

Your Employees Are Already Using AI:

An Employer's Guide to Controlling Risk

Presented by:

Michael J. Neary

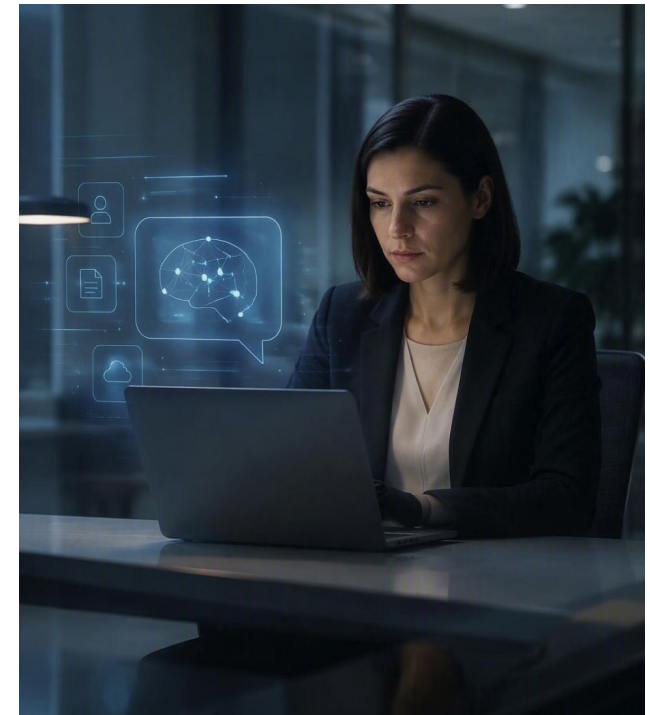
Employment Principal

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The Quiet Adoption Problem

Employees are using AI tools without waiting for permission — and that gap between usage and policy is where liability lives.

- Around 60% of employees now have access to AI at work, and surveys consistently find a significant share use unsanctioned tools.
- Most organizations have no formal AI acceptable-use policy, meaning employees are making their own judgment calls about what data to share and with which tools.
- The risk is not AI itself — it is the unmanaged, undocumented gap between how employees use it and what the employer's legal obligations require.



Before examining each risk category, it helps to understand exactly what's at stake when confidential data leaves the building.

Confidential Data Entering Public AI Systems

Every prompt an employee sends to a public AI tool is a potential data breach — and the employer bears the consequences.

Sensitive Data in Every Prompt	AI Tools May Retain Your Data	Broad Legal Exposure
Employees routinely paste client lists, personnel files, trade secrets, and financial projections into public AI tools like ChatGPT, Gemini, or CoPilot to speed up work. Immediate Exposure	Many commercial AI tools ingest user inputs to train future models unless enterprise configurations explicitly disable that feature — meaning confidential data can persist beyond the session. Persistent Risk	Legal exposure includes breach of confidentiality obligations to clients or customers, trade secret misappropriation claims, and potential violations of HIPAA, GLBA, or state privacy laws, depending on the data type. Multi-Law Liability

Practical risk: A single employee action can waive protections the organization spent years building.

AI-Generated Interview Questions and Candidate Rankings

Key Takeaway: Automated screening tools offer efficiency but carry legal liability that follows the employer, not the vendor. Employer liability cannot be delegated to the software vendor.

Three Legal Risk Vectors

Adverse Impact on Protected Classes (High Risk): Applicant tracking systems that score resumes or rank candidates using AI models can produce adverse impact against protected classes even when the algorithm appears facially neutral.

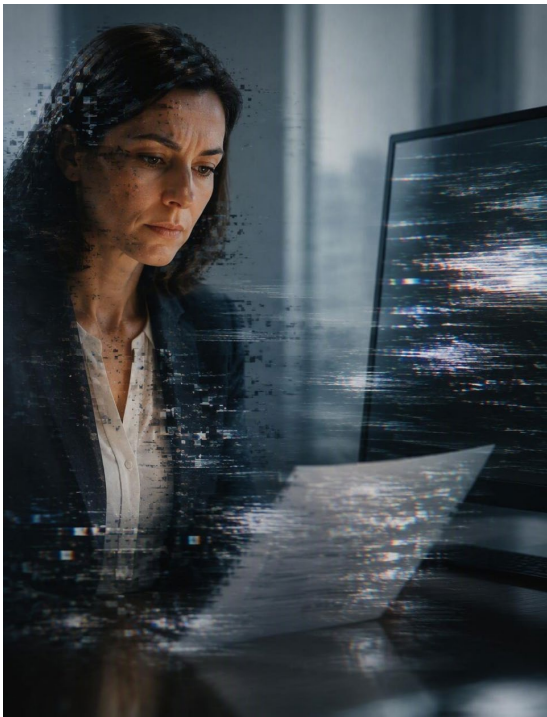
Employer Liability Confirmed: *Mobley v. Workday, Inc.* (Case Law): A federal court allowed discrimination claims to proceed against both an AI vendor and the employers using its screening tools — extending liability directly to the employer, not just the vendor.

State & Local Compliance Mandates (Regulatory): NYC Local Law 144 requires annual bias audits and public disclosure. Illinois HB 3773 (effective Jan 1, 2026) requires notification whenever AI contributes to an employment decision.

Also watch for: AI-generated interview questions may inadvertently solicit protected-class information or screen out candidates with disabilities who cannot interface with the tool.

Accuracy, Hallucinations, and Who Owns the Final Decision

AI confidently produces wrong answers — and the document it generated still exists in the personnel file.



- Large language models hallucinate: they generate plausible-sounding but factually incorrect content, including fabricated citations, inaccurate performance data, and misattributed statements.
- An AI-drafted termination letter citing a policy violation the employee never committed, or a performance review attributing a metric error to the wrong person, becomes the employer's legal position the moment a manager sends it.
- The California “No Robo Bosses Act,” would bar employers from relying solely on automated systems to fire or discipline workers and would mandate human oversight.

