The Americans With Disabilities Amendments Act (ADAAA), enacted in 2009, was passed by Congress with the intent to broaden the scope of protection under the Americans with Disabilities Act, which had been narrowed through a series of U.S. Supreme Court rulings. See 42 U.S.C. § 12102(4)(A), as amended. In May 2011, the Equal Employment Opportunity Commission (EEOC) issued its Regulations under the ADAAA. See 29 C.F.R. § 1630. The ADAAA and the EEOC Regulations greatly expanded the definition of disability making it easier for employees to demonstrate that they are disabled. Because more employees now qualify as disabled under the Act and there are fewer barriers for employees to establish a disability, disability issues are increasingly focused on the scope of an employer’s obligation to provide reasonable accommodations to an applicant or employee with a disability.

I. Overview of Reasonable Accommodations.

An employer must make a reasonable accommodation for the known disabilities of applicants and employees, unless it can be proven that to do doing so would constitute an undue hardship, or that the individual would pose a direct threat to the health or safety of the individual or others, regardless of any accommodation. The EEOC has issued a comprehensive guidance on reasonable accommodations. See Revised Enforcement Guidance Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, http://www.eeoc.gov/policy/docs/accommodation.html. The Guidance defines an accommodation as “any change in the work environment or in the way things are customarily
The Guidance and Regulations identify three categories of reasonable accommodations: (1) modifications or adjustments to a job application process, (2) modifications or adjustments to the work environment, and (3) modifications to adjustments that enable enjoyment equal benefits and privileges of employment. \textit{Id.}; 29 C.F.R. § 1630.2(o)(1)(i-iii). A modification or adjustment is “reasonable” if it “seems reasonable on its face, i.e., ordinarily or in the run of cases;” this means it is “reasonable” if it appears to be “feasible” or “plausible.” \textit{Id.} The Guidance also discusses the interactive process for arriving at an accommodation, the employer and employee duties, and hardship defense considerations including rejecting such theories as cost-benefit analysis. Examples of reasonable accommodations, including the following:

- making existing facilities (work and non-work areas) accessible to disabled individuals;
- job restructuring of non-essential, marginal job functions;
- job reassignment;
- part-time or modified work schedules;
- granting unpaid (but not unlimited) leave;
- acquisition or modification of equipment;
- providing qualified readers or interpreters, but not personal items such as glasses and hearing aids;
- adjustment or modification of exams, training materials or policies (see discussion above); and
- other (a catch-all, leaving room for accommodations not previously listed).

\textit{See} 42 U.S.C.A. § 12111(9); 29 C.F.R. § 1630.2(o)(2)(i-ii). The employer is not required to provide the best accommodation or the one preferred by the employee, so long as the
accommodation provided is sufficient to meet the job-related needs of the individual being accommodated. See EEOC Guidance, http://www.eeoc.gov/policy/docs/accommodation.html.

Whether an employer has fulfilled the reasonable accommodation obligation continues to be a complex and hotly contested issue in disability discrimination litigation, particular with respect to issues relating to leaves of absences, workplace attendance and reassignment of disabled employees to vacant positions.

II. Leave as a Reasonable Accommodation.

The EEOC’s Guidance identifies leave as a form of accommodation and provides examples of some of the reasons an employee with a disability might require leave:

- Obtaining medical treatment or rehabilitation services related to the disability.
- Recuperating from an illness or an episodic manifestation of the disability.
- Obtaining repairs on prosthetic device or other equipment such as a wheelchair.
- Avoiding temporary adverse conditions in the work environment (for example, an air-conditioning breakdown causing unusually warm temperatures that could seriously harm an employee with multiple sclerosis).
- Training in the use of a service animal or assistive device.
- Training in the use of Braille or sign language.

EEOC Guidance at Question 21, http://www.eeoc.gov/policy/docs/accommodation.html. However, the EEOC Regulations, Guidance, and the ADA do not set a specific amount of time relative to the use of leave as a reasonable accommodation. As such, the obligation to provide leave as an accommodation is one of the most complex issues employers are likely to face under the ADA.
In recent years, the EEOC has filed a series of lawsuits against large employers alleging that they violated the ADA by failing to provide employees with reasonable accommodations in the form of leave. The common thread in each of these cases as discussed below was an employer leave policy that the EEOC viewed as being inflexible applied universally to all employees that did not allow for the individualized determinations in providing a reasonable accommodation. It is unclear whether the courts will endorse the EEOC’s position on these types of policies as, to date, these cases have not been decided on the merits by a court, with the overwhelming majority of these cases resolving via settlement.

