. Along with this formal notification, Sears must also send the employee a revised Heath Care Certification form that asks a health care provider to specifically identify whether the employee is limited in any major life activities as a result of the injury or illness and identify any accommodations the health care provider recommends.

Sears' obligations, however, are not satisfied once this letter is sent to its employees. If the employee does not respond to the original "leave-end" letter, Sears must then send another letter to the employee no less than ten (10) business days before the employee is discharged. The letter must again advise the employee of the right to request an accommodation, as well as the consequences of failing to do so (*i.e.* advise of the pending discharge).

If the employee still does not respond, Sears has one more step before it can discharge the employee. It must request from its third-party workers' compensation administrator a copy of any doctor's releases on file for the employee so that they may be reviewed by the Centralized Leave Management Team. The consent decree does not specify what the team is searching for

[7] Notification is required no later than 45 days before the employee is set to expire the one-year maximum leave provided under the policy.

or what it should do with the documentation when there is no request for accommodation from the employee. The fact it is required to take this final step, however, suggests the EEOC expects Sears to, *sua sponte*, search for possible additional accommodations even absent an employee's request for one.[8]

Employers familiar with *Sears* and similar settlements are led to believe that the process mandated by the consent decree must be the "model" approach to offering leave as an accommodation under a neutral maximum leave policy. Yet, the EEOC's enforcement position is contrary to the statutory mandates of the ADA and requires a far greater level of involvement by the employer than the ADA originally intended. To that end, there is absolutely no support in the ADA for the proposition that an employer has to affirmatively seek out employees and ask them if they would like an accommodation in this circumstance. Indeed, the legislative history confirms that the duty to seek an accommodation lies with the disabled employee:

> Third, the legislation clearly states that employers are obligated to make reasonable accommodations only to the "known" physical or mental limitations of an otherwise qualified individual with a disability. Thus, the duty to accommodate is generally triggered by a request from an applicant for employment or an employee. Of course, if a person with a known disability is having difficulty performing his or her job, it would be permissible for the employer to discuss the possibility of a reasonable accommodation with the employee.
>
> In the absence of a request, it would be inappropriate to provide an accommodation, especially where is could impact adversely on the individual.

H.R. REP. 101-485(II), at **42.

The EEOC's enforcement position is also inconsistent with its own policy guidance on the topic, which similarly advises that an employer is not required to ask an employee is there is a need for reasonable accommodation unless the employer "knows, or has reason to know, that the disability prevents the employee from requesting a reasonable accommodation." (RA Guidance, Question 40).

Courts agree that the duty to request a reasonable accommodation lies squarely with the disabled employee. *See Freadman v. Metropolitan Property & Cas. Ins. Co*., 484 F.3d 91 (1st Cir. 2007)

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[8] The $3.2 million consent decree in *EEOC v. Supervalu, Inc.*, No. 09-5637 (N.D. Ill.) included many of the same processes required of Sears. Like Sears, Supervalu's policy allowed for a maximum one-year leave. Under the January 14, 2011 consent decree, Supervalu was required to create a Medical Accommodation Administration Team. Supervalu also was required to send out letters to employees on leave at 26 weeks, 40 weeks, and 10 days before discharge. The EEOC also required the team to collect records from the third-party leave administrator at least 4 weeks before discharge so that the team could independently - without a specific request for leave - assess whether the employee could return to work, with or without reasonable accommodation. Where the team believed a return to work option was available, it was required to provided a written return to work offer to the employee on leave.

(disabled employee must make "direct and specific" request for accommodation; the court found no such request was made where employee simply requested "some time off" because she was "starting" to feel ill"); *Gantt v. Wilson Sporting Goods Co.*, 143 F.3d 1042 (6th Cir. 1998) ("There is no question that the EEOC has placed the initial burden of requesting an accommodation on the employee. The employer is not required to speculate as to the extent of the employee's disability or the employee's need or desire for an accommodation.").

2. Undue Hardship

Not only does the EEOC's enforcement approach require more than that which was anticipated by Congress in enacting the ADA or the EEOC's own regulations, it also places an unnecessary burden on employers. In the case of large employers, like Sears or Supervalu, who have thousands of employees, any number of whom may be on leave at the same time, the only way to implement a policy that requires the employer to send multiple letters at various points during an employee's leave would be to hire a dedicated "team" to track and manage employees' leaves. This creates an added financial and administrative burden by way of payroll costs, benefit costs, training costs, costs for supervision, etc. In essence, the employer is required to create a whole new structure in order to track employees on leaves and to make certain it then proactively and repeatedly asks employees if they want to pursue an accommodation – certainly not a consequence intended by Congress in enacting the ADA.