Accountability principle: the employer — not the software vendor — owns the accuracy and consequences of every document issued under its letterhead.

Wage-and-Hour Risks: When AI Removes Employee Discretion

An exempt employee who outsources judgment to AI may no longer qualify for the exemption — triggering retroactive overtime liability.

FLSA Administrative Exemption



Key Requirement

Primary duties must include **exercise of discretion and independent judgment** on matters of significance



Risk: AI absorbs exempt-level duties → employees retroactively entitled to overtime



Note: AI freeing employees for higher-level work may strengthen — but not create — exempt status

- The FLSA administrative exemption requires that an employee's primary duties include the exercise of discretion and independent judgment on matters of significance.
- If a historically exempt role defaults to AI for compliance analysis, legal research, drafting, and recommendations, employers face the argument that the employee — not the system — is no longer making the call.
- If courts or the DOL find that an AI tool has absorbed the exempt-level duties, employees in those roles could be entitled to overtime retroactively.
- Increased productivity alone does not create exempt status — the legal test is about the nature of the duties, not the speed at which they are performed.

Practical Steps: Audit job descriptions and actual duties annually as AI tools are adopted; document the discretion employees continue to exercise independently.

When Employee Monitoring Becomes Excessive

Productivity surveillance enabled by AI can cross into legally and culturally dangerous territory faster than employers expect.



- AI-enabled monitoring tools now track keystrokes, call durations, screen activity, delivery windows, and movement patterns — often without employee awareness
- Legal risks include: NLRA violations if monitoring chills protected concerted activity, state wiretapping and electronic surveillance laws requiring notice or consent, and ADA issues if monitoring data is used to infer health conditions
- Connecticut will require disclosure, starting October 1, 2026, when AI contributed to certain mass layoff decisions — signaling a regulatory direction toward transparency in how surveillance data is used
- Cultural risk is real: employees who feel surveilled rather than trusted report lower engagement and higher turnover, undermining the efficiency gains AI monitoring is supposed to deliver

Attorney-Client Privilege and AI

Feeding legal advice into a public AI tool — or using AI to generate what looks like legal analysis — can destroy the privilege that protects it.



What Privilege Protects

Attorney-client privilege covers confidential communications between lawyer and client made for the purpose of obtaining legal advice. The protection is waived when that communication is disclosed to a third party.



Policy Requirement

The AI acceptable-use policy must explicitly prohibit inputting attorney communications, litigation hold materials, or work product into any AI tool not operating under a business-associate or enterprise data-protection agreement.



Waiver Risk: Direct Input

When an employee pastes privileged legal advice, settlement communications, or attorney work product into a public AI tool, confidentiality of that communication may be lost — permanently.



Action Required

Organizations should consult counsel about privilege review protocols before deploying AI tools in legal, compliance, or HR functions that routinely handle privileged information.



Waiver Risk: AI-Drafted Documents

If AI input included non-privileged business data, courts may scrutinize whether the resulting document is genuinely privileged — even when counsel later reviews it.



The Irreversibility Problem

Privilege waiver is permanent. One employee action — pasting a privileged legal memo into a public AI tool — can strip protection from communications the organization spent years safeguarding.



What AI breaks

Confidentiality — kept within a privileged circle
Legal purpose — communication made to obtain legal advice



Subpoena and disclosure risks

An employee inputting into an AI agent privileged communications, work product, investigations, mental impressions, or any other privileged material may subject that information to subpoenas directed to that AI agent provider. . Even if information “de-identified,” that does not mean it cannot be discovered or subpoenaed.

Recording and Transcribing Meetings with AI Assistants

AI meeting recorders are the easiest AI tool for employees to deploy — and one of the highest-risk for the employer if consent rules are ignored.

Common Tools: Otter.ai; Fireflies; Microsoft Copilot Meeting Recap

Federal Law (ECPA)	One-Party Consent	States: All-Party Consent Required	Criminal Violation Risk
General rule: one participant's consent is sufficient to record		States Include: CA · FL · IL · MD · MA · MT · NV · NH · PA · WA Recording without disclosure to all parties may be a criminal violation	
- The Electronic Communications Privacy Act sets the federal baseline for call recording - An employee (or their AI bot) can record a call without notifying other participants — under federal law alone - AI bots join on the employee's behalf, meaning the "recorder" is never physically present — yet the one-party rule still applies - Federal floor does not preempt more restrictive state consent laws		- Risk applies whenever any participant is located in one of these states — regardless of where the recorder is - Transcripts of disciplinary meetings, salary discussions, or union organizing conversations create discovery obligations and may be used against the employer in litigation - Privilege risk: AI-transcribed conversations with in-house counsel may be deemed non-confidential if a third-party tool processed the recording	

Policy requirement: All AI meeting recording must be disclosed at the start of each call. Transcripts must be treated as records subject to the organization's document-retention policy.

The Regulatory Landscape: What's Active Right Now

The patchwork of state AI laws is the compliance reality — federal preemption is promised but not yet delivered.

Law / Case	Status	Key Employer Obligation
Illinois HB 3773	Active Jan 1, 2026	Notify employees when AI is used in employment decisions; records retained 4 years; applies to any employer with 1+ Illinois employees.
Connecticut (Mass Layoff AI)	Effective Oct 1, 2026	Requires disclosure when AI contributed to mass layoff decisions.
California "No Robo Bosses Act"		Would ban sole reliance on automated systems for discipline or termination
Colorado SB 26-189	Effective Jan 1, 2027	Narrower notice and disclosure obligations, replacing the original Colorado AI Act.
NYC Local Law 144	In Effect	Annual bias audits and public disclosure required for automated employment decision tools.
Mobley v. Workday, Inc.	Federal Court	Discrimination claims allowed to proceed against both AI vendor and employer-users — expanding direct employer liability.

Liability Cannot Be Delegated to the Vendor

Buying AI from a vendor does not transfer the employer's legal obligations — courts and regulators have made this explicit.

