Last month the United States Supreme Court refused to resolve the circuit split that has evolved over the issue of whether there is an affirmative duty under the Americans with Disabilities Act ("ADA") to accommodate a disabled individual through reassignment to another vacant job, without regard to whether there is a more qualified applicant for the same job. (The ADA prohibits employers with 15 or more employees from discriminating against individuals with disabilities and requires employers to engage in an interactive process with employees and applicants to determine whether there is a reasonable accommodation that will enable an employee to perform the job held or desired.)

Just in case you haven't been following this issue, here is a quick recap:

Last September the United States Court of Appeals for the Seventh Circuit Court reversed its prior precedent in EEOC v. Humiston Keeling, 227 F.3d 1024 (7th Cir. 2000) and held that an employer must reassign a disabled employee to a vacant position for which the employee is "minimally qualified" regardless of whether there are other, more qualified applicants. E.E.O.C. v. United Airlines, 693 F.3d 760 (7th Cir. 2012). In the case, the EEOC challenged United Airlines' reassignment policy, which afforded disabled employees who became unable to do their job preferential treatment to apply to transfer to another vacant position within the company. While the policy guaranteed an interview, it did not guarantee that the disabled individual would be selected for the job, but rather stated that the selection process would be competitive. (Notably this policy went beyond what the Seventh Circuit case law required at the time. By being proactive, United Airlines actually exposed itself to risk and gained the attention of the EEOC.) Relying on the U.S. Supreme Court decision, U.S. Airways, Inc. v. Barnett, 535 U.S. 391 (2002), the Seventh Circuit ruled that the ADA mandates that an employer appoint minimally qualified employees with disabilities to vacant positions, unless the accommodation would present an undue hardship to the employer. The Seventh Circuit explained that under the two-prong test developed in Barnett, the employee must demonstrate that the accommodation in question would normally be reasonable, and then the burden shifts to the employer to show special circumstances, which demonstrate that providing the accommodation would constitute an "undue hardship." In Barnett, the Supreme Court recognized that a seniority system may give rise to these special circumstances. Ultimately, the Seventh Circuit remanded the case, for the District Court to conduct an undue hardship analysis for which the U.S. Supreme Court
and Seventh Circuit have given virtually no guidance.

In denying certiorari last month, the U.S. Supreme Court refused to resolve a split among the circuits as to whether an employer must give preference to minimally qualified applicants as a reasonable accommodation and therefore left employers guessing as to their obligations. In addition to the Seventh Circuit, the Third, Tenth and D.C. Circuits have held that employers have a duty to give preference to minimally qualified disabled applicants. See Mengine v. Runyon, 114 F.3d 415, 420 (3d Cir. 1997); Smith v. Midland Brake Inc., 180 F.3d 1154 (10th Cir. 1999); Aka v. Washington Hospital Center, 156 F.3d 1284 (D.C.Cir. 1998). While the Second, Fifth, Sixth, Eighth and Eleventh Circuits do not currently require employers to waive legitimate, non-discriminatory employment policies or displace other employees’ rights in order to accommodate a disabled employee, many of these decisions were based upon the Seventh Circuit’s prior law. See Shannon v. New York City Transit Authority, 332 F.3d 95, 104 (2d Cir. 2003); Toronka v. Continental Airlines, Inc., 411 Fed. Appx. 719, 726 n. 7 (5th Cir. 2011); Hendrick v. W. Reserve Care Sys., 355 F.3d 444, 457 (6th Cir. 2004); Huber v. Wal-Mart Stores, Inc., 486 F.3d 480, 483 (8th Cir. 2007); Terrell v. USAir, 132 F.3d 621, 627 (11th Cir. 1998). The First, Fourth and Ninth Circuits do not appear to have addressed the issue, although the District of Arizona has held that an employer must give a minimally disqualified applicant preference over non-disabled applicants. See Coleman v. City of Tucson, 2008 WL 5134346, at *2 (D. Ariz. 2008) (same).