The impact is just as significant for smaller employers. While the number of individuals on leave is presumably fewer, thereby requiring less tracking and administrative follow-up, the resources to handle such tasks are also fewer. That means an already burdened employer will be required to track not only employees' leaves, but also when letters were mailed out, whether they have been returned, when a follow up letter is required, and other information. There are also costs attendant with the act of mailing these letters (postage or other delivery costs).

Beyond the hardship of administering this "tracking" program is the underlying, and perhaps more important, concern – will extending leave beyond the maximum period allowed under the employer's policy generally imposes an undue hardship. From a practical standpoint, most employers offering neutral maximum leave policies offer generous amounts of leave under those policies and presumably select the maximum leave amount offered based on an analysis of how much absence from work it can bear.[9]

When a leave extends beyond that for which the employer has planned, there is a significant disruption to the business, particularly because the employer is still not able to fill the "empty" position on a permanent basis unless it can prove an undue hardship. For most employers with maximum leave policies, extending leave beyond that provided in the policy extends the

[9] The EEOC's enforcement efforts may also have the unintended effect of forcing employers to rethink their leave management policies. If employers believe they will regularly be required to provide more than the maximum leave they believe they can bear and for which they have presumably planned by instituting these maximum leave policies, they may feel a need to reduce the amount of standard leave provided to all employees to account for the additional anticipated leave at the end of the leave period for disabled employees.

employer's reliance on transient replacement methods of completing work - either hiring temporaries or redistributing work amongst its remaining staff. This continued reliance comes at a price. These transient replacement methods often lead to losses in productivity, lower quality of work and less accountability for quality, less responsive customer service, inability to complete improvement projects, increased stress, and lower morale. Essentially, an employer is prevented from operating its business in an efficient and effective manner. Basically, the employer cannot decide how best to staff works, meet customer demands, mandate and retain employees - in essence, making legitimate business decisions regarding how it operates its business.

For example, in the case of an employer with a high-level or highly skilled employee on extended leave, the difficulty becomes finding acceptable replacement methods. It is typically extremely difficult to find a temporary employee to fill a high-level position as most potential candidates either do not possess the requisite skill and experience, or if they do, they are seeking a more permanent job placement. Thus, many employers are left reassigning work among the existing workforce. Doing so for an extended period of time, however, not only places a significant amount of stress on these individuals, which in turn leads to an increase in errors and quality assurance problems (among other things), as well as a decrease in job satisfaction. This dissatisfaction sometimes leads to additional turnover, thereby exacerbating the employer's problem.

The extended absence of an entry-level employee can have just as significant an impact. Take, for instance, an entry-level production worker. While finding a temporary employee to fill these openings is typically easier, the turnover rate is also normally higher, which results in higher training costs, more quality control issues, less accountability for quality, less reliability, and a whole host of similar issues. The EEOC should recognize that simply because an employer can hire temporary employees to fill positions cannot automatically mean that there is no undue hardship in keeping positions open. Thus, having an employee on an extended leave of absence - entry level or otherwise - often constitutes a significant obstruction to an employer's ability to effectively and efficiently run its business.

3. Recommendations

In light of the above, we believe the EEOC should clarify in a revised guidance that where an employer has (1) a well-defined and published maximum leave policy making it clear to all employees the maximum leave time allowed under the policy, and (2) an ADA policy in place that clearly explains the procedure by which an employee requests a reasonable accommodation, it is not required to take any further affirmative steps in terms of notifying employees on leave that their leave is about to expire and that they should contact an employer to discuss a possible accommodation. Absent the very rare circumstance where an employee's disability causes him to be unable to request an extension of leave, the onus must remain on the employee to seek an accommodation. That was Congress' intent, and that makes practical sense. The employer should not be required to engage in burdensome letter writing campaigns and complicated tracking protocols. Of course, in the event an employee requests additional leave or another accommodation, an employer would have the duty to engage in the interactive process, thereby satisfying the duty to modify workplace policies.