Principle 1 — Statutory Liability Belongs to the Employer	Principle 2 — EEOC: Algorithmic Bias Does Not Transfer Responsibility	Principle 3 — Courts Are Expanding Co-Liability — Employer Exposure Remains Primary
Title VII, the ADA, the ADEA, and state equivalents impose liability on the employer — not on the software vendor. An employer cannot defend a discrimination claim by arguing a machine made the call.	The EEOC has confirmed that employers remain responsible for adverse impact caused by algorithmic tools even when a third party built and maintains them.	<i>Kistler v. Eightfold AI Inc.</i> is among a growing body of cases testing AI vendor and employer co-liability. The legal landscape moves toward shared responsibility, but the employer's primary exposure does not diminish. <i>Before deploying AI in any HR function: review vendor contracts for indemnification provisions, data-processing agreements, bias audit rights, and model explainability commitments.</i>

Building an Effective AI Acceptable-Use Policy

An AI acceptable-use policy in 2026 is a **MUST**

1. Approved Tools & Prohibited Data	2. Required Configurations	3. Human Review & Sign-Off	4. Incident Reporting	5. Training & Acknowledgment	6. Review Schedule
Name approved platforms explicitly. List prohibited data types — personnel files, trade secrets, PHI, attorney communications — and prohibit their use in unapproved tools.	Mandate enterprise mode and data-retention settings. Default consumer configurations often allow training on user inputs — disable this at the account level before deployment.	AI may draft; a qualified human must review, apply independent judgment, and formally approve before any document is issued or employment decision acted on.	Require employees to report AI outputs discovered to be inaccurate, harmful, or biased. Define escalation paths to HR, Legal, and IT Security with documented timelines.	Provide role-specific training. Managers need to understand legal consequences of rubber-stamping AI output; employees need data-classification rules. Obtain written acknowledgment	Review at minimum annually. Assign joint ownership to HR and Legal. Build in a trigger for review whenever a major new law takes effect or a significant tool is adopted.

Essential Elements of an Action Plan

Risk control is achievable — but only with a structured, documented approach that HR and legal build together.

1

Inventory

Identify every AI tool currently in use across the organization, including tools employees are using without authorization (shadow AI)

2

Classify

Categorize tools by risk level based on data accessed and decisions influenced; apply strictest controls to tools touching hiring, discipline, and termination

3

Policy

Adopt a written AI acceptable-use policy covering approved tools, prohibited data, human-review requirements, incident response, and training; obtain written acknowledgment

4

Train

Provide role-specific training — managers need to understand legal consequences of treating AI output as a final decision; employees need data-classification rules

5

Monitor & Update

Review policy at least annually; assign ownership to HR and Legal jointly; build in a trigger whenever a significant new law takes effect or a major tool is adopted

Thank You!

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About the Presenter



Michael J. Neary

Employment Principal

Lerch, Early & Brewer

T 301-945-7392

F 301-347-1790

mjneary@lercheearly.com

Michael Neary is an employment attorney and commercial litigator who works with businesses to prevent and defend against employee claims. He also litigates commercial disputes such as real estate controversies, business fraud, corporate and partnership dissolutions, and commercial contract claims.

Michael helps his clients comply with employment and labor laws, such as the Fair Labor Standards Act (FLSA), the Family and Medical Leave Act (FMLA), the Americans with Disabilities Act (ADA), Title VII, and their state and local counterparts.

The next session will begin shortly

The First 48 Hours

*Initial Responses to Employee Complaints,
Requests, and Misconduct that Minimize Risk*

Presented by:

Jessica B. Summers and Lauri E. Cleary

Employment Principals

Lerch, Early & Brewer

Introduction

The first 48 hours are not about finding every answer and addressing every issue – they are about performing triage on the situation, identifying sources of evidence and preserving it, controlling risk, protecting employees, and positioning the entity to prepare the best (or a defensible) response.

Why the First 48 Hours are Key

- Failing to identify and properly address complaints and other reports can increase liability and deprive employers of valuable opportunities to be proactive and mitigate risk.
- Immediate preservation of documents and information is critical both for internal and external complaints and actions.
- Immediate identification of parties and witnesses is critical to addressing the concerns of, working with, and properly counseling all involved.

Why the First 48 Hours are Key

- When it comes to lawsuits or administrative charges, initial response deadlines come quickly and extensions are not guaranteed.
- Where a current employee is involved, the employer's immediate response can significantly impact how the employee perceives the employer's handling of the situation.
- Early missteps by untrained personnel can create significant liability later.

Promptly Identifying That You Have an Issue

- *Internal Complaints*
 - Ensure that the employee handbook has clear policies identifying to whom EEO-related, whistleblower, and other types of complaints should be made.
 - Train all managers and supervisors to identify and elevate complaints and concerns through the appropriate channels, even if they are not designated to receive such complaints.

Promptly Identifying That You Have an Issue

- *Lawsuits or Administrative Actions* -
 - Make sure your registered/resident agent information is up to date.
 - Train your receptionist/front desk staff to reject attempts to serve them on behalf of the entity.
 - When a manager or HR professional leaves, either shut down their email or create a clear bounce-back notice so that it is clear to the sender that the desired email recipient is no longer there and the email has not been received.
 - Make sure incoming mail is carefully monitored.
 - Be proactive and enhance monitoring if you are expecting a claim.

Marshaling a Rapid Response

Use a “PR” checklist

- **PRotect** people
- **PReserve** evidence and information
- **PRobe** the situation
- **PResent** the results of the investigation
- **PRoceed** as appropriate

Following these steps will make any claim against the entity more defensible while facilitating positive public relations.

Preserving Evidence and Information

- *When Litigation or a Charge is Anticipated-*
 - Involve IT.
 - Suspend any data or document destruction practice, including auto-delete functions.
 - Identify who might have relevant documents and issue litigation hold letters or preservation instructions.
 - Take affirmative steps to preserve documents in their native form.

