

# **RESOURCE GUIDE: DISABILITY DISCRIMINATION IN EMPLOYMENT**

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## WHAT LAWS PROTECT EMPLOYEES WITH DISABILITIES?

**Title I of the Americans with Disabilities Act (ADA)** offers protection from discrimination based on disability for qualified people with disabilities. The law covers employers with 15 or more workers. Religious organizations are exempt.<sup>1</sup>

**Title II of the Americans with Disabilities Act (ADA)** offers protection from discrimination based on disability for qualified people with disabilities. The law covers state or local government employers regardless of the number of workers employed.<sup>2</sup> *Please note, the ADA does not apply to federal government workers.*<sup>3</sup>

**The Colorado Anti-Discrimination Act (CADA)** protects employees with disabilities regardless of the number of workers employed. Unlike the ADA, it also provides protection from discrimination based on sexual orientation.<sup>4</sup>

**Section 504 of the Rehabilitation Act (Section 504)** states that no qualified individual with a disability shall be “excluded from the participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving federal financial assistance.” This includes employment and federal government workers.<sup>5</sup>

## WHAT IS A DISABILITY?

Under the civil rights protections listed above, the term *disability* means:

- 1) A physical or mental impairment that *substantially limits* one or more of the major life activities of such individual; or
- 2) A *record of* such an impairment; or
- 3) Being *regarded as* having such an impairment.<sup>6</sup>

1) **Substantial Limitation:** A physical or mental impairment that substantially limits one or more major life activities is not meant to be a demanding standard, but should instead be construed broadly in favor of expansive coverage.<sup>7</sup> An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active. Major life activities include activities such as

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<sup>1</sup> 42 U.S.C. §§ 12111-12117.

<sup>2</sup> *Id.* at §§ 12131-12134.

<sup>3</sup> **If you are a federal government worker, you should contact an attorney for advice specific to the federal government. This packet does not provide information pertaining to federal government employees.**

<sup>4</sup> Colo. Rev. Stat. § 24-34-401.

<sup>5</sup> 29 U.S.C. § 794(a).

<sup>6</sup> 42 U.S.C. §§ 12102(1)(A)-(C).

<sup>7</sup> 42 U.S.C. § 12102(4)(A); 29 C.F.R. § 1630.2(j)(1)(i).



walking, breathing, and caring for oneself and also include major bodily functions, such as bladder and brain functions.

The determination of whether an impairment substantially limits a major life activity must be made without regard to the ameliorative effects of mitigating measures (with the exception of “ordinary eyeglasses or contact lenses”).<sup>8</sup> As an example, a person with an amputated leg would still be substantially limited in a major life activity of walking even though a prosthetic leg could significantly cure their limitations.

The definition of disability was greatly expanded with the passage of the Americans with Disabilities Amendments Act in 2008. You should visit [www.ada.gov](http://www.ada.gov) for additional information for determining whether you are a person with a disability who is covered by the Americans with Disabilities Act.

2) **Record of Such an Impairment:** The term “record of such an impairment” means you have a history of, or have a record of having, a mental or physical impairment that substantially limits one or more major life activities.<sup>9</sup>

3) **Regarded as Having Such an Impairment:** To determine whether a person is regarded as having a disability, the focus for establishing coverage is on how a person has been *treated* based on a real or perceived impairment, regardless of whether the person has an actual disability. It is important to note that a person who is covered by the law because of being regarded as a person with a disability is not entitled to reasonable accommodations.<sup>10</sup> Therefore, you must show that you have either an actual or record of disability to qualify for a reasonable accommodation.

Additionally, it is important to note that to be a covered employee, an employee with a disability must be able to perform the **essential functions** of his/her job, with or without reasonable accommodations. Essential functions are the necessary duties and activities of the job position.<sup>11</sup>

## **LIMITATIONS ON DISABILITIES**

Under the ADA, temporary conditions that are minor usually do not qualify as disabilities (e.g. colds, the flu, and sprains), assuming they don't have serious, long-term consequences. A temporary impairment caused by an injury may be a covered “disability” under the ADA Amendments Act if it's “sufficiently severe” to substantially limit a major life activity. Whether a temporary impairment will rise to the level of disability will necessarily be fact-specific and on a case-by-case basis.

