



Americans with Disabilities Act (ADA)-Title I

Kelly A. Lynch-JD, AICP
Deputy Director/General Counsel - MLCT

Angela Simonson, MPA, PHR, SHRM-CP
Human Resource Specialist-MMIA

Today's Agenda

- The What – ADA Title I
- The Why – Reasons to Comply
- The Who – Who is Protected?
- The When – When Do Protections Apply?
- Employer Obligations
 - Qualified Individual
 - Essential Functions
 - Reasonable Accommodations
 - Undue Hardship
- Flow Chart for Interactive Process
- Case Study of Interactive Process



"[T]he ADA was designed in part to integrate persons with disabilities into the economic and social mainstream of American life."

PGA Tour Inc. v. Martin, 532 U.S. 661, 675 (2001).

Americans with Disabilities Act Title I

- Prohibits discrimination against people with disabilities in employment
- Amended in 2008 to clarify (restore?) definition of disability (ADAAA)
- Montana Human Rights Act (Title 49)

The Why

- US unemployment rate for disabled hovers around 65%; slightly lower in Montana
- Studies show people with disabilities take less absence days and more likely to stay on the job longer than non-disabled
- Workers with disabilities have significantly higher performance in area of safety
- Increase diversity of workplace and employee morale
- 92% of the American public view companies that hire people with disabilities more favorably than those that do not