Internal Investigations – When to do them

- *When to do them?*
 - Whistleblower, EEO complaints or other internal reporting from employees or others.
 - Law firm letter on behalf of purported whistleblower or claimant.
 - Misconduct allegations from competitor, supplier, or others in the industry.
 - Audit findings.
 - Media reports of misconduct allegations.
 - Government subpoenas or other requests for documents, interviews, etc.
 - Indicia of law enforcement activity.

Internal Investigations – Key Steps

- Assess privilege issues and identify who is handling the investigation.
- Have a clearly defined scope to avoid “scope-creep.”
- Identify and interview potential witnesses.
- Document adequately.
- Create a timeline and avoid delays that allow memories to fade, evidence to be lost.
- Reach a conclusion, determine a response, and communicate with the impacted parties.

Retaliation

- Don't win the battle and lose the war.
- Retaliation is consistently the most common charge brought before the EEOC.
- Train managers in anti-retaliation principles and advise all involved in an investigation.
- Require HR or senior management to review and approve adverse actions before any adverse action is taken against any involved party in aftermath of a complaint or investigation.
- Explain retaliation reporting procedures to complainant when closing out the matter.
- Monitor the situation.

Takeaways: The Dos

- Follow the PR checklist.
- Assess the risk level and plan out the response.
- Preserve evidence and documents.
- Create a clear delegation of duties and centralize the response and communications.
- Involve legal counsel early to help determine what response is needed by whom.
- Monitor and stay ahead of deadlines.
- Communicate clearly with the complaining party.
- Maintain confidentiality as much as possible (but do not guarantee it).
- Acknowledge the complaint and validate any employee who raises an issue in good faith – even if it is not substantiated or found to be unlawful conduct.

Takeaways: The Don'ts

- Ignore the situation or delay the response.
- Rush the process or jump to conclusions.
- Promise confidentiality or outcomes.
- Delete or destroy information.
- Utilize untrained or conflicted staff to investigate problems.
- Involve or divulge information to those who do not need to know it.
- Allow gossip or unnecessary discussions about the allegations.
- Retaliate against complaining or participating employees.

Thank You!

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About the Presenter



Jessica B. Summers

Employment Attorney

Lerch, Early & Brewer

T 301-657-3442

F 301-986-1300

jbsummers@lerchearly.com

Jessie Summers works with companies, organizations, and individuals in Maryland, the District of Columbia, and Virginia on a wide range of employment, business, and litigation matters.

Jessie works with clients on establishing and implementing effective employment policies, drafting and negotiating employment and separation agreements, handling business litigation in state and federal courts, and monitoring and advising clients on legislative and regulatory developments of import to them.

About the Presenter



Lauri E. Cleary

Employment Attorney

Lerch, Early & Brewer

T 301-657-0176

F 301-347-1792

lecleary@lercheearly.com

Lauri Cleary is a trial lawyer who helps businesses, religious institutions, schools and other employers, as well as individuals, navigate difficult issues and resolve disputes in and out of the courtroom throughout Maryland, DC, and Virginia. Lauri negotiates and litigates employment, commercial, real estate, professional responsibility, and white-collar criminal defense cases in the trial and appellate courts.

The next session will begin shortly

Neurodiversity in the Workplace

Navigating Accommodations, Performance Issues, & the ADA

Presented by:

Julie A. Reddig

Employment Attorney

Lerch, Early & Brewer

Jane Singleton

Founder

Launchpad for Life

1 in 5

Individuals have learning disabilities and attention issues

Neurodiverse

“recognizes that neurological differences (e.g., Autism, ADHD, Dyslexia, Tourette's Syndrome) are natural human variations, not deficits. It's about brain difference, not brain disorder.”

Source: Armstrong, T. (2010). Neurodiversity: Discovering the Extraordinary Gifts of Autism, ADHD, Dyslexia, and Other Brain Differences

Neurodivergent

A wide range of unique cognitive traits (criteria for a diagnosis) that are seen as distinct differences in brain function from what has been determined as the statistical “norm.”

Source: Cleveland Clinic. "Neurodivergent." Cleveland Clinic, <https://my.clevelandclinic.org/health/symptoms/23154-neurodivergent>.

Neurodivergent Strengths

Deep Focus: Depth of detail on topics of interest.

Pattern Recognition: Making meaning of complex data sets.

Innovative and Creative Thinking: Excel at "interdisciplinary" thinking.

Authenticity and Integrity: Love rule-based thinking and prefer ethics over social conformity.

Source: Wilhide, M. (2025, October 31). Different minds, stronger science: Celebrating neurodiversity in research and innovation. Editage Insights. <https://www.editage.com/insights/different-minds-stronger-science-celebrating-neurodiversity-in-research-and-innovation>

Accessibility Challenges

- Explicit Communication
- Accessible Information, Training, Assessments
- Organization of information (and multiple channels of distribution)
- Unwritten Rules of Social Communication
- The How, When, and Why of Feedback
- The WHY behind projects and interdivisional team deadlines

The Why and The Cost

- Replacing one employee costs 50-200% of their annual salary.
- Disability is now the fastest-growing charge category at the EEOC. Disability made up 33.4% of all EEOC charges in FY2019; by FY2024 it was 38.0%.
- Disability accommodation litigation is accelerating. (Filings in 2025 were up 42% in a single year).
- This is a workforce-composition shift, not a passing spike. Accommodation requests rose from 25% to 30% of all U.S. adults in just one year (2024— 2025), and Gen Z requests accommodations at more than three times the rate of Baby Boomers (42% vs. 13%).

Sources: SHRM (2024); Gallup (2023); Work Institute, 2025 Retention Report; Psychology Today (2025). Baker Donelson, "Disability Accommodation Claims Surge, Raising Stakes for Employers" (EEOC enforcement data via cwc.org / genre.com; Heather M. Collins Civil Rights); Understood.org, 2025 Neurodiversity at Work Survey

Case Study

David excels at solving complex problems and has creative input to improve workflow because of his pattern recognition skills.