Finally, it is our position that, while an employer is required to consider providing an employee additional leave beyond the maximum provided in neutral maximum leave policies as a reasonable accommodation, in most cases, where the employee has already provided substantial leave benefits, additional leave may not be appropriate under an undue hardship assessment. Thus, we would ask that the EEOC's guidance materials include more detailed and defined examples of situations where maximum leave policies are called into question and provide examples of times when additional leave will be deemed necessary and when it will not. For instance, taking the situation set forth above, in the case of an employer running a lean production operation, where an entry-level employee is approaching the end of the company's 6-month maximum leave period, and the employee requests additional leave, we would suggest the EEOC counsel employers that granting the request for additional leave would constitute undue hardship where the employer can show that the use of temporary replacement methods has resulted in lower productivity, lower quality, higher turnover in other, related positions, or increased customer complaints. On the other hand, if the employer has a workforce of floating temporaries used to fill absences that have been trained in the same manner as a permanent employee and the use of which results in no productivity or quality concerns for the employer, continued leave may constitute a reasonable accommodation.

C. Indefinite Leave

1. General Discussion

As discussed above, providing a disabled employee with a leave of absence may constitute a reasonable accommodation under the ADA, but as the EEOC's Performance and Conduct Standards advise, an employer generally does not have to grant indefinite leave because doing so would impose an undue hardship on the employer. (Performance and Conduct Standards, Question 21). To that end, the Small Employers Guide advises that an employer may be able to establish an undue hardship if the employer can neither plan for the employee's return nor permanently fill the position. (Small Employers Guide, Question 17). Similarly, the RA Guidance advises that the lack of a fixed return to work date may constitute an undue hardship if the employer can neither plan for the employee's return nor permanently fill the position. (RA Guidance, Question 44).

Case law support's the EEOC's contention that employers need not provide disabled employees with indefinite leave as a reasonable accommodation, but most reach that conclusion through a different analysis. Rather than finding that an indefinite leave constitutes an undue hardship, courts often find that the request for indefinite leave - in and of itself - is unreasonable. *See Graves v. Finch Fruyn & Co.*, 2009 U.S. App. LEXIS 25142 (2nd Cir, 2009) (two week leave unreasonable where there was no indication employee could actually return to work at end of two weeks and doctor advised he could not return for the foreseeable future); *Lara v. State Farm Fire & Cas. Co.*, 121 Fed. Appx. 796 (10th Cir. 2005) ("A request for indefinite leave therefore cannot constitute 'reasonable accommodation' as 'such a leave request does not allow the employee to perform the essential functions of the job in the *near future*.'"); *Vice v. Blue Cross and Blue Shield of Oklahoma*, 2004 U.S. App. LEXIS 21375 (10th Cir. 2004) (continued leave was not reasonable where employee never indicated when, if ever, she could return to work); *Walsh v. UPS*, 201 F.3d 718 (6th Cir. 2000) ("when the requested accommodation has no

reasonable prospect of allowing the individuals to work in the identifiable future, it is objectively not an accommodation that he employer should be required to provide").[10]

While the end result of both positions is the same - an employer need not provide indefinite leave as a reasonable accommodation - the EEOC's approach seems to have lost sight of the fundamental analysis required when considering a request for a reasonable accommodation - whether the requested accommodation actually reasonable. Employers would argue, and it seems the EEOC philosophically agrees, that it is simply *not* reasonable to have an employee off work for an extended period of time without knowing when, if ever, the employee will return to work. *See* EEOC's Corrected Amicus Brief in *Hindman v. Greenville Hosp. Sys.*, No. 96-2784 (4th Cir) ("the duty to provide reasonable accommodation under the ADA 'does not require [an employer] to wait indefinitely for [a disabled employee's] medical condition to be corrected.'")

Beyond the need for clarification as to whether a request for indefinite leave is an unreasonable request for accommodation, the examples set forth in the EEOC guidance provide very little assistance in determining when a request for leave stops being definite and reasonable and becomes indefinite and unreasonable.[11] Moreover, the examples provided by the EEOC guidance deal with situations where employees are providing at least some indication of the length of their anticipated leave – even if that leave must later be extended. In the real world, however, many employees are unable – right from the very start – to provide any idea as to an anticipated return to work date. Rather, employees often submit medical documentation advising that they must remain off work *at least* until their next doctor's visit, at which time their condition will be re-assessed. Thus, the request for 4, 8 or 12 weeks of leave is not really an indication of the anticipated return to work date, but rather, a placeholder of sorts. The various EEOC guidances do not address this type of situation.