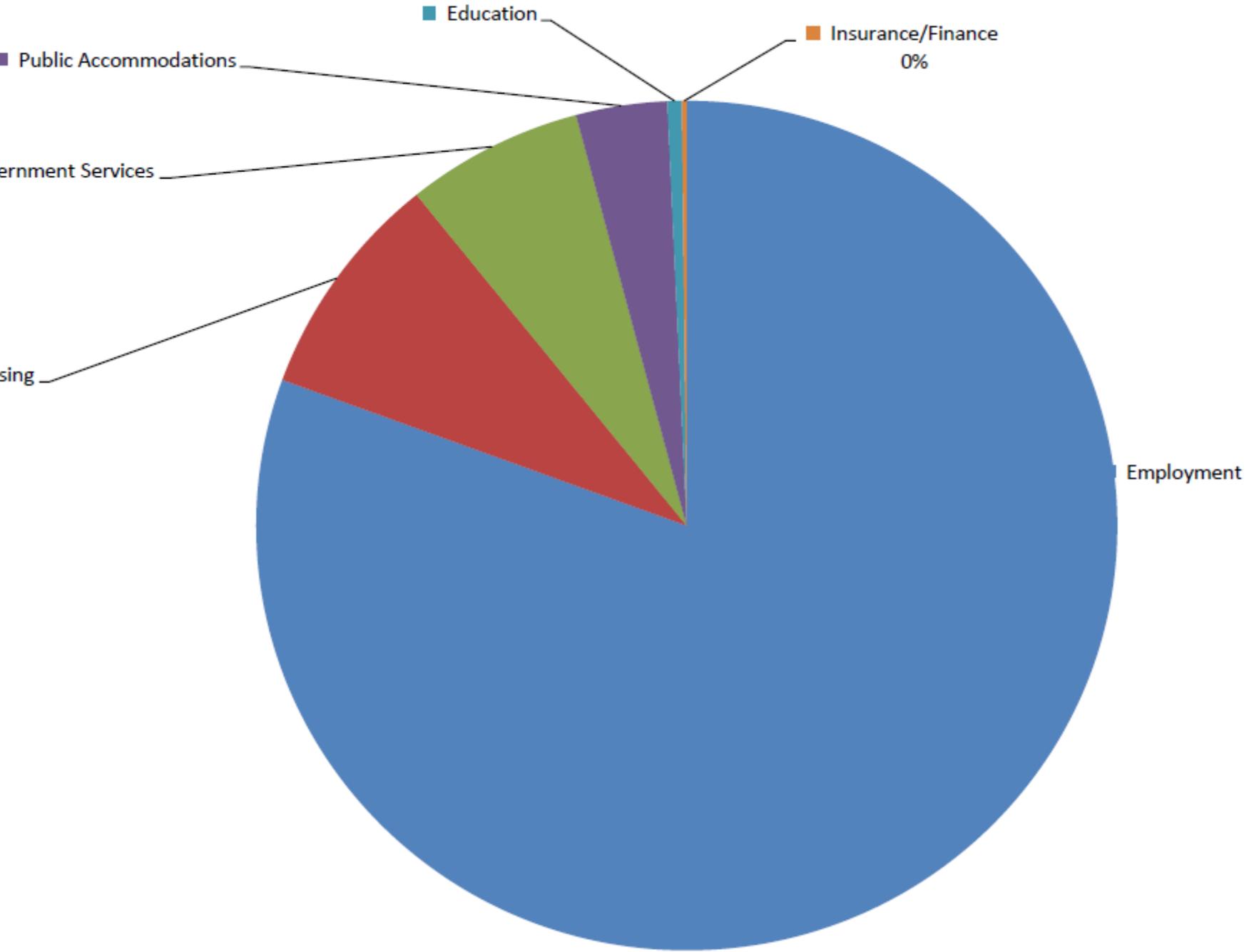
Consequences of Violations

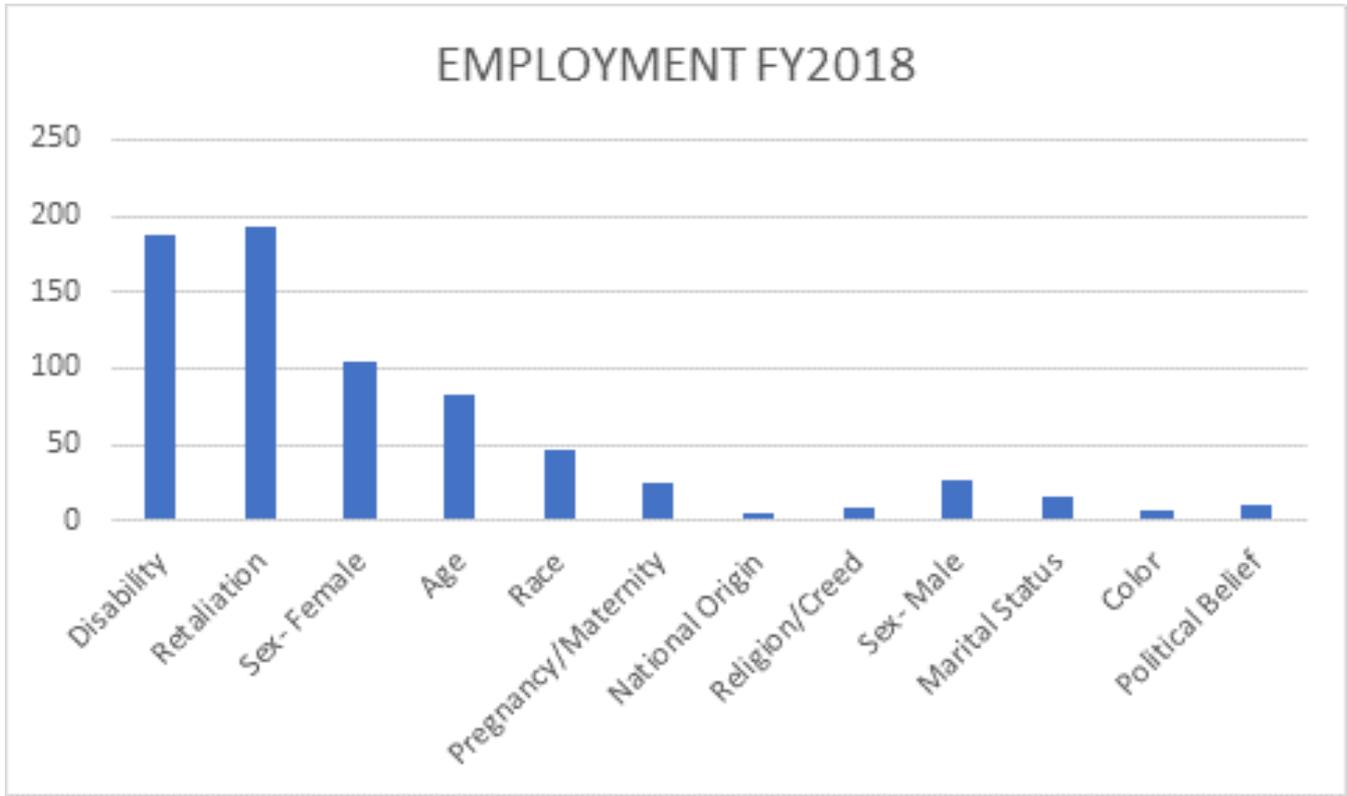
- U.S. Dept. of Labor-Equal Employment Opportunity Commission (EEOC) enforces Title I of ADA
- Montana Dept. of Labor- Human Rights Bureau (MHRB) is the Fair Employment Practice Agency (FEPA) for Montana
- Complaint must be filed with HRB within 180 days of adverse action (normally "dual" filed)
- If ER has 15+ EE, then the charging party can file claim directly with EEOC within 300 days