Accordingly, regardless of the above decisions employers need to tread carefully in this area and consider whether a request for reassignment poses an undue hardship due to “special circumstances.” Undue hardship has been defined as an “action requiring significant difficulty or expense” when considered in light of a number of factors. The factors include the nature and cost of the accommodation in relation to the size, resources, nature, and structure of the employer’s business operation. Undue hardship is determined on a case-by-case basis, but generally, a larger employer with greater resources will be expected to make accommodations requiring greater effort or expense than would be required of a smaller employer with fewer resources. Where the company making the accommodation is part of a larger entity, the structure and overall resources of the larger organization will be considered, as well as the financial and administrative relationship of the facility to the larger organization. Exactly what will be sufficient to constitute “special circumstances” remains to be seen.

While the confusion surrounding reassignment as a vacant position is very real, there are trends emerging from the existing case law that can help make compliance a little less daunting, including the following:

1. Make sure your job descriptions and job advertisements expressly state that consistent, reliable attendance and punctuality are essential job functions. Most circuits, including the Seventh, have reached the conclusion that regular, reliable attendance, is an essential function of most jobs. See e. g. Samper v. Providence St. Vincent Medical Center, 2012 U.S. App. LEXIS 7278, (9th Cir. 2012) (holding
OBLIGATION TO REASSIGN OR NOT? THAT IS THE QUESTION.

that regular attendance was an essential function of a neo-natal nursing position), Fisher v. Visioncore, Inc., 2011 U.S. App. LEXIS 14908 (7th Cir. 2011) (same), Rask v. Fresenius Medical Care North America, 509 F.3d 466 (8th Cir. 2007) (same). Reviewing job descriptions and advertisements to ensure that they highlight the attendance needs for all positions will help place some boundaries on the employer’s obligation to reassign employees to other, vacant job because all jobs will have that same, baseline requirement. Of course, employers should not forego the interactive process if a request for reassignment is received but rather should keep the essential job function of attendance in mind in determining what accommodations they are able to provide.

2. Remember that reassignment is the accommodation of last resort. Explore every other opportunity to keep an employee in his or her own job before moving on to the uncertain world of reassignment. Just because an employee requests reassignment to another job does not mean that you have to offer that particular accommodation.

3. Establish a formal process for requesting reassignment to a vacant position as an accommodation. Publish the process for employees so employees know exactly what the process requires. Otherwise, vague statements by employees about their desire to remain employed may be viewed as enough to give rise to an obligation to reassign an employee.

4. Establish a specific timeframe in which employees must identifying vacant jobs for which they are qualified when reassignment is sought. Of course, your process should be flexible to encompass the situation where a vacant position for which the employee is minimally qualified becomes available right after the deadline expires.

5. Ensure that vacant jobs are posted and available to be identified by employees. If employees have no way of knowing what vacant jobs are available, your efforts to shift the burden to employees to identify a vacant position for which they are qualified will fail.

6. Review other benefit plans, programs and obligations, such as those arising under short-term and long-term disability plans and union contracts to determine the length of time that an employee remains "employed" under those particular plans and consider these timelines before filling jobs. For example, if your company’s disability plan provides that an employee will remain employed for one year while receiving disability benefits, you should consider this fact before filling a job. Otherwise, you will find yourself in the position of having to find the employee a new job if he or she is able to return to work within the one-year window but his or her job has already been filled.

7. Remember to engage in the interactive process. Although we can all agree that the process can be frustrating, be sure that your correspondence to employees does not reflect your frustration. Otherwise, all of you interactive dialogue will go out the window.
8. Remember to communicate within your own organization! Now more than ever ADA accommodation issues are spanning several different departments and also potentially several vendors. It is critical that all parts of your multi-faceted organization be on the same page.

9. Remember to consider the disability and leave laws in your state. Just because your company may be in a circuit where federal interpretations of the ADA law are favorable does not mean that the state law counterparts will follow suit.