In 2009, the EEOC brought a class action suit against UPS claiming the company violated the ADA by rejecting requests for medical leave extensions beyond its 12-month leave policy. *EEOC v. UPS*, Case No. 09-5291 (N. D. Ill). UPS initially moved to dismiss the complaint, among other reasons, because the EEOC failed to plead any facts to demonstrate that the potential class members were qualified individuals under the ADA. The district court granted UPS’s motion to dismiss. The Court found the complaint “so threadbare, conclusory, and formulaic” that it did not permit the court to infer that the individuals were otherwise qualified to perform the essential functions of their jobs with or without accommodation. The Court granted the EEOC two additional opportunities to amend its complaint, but rejected both attempts finding the EEOC failed to allege any additional, specific facts regarding the unidentified class members. The EEOC asked the Court to certify the matter for appeal. In taking the EEOC’s request under advisement, the Court *sua sponte* reconsidered its decisions to dismiss the EEOC’s complaint and on January 11, 2013, it reversed its earlier rulings allowing the case to proceed forward on the merits to decide whether UPS’ leave policy violates the ADA.
In January 2011, the EEOC announced a $3.2 million settlement in the case of Supervalu, Inc., American Drug Stores, LLC, and Jewel Food Stores, Inc. *EEOC v. Supervalu*, Case. No. 09-cv-05637 (N.D. Ill). The employers in that case had a policy of automatically terminating employees who were unable to return to work after a one-year disability leave. In addition, employees returning from a medical leave were required to show that they were free of any physical or mental restrictions. The EEOC alleged that the employer had unlawfully terminated employees with disabilities at the end of medical leaves rather than bringing them back to work with reasonable accommodations.

In July 2011, the EEOC announced a similar settlement with Verizon Communications. *EEOC v. Verizon*, Case No. 11-cv-01832-SKG (D. Md). The EEOC alleged that Verizon maintained a “no fault” attendance policy under which employees were disciplined for exceeding limits on “chargeable absences.” The policy had no exceptions for absences caused by ADA-covered disabilities. Verizon ultimately agreed to settle the case by paying $20 million to a nationwide class of employees.

More recently, the EEOC reached a $2 million settlement with Dillard’s in a lawsuit challenging Dillard’s national policy and practice of requiring all employees to disclose personal and confidential medical information in order to be approved for sick leave. *EEOC v. Dillard*, Case No. 3:08-cv-1780 CAB PCL (S.D. Cal.). The lawsuit also claimed that Dillard’s terminated a nationwide class of employees for taking sick leave beyond the maximum amount of time allowed.

The EEOC’s position regarding employer maximum leave policies was clarified in June 2011, when the EEOC held a public hearing on the issue of leave as a reasonable accommodation. See Hearing Transcript, [http://www.eeoc.gov/eeoc/meetings/6-8-](http://www.eeoc.gov/eeoc/meetings/6-8-).
At the hearing, the EEOC emphasized that employers should not maintain inflexible leave of absence policies that provide for the automatic termination of employment when an employee is unable to return to work at the end of a specified maximum leave period. The EEOC stated that the appropriate length of leave under the ADA requires an “individualized” analysis, even if the employer provides a substantial amount of disability leave as a matter of course. Further, the EEOC noted that employers risk liability under the ADA where they outsource leave administration functions, such as the administration of worker’s compensation benefits or disability benefits. In such cases, the employer may lose sight of its obligation to provide time off under the ADA. Finally, the EEOC emphasized the need to engage in an “interactive process” with employees seeking accommodations.

At the hearing, attorneys presenting the view of employers, called on the EEOC to provide more detailed and defined examples of situations where maximum leave policies are called into question and examples of times when additional leave will be deemed necessary and when it will not. See Transcript, http://www.eeoc.gov/eeoc/meetings/6-8-11/transcript.cfm. The employer attorneys also urged the EEOC to recognize the challenges facing employers who do not have spare staff or sophisticated human resource personnel.

The recent litigation and guidance by the EEOC signals that the EEOC may not regard attendance to be an essential job function under the ADA although the EEOC has not explicitly articulated this position. The EEOC appears to be signaling in cases such as the Verizon matter that it believes an employer commits a violation of the ADA when it charges an employee absence against a no-fault attendance policy when the absence results from a medical condition that qualifies as a disability.
Most courts, however, have found that regular physical attendance is an essential job function under the ADA and “the ADA does not protect persons who have erratic, unexplained absences, even when those absences are a result of a disability.” *EEOC v. Yellow Freight Sys., Inc.*, 253 F.3d 943, 948 (7th Cir. 2001) (quoting *Waggoner v. Olin Corp.*, 169 F.3d 481, 484 (7th Cir. 1999)). *See also Brammen v. Luco Map Co.*, 521 F.3d 843 (8th Cir. 2008); *Rios-Tamaez v. Sec. of Veterans Affairs*, 520 F.3d 31 (1st Cir. 2008). Likewise, court have found that there are limits as to how long an ADA required leave of absence can be and an accommodation of an open-ended schedule with the privilege to miss workdays frequently and without notice is unreasonable. *See Mobley v. Allstate Ins. Co.*, 531 F.3d 539, 547-78 (7th Cir. 2008).