Consequences of Violations Continued...

- Multiple step appeal process for charging party
- HRB/EEOC may issue Notice of Right to Sue
- HRB/EEOC may file lawsuit against employer directly

HRB - AREA CASES FILED FY 2018





Employer Need to Know

- Cannot refuse to hire/retain due to disability
- Must offer reasonable accommodation
- Engage in interactive process



Applicable to:

- Hiring process



- Post-offer, pre-employment



- Current employees



Hiring Process

- Must be made accessible and accommodations provided if requested
- No disability inquiry during recruitment, screening, or hiring process
- No medical inquiries or “indirect” questions about disability
- Many disabilities are not “obvious”
- Applicants have legally protected right to not disclose disability during the hiring process

Post-offer, pre-employment



- Some medical inquiry can be made
- Must apply same medical inquiry process to all applicants in a job category (no selective inquiries)
- If inquiry shows that the person has a disability, the job offer can only be withdrawn if:
 - The withdrawal is job-related and consistent with business necessity
 - No reasonable accommodation can be provided

Current Employment

- Must not discriminate based on disability, perceived or actual
- Must provide reasonable accommodations through interactive process
 - Medical information related to the accommodation need can be collected and must be kept confidential
- Must not retaliate against EE for enforcing rights or opposing practices

Disability is Defined Broadly

- Any person who has a physical or mental impairment which substantially limits one or more major life activities
- Includes walking, seeing, hearing, communicating, concentrating, breathing, learning, working, eating, caring for oneself or performing manual tasks
- Has a record of such an impairment or is regarded as having an impairment

ADAAA—Amended ADA

- Section 3(4)(A) of the ADAAA states definition: “shall be construed in favor of broad coverage of individuals under this Act to the maximum extent permitted”
- Safest to assume that a medical condition may be a disability
- Includes many Workplace Injuries that may result in long term restrictions or limitations—different from early return to work

Not Protected:

- Short-term illness
- Environmental, cultural, or economic disadvantages
- Age, pregnancy without work restrictions, or obesity
- Gender identity disorders, sexual behavior disorders, or compulsive gambling disorders
- Disorders resulting from the current use of drugs/alcohol—if in treatment, then addiction is covered

Qualified Individual

- A person who meets legitimate skill, experience, education or other requirements of an employment positions that he/she holds or seeks and who can perform the essential functions of the position with or without a reasonable accommodation. --EEOC

Essential Functions

“The fundamental job duties of the employment position... [not including] the marginal functions of the position.” (EEOC)

- The reason the position exists;
- Limited number of employees among whom the function can be distributed; or
- Highly specialized

Evidence of Essential Functions

- Employer's judgment
- Amount of time spent performing function
- Consequences if function is not performed
- Terms of a CBA
- Work experience of past incumbents in position
- Work experience of incumbents in similar jobs
- Written job descriptions prepared prior to hiring and signed by employee

