



# ADA & Civil Service Rule 12.6(a) 1

## How to Avoid an EEOC Claim

PRESENTED OCTOBER 20, 2017

SCS - CLE

# Civil Service Rule 12.6 (a)(1)

- ▶ (a) An employee may be non-disciplinarily removed under the following circumstances:
  - ▶ 1. When, on the date the notice required by Civil Service Rule 12.7 is mailed, hand delivered, or orally given, the employee is unable to perform the essential functions of his job due to illness or medical disability and has fewer than eight hours of sick leave. An employee removed under this provision shall be paid for all remaining sick leave.

# Elements of the Rule

- ▶ Date the pre-deprivation letter is mailed, hand-delivered or orally given:
  - ▶ Employee has less than eight hours of sick leave to his/her credit
  - ▶ Unable to perform essential functions of job
  - ▶ Due to illness or medical disability

But  
Before

FMLA and ADAAA  
Federal Laws?

Using CSR  
12.6(a)1 did  
you advise  
your client  
about:



# Why should our clients care about the ADA?

## **UPS to Pay \$2 Million to Resolve Nationwide EEOC Disability Discrimination Claims**

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Shipping Giant's Rigid Leave Policies Forced Out Employees Who Needed Accommodations, Federal Agency Charged

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# Americans With Disabilities Act as Amended

- ▶ Title 1 of the ADA deals with the Employment Relationship
  - ▶ Prohibits discrimination against an employee on the basis of a disability in any aspect of the employment relationship.
  - ▶ This includes removing someone for having less than 8 hours of sick leave

# Title 1 ensures that qualified individuals with disabilities:

- ▶ Have comparable access to the employment process
- ▶ Are afforded an interactive process to determine reasonable accommodation
- ▶ Are provided access to all benefits of employment

# Does the Employee have a disability?

- ▶ What is a disability?
  - ▶ A physical or mental impairment that substantially limits one or more major life activities;
  - ▶ A record of such impairment; or
  - ▶ Being regarded as having such an impairment.



# Does the Employee have a disability?

- ▶ What is a Major Life Activity?
  - ▶ A. Includes but is not limited to, caring for oneself, performing manual task, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.

# Does the Employee have a disability?

What is a Major Life Activity?

- ▶ B. Also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

# Does the Employee have a disability?

- ▶ A disability does NOT include an individual currently engaging in illegal drug use.
  - ▶ However, it does include someone who has successfully completed a supervised drug rehabilitation program and no longer engaging in the illegal use; is participating in a supervised rehabilitation program and no longer engaged in use or is erroneously regarded as engaging in use, but not actually engaging.

# Employee's Essential Function of his/her job?

- ▶ What is Essential Functions of the Job?
  - ▶ The fundamental job duties of the employment position the individual with the disabilities holds. Does not include marginal functions.

# Employee's Essential Function of his/her job?

- ▶ How to determine what is an Essential Function?
  - ▶ The employer's judgment
  - ▶ Written job descriptions
  - ▶ The amount of time on the job performing the function
  - ▶ The consequences of not requiring the incumbent to perform the essential function

# What about a reasonable accommodation?

- ▶ What is a reasonable accommodation?
  - ▶ A change in the work environment that enables a qualified employee to accomplish their tasks that does not create an undue hardship to the employer.

# What about a reasonable accommodation?

## ▶ Examples:

- ▶ Making existing facilities accessible
- ▶ Job Restructuring
- ▶ Modified Work-Schedule
- ▶ Reassignment to vacant position to which the employee qualifies
- ▶ Additional leave – including LWOP

# Yes - But

My Client needs  
the employee  
back at work or  
the employee  
removed in order  
to get the job  
done?

- ▶ So, when can I advise  
my client to use  
12.6(a)1?





# Did your client engage in the interactive process?

- ▶ What is the interactive process?
  - ▶ A process designed to enable the employer to obtain relevant information to determine the feasibility of providing an accommodation without causing an undue hardship.