2. Recommendations

The employer community understands that most often some amount of leave will be necessary as a reasonable accommodation. Although indefinite leaves are undoubtedly unreasonable, employers need more definitive parameters as to when a request for leave transititions from being a reasonable request for definite leave to being an unreasonable request for indefinite leave. Parameters that outline, for instance, that a request typically becomes unreasonable after being renewed 2 times, would be helpful. Employers would also like to see additional examples

[10] A few courts seem to have adopted the EEOC's approach to analyzing questions of indefinite leave under the undue hardship analysis. *See Nunes v. Wal-Mart Stores, Inc.*, 164 F.3d 1243 (9th Cir. 1999) (court opined that it might not be an undue hardship to hold a position open for seven months where the company's own policy allowed for leaves of absence up to one-year long and regularly hired seasonal employees to fill positions); (*Garcia-Ayala v. Lederle Parenterals, Inc.*, 212 F.3d 638 (1st Cir. 2000) (employer may have been able to establish undue hardship if it had shown that temporary employees were unavailable for the position or the cost of the temporary employee exceeded that of the permanent employee).

[11] The examples are also scattered among so many different publications that, unless an employer reviews all four main sources of ADA guidance, it may miss useful assistance.

that more closely reflect the realities of today's workplace as outlined above. These examples should take into account the fact that it is not unusual that the very first request for leave will lack any definition as to an anticipated return to work and will provide no reliable assurances that the individual will be able to work in the identifiable future. To that end, we believe the EEOC's examples should make it clear that, under certain circumstances, employers are entitled to deny any amount of leave as a reasonable accommodation if it is clear from the outset that the request is one for indefinite leave. In other words, employers should not be required to arbitrarily wait until an employee has made two or three requests for leave before denying the request as unreasonable. Finally, we believe, as has been set forth above, that the EEOC should combine all of its guidance on this topic into one comprehensive guide, making it easier for employers to seek the assistance they need in complying with the ADA.

D. Attendance as an Essential Function

1. General Discussion

Even more difficult for employers than extended leaves of absence is managing unplanned intermittent absences. Although the ADA does not address whether regular predictable attendance constitutes an essential function of a job, its regulations do provide that "[a] job function may be considered essential for any of several reasons" and "[e]vidence of whether a particular function is essential includes, but is not limited to: (i) [t]he employer's judgment as to which functions are essential; (ii) [w]ritten job descriptions prepared before advertising or interviewing applicants for the job; (iii) [t]he amount of time spent on the job performing the function; (iv) [t]he consequences of not requiring the incumbent to perform the function; (v) [t]he terms of a collective bargaining agreement; (vi) [t]he work experience of past incumbents in the job; and/or (vii) [t]he current work experience of incumbents in similar jobs." 29 C.F.R. §1630.2(n).

The EEOC interprets this regulatory definition of an essential job function *not* to include attendance as, in the EEOC's opinion, an essential job function must be an actual duty to be performed. (RA Guidance, fn 65). In the very next sentence, however, the guidance provides that "attendance is relevant to job performance," but focuses only on the impact of attendance on the time during which an essential function is performed. *Id.* In contrast, the EEOC's Performance and Conduct Standards seems to indicate that attendance is an essential job function and unpredictable absences make the employee not qualified. (Performance Conduct Standards, fn 75). This guidance also provides that an employer does not have to exempt an employee entirely from time and attendance requirements, does not have to grant "open-ended schedules" where the employee may come and go as he pleases, and does not have to accept "irregular, unreliable attendance." (Performance and Conduct Standards, Question 20). To that end, "[e]mployers generally do not have to accommodate repeated instances of tardiness or absenteeism that occur with some frequency, over an extended period of time and often without advance notice" because the "chronic, frequent and unpredictable nature of such absences may put a strain on the employer's operations." (Performance and Conduct Standards, Question 20). In particular, the Performance and Conduct Standards note that such sporadic and unpredictable attendance could result in: "[1] an inability to ensure a sufficient number of employees to accomplish the work required; [2] a failure to meet work goals or to serve customers/clients adequately; [3] a need to shift work to other employees, thus preventing them from doing their