Recently, in *Monika Samper v. Providence St. Vincent Medical Center*, 675 F.3d 1233 (9th Cir. 2012), the Ninth Circuit held that an employee’s regular attendance was an essential job function. In that case, the plaintiff was a neo-natal nurse who had a long history of excessive unplanned absences due to fibromyalgia. The plaintiff requested she be excused completely from the employer’s attendance policy as an accommodation. The employer would not provide that accommodation and terminated her for violating the attendance policy. The plaintiff argued that the employer’s policy of allowing unplanned absences, plus its tolerance of plaintiff’s own past absences, were proof that her regular attendance was not essential. The Ninth Circuit rejected this logic, reasoning that the employer’s past patience and accommodation did not mean it had to tolerate unlimited absences going forward. The Ninth Circuit found that the employer established that attendance was an essential function by producing a detailed job description identifying attendance and punctuality as essential job functions and a declaration from the plaintiff’s former supervisor that nurses are specialized, that is hard to find replacements, and
that understaffing compromises patient care. The Ninth Circuit affirmed summary judgment for the employer.

The Eight Circuit recently addressed the common attendance issue of whether allowing an employee to move from rotating shifts to straight daytime work is a required “reasonable accommodation” under the ADA. *Kallail v. Alliant Energy Corporate Services, Inc.*, 691 F.3d 925 (8th Cir. 2012). The employee was one of several “resource coordinators” who monitored power distribution and scheduled and routed resources to respond to routine and emergency situations such as power outages. To provide coverage, resource coordinators were required by the employer to work a schedule rotating between eight and 12-hour shifts, days and nights. The employee, an insulin-dependent diabetic, began experiencing erratic changes in her blood pressure and blood sugar which put her at higher risk for diabetic complications and death, a development her physician attributed to her work schedule. The employee asked to be accommodated with a straight day shift which was denied by the employer. The employee then filed a charge of discrimination with the EEOC, and ultimately filed a lawsuit, alleging that the employer failed to provide her with a reasonable accommodation. The district court granted summary judgment in favor of the employer. In reviewing the lower court’s dismissal of the case, the Eighth Circuit began by reviewing the issue of whether the employee could perform the essential functions of her coordinator position, with or without an accommodation – if she could not, she would be unable to prove herself to be a “qualified individual with a disability” who was entitled to the protections of the ADA. The Eighth Circuit held that the rotating shift was an essential function of the job, and that employer was not required to provide the requested accommodation.
The Tenth Circuit Court of Appeals, recently issued a decision in *Robert v. Board of County Commissioner of Brown County*, 691 F. 3d 925 (10th Cir. 2012), holding that an employee on leave must provide an employer with a reasonable estimate of when he or she will be able to return to duty, performing all essential functions, in order for a leave of absence to be a reasonable accommodation under the ADA. Part of the employee’s essential functions required that she visit offenders at their homes or in jail, attend hearings, and supervise drug testing. The employee suffered from sacroiliac joint dysfunction which required surgery and made her unable to perform site visits or supervise drug screenings. The employee’s leave request also did not include an anticipated return-to-work date. The employee’s treating physician prepared a note indicating that the employee could work on a computer from home. The employer eventually decided to terminate the employee because her FMLA, sick and vacation leave were exhausted, and it was unclear from the employee’s leave request how long it would take for Robert to be able to perform *all* of the essential functions of her job.

In affirming the district court's granting of summary judgment, the Tenth Circuit found that the employee could not perform the essential functions of her position, even presuming that the employer would permit her to work from home as a potential accommodation while she recovered from her surgery. Specifically, the employee could neither visit offenders at home or in jail, nor could she supervise drug screenings – all of which were essential functions of her position. In analyzing the employee’s leave request, the court noted that there are two limits on the bounds of reasonableness for leave as an accommodation. First, the employee must provide the employer with an estimated date when essential job duties can be resumed because without such an end date an employer cannot assess whether a temporary exemption from these duties is reasonable. Second, there is a durational limit, namely that “a leave request must assure an
employer than an employee can perform the essential functions of her position ‘in the near future.’ *Id.* at 1218. The court held that the employee’s leave request failed the first limit of reasonableness finding that the employee’s only potential accommodation that would allow her to eventually perform the essential functions of her job was an indefinite reprieve from those functions.