His manager is frustrated because his work product is inconsistent. Sometimes it is timely and well done; other times, it is late or not “detailed enough.” His team sees him as unreliable.

David’s role requires him to complete disparate tasks. He receives vague deadlines and no framework for the work he is tasked with. His supervisor and team communicate assignments and deadlines through regular video calls, some of which are scheduled, and others occur without notice throughout the workday.

Case Study

David is frustrated because the constant context-switching reduces his productivity and ability to use his hyper-focused talent.

David receives a “Needs Improvement” on his annual evaluation.

David submits a doctor’s note to his manager requesting three specific accommodations:

- task lists in a modified, consistent format
- written (non-verbal) deadlines
- short scheduled buffers between tasks to reduce the cost of context-switching

Case Study

In response, David's manager tells him to "try to manage his time better." David's manager provides no explanation as to why any of the three requested accommodations were or weren't tried.

90-days later, there is no improvement in David's performance. David's manager and HR place David on a formal Performance Improvement Plan.

The PIP cites nearly the same list of issues as the needs improvement review.

What could David's employer have done differently that would have resulted in a better outcome?

What does the law require?

Americans with Disabilities Act (ADA) - Requires employers not to discriminate against *qualified* individuals with a disability, including by failing to make *reasonable accommodation*.

Following the 2008 ADA Amendments Act, the legal focus is on:

1. Whether the individual is a *qualified* individual with a disability
2. Whether the accommodation is *reasonable* or imposes an *undue hardship*
3. Whether the employer **engaged in the interactive process**

But don't forget RETALIATION claims!

What does the law require?

Employers must make a ***reasonable accommodation*** to the known physical or mental limitations of an otherwise ***qualified*** individual unless doing so would impose an undue hardship.

Disabled employees are held to the same performance standards as nondisabled employees.

What does the law require?

Q: When must an employer provide an accommodation to a disabled individual?

A: When the employee communicates to the employer:

(i) the disability; and

(ii) the desire for assistance with the workplace or job duties *because of* the disability.

No magic words required!

What does the law require?

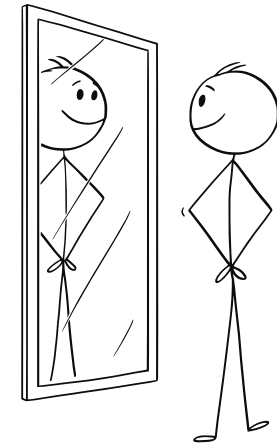
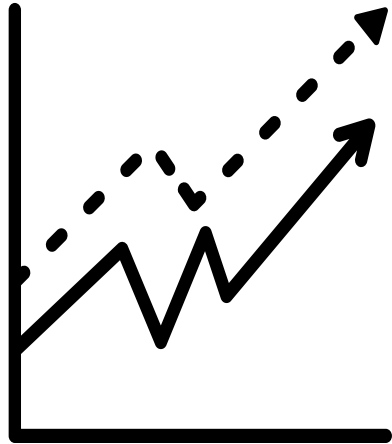
The Interactive Process – Requires good-faith flexible discussions between employer and employee to identify a reasonable accommodation.

Two parts:

1. Is the individual qualified?
2. What accommodation will allow the employee to perform the essential functions of the position or enjoy the benefits and privileges of employment without imposing undue hardship?

The Why: Mindset Shift

How would we problem solve if we thought systems and information channels were faulty versus people?



From Compliance to Sustainable Performance

- Counsel: What does the law require?
- HR: What does the organization need to implement?
- Manager: What do I actually do?
- Employee: What do I need to understand and manage?
- Organization: How do we make this sustainable?



Attention & Executive Function



Attention: Sustained focus, filtering, switching

Working Memory: Retain and manipulate information in your mind

Cognitive Flexibility: Pivot and adapt

Inhibitory Control: Pause and reflect before acting and control impulses

Source: > Diamond, A. (2013). Executive functions. Annual Review of Psychology, 64, 135–168. <https://doi.org/10.1146/annurev-psych-113011-143750>

Barriers/Access

- Lack of clear processes and structured initiation points
- A lack of chunked time for hyperfocus negatively impacts productivity
- Vague language as it relates to prioritizing and deadlines, and no clear written directives
- Information coming from multiple channels



Disabilities that impact Communication



- Social Pragmatics (context & nonverbals).
- Language Processing & Expression.
- Attention, Executive Function & Output.
- Emotional Regulation.
- Speech Production & Fluency.



Systems Challenge



1. Workplace communication that **relies on implicit social cues**
2. Environments can create **sensory overload**
3. Misused “**channels**” of communication
4. Not enough **direct/explicit feedback**
5. Penalizing someone on an evaluation for ‘professionalism’ when the criteria are based on undefined social expectations/subjective social norms.

Case Study

A supervisor managing about ten people has an autism spectrum diagnosis. He finds engaging in small talk draining.

A coworker told him she was going to “teach him how to say hello and good morning.”

Shortly thereafter, the manager asks to be excused from exchanging pleasantries or greetings with colleagues before moving straight into work-related conversations. He has not asked to be excused from greeting the customers he interacts with directly.

Case Study

HR has a doctor's note disclosing his condition and supporting his request. They are considering how to proceed.

The Employer's perspective is that, for a variety of reasons, engaging in small talk is an important part of a supervisor's job duties.

The employer believes that greetings are important because they demonstrate respect for others, and the organization's culture is built around "respect." Therefore, supervisors are expected to model that behavior and engage in small talk with their direct reports and other colleagues.

How should the employer proceed?

Case Study

Legally Required Response

The law requires engaging in the interactive process:

1. Is the employee qualified?
2. Is there another accommodation that will allow the employee to perform the essential functions?

Case Study

Alternative System Solutions

Be explicit about social expectations as it pertains to culture and relationship building as a supervisor.