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<sup>8</sup> 42 U.S.C. §§ 12102(2), (4)(D), (4)(E); 29 C.F.R. § 1630.2 (j)(1)(vii).

<sup>9</sup> 29 C.F.R. § 1630.

<sup>10</sup> 42 U.S.C. § 12102(3); *Id.*

<sup>11</sup> 42 U.S.C. §12111(8); 29 C.F.R. § 1630.

Further, the ADA and the final regulations specifically state that an impairment that is episodic or in remission meets the definition of disability if it would substantially limit a major life activity when active. This means that chronic impairments with

symptoms or effects that are episodic rather than present all the time can be a disability even if the symptoms or effects would only substantially limit a major life activity when the impairment is active. Examples of impairments that may be episodic, include epilepsy, hypertension, asthma, diabetes, major depressive disorder, bipolar disorder, and schizophrenia. An impairment such as cancer that is in remission but that may possibly return in a substantially limiting form will also be a disability under the ADA and the final regulations.<sup>12</sup>

Additionally, a person who currently uses alcohol is not automatically denied protection simply because of the alcohol use. An alcoholic is a person with a disability under the ADA and may be entitled to consideration of accommodation, if he or she is qualified to perform the essential functions of a job. However, an employer may discipline, discharge or deny employment to an alcoholic whose use of alcohol adversely affects job performance or conduct to the extent that s/he is not “qualified.” Illegal drug use is never protected, but recovering addicts are protected under the ADA. According to the Equal Opportunity Employment Commission’s (“EEOC”) manual, “Persons addicted to drugs, but who are no longer using drugs illegally and are receiving treatment for drug addiction or who have been rehabilitated successfully, are protected by the ADA from discrimination on the basis of past drug addiction.” However, a drug test that shows the employee is using an illicit substance qualifies as “illegal drug use” and bars him or her from ADA protections. In both cases, employers are allowed to hold the individuals to the performance standards applicable to their jobs, and an employer may prohibit the use of drugs and alcohol in the workplace and require that employees not be under the influence of alcohol or drugs in the workplace.<sup>13</sup>

## **WHAT ARE MY RIGHTS AS AN EMPLOYEE WITH A DISABILITY?**

As a qualified individual with a disability, you have the right not to be discriminated against in all employment practices, such as:

- Hiring
- Recruitment
- Retention

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<sup>12</sup> 29 C.F.R. § 1630.2(j)(1)(vii) and corresponding Appendix section; *Summers v. Altarum Inst., Corp.*, 740 F.3d 325 (4th Cir. 2014).

<sup>13</sup> See EEOC TECHNICAL ASSISTANCE MANUAL: TITLE I OF THE ADA, available at <https://askjan.org/links/ADAtam1.html>; SHARING THE DREAM: IS THE ADA ACCOMMODATING ALL, available at <http://www.usccr.gov/pubs/ada/ch4.htm>.

- Training
- Job assignments
- Promotions
- Pay
- Benefits
- Lay off
- Leave
- All other employment related activities<sup>14</sup>

You have a right to reasonable accommodations for your disability, so long as you can perform the essential functions of the job (please refer to the next section for a more in-depth discussion of reasonable accommodations).<sup>15</sup> You have the right not to be retaliated against for asserting your rights under the ADA.<sup>16</sup> The ADA also protects you if you are a victim of discrimination because of your family, business, social or other relationship or association with an individual with a disability. This is known as “associational discrimination.”

In addition to the workplace discrimination protections discussed above, Colorado provides broad workplace discrimination protections to employees under the Colorado Anti-Discrimination Act (CADA). Unlike federal anti-discrimination laws, which typically apply to employers with 15 or more employees, *CADA applies to all employers, regardless of size*. CADA contains limited exemptions for religious organizations and associations. However, religious organizations or associations that receive support partially or wholly from state taxes or public borrowing are not exempt from the CADA’s requirements. CADA prohibits differential treatment in employment based on a person’s protected status. Protected statuses include disability, race, creed, color, sex, sexual orientation, religion, age, marriage to a co-worker, national origin and ancestry.<sup>17</sup>

### **WHAT ARE REASONABLE ACCOMMODATIONS?**

A reasonable accommodation is any change in the work environment or the way things are usually done that gives equal employment opportunities to a person with a disability. An accommodation is considered reasonable if it is feasible and meets the need of the person with a disability without causing an undue burden or fundamental alteration for the employer.<sup>18</sup>

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<sup>14</sup> 42 U.S.C. § 12112(a)-(c).