own work or imposing significant additional burdens on them; [or 4] incurring significant additional costs when other employees work overtime or when temporary workers must be hired." (Performance and Conduct Standards, Question 20). The EEOC suggests that when an employer can establish one of these four outcomes, it *may* be able to demonstrate either that the employee cannot perform one or more of the essential functions of the job or that accommodating the modified schedule would impose an undue hardship. The conflicting positions in the RA and Performance and Conduct Standards Guidances necessitates a review and clarification of the EEOC's position on attendance issues.

An employer's belief that attendance *is*, in fact, an essential job function is generally supported by case law. The proposition is simple - an employee cannot perform any of his essential functions if he is not working. "A job function is essential if its removal would fundamentally alter the position. The inability to attend work can 'fundamentally alter' a position which requires attendance to perform tasks." *Denman v. Davey Tree Expert Co.*, 266 Fed. Appx. 377 (6th Cir. 2007). Many other appellate courts agree with this view. *See Murray v. AT&T Mobility LLC*, 374 Fed. Appx. 667 (7th Cir. 2010) ("employer is generally permitted to treat regular attendance as an essential job requirement and need not accommodate erratic or unreliable attendance," thus for an employee who exceeded the number of absence points available under the employer's policy, it was "difficult to see how she met the essential attendance element of her job"); *Miller v. University of Pittsburgh Medical Center*, 350 Fed. Appx. 727 (3rd Cir. 2009) ("Attendance can constitute an essential function under the ADA …Given the nature of Miller's job, assisting during surgery performed in the hospital, we find it evident that attendance is an essential element of this position."); *Webb v. Donley*, 347 Fed. Appx. 443 (11th Cir. 2009) ("a request to arrive at work at any time, without reprimand, is not a reasonable accommodation because it would change the essential functions of a job that requires punctual attendance"); *Willi v. American Airlines Inc.*, 288 Fed. Appx. 126 (5th Cir. 2008) ("regular attendance is an essential function of Appellants' positions as reservation agents); *Brannon v. Luco Mop Co.*, 521 F.3d 843 (8th Cir. 2008) ("regular attendance at work is an essential function of employment"); *Rios-Jimenez v. Principi*, 520 F.3d 31 (1st Cir. 2008) ("At the risk of stating the obvious, attendance is an essential function of any job."); *Lamb v. Qualex, Inc.*, 33 Fed. Appx. 49 (4th Cir. 2002) ("A regular and reliable level of attendance is an essential function of one's job. Indeed, an employee 'who does not come to work cannot perform any of his job functions, essential or otherwise.' An employee who cannot meet the attendance requirements of the job at issue cannot be considered a 'qualified' individual protected by the ADA."); *Hibbler v. Regional Medical Center at Memphis*, 12 Fed. Appx. 336 (6th Cir. 2001) (employer "not required to overlook or accommodate frequent unscheduled-and unapproved-absences" because "[a]n employee who cannot meet the attendance requirements of the job at issue cannot be considered a 'qualified' individual protected by the ADA.'"); *Dudley v. California Dept. of Transp.*, 213 F.3d 641 (9th Cir. 2000) (plaintiff failed to demonstrate she was "otherwise qualified" because she did not maintain regular and consistent attendance; "An employee who is 'unable to come to work on a regular basis ... [is] unable to satisfy any of the functions of the job in question, much less the essential ones.'"); *Gantt v. Wilson Sporting Goods Co.*, 143 F.3d 1042 (6th Cir. 1998) (employee who was not released by her doctor to return to work was not entitled to a reasonable accommodation because "[a]n employee who cannot meet the attendance requirements of the job at issue cannot be considered a 'qualified' individual protected by the ADA."); *Deal v. Candid Color Systems*, 153 F.3d 726 (10th Cir. 1998) ("Deal does not claim that she could have performed her job functions anywhere other than at the CCS

workplace. Work attendance, thus, was essential for Deal's job because she could not complete her job functions during her frequent absences from the workplace.")