Provide differentiated training based on need for new managers or when new issues arise.

Spend time understanding the problem collaboratively and build perspective taking on BOTH sides to reach a reasonable adjustment or accommodation as well as identify implementation barriers.

The ROI of Neuroinclusion

- JPMorgan Chase's Autism at Work program: participants were 90-140% more productive, with fewer errors, than neurotypical peers in the same roles.
- The math strongly favors prevention over litigation. 61% of workplace accommodations cost employers nothing to implement against a typical disability-discrimination settlement range of roughly \$25,000 to \$150,000+. (Job Accommodation Network; U.S. DOL ODEP; employment-law settlement trackers).
- Organizations with dedicated neurodivergent hiring and inclusion programs report retention rates above 90%.

Source: Austin & Pisano, Harvard Business Review ("Neurodiversity as a Competitive Advantage"); company-reported program data (JPMorgan Chase, EY, SAP, Microsoft).;

Job Accommodation Network; U.S. DOL ODEP; employment-law settlement trackers

Perceived Cost vs. Reality

- 61% of accommodations cost nothing to implement.
- 33% had a one-time cost — median \$300.
- 85% of employers said accommodations increased employee retention.

Source: Job Accommodation Network (JAN). Cost and Benefits of Accommodations. Office of Disability Employment Policy, U.S. Department of Labor, updated September 17, 2025. <https://askjan.org/topics/costs.cfm>

Prevent Liability: Build Neuroinclusive Workplaces

- Education and Shared Language
- Accommodation implementation
- Performance management
- Manager communication
- Hiring & onboarding
- Training
- Feedback & evaluation
- Return-to-work
- Self-management & self-advocacy
- Universally offering basic accommodations

Neuroinclusive Communication Resource



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About the Presenter



Julie A. Reddig

Employment Attorney

Lerch, Early & Brewer

T 301-961-6099

F 301-347-1788

jareddig@lercheearly.com

Employment attorney Julie Reddig provides advice and counsel that helps employers build and maintain productive workplaces. She helps them navigate the many federal, state, and local laws that protect employees in the workplace.

Julie also defends employers against employment claims filed before administrative agencies as well as the local, state, and federal courts in Maryland and the District of Columbia.

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Jane Singleton

Founder & Strategy Consultant

Launchpad for Life

www.launchpadforlife.org

jane@launchpadforlife.org

Jane Singleton is the founder of Launchpad for Life. She offers:

- 1:1 Leadership Coaching and Team Facilitation
- Customized Workshops and Accommodation Implementation Support
- Consultation on neuroinclusive design for performance systems & training
- Speaking Engagements



The next session will begin shortly

Document, Document, Document

Creating Records to Memorialize and Defend Your Employment Decisions

Presented by:

Jase Tilley, Tiffany McClease, Mason Navarrete

Employment & Litigation Associates

Lerch, Early & Brewer

What to document in the normal course of employment?

Employee Handbook/Policies

Provides:

- Clarity and consistency
- Legal Protection
- Framework for Action

Tip: Require employees to sign a policy/handbook acknowledgment of receipt

Job Descriptions

- **Should include:**
 - Title of the position
 - Essential functions
 - Ancillary or other duties and responsibilities
 - Physical restrictions or requirements
 - Name or title to whom the position reports
- **Sets Expectations**
- **Supports Employment Decisions**

Tip: Evaluate and update job descriptions regularly and have employees sign an acknowledgment of receipt.

Personnel Files

- **Includes:**
 - Resumes/application forms submitted by applicants
 - Records dealing with hiring (i.e., interview notes, screening tools/tests), promotion, demotion, transfer, lay-off or termination
 - Leave records
 - Rates of pay, compensation, tenure
 - Selection for training or apprenticeship, or other terms of employment
 - Requests for reasonable accommodation
- **Tip- Medical documentation should be treated as confidential and kept separate from the personnel file.**

Performance Standards/Reviews

- Effective performance management requires putting employees on notice of what's expected of them and letting them know when they fall short.
- Employers should conduct performance reviews in the normal course of employment. Don't wait until issues arise to review performance.

Training Records

- **Legal Compliance**
- **Proof of Equal Access**
- **Proof of Good Faith Effort**

Timekeeping Records

- Under the **Fair Labor Standards Act (FLSA)**, every employer that employs Non-Exempt employees must maintain payroll and timekeeping records.
- **Includes:**
 - Payroll records
 - Collective bargaining agreements
 - Sale and purchase records
 - Wage computation records: Timecards, piece work tickets, wage rate tables, work and time schedules, records of additions to or deductions from wages
- If an employer fails to maintain a record of an employee's hours worked, it may not complain of inaccuracies in its employee's records as a basis for denying relief.

Other Documentation

- **EEO-1**
 - Covered employers must record and file workforce demographic data
 - There is a Notice of Proposed Rulemaking to eliminate the EEO-1 reporting requirement; however, the obligation continues until a final rule is issued.
- **FMLA Records**
 - Includes: leave dates and hours, employee leave requests, medical certification forms, and fitness for duty reports
- **Form I-9**
 - Used to verify an employee's identity and eligibility to work in the United States. It should be kept separate from an employee's personnel file.
- **Office of Federal Contract Compliance Programs (OFCCP) records**
 - Affirmative action plans for individuals with disabilities and protected veterans
 - As of September 21, 2026, federal contractors should no longer use OFCCP's self-identification of disability form CC-305

What should employers document when things are not going well?

Performance Review: Accuracy and Specificity

- Evaluate employee against communicated duties, standards, and expectations.
- Record both strengths and material deficiencies.
- Avoid inflated ratings that conflict with later discipline or termination.
- Use specific examples, dates, assignments, and expected outcomes.

Tip: The review should reflect actual performance, not the manager's desire to avoid a difficult conversation.

Preserving the Underlying Performance Record

- Client complaints, inaccurate communications, missed deadlines.
- Supervisor emails outlining deficiencies or concerns.
- Notes of informal coaching and counseling.
- Work samples.