<sup>15</sup> 42 U.S.C. § 12111(8); 29 C.F.R. § 1630.2(m).

<sup>16</sup> 42 U.S.C. § 12203.

<sup>17</sup> C.R.S. § 24-34-301 et seq.

<sup>18</sup> 42 U.S.C. §§ 102(b)(4), 12111(9)-(10), 12112(b)(4); 29 C.F.R. §§ 1620.8, 1630.2(o).

Reasonable accommodations may be needed:

- During the application/interview process;
- To perform the essential functions of the job; and
- For the enjoyment of equal terms, conditions, and privileges of employment.<sup>19</sup>

Requests for reasonable accommodations may include, but are not limited to:

- Changes in physical accessibility of location/work site;
- Job restructuring;
- Modified work schedule;
- Acquisition or modification of work equipment;
- Modification of training materials or examinations;
- Modification of policies;
- Altering how an essential function of the job is performed; or
- Reassignment to a vacant position.

### **WHEN MUST AN EMPLOYER MAKE A REASONABLE ACCOMMODATION?**

An employer must make a reasonable accommodation for an employee with a known disability if the employee requests it and can show that it is necessary—unless the employer can show that the accommodation would cause an undue financial burden on the operations of its business, or that providing the accommodation would pose a direct threat to the health or safety of the employee or others.<sup>20</sup>

### **WHAT IS THE PROCESS FOR REQUESTING AND CREATING REASONABLE ACCOMMODATIONS?**

An employee's request for a reasonable accommodation may be oral or in writing.<sup>21</sup> If you need an accommodation, you should tell your employer (1) that you have a disability, (2) how your disability interferes with your ability to do your job functions, and (3) what accommodation(s) you need in order to do your job functions. You may use "plain English" and need not mention the ADA or use the

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<sup>19</sup> 42 U.S.C. §12112(a).

<sup>20</sup> 42 U.S.C. §§ 12111(9)(B), (10); 29 C.F.R. §§ 1630.2(o)(2), 1630.9.

<sup>21</sup> See, *Schmidt v. Safeway Inc.*, 864 F. Supp. 991, 997 (D. Or. 1994) ("statute does not require the plaintiff to speak any magic words. . . The employee need not mention the ADA or even the term 'accommodation.'"); *Hendricks-Robinson v. Excel Corp.*, 154 F.3d 685, 694 (7th Cir. 1998) ("[a] request as straightforward as asking for continued employment is a sufficient request for accommodation"); *Bultemeyer v. Ft. Wayne Community Schs.*, 100 F.3d 1281, 1285 (7th Cir. 1996) (an employee with a known psychiatric disability requested reasonable accommodation by stating that he could not do a particular job and by submitting a note from his psychiatrist).

phrase “reasonable accommodation.” Requests for a reasonable accommodation do not need to be in writing; however, it is better practice to put your request in writing so you have a record of it. For a sample letter requesting a reasonable accommodation, please see page 10 of this informational packet.

Once an employee requests a reasonable accommodation, the employer and employee should engage in a productive and interactive exchange to determine the accommodations that are appropriate to the needs of the employee.<sup>22</sup> If a specific accommodation is requested, the employer should consider the specific request, but may provide an equally effective alternative, even if it is not the employee’s preferred accommodation.<sup>23</sup>

Creating reasonable accommodations is an **individualized** process and will vary from person to person based on functional limitations.<sup>24</sup> Keep in mind that reasonable accommodations are to be provided to enable the employee to perform the **essential functions of the job**.

## **WHAT MEDICAL INFORMATION MUST THE EMPLOYEE PROVIDE TO THE EMPLOYER?**

After an employee requests an accommodation, the employer can request medical documentation of the covered disability and the need for the accommodation.<sup>25</sup> Any medical information provided to the employer is to be treated as confidential and kept in a record separate from the employee personnel file.