Tips on Essential Functions

- Essential functions are WHAT is performed; accommodation is HOW it is performed
- Use caution when modifying essential functions
- Know which functions are essential, non essential and/or marginal duties
 - Not essential simply because it is written or you “say so”
- Ensure all positions have a Job Description
- Ensure all Job Descriptions are current

Reasonable Accommodations

- A modification or an adjustment to the job or the work environment that will enable a qualified applicant or employee with a disability to participate in the application process or to perform essential job functions.
- Must be EFFECTIVE
- EE is entitled to a reasonable accommodation if it can assist with job duties or alleviate barriers to EE's ability to enjoy equal benefits, privileges, and opportunities of employment

Examples of Accommodations

- Modified policies
- Devices to assist with mobility/lifting
- Computer software for typing, talking
- Sign Language Interpreters
- Physical changes to the work place, furniture, equipment
- Larger pens/scissors for hand mobility
- Screen readers or magnifiers
- Aids: reminders, checklists, picture-based tools
- Written instructions
- Schedule changes, frequency of breaks
- Leave
- Reassignment to vacant position for which they qualify
- Telecommuting

Factors to Consider:

- Purpose and essential functions of the job
- Job-related limitations imposed by disability
- Effectiveness of potential accommodations
- Preference of the employee or applicant
- May have multiple accommodations to meet various/single essential functions
- Nature and cost of the accommodation(s)
- Financial resources of the employer – average cost of an accommodation nationally is \$500 (about half of all accommodations cost nothing)

Undue Hardship

- “Significant difficulty or expense incurred” by ER
- Factors to consider include:
 - Nature and cost of the accommodation
 - Overall financial resources of the facility involved
 - Overall financial resources of ER as a whole;
 - Type of operation or operations of ER
 - Impact on operation of the facility

Obligations of Employer

- Engage in the interactive process in good faith
- “Is there anything I can do to help you do your job?”
- Offer effective and reasonable accommodations
- Continue open dialogue with EE



Yeah, but how?

Interactive Process

"The interactive process requires communication and good-faith exploration of possible accommodations between employers and individual employees. The shared goal is to identify an accommodation that allows the employee to perform the job effectively. Both sides must communicate directly, exchange essential information, and neither side can delay or obstruct the process."

*(Barnett v U.S. Air, Inc., 228 F.3d 1105, 1114-1115
(9th Cir. 2000)*

Aware of possible need

- EE asks/tells
- Manager suspects or observes
- “Is there anything I can do to help you do your job?”
- Repeat as necessary

Identify Limitations

- Medical Inquiry Form-ADA doesn't require this
- Repeat as necessary

Research

- Medical Provider
- JAN
- EE ideas
- ER ideas
- Repeat as necessary



Meet with EE
(interactive
process)

- Both share ideas and ask clarifying questions
- Must be effective
- No decisions are made at this stage
- Repeat as necessary



Analyze
Reasonableness

- Involve City Attorney
- Undue hardship?
- Repeat as necessary

DOCUMENT EVERYTHING!



Make Offer/Denial

- With City/Town Attorney assistance
 - In writing, make offer of accommodation(s) you are able to make
 - Have EE sign accepting these
- OR
- In writing, deny accommodations due to being unable to find an effective and reasonable accommodation
 - What is the next step?
 - Hold to performance standards
 - Revisit potential accommodations
 - Discipline if necessary
 - Terminate employment

Case Study

Cast

Marybeth—Manager

Jake—Employee

Angela—HR

Kelly—City Attorney

Setting: Office environment where manager continues to observe performance issues. Very close to disciplinary action based on past communication of expectations.

Oh no, not again! He has missed so many deadlines lately and cannot keep organized. It's as if he is sleeping at his desk rather than working.



I need help getting my job done. I cannot seem to focus in this noisy environment! I feel so disorganized. I might as well take a nap, I'd get more done. Should I tell my boss about my ADD? It's hard to talk about.



I'm embarrassed to admit this, but my medical issue has gotten in the way of my work.