Tip: Document the event, the expectation, the impact, the employee's explanation, and the follow up.

Performance Improvement Plans

- Define the deficiency and cross reference any written expectations, policies, or job performance requirements outlining required conduct.
 - Identify required improvement and how it will be measured.
 - Set realistic goals, deadlines, and identify available support.
 - Document meetings, employee responses, and progress.
 - State the consequences of failing to meet expectations.
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- **Tip: Use a PIP only if the employer (and their manager) is prepared to retain the employee if the employee meaningfully satisfies it.**

Documenting Adverse Actions

- Memorialize the decision date, decision makers, and information considered.
 - State the legitimate business reason in clear, consistent terms.
 - Preserve documents supporting decision.
 - Outline any prior corrective steps taken (such as a PIP).
 - Identify any standards or policies violated.
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- **Tip: If the decision is made Monday but communicated Friday, document the Monday decision on Monday. Timing matters when protected activity occurs between the internal decision and the employee-facing communication.**

Consistency Across Employees

- Use common forms and processes.
 - Apply the same or similar standards to similarly situated employees.
 - Train managers on rating scales and disciplinary language.
 - If there are legitimate considerations making some situation unique, that should be documented.
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- **Tip: Consistency means using a defensible process and explaining material differences, not forcing identical outcomes.**

Complaints and Investigations

- Promptly record the complaint
 - Document supporting information:
 - Identify witnesses
 - Relevant documents
 - Document investigation steps:
 - Witness interviews
 - Documents considered
 - Record conclusions, basis for conclusions, and corrective action taken (if any).
-
- **Tip:** Be prompt, neutral, consistent, and specific. Separate facts, credibility assessments, and conclusions

What not to document

- **Editorial thoughts or personal opinions on employees:** Be neutral, objective, and fact specific.
- **Avoid extreme statements:** “always,” “never.” Employees can use one or two examples of contrary activity to undermine employer credibility.
- **Protected characteristics:** mentioning age, race, gender, religion, or medical issues as part of an evaluation process.

What should employers keep, and when does the retention clock stop?

Offboarding: Preserve Before You Purge

- Coordinate HR and IT before deleting a departing employee's email, files, or devices.
- Do not auto-wipe laptops or phones or reassign mailboxes on the last day.
- Give extra care to departing HR staff, managers, and decision-makers.
- Flag any employee with a complaint, accommodation request, leave, or dispute.

Example: An employee claims he worked unpaid overtime until 10 p.m. every night. Email showing no activity after 6 p.m. is strong evidence, but only if it still exists.

Tip: Build an HR/IT checkpoint into every separation before anything is deleted.

The Trigger: When the Duty to Preserve Begins

- The duty starts when litigation is **reasonably anticipated**, not when a lawsuit is filed.
- Common triggers:
 - Demand or preservation letter
 - EEOC, MCCR, or agency charge; subpoena; lawsuit
 - Internal complaint of discrimination, harassment, or retaliation
 - Contentious termination or threat to “call a lawyer”
- Once triggered, the hold overrides your normal deletion schedule.

Tip: When in doubt, escalate to HR or counsel the same day.

After a Trigger: Implementing a Litigation Hold

- Notify counsel and identify key people, time period, and issues.
- Have IT suspend auto-delete, email purges, and device wipes for those custodians.
- Send a written hold notice to custodians and get signed acknowledgments.
- Cover email, texts, Teams/Slack, shared drives, HR files, payroll, and time systems.
- Preserve good and bad documents. Do not edit, rename, or “clean up” files.
- Re-send reminders and keep the hold in place until counsel releases it.
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- **Tip: Know your auto-deletion settings now, before you ever need to turn them off.**

Retention Floors: Personnel and Pay Records

Record	Source	Minimum Period
Personnel records (hiring, promotion, discipline, accommodation requests, termination)	EEOC regulations (Title VII, ADA, GINA)	1 year from record or action; 1 year after involuntary termination
Payroll records	FLSA; Maryland Wage & Hour Law	3 years
Time cards, schedules, wage-rate tables	FLSA (Maryland: hours worked, 3 years)	2 years (3 years in Maryland)
Wage and separation records	Maryland unemployment regulations	5 years from end of calendar quarter

Tip: When more than one rule applies, keep the record for the longest period.

Retention Floors: Leave, I-9, and Safety

Record	Source	Minimum Period
FMLA leave records (medical certifications kept separately and confidentially)	FMLA	3 years
Form I-9	Immigration law (IRCA)	Later of 3 years after hire or 1 year after separation
OSHA 300 log, 300A summary, 301 reports	OSHA	5 years after end of calendar year
Records related to an EEOC charge	EEOC regulations	Until final disposition, including appeals

Recommended Practice

- Adopt a written schedule by record type, with an owner and start date for each.
- Start the clock at separation for most personnel records.
- Keep key records through the limitations period (often 3 years in Maryland), not just the regulatory minimum.
- Follow your own policies too. If your policy says 7 years, keep it 7 years. Inconsistency raises red flags.
- Destroy on schedule, consistently, and log it. Keeping everything forever is its own risk and is often more harmful than helpful.
- **Tip: Selective or inconsistent deletion looks worse in court than a consistent schedule.**

Practical Rules: Retention Takeaways

- **Know the floors.** Keep each record for the **longest** applicable period.
- **Follow your policy.** Your own retention policy is a promise, **not a suggestion.**
- **Offboard carefully.** No deletion without an HR/IT checkpoint. Ensuring HR and IT are working closely is very helpful.
- **Recognize the trigger.** The hold starts at reasonable anticipation, not the lawsuit.
- **Stop the auto-delete.** Suspend purges for anyone tied to the dispute.
- **Call counsel early.** A prompt, documented hold is your best defense.

Questions?

Thank You!