An employee need not provide all of his/her medical files; they may submit only medical information needed to establish a substantial limitation and need for accommodation.<sup>26</sup>

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<sup>22</sup> 29 C.F.R. 1630.2(o)(ii)(3).

<sup>23</sup> 29 C.F.R. § 1630.9; *see also* *Stewart v. Happy Herman's Cheshire Bridge, Inc.*, 117 F.3d 1278, 1285-86, (11th Cir. 1997); *Hankins v. The Gap, Inc.*, 84 F.3d 797, 800 (6th Cir. 1996); *Gile v. United Airlines, Inc.*, 95 F.3d 492, 499, (7th Cir. 1996).

<sup>24</sup> *See* *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 119 S.Ct. 2139, 2147, 144 L.Ed.2d 450 (1999); *Keith v. City of Oakland*, 703 F.3d 918, 923 (6th Cir. 2013); *Holiday v. City of Chattanooga*, 206 F.3d 637, 643 (6th Cir. 2000); *Wilson v. Chrysler Corp.*, 172 F.3d 500, 505 (7th Cir. 1999).

<sup>25</sup> 29 C.F.R. 1630.14 (c); *see also* *Gard v. U.S. Dep't of Educ.*, 691 F.Supp.2d 93, 100 (D.D.C. 2010), *aff'd*, No. 11–5020, 2011 WL 2148585 (D.C. Cir. May 25, 2011); U.S. EQUAL OPPORTUNITY COMM’N, POLICY GUIDANCE ON EXECUTIVE ORDER 13164: ESTABLISHING PROCEDURES TO FACILITATE THE PROVISION OF REASONABLE ACCOMMODATION, *available at* <https://www.gpo.gov/fdsys/pkg/WCPD-2000-07-31/pdf/WCPD-2000-07-31-Pg1687.pdf>.

<sup>26</sup> 42 U.S.C. § 12112(d); 29 C.F.R. 1630(c)(1).

## **ARE THE ADA AND THE FAMILY MEDICAL LEAVE ACT (FMLA) THE SAME?**

The ADA and FMLA are not the same. The purpose of the FMLA is to provide job protection for employees (1) with serious health conditions, (2) who care for family members with serious health conditions, (3) who will have a child born, placed, or adopted into the family, (4) who care for family members in the armed forces undergoing medical treatment, recuperation, or therapy for a serious injury or illness, or (5) who require leave for a “qualifying exigency” related to a family

member’s active duty in the armed forces. Not all employment positions qualify for FMLA leave. Please check with your employer regarding your specific employment situation.

You may have both “a disability” within the meaning of the ADA and a serious health condition within the meaning of the FMLA. The FMLA is not intended to modify or affect the ADA or its coverage. The leave provisions of the FMLA are wholly distinct from the reasonable accommodation obligations of employers covered under the ADA. The purpose of the FMLA is to make leave available to eligible employees and employers within its coverage and not to limit already existing rights and protections under other laws. An employer must provide leave under whichever statutory provision provides the greater rights to you. When an employer violates both the FMLA and the ADA, you may be able to recover under either or both statutes. When you are a qualified individual with a disability under the ADA, the employer must make reasonable accommodations for you, while at the same time affording you your rights under the FMLA. For more information regarding FMLA please see The Family Medical Leave Act of 1993 (FMLA).<sup>27</sup>

## **WHAT SHOULD I DO IF I BELIEVE I WAS DISCRIMINATED AGAINST?**

If you suspect you have been the subject of employment discrimination, including if your employer failed to provide reasonable accommodations, you have the right to file a complaint, or charge, with the Equal Employment Opportunity Commission (EEOC), or the Colorado Civil Rights Division (CCRD). Before doing so, you should consider whether there are routes to opening lines of communication within your employment setting, such as:

- Are you represented by a union that can advocate for your rights?
- Does your company employ an ADA Coordinator or someone who monitors compliance with discrimination laws? This information may be available through your human resources department.

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<sup>27</sup> 29 U.S.C §2601 et seq., 29 C.F.R 825.100 et seq.