Is there anything I can do to help you perform your duties? You continue to struggle with deadlines.



Hi HR, I need
your help!



I'm here to
help! Fill me
in on what is
going on.



EMPLOYEE NAME: _____ DATE: _____

**MEDICAL INQUIRY FORM IN
RESPONSE TO AN ACCOMMODATION REQUEST**

A. Questions to help determine whether an employee has a disability.

MEDICAL PROVIDER NAME: _____ **PHONE:** _____

PLEASE REVIEW THE ATTACHED JOB DESCRIPTION TO ASSIST YOU ANSWERING QUESTIONS ON PAGE 2. Feel free to contact me if you need clarification on the form: _____

For reasonable accommodation under the ADA, an employee has a disability if he or she has an impairment that substantially limits one or more major life activities or a record of such an impairment. The following questions may help determine whether an employee has a disability:

Does the employee have a physical or mental impairment?	Yes <input type="checkbox"/>	No <input type="checkbox"/>
---	------------------------------	-----------------------------

If yes, what is the impairment or the nature of the impairment? Please limit your answer to basic information, there is no need for dx or genetic information to be disclosed.

Answer the following question based on what limitations the employee has when his or her condition is in an active state and what limitations the employee would have if no mitigating measures were used. Mitigating measures include things such as medication, medical supplies, equipment, hearing aids, mobility devices, the use of assistive technology, reasonable accommodations or auxiliary aids or services, prosthetics, learned behavioral or adaptive neurological modifications, psychotherapy, behavioral therapy, and physical therapy. Mitigating measures do not include ordinary eyeglasses or contact lenses.

Does the impairment substantially limit a major life activity as compared to most people in the general population?	Yes <input type="checkbox"/>	No <input type="checkbox"/>
---	------------------------------	-----------------------------

Note: Does not need to significantly or severely restrict to meet this standard. It may be useful in appropriate cases to consider the condition under which the individual performs the major life activity; the manner in which the individual performs the major life activity; and/or the duration of time it takes the individual to perform the major life activity, or for which the individual can perform the major life activity.

OR
Describe the employee's limitations when the impairment is active.

If yes, what major life activity(s) (includes major bodily functions) is/are affected?

- | | | | | |
|--|--|-----------------------------------|-----------------------------------|--|
| <input type="checkbox"/> Bending | <input type="checkbox"/> Hearing | <input type="checkbox"/> Reaching | <input type="checkbox"/> Speaking | <input type="checkbox"/> Driving |
| <input type="checkbox"/> Breathing | <input type="checkbox"/> Interacting With Others | <input type="checkbox"/> Reading | <input type="checkbox"/> Standing | <input type="checkbox"/> Other: (describe) |
| <input type="checkbox"/> Caring For Self | <input type="checkbox"/> Learning | <input type="checkbox"/> Seeing | <input type="checkbox"/> Thinking | |
| <input type="checkbox"/> Concentrating | <input type="checkbox"/> Lifting | <input type="checkbox"/> Sitting | <input type="checkbox"/> Walking | |
| <input type="checkbox"/> Eating | <input type="checkbox"/> Performing Manual Tasks | <input type="checkbox"/> Sleeping | <input type="checkbox"/> Working | |

Major bodily functions:

- | | | | |
|---|--|--|--|
| <input type="checkbox"/> Bladder | <input type="checkbox"/> Digestive | <input type="checkbox"/> Lymphatic | <input type="checkbox"/> Reproductive |
| <input type="checkbox"/> Bowel | <input type="checkbox"/> Endocrine | <input type="checkbox"/> Musculoskeletal | <input type="checkbox"/> Respiratory |
| <input type="checkbox"/> Brain | <input type="checkbox"/> Genitourinary | <input type="checkbox"/> Neurological | <input type="checkbox"/> Special Sense Organs & Skin |
| <input type="checkbox"/> Cardiovascular | <input type="checkbox"/> Hemic | <input type="checkbox"/> Normal Cell Growth | <input type="checkbox"/> Other: (describe) |
| <input type="checkbox"/> Circulatory | <input type="checkbox"/> Immune | <input type="checkbox"/> Operation of an Organ | |

Marybeth has an employee who hasn't been meeting performance expectations. He has just told her about a medical issue that affects his ability to concentrate. We will be engaging in the interactive process later this week.