The above cases underscore that there is no bright-line rule for employers to follow regarding how much leave is required to be provided as a reasonable accommodation. Employers should, however, be cautious about using maximum leave policies given the EEOC’s position that policies which call for termination of employment after the employee has been absent for a certain period of time do not sufficiently meet the employer’s obligation to engage in the ADA’s interactive process and to determine whether a reasonable accommodation is necessary. At a minimum, attendance policies should incorporate a case-by-case assessment of the individual employee’s situation and an employer’s duty as to reasonable accommodation. Additionally, if regular attendance is truly essential to a particular position, a written job description should accurately reflect that fact and employers should still engage in a good–faith interactive process to determine if they can provide a reasonable accommodation to a qualified employee with a disability without undue hardship to the employer.

### III. Reassignment as a Reasonable Accommodation.

The overwhelming majority of courts hold that the ADA requires employers to consider reassignment as a reasonable accommodation, though the courts often differ in interpreting the scope of the obligation. *Compare e.g. Smith v. Midland Brake Inc.*, 180 F.3d 1154 (10th Cir. 1999) (employers must reassign disabled employees to vacant positions over other employees if the disabled employee is qualified to do the job) *with e.g. Daugherty v. City of El Paso*, 56 F.3d
recognizing reassignment as a possible reasonable accommodation but stating “we do not read the ADA as requiring affirmative action in favor of individuals with disabilities, in the sense of requiring that disabled persons be given priority in hiring or reassignment over those who are not disabled’’). In particular, the courts are divided as to whether preference should be given to disabled workers who are no longer able to perform their regular job, even with reasonable accommodations, but who meet the minimum qualifications for a vacant position over a more qualified worked who is not disabled. The Court of Appeals for the District of Columbia, Seventh and Tenth Circuit have held that a minimally qualified disabled worker should be assigned a position, reasoning that otherwise the reasonable accommodation of “reassignment to a vacant position” is meaningless. See e.g., Duvall v. Georgia Pacific, 607 F.3d 1255 (10th Cir. 2010). The Court of Appeals for the Fifth, Eighth and Ninth Circuit disagree reasoning that the ADAAA is not an affirmative action statute, and thus disabled workers should not be given a preference over other workers with higher qualifications. See e.g., Huber v. Wal-Mart Stores, 486 F.3d 480 (8th Cir. 2007). Rather, they are only to be assured equal footing as compared to others.

The recent Seventh Circuit decision in EEOC v. United Airlines, where the Seventh Circuit reversed its own previous holdings regarding reassignment, may signal a potential shift in the circuits toward requiring employers to give preferential treatment to disabled employees for vacant positions. EEOC v. United Airlines, Inc., 693 F.3d 760 (7th Cir. 2012). In this case, EEOC challenged the airline’s “competitive transfer” policy that provided that an employee with a disability who required reassignment would receive priority consideration for a vacant position, a guaranteed interview, and selection for the position, so long as the employee with a disability was equally qualified for the position as other employee applicants. In keeping with twelve
years of Seventh Circuit precedent including *EEOC v. Humiston Keeling*, 227 F.3d 1024 (7th Cir. 2000), the District Court found for United. On appeal, the Seventh Circuit overruled its holding in *Humiston Keeling* and instead held that the ADA mandates an employer appoint employees with disabilities to vacant positions for which they are qualified, provided that such accommodations would be ordinarily reasonable and would not present an undue hardship to that employer.

The approaches of the District of Columbia, Seventh and Tenth Circuit potentially create significant challenges for employers who are charged with balancing the rights of disabled workers with the rights of other workers who are also qualified for the position at issue. We anticipate seeing increased litigation in instances where a less-qualified, disabled applicant was selected for a position over a more-qualified older worker or an individual in some other protected group.

**CONCLUSION**

The ADAAA and EEOC Regulations lowered the barrier to proving disability and brought the issue of reasonable accommodation to the forefront of disability litigation. While leave is generally viewed as a possible reasonable accommodation by the courts, there remain many open issues that must be addressed by the employer and the employee. While it is hard to deduce simple rules regarding leave as an accommodation, the recent cases emphasize that an employer should conduct an individualized assessment in each case and refrain from relying on *per se* rules or blanket policies to reduce its exposure to liability. The recent case developments regarding the issue of reassignment as a reasonable accommodation highlight that the scope of an employer’s duties in providing reasonable accommodations remains an unsettled issue that is continuing to evolve.