- Are you a state employee who may be required to enter an internal process before filing a charge with the EEOC/CCRD?
- Is there an internal grievance procedure, an administrator with decision making powers, or a board where your issues can be heard and addressed?
- Is there an opportunity to negotiate or mediate with your employer?

Make sure you are aware of deadlines for filing the charges that are listed below.  
**Failure to file before the deadline may cause you to lose your right to file a claim or charge.**

### **WHERE CAN I FILE A CHARGE OF EMPLOYMENT DISCRIMINATION BASED ON DISABILITY?**

**Colorado Civil Rights Division (CCRD)**  
1560 Broadway, Suite 1050  
Denver, CO 80202  
Phone: (303) 894-2997  
Toll Free: (800) 262-4845  
V/TTY: (711) 894-2997  
[askdora.colorado.gov](http://askdora.colorado.gov) (click on Civil Rights)  
There are satellite offices in Pueblo and Grand Junction, but all intakes must be initiated by contacting the Denver Office.  
CCRD has jurisdiction over businesses regardless of the number of employees.  
CCRD may offer either group or individual intake.

**Equal Employment Opportunity Commission (EEOC)**  
303 East 17<sup>th</sup> Avenue, Suite 510  
Denver, CO 80203  
Phone: (303) 866-1300  
Toll Free: (800) 669-4000  
V/TTY: (303) 866-1950 or (800) 669-6820  
[www.eeoc.gov](http://www.eeoc.gov)  
EEOC has jurisdiction for businesses with 15 or more employees.

### **HOW QUICKLY MUST I FILE TO PROTECT MY LEGAL RIGHTS?**

If you are filing with **CCRD**, you must file within **180 days** from the date the discrimination occurred.

If you are filing with **EEOC**, you must file within **300 days** from the date the discrimination occurred for all federal claims.

You do not need to file with both agencies. To protect your legal rights, you **must** file with EEOC/CCRD within these timeframes; failure to do so will result in your inability to file a lawsuit.

#### **Beware of Alternative Deadlines:**

You should also be aware that State and/or unionized employees may have mandatory prerequisites to the deadlines listed above. Deadlines may be within a

few days. *Additionally, other employment claims (not related to disability discrimination) may have different filing requirements and deadlines.*

### **Private Lawsuits:**

In most cases, you must file a sworn written statement (charge) with EEOC or CCRD before a private lawsuit alleging disability discrimination may be filed in court. You must receive a right-to-sue letter from EEOC/CCRD prior to filing a private suit.

## **WHAT IS THE PROCESS FOR FILING A CHARGE WITH THE EEOC/CCRD?**

As the charging party, you should be prepared to provide the who, what, when, where and how of the discrimination. For example, your charge should include:

- Your name, address, and telephone number;
- Your employer's name, address, and telephone number;
- The number of employees, if known;
- A description and timeline of events, with any available documentation, to support your claim of disability discrimination;
- The names, addresses, and phone numbers of anyone who could support your claim of employment discrimination (witnesses); and
- Documentation of your disability.

When you file a charge of disability discrimination with the EEOC or CCRD, you will be assigned a charge number. An investigator will have primary responsibility for handling your complaint. The employer that you filed a charge against will have the opportunity to respond to your statements alleging discrimination. The EEOC or CCRD may request that you submit additional information related to your charge. You may be offered the chance to mediate with your employer, but mediation will occur only if you and your employer voluntarily agree to it.

After the claim has been investigated, EEOC/CCRD will determine if there is "probable cause" to substantiate discrimination and the EEOC/CCRD may initiate further agency action. If the EEOC/CCRD finds there is "no probable cause" to substantiate discrimination, you will be provided with a right-to-sue letter that will enable you to file your complaint of discrimination in federal or state court if you wish. You will lose your right to sue if you do not file such a complaint in court within 90 days from the date on the letter. If the EEOC/CCRD finds that there is "probable cause," they may choose to pursue a lawsuit on your behalf, or they may provide you with a right-to-sue letter.

You should visit [www.dora.state.co.us/civil-rights/complaints\\_process.html](http://www.dora.state.co.us/civil-rights/complaints_process.html) (CCRD) and [www.eeoc.gov](http://www.eeoc.gov) (EEOC) for additional information on this process.