Even the Commission itself has decided cases that infer most individuals cannot perform the essential functions of their jobs if they are not at work. In *Williams v. James*, 2004 WL 414314 (EEOC 2004), the EEOC affirmed the employer's decision to terminate an employee with unreliable and unpredictable attendance, holding that "regular attendance is a uniformly applied conduct rule, that is job-related and consistent with business necessity. An employer may discipline an employee with a disability for engaging in such misconduct if it would impose the same discipline on an employee without a disability." Similarly, in *Cepeda v. Barnhart*, 2004 WL 1554789 (EEOC 2004), the EEOC held that an employee who worked behind a counter receiving documents from the public was not entitled to "unscheduled leave on demand" because the essential functions of his job required "his presence in the office during normal working hours." Because he could not attend reliably, the Commission found that he was "not a 'qualified' disabled individual entitled to a reasonable accommodation."

2. Undue Hardship

Most troubling is that EEOC enforcement recently has issued nationwide discovery requests relating to no-fault attendance policies. These requests most often ask for information relating to any employee with a disability who was disciplined or discharged under a no-fault attendance policy. Most employers believe they can enforce no-fault attendance programs, even when the absences beyond the program's stated maximum are because of a disability. The EEOC's apparent enforcement position is inconsistent with the Commission's guidance on the subject which states that, "employers need not… accept irregular, unreliable attendance." The current guidances do not address no-fault attendance programs and whether an employer can enforce its program or must, for every employee with a disability, go through the undue hardship analysis. The EEOC should allow employers to continue to enforce no-fault programs without going through the undue hardship analysis because reliable, predictable attendance is an essential function of every employee's job. A contrary position is not supported by case law or the EEOC's position in its Performance and Conduct Guidance.[12]

[12] The tangible and intangible costs of employee absences are high and can range from the direct costs of covering the absent employee's work (through overtime or temporaries) through the indirect costs of lower productivity and lower quality. When the absences are unplanned and intermittent, the costs are even higher. According to Mercer, unplanned employee absences cost organizations approximately nine percent of their base payroll - more than half the cost of healthcare benefits. (Mercer 2008 Survey on the Total Financial Impact of Employee Absences; Mercer 2010 Survey on the Total Financial Impact of Employee Absences). Moreover, and perhaps more importantly, replacement workers are only 71% as efficient as the regular employee during unplanned/intermittent absences. (Mercer 2010 Survey on the Total Financial Impact of Employee Absences).

3. Recommendations

We strongly encourage the EEOC to consolidate the guidance on attendance issues, to recognize that attendance is an essential job function and that unpredictable attendance makes an employee not qualified for the position. In the alternative, if it asserts that an employee who does not have regular, predictable attendance is still qualified, we encourage the EEOC to include more detailed examples of situations where, in the case of chronic, unplanned absences, an employer will be able to establish an undue hardship in allowing the employee additional time off beyond that allowed under the employer's attendance policy. We encourage the EEOC to include examples, taking into consideration the impact recent economic conditions have had on employers, and in particular, the fact that most employers are operating with a much leaner workforce and less "cushion" to cover absent employees.

Finally, the EEOC should make clear that an employer generally has no obligation to ask an employee who it knows has absences due to a disability whether it needs a reasonable accommodation with respect to any attendance program. We note that the EEOC already has stated that "[i]t is best if an employee requests accommodation once he is aware that he will be violating an attendance policy or requiring intermittent lave due to a disability." (Performance and Conduct Standards, Question 20).[13] Likewise, the EEOC should make it clear that an employer does not have to modify the language in its attendance program to include reasonable accommodation language.

E. Reassignment

1. Reassignment When Continued Leave Becomes an Undue Hardship

The issue of reassignment as a reasonable accommodation can arise under many circumstances, including upon an employee's return from a leave of absence. For example, despite an employer's best efforts, an employer may not have been able to keep an employee's position open while the employee was on leave due to an undue hardship. Employers may also face the issue of reassignment when an employee is released to return to work but cannot perform the essential job functions of his or her former position, even with a reasonable accommodation. Employers understand that they have an obligation to determine if reassignment is an appropriate reasonable accommodation, but this issue becomes muddled when one looks to the statute and regulatory guidance on this subject.

The statutory text of the ADA provides that reassignment to a vacant position may constitute a reasonable accommodation under the Act, absent undue hardship. 42 U.S.C. §12111(9)(B). The regulations and EEOC guidance recognizes, however, that reassignment should only be considered when accommodation within the individual's current position would pose an undue hardship; it is an accommodation of last resort. (29 C.F.R. §1630, App.; RA Guidance, Reasonable Accommodation).