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About the Presenter



Jase B. Tilley III

Employment Attorney

Lerch, Early & Brewer

T 301-657-2719

F 301-347-1788

jbtalley@lercheearly.com

Jase Tilley works on a variety of cases ranging from [probate matters](#), disputes over business relations, corporate transactions, and insurance disputes.

Results-oriented and determined, Jase's approach to his practice is to focus on exactly what the client's objectives are and then to devise a litigation strategy that is practical and effective in order to achieve those results. He is dedicated to finding the best outcome for each client based on their individualized needs and expectations.

About the Presenter



Tiffany N. McClease

Employment Attorney

Lerch, Early & Brewer

T 301-657-0744

F 301-986-0332

tnmcclease@lerchearly.com

Tiffany McClease is an employment attorney who represents clients in a wide range of labor relations, employment litigation, and workplace safety matters in Maryland. In her practice, Tiffany represents employers in cases arising under Title VII, FMLA, ADA, and FLSA, and provides strategic legal counsel and advice to employers on discipline, performance management, misconduct investigations, reasonable accommodations, and workforce restructuring.

About the Presenter



Mason Z. Navarrete

Litigation Attorney

Lerch, Early & Brewer

T 301-657-0186

F 301-347-1788

mznavarrete@lercheearly.com

Mason Navarrete is a litigation attorney who helps clients resolve disputes across the Washington, D.C. metropolitan area.

Mason represents individuals and businesses in complex business, estate, and employment litigation. He also regularly handles commercial landlord-tenant matters for landlords throughout the region.

The next session will begin shortly

An Insider's Perspective

How Trump 2.0 Is Impacting the Workplace

Presented by:

Jim Hammerschmidt and Victoria Lipnic

An Insider's Perspective: How Trump 2.0 Is Impacting the Workplace

Lerch, Early & Brewer and Resolution Economics

What the heck is going on at the EEOC?



Are you a white male who has experienced discrimination at work based on your race or sex?

You may have a claim to recover money under federal civil rights laws. Contact the @USEEOC as soon as possible.

The EEOC is committed to identifying, attacking, and eliminating ALL race and sex discrimination — including against white male employees and applicants.

Visit [EEOC.gov](https://www.eeoc.gov) to learn more and read our one-page explainer about DEI-related discrimination.



Every day, American workers face discrimination simply because they're American.

Laid off and told to train your replacement—a guest worker visa holder? Passed over, excluded, or harassed just because you're American?

That's national origin discrimination. It's illegal, and the EEOC is fighting back to protect workers of ALL races who are American.



Trump v. Slaughter

- The Ruling: Supreme Court ruled 6-3 on June 29, 2026
- Precedent Overturned: Overruled the 91-year-old *Humphrey's Executor v. U.S.* (1935)
- Core Principle: Congress cannot constitutionally shield executive agency leaders with for-cause removal protections

Data Collection

- July 21, 2026 – Commission Voted to Issue NPRM to Rescind EEO-1 Reporting.
- Elimination of EO 11246.
- Reconciling Shift in Federal Law With Other Employer Needs for Data Collection.



Andrea Lucas, member to be a member of the Equal Employment Opportunity Commission, testifies during a Social Security, Education, Labor, and Pensions (SLELP) Committee hearing on June 28, 2025, on Capitol Hill in Washington. (AP Photo/Michael Johnston)

Department of Justice Memo to EEOC

- July 9, 2026, the DOJ Office of Legal Counsel Issued a Memorandum for the EEOC Chair.
- Opines that EEOC's Title VII Guidelines Are Unconstitutional Because They Contemplate Liability Based on Disparate Impact.



An Insider's Perspective: *How Trump 2.0 Is Impacting the Workplace*

FEDERAL ENFORCEMENT SNAPSHOT

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Four Major 2026 Settlements

A side-by-side view of the government's enforcement theories, monetary impact and challenged conduct

IBM \$17.1M CASH SETTLEMENT False Claims Act DOJ THEORY Employment practices allegedly considered race, color, national origin or sex. FEDERAL CONTRACTOR	PayPal ≈ \$30M ECONOMIC VALUE Equal Credit Opportunity Act DOJ THEORY Race and national-origin preferences in a business investment and support program. FINANCIAL OPPORTUNITY	Deloitte \$21.5M CASH SETTLEMENT False Claims Act DOJ THEORY Alleged race- and sex-based employment practices while certifying federal-contract compliance. FEDERAL CONTRACTOR	Accenture \$25M CASH SETTLEMENT False Claims Act DOJ THEORY Race or sex allegedly considered in hiring and promotion to advance workforce-composition goals. FEDERAL CONTRACTOR
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Source: U.S. Department of Justice announcements and settlement materials (2026)

Amounts and descriptions reflect DOJ's stated allegations; settlements generally resolve claims without adjudication.

Trump 2.0's Approach to Other Significant Developments

- Artificial Intelligence and Automated Decisions
- Independent Contractor Classification
- Joint Employer
- Keith Sonderling's Pending Nomination as Secretary of Labor

Thank You!

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About the Presenter



Jim R. Hammerschmidt

Employment Attorney

Lerch, Early & Brewer

T 301-841-0189

F 301-986-0332

jrhammerschmidt@lercheearly.com

Jim Hammerschmidt's practice includes a range of commercial, corporate, and employment counseling and litigation in Maryland and the District of Columbia. Jim has extensive experience representing and counseling clients on employment law issues. He represents clients in federal and state courts, as well as before agencies such as the EEOC, Department of Labor, and local and state human rights commissions and labor departments.

About the Presenter



Victoria A. Lipnic

Partner

Resolution Economics

T 202-769-2426

vlipnic@resecon.com

Victoria Lipnic is a Partner at Resolution Economics. She leads the Company's Human Capital Strategy Group. The Human Capital Strategy Group combines the Company's expertise in data analytics and deep knowledge of regulatory requirements with an interdisciplinary approach to advising organizations on the full range of their human capital needs and reporting requirements, including recruitment, selection, promotions, DEI&A, pay equity, and overall talent allocation.

The End!