## EMPLOYMENT LAWYER REFERRAL LIST

The attorneys listed below have identified themselves as having knowledge of employment law and an understanding of disability. These attorneys embrace the following values in providing services and advocacy for people with disabilities:

- Empowerment;
- Self-determination;
- Independence; and
- Inclusion.

Disability Law Colorado neither receives nor pays any compensation from/to these attorneys for their placement on this list.

### **Dale A. Gaar**

1600 Stout Street, Suite 1000  
Denver, CO 80202  
(303) 446-9300

[www.daleagaar.com](http://www.daleagaar.com)

Specialties: Discrimination and Personal Injury

Does NOT accept: ERISA, Worker's Compensation, Federal Government Employment, Social Security, or Union Matters

### **Paula D. Greisen**

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1670 York Street  
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(303) 298-9878

[www.kinggreisen.com](http://www.kinggreisen.com)

Does NOT accept: Worker's Compensation, Federal Government Employment, Social Security, or Personal Injury

### **Kimberlie Ryan**

Ryan Law Firm, LLC  
191 University Boulevard, #700  
Denver, CO 80206  
(303) 520-5119

[www.kimberlieryan.com](http://www.kimberlieryan.com)

Does NOT accept: ERISA, Union Matters, Social Security, Worker's Compensation

**Cynthia Wellbrock** (knows signed English sign language)

The Law Office of Cynthia E. Wellbrock, LLC

7887 East Belleview Ave, Suite 1100

Denver, CO 80111

(303) 785-7783

[www.cynthiawellbrock.com](http://www.cynthiawellbrock.com)

Specialties: Harassment, Discrimination, Wage/Hour Disputes

Does NOT accept: ERISA, Worker's Compensation, State/Federal Government Employment, Employee Benefits (long/short-term disability).

## **INTERNET RESOURCES**

### **Department of Justice**

- U.S. Department of Justice: [www.justice.gov](http://www.justice.gov)
- Information and Technical Assistance on the ADA: [www.ada.gov](http://www.ada.gov)
- Definition of Disability Under the ADA: [www.ada.gov](http://www.ada.gov)

### **Equal Employment Opportunity Commission**

- EEOC: [www.eeoc.gov](http://www.eeoc.gov)
- EEOC Denver Field Office: [www.eeoc.gov/field/denver/charge.cfm](http://www.eeoc.gov/field/denver/charge.cfm)
- EEOC ADA Q&A: [www.ada.gov/qandaeng.htm](http://www.ada.gov/qandaeng.htm)
- EEOC Overview of Disability Discrimination: [www.eeoc.gov/laws/types/disability.cfm](http://www.eeoc.gov/laws/types/disability.cfm)

### **Colorado Civil Rights Division**

- CCRD: [www.colorado.gov/pacific/dora/civil-rights/employment-discrimination](http://www.colorado.gov/pacific/dora/civil-rights/employment-discrimination)

### **Job Accommodation Network**

- JAN: [www.askjan.org](http://www.askjan.org)

## Sample Letter Requesting a Reasonable Accommodation from Your Employer

**[Date]**

Mr. / Ms. **[Name of Manager]**  
**[Company Name]**  
**[Address]**

Dear Mr. / Ms. **[Name of Manager]**:

I have worked at **[company name]** as a **[position or position in "X department" if appropriate]** since **[approximate date of hire]**. I have a condition that qualifies me as a person with a disability, namely I **[describe disability or, to be more general, describe the major life activities that are limited]**.

I am experiencing the following difficulties in performing my job because of my disability: **[describe the difficulties you're experiencing]**. I am writing to request that you **[state requested accommodation]** because it will **[explain how it will help you do your job]** as a reasonable accommodation.

If you have alternative suggestions regarding reasonable accommodations, please share them with me so we can work together to find a workable and effective accommodation.

I have a disability as defined by the Americans with Disabilities Act, and I need this accommodation to successfully perform my job.

If you have any questions about my request you can contact me in writing or by phone. However, I ask that you provide me a written response to this request within two weeks of the date of this letter. Thank you very much.

Sincerely,  
**[Your name]**  
**[Your full address]**  
**[Your phone number]**