[13] The EEOC's requirement that the employer ask an employee if he needs a reasonable accommodation prior to the expiration of maximum leave in the *Sears* and *Supervalu* consent decrees is inconsistent with this guidance statement.

In the case of an employee on leave of absence as an accommodation, the employer must hold the employee's position open for the duration of the leave unless it can show that to do so would impose an undue hardship. (RA Guidance, Question 18). If the employer can demonstrate that holding the employee's position open would impose an undue hardship, the employer must then look for an "equivalent" vacant position for which the individual is qualified, and to the extent one exists, must reassign the employee to that position and leave it open for the remainder of the employee's leave. (RA Guidance, Question 18). When the employee returns from leave, he or she will be placed in the new position. (RA Guidance, Question 18). If an equivalent position is not available, the employer must look for a vacant, lower level position and hold that position open until the employee returns. (RA Guidance, Question 18). If no vacant position exists, continued leave is not required as a reasonable accommodation. (RA Guidance, Question 18). Despite this guidance, however, the regulations suggest some further duty on the part of the employer. In particular, the regulations provide, "suppose there is no vacant position available at the time that an individual with a disability requests reassignment as a reasonable accommodation. The employer, however, knows that an equivalent position for which the individual is qualified, will become vacant next week. Under these circumstances, the employer should reassign the individual to the position when it becomes available." (29 C.F.R. §1630, App.).

As a practical matter, continually reassigning an employee on leave to a vacant position is by its very nature, unreasonable. Most often, when an employee is on leave and his position is filled, the employer keeps the employee on leave until the employee can return to work, with or without a reasonable accommodation. The duty to reassign the employee on leave to another job should attach when the employee is able to return to work, not while the employee is still on leave. Otherwise, an employer is left with continually going through the reassignment process with employees who are not able to actually fill the job. The employer may have already begun the hiring process for the position, including interviewing candidates, only to now be required to fill the job with a temporary employee because the employee on leave was reassigned to the job.[14]

Further, the EEOC's position actually hurts the disabled employee on leave as, according to the RA Guidance, if there is no vacant position available for reassignment, the employee's leave does not need to be continued, meaning the employee can be terminated. Surely, this is not the result the EEOC intended or desired. Instead, it makes more sense that if an employee's position is filled while on leave, the reassignment obligation attaches when the employee is returning to work and not before. This position allows the employee to retain his job longer with the hope that there will be an available position when he returns to work, and does not require an employer to fill its open positions with employees who are on leave, thus incurring the hardships discussed above relative to temporary replacement employees.

[14] This is particularly concerning in light of the EEOC's position that disabled employees need not "compete" for vacant positions, but rather should automatically be reassigned if they are minimally qualified for the position. Under that model, the disabled individual on leave will always be placed in a vacant position for which they are qualified.

2. Recommendations

The existing regulations and guidance leave employers confused as to what its obligations are with respect to reassigning employees on leave of absence to a vacant position. It is our recommendation that employers be required to undergo the reassignment analysis only when an employee is returning to work. In the event an employee returning to work cannot perform his or her own job, with or without a reasonable accommodation, the employee should be given a list of vacant positions and instructions as to how to apply for those positions in which he or she is interested and meets the minimum qualifications. To the extent the individual is the best qualified candidate for one of the vacancies, the employee should be reassigned.[15] If not, the employee should be separated and may reapply.

F. Part-Time Work Schedules

1. General Discussion

Another reasonable accommodation request that can come from an employee who needs leave is a request for a permanent part-time work schedule upon return from leave. According to the EEOC's RA Guidance, an employer must provide a qualified employee with a disability with a part-time schedule as a reasonable accommodation unless it can demonstrate that doing so would impose an undue hardship. (RA Guidance, Question 22). This is the case even if the employer does not allow other employees to work part-time. (RA Guidance, Question 22).