# Interactive Process

- ▶ As a general rule, the employee must inform the employer that an accommodation is needed.
  - ▶ The information required by the employer to determine if additional leave may cause undue hardship will be fact specific for each employee.
  - ▶ Some things to focus on by the employer is:
    - ▶ the specific reason for the additional time off
    - ▶ whether the time will be a block of time and the duration

# Interactive Process

- ▶ Communication after an Employee Request Leave
  - ▶ An employer may obtain information from the employee's health care provider (with permission) to confirm or elaborate on the information the employee provided;
  - ▶ Employers may request the health care provider respond to specific questions designed to enable the employer to understand need for additional leave;

# Interactive Process

- ▶ Communication after Employee Request Leave  
Con't
  - ▶ The employer may inquire from the health care provider the amount and type of leave;
  - ▶ Whether reasonable accommodations other than leave may be effective.

# Interactive Process

- ▶ Communication During Leave but Prior to Return
  - ▶ The interactive process may continue after the initial request has been granted if no specific return date has been set or if additional leave beyond originally requested.

# Interactive Process

- ▶ Interactive Process and Return to Work
  - ▶ If the employee provides the employer a doctor's clearance to return to work with restrictions, the employer cannot invoke a 100% release before returning policy.
  - ▶ The employer may ask why the restrictions are required and how long they may last.

# Interactive Process

- ▶ Interactive Process and Return to Work Con't
  - ▶ Things to considered after a request for accommodation:
    - ▶ Specific accommodation requested
    - ▶ Reason for accommodation
    - ▶ Length of time for accommodation
    - ▶ Possible alternative accommodation
    - ▶ Would the accommodation cause undue hardship

# Does the accommodation cause an Undue Hardship?

- ▶ Factors to Consider:
  - ▶ Amount and/or length of additional leave
  - ▶ Frequency of Leave (Intermittent)
  - ▶ Impact of the employee's absence on coworkers and specific job duties
  - ▶ Impact on employer's operation and its ability to serve customers/clients appropriately and timely
  - ▶ Indefinite Leave will be considered undue hardship



# Now Use of 12.6(a)1 May Be Appropriate

- ▶ Once your client has engaged in the interactive process and legitimately determines that removal is still necessary, the use of 12.6(a)1 may be appropriate.
- ▶ Make sure there is documentation of engagement in the interactive process.

# Hypothetical

- ▶ Employee A was a classified employee with an agency of the state. Employee fell while at work and ruptured his bilateral quad tendons on both legs, requiring surgery. He requested and received FMLA leave.
- ▶ While out on sick leave, employee requested to work from home. Agency failed to respond to the request.
- ▶ On July 19, 2011 employee's doctor released him to return to work with an accommodation of the use of a wheel chair.
- ▶ On July 27, 2011, employee notified agency he could return to work with accommodations.
- ▶ On July 29, 2011, agency had delivered to his home a pre-deprivation notice claiming he had exhausted sick leave and as of July 22, 2011, exhausted FMLA.

# Hypothetical

- ▶ In the pre-deprivation notice, agency stated that employee was not cleared to return to work until August 1, 2011, and agency needed to resume duties of employee's position in a "normal" fashion.
- ▶ On August 1, 2011, employee was released to return to work, however, agency removed him under 12.6(a)1 same day.
- ▶ Question – Is this a violation of the ADAAA?

# Jurisdictional Issues

- ▶ If employee files an appeal alleging discrimination under ADA with the Appeals Divisions, under Agricultural v Sumrall, the Commission is going to dismiss for lack of SMJ.
- ▶ However, the employee can still file a claim with the EEOC.
- ▶ Does the state have sovereign immunity from an ADA claim in court if granted a right to sue letter? See Board of Trustees of the University of Alabama v. Garrett 531 U.S. 356 (2001) But see also footnote 9

# So your client removed the employee is this the End of the Story?

- ▶ If your client removes someone under C.S.R. 12.6(a)1, and has NOT engaged in the interactive process, you may prevail on the Civil Service Appeal, but what about the EEOC and a federal question lawsuit?
- ▶ ALWAYS advise your client to engage in the interactive process before removing someone under C.S.R. 12.6(a)1.