Thanks for the heads-up. Keep me in the loop as you go through this process.



I have ideas for what has helped me before!



No decisions today, just sharing ideas! I'll take notes.



Remember the essential functions are what we will focus on!



OK....well Chatty Carol interrupts me constantly. She talks so much! How about moving her to another office?



Tell me more about that. It sounds like noise in the workplace might be affecting you.



I've used headphones in the past and they seemed to help. Do you think tall walls would be enough to keep out the noise?



Ok. Have you thought of a cubicle with tall walls or noise cancelling headphones?



Remove paying bills from my list of “to-do” list. It takes so much concentration to get it right.



Paying bills is a primary function of your job. Remember, we need to focus on HOW you do the duties, not WHAT you do. How can we help you with concentration?



Nice work coming up with a list of possible accommodations. We need to analyze these to determine which, if any, we can offer. We will be in touch soon!



Tell me what you are considering and not considering.



Marybeth and I have narrowed down the list to what seems most effective based on what Jake shared with us. Help us analyze!



These look good and I'm willing to give them a try. Now what?



We will meet in 30 days to evaluate how things are going. Let us know if you have questions or concerns before that time.



Jake, we have looked over all accommodations we discussed, plus what your medical provider suggested and have made a written offer for you.



Dear Jake

This letter is in response to your request for an accommodation to assist you in performing the essential functions of your position as an Account Representative for our company. On September 24, 2018, Angela and Marybeth met with you to discuss possible accommodations needed because of the restrictions and limitations both you and your physician have shared. During this discussion you indicated a private work setting might be best as the noisy office causes concentration issues for you.

After reviewing information from your medical provider and the information you shared with us during the September 24th meeting, we have approved the accommodations listed below. *Please circle accept or decline and initial below each option.* Our hope is that you will accept all offered accommodations as we believe they are most effective when implemented together.

1. Moving to a cubicle with higher walls and away from the main flow of heavy office traffic.

This accommodation is being made in an attempt to assist you in having a more quiet work environment.

Accept/Decline _____ Initials

2. Allowing you to wear noise cancelling headphones, provided by our company, during times when the office continues to be especially noisy.

This accommodation is being made in an attempt to assist you in having a more quiet work environment.

Accept/Decline _____ Initials

3. Utilizing the task tracker app, provided by our company on a company provided tablet. Both you and Marybeth can easily add tasks and due dates using this app.

This accommodation is being made in an attempt to assist you in better tracking important due dates and helping to remind you of upcoming deadlines.

Accept/Decline _____ Initials

Marybeth will meet with you in 30 days, or earlier if necessary, to evaluate the effectiveness of these accommodations. Please notify her immediately if you have questions or concerns.

As a reminder, these accommodations are being made to help you meet the essential functions of your position, as summarized in your job description, with the goal of ensuring your success at our company.

Sincerely,

BIG BOSS BILL

By signing below, you are stating you understand the accommodations being offered to you and the expectations for your position going forward.

JAKE

Date

Resources

- Job Accommodation Network (JAN) <https://askjan.org/>
- ADA National Network <https://adata.org>
- EEOC Enforcement Guidance for Reasonable Accommodation/Undue Hardship under ADA
<https://www.eeoc.gov/policy/docs/accommodation.html>
- *Employer's Practical Guide to Reasonable Accommodation under the ADA*
<https://askjan.org/publications/employers/employers-guide.cfm>
- Rocky Mountain ADA Center www.rockymountainada.org
- Employee--Ask them questions, learn
- Employee's Medical Provider--Via the ADA Accommodation Form



October is National Disability Employment Awareness Month

- Review policies
- Apply for no cost Employment Practices Coverage via MMIA
- Provide training and education
- Incorporate disability inclusion into your onboarding process