Courts, however, disagree with the EEOC's view. As the Seventh Circuit has held, "part-time work is not a reasonable accommodation for a full-time job." *Lileikis v. SBC Ameritech, Inc.*, 84 Fed.Appx. 645 (7th Cir. 2003). The Fourth Circuit similarly held that where "an employer has no part-time jobs available, a request for part-time employment is not a reasonable one." *Lamb v. Qualex, Inc.*, 33 Fed. Appx. 49 (4th Cir. 2002). *See also, Terrell v. U.S. Air*, 132 F.3d 621, 626 (11th Cir. 1998) ("Although part-time work, as the statute and regulations recognize, may be a reasonable accommodation in some circumstances (particularly where the employer has part-time jobs readily available), we hold that [the employer] was not required to create a part-time position for [p]laintiff...[w]hether a company will staff itself with part-time workers, full-time workers, or a mix of both is a core management policy with which the ADA was not intended to interfere").

[15] Contrary to the EEOC's position, we believe employees seeking reassignment as a reasonable accommodation should compete for vacant positions and be reassigned only when the disabled employee is the best qualified candidate for the position. *See e.g., Huber v. Wal-Mart Stores, Inc.*, 486 F.3d 480 (8th Cir. 2007) ("The ADA is not an affirmative action statute and does not require an employer to reassign a qualified disabled employee to a vacant position when such a reassignment would violate a legitimate nondiscriminatory policy of the employer to hire the most qualified candidate."); *EEOC v. Humiston-Keeling, Inc.*, 227 F.3d. 1024, 1027-28 (7th Cir. 2000); *E.E.O.C. v. Sara Lee Corp.*, 237 F.3d 349 (4th Cir. 2001); *Chapple v. Waste Management, Inc.*, 2007 WL 628361 (D. Minn. Feb. 28, 2007).

Not only does the EEOC's position in this regard conflict with existing case law, it is also inconsistent with its own regulations, which provide employers do not have to reallocate essential functions or create positions in order to accommodate disabled employees. As the regulations advise:

> An employer or other covered entity is not required to reallocate essential functions. The essential functions are by definition those that the individual who holds the job would have to perform, with or without reasonable accommodation, in order to be considered qualified for the position. For example, suppose a security guard position requires the individual who holds the job to inspect identification cards. An employer would not have to provide an individual who is legally blind with an assistant to look at the identification cards for the legally blind employee. In this situation the assistant would be performing the job for the individual with a disability rather than assisting the individual to perform the job.

29 C.F.R. §1630, App.

It is unclear how transferring a previously full-time employee, with full-time tasks and duties, into a permanent part-time position, is in any way different from creating a new position. Unless a part-time position exists and is vacant, the very act of transforming the full-time employee into a part-time employee necessarily creates a new position as the employer will be required to restructure the job and reassign duties to other individuals or hire someone else to do the remaining hours of work. As the Fifth Circuit held in *Toronka v. Continental Airlines, Inc.*, 2011 WL 493101 (5th Cir. Feb. 14, 2011), "[i]t would not be a reasonable accommodation to require the employer to eliminate essential job functions, modify job duties, reassign existing employees, or hire new employees."

The above analysis is inapplicable in the case of a temporary request for part-time work. That request, like a request for leave of absence or a modified scheduled under the FMLA, will likely be reasonable for most employers – at least on a short-term basis. Our concern lies mainly with requests for permanent reassignment to a part-time position where no such vacant part-time position exists.

2. Recommendations

We believe the Commission's guidance as relates to part-time needs updating. At present, although the RA Guidance discusses the fact that an employer may have to offer part-time status to a disabled individual, the examples address issues related to modified schedules only; there is no substantive discussion or examples of how to assess whether a request for part-time work would constitute a reasonable accommodation and/or an undue hardship.

We also recommend the EEOC reconsider its position as relates to part-time work. In particular, we would ask the EEOC to update its guidance to reflect that, if a part-time position exists, reassignment to that position may be a reasonable accommodation (subject to the provisions of the reassignment protocols). If no part-time position exists, a request for permanent reassignment to part-time status would impose an undue burden on employers and is unreasonable. Finally, we also strongly encourage the EEOC to provide some parameters as to

when a request for a temporary part-time position crosses the line to a request for an indefinite or permanent part-time position.

IV. Conclusion

We thank you for the opportunity to present our concerns related to leaves of absence as a reasonable accommodation under the ADA. We hope the recommendations set forth herein will help the EEOC to provide further clarity to employers and employees alike on the complex issues surrounding leave as a reasonable accommodation.