



FLOYD SKEREN MANUKIAN LANGEVIN **Fisher Phillips**
ON THE FRONT LINES OF WORKPLACE LAW

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Off to Work we Go

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Entering the World of Yesterday, Tomorrow and Fantasy: Artificial Intelligence and the Impact it Will Have on the Workplace

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What is AI?

- Oxford English Dictionary - "the theory and development of computer systems able to perform tasks normally requiring human intelligence, such as visual perceptions, speech recognition, decision-making, and translation between languages."
- In short – think, learn & decide
- Employees throughout the U.S. - "huge threat."

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AI - Major Element of The Fourth Industrial Revolution (4IR)

- "The AI revolution, will lead to . . . no more need to perform routine, limited value, jobs. The workforce and the underlying employment models, will move from **long-term, full-time employment agreements**, to flexible, selective premium services offerings."
- "A robot and an intelligent algorithm cannot become ill, have children or go on strike and is not entitled to annual leave . . . and works reliably and constantly in danger zones and during the night."
- 65% of Americans expect that, within 50 years, a robot or intelligent algorithm will be doing their work.

George Krasadakis, AI: *The Impact on Employment and the Workforce*, MEDIUM (Jan. 17, 2018), <https://medium.com/innovation-machine/artificial-intelligence-3c6d80072416>.

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Overview of How AI is Impacting the Workplace

- Reductions in Force (RIF)
- Union Context
- Autonomous Vehicles
- OSHA
- Screening and Hiring
- Assessing Employee Data (Smartwatches)

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Reductions in Force

- AI algorithms and robots are replacing human workers.
- Employers may ultimately engage in mass layoffs and RIF for efficiency and cost-savings.

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WARN Acts and miniWarn Acts

- **WARN Act Requirements**
 - Generally covers businesses with 100 or more full-time employees (or 100 or more part-time with additional requirements)
 - Requires 60 days' written notice of a plant closing or mass layoff to:
 - Affected non-union employees
 - Representative of those employees
 - State or entity designated to carry out rapid response activities; and
 - Chief elected official of local government where closing or layoff occurs
- **miniWARN Acts**
 - CA, IL, MD, NJ, NY, TN, WI

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Avoiding RIF Liability

- Request a seat at the table
- Consider voluntary ADEA-compliant termination plan.
- Comply with WARN Act and miniWarn Acts.
- Consider whether reductions or plant closings require mandatory bargaining.
- Encourage employers to communicate positive aspects of automation (effect on workplace morale)

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Union Considerations

- “People Before Robots”
- **September 2018**– Transportation Workers Union of America launched campaign and threatened large strike over driverless buses coming to Columbus.
- TWUA argues buses could put roughly 17,000 Ohioans out of work.

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“People Before Robots”

- Strike shows that human element of the job remains a hot topic.
 - Ex: Driverless buses cannot detect on-board physical threats, medical emergencies, or even suspicious packages.
- Labor Implications:
 - Potential duty to bargain over:
 - Decision to eliminate jobs when implementing AI;
 - Effects the change will have on employees

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Autonomous Vehicles (“Offices on Wheels”)

- AV is not a question of if, but when.
- States clearing way for AV’s to be tested and driven.
- **Lyft**– Over 5,000 driverless rides completed in Las Vegas alone.
- Potential wage and hour (tracking hours worked)
- Potential ADA accommodation issues (is driving an essential function still?) for employers.


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OSHA Concerns

- Currently no OSHA standards for robotics industry.
- However, employers must still conduct “hazard assessments” and implement “hazard controls.” 29 C.F.R. § 1910.132(d).

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OSHA Concerns

Limiting Liability

- Enlist assistance of OSHA-trained attorney when implementing AI.
- Employer should develop basic understanding of robot’s potential hazards.
 - Robot decision tree
 - Possible response options
 - Shut down
- Know whom to contact when robots misbehave.
 - Error in programming logic
 - Engineers, not HR

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AI in Screening and Hiring

Traditional Pre-Employment Screening Tools

- Application
- Credentials verification
- Past employment verification
- Reference checks
- Background checks
- Credit reports
- Social media
- Drug testing
- In-person interview


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Advantages of AI in Screening and Hiring

- **Recent LinkedIn Survey (2018)** - majority of companies now use data screening of some sort for employment decisions.
- **Advantages**
 - Speed
 - Predictive capacity
 - Consistent application of data/characteristics


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Examples of AI in Screening and Hiring

- Filtering large pools of job applicants
- Auto-screening resumes
- AI-powered recruiting assistants to facilitate applicant questions and communication
- Social media search to fill gaps in candidate profiles
- Neuroscience-based computer games to determine who interviews
- AI conducted and recorded interviews (analyzes key words, speech speed, body language, etc.)


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AI Has Potential to Increase Workplace Diversity

- AI can act as a “devils advocate,” to combat bias and groupthink
- AI can “cut out” human bias and detect cultural sensitivities
- Still, current underlying trend remains using AI to cut costs and beat competitors


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Limitations of AI in Screening and Hiring

- **Unconscious Bias Issue**
 - What traits, skills, or characteristics do you code into the hiring program?
 - From what source?
 - Algorithms are written by humans
 - AI learns as more info (even biased info) is added
 - Litigation risk as no explaining how AI arrived at a particular decision

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Why Does this Matter?

Legal Exposure

- Programming limitations and inherent biases may lead to discrimination lawsuits or other legal challenges.
- Unintentional Decisions → Disparate Impact Claims
 - Distance from jobsite
 - Reputation of universities
 - Previous hiring decisions
- Already talk of a “Universal Design”
 - Transparency of data use
 - Explainability of decision making
 - Data collection controls


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Case Study– Amazon (Previous Hiring Decisions)

- **2014** - AI tool built to speed up recruitment
- Automatically ranked and rated resumes
- Data used to train tool drawn from resumes of previous hires (mostly men)
- Consistently ranked resumes featuring the word “women” poorly
- Tool essentially “learned” that Amazon did not want to hire female applicants

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Considerations in Limiting AI Exposure in Hiring

- Ensure proper and relevant data used when developing AI systems to assist with screening and hiring.
- Utilize AI instead of human intelligence to reduce risk of human biases.
- Use screening filters specific to position you seek to fill.
- Review any voice-recognition programs to ensure compliance with disability and ethnicity/national origin issues.
- Encourage employers to supplement AI use by personally screening applications.
- Supplement AI by screening manually if possible.

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Dangers of AI in Wearable Technology

- Wearable technology (i.e., Apple Watch, Fitbit, etc.) increasingly prominent in private life.
- AI can be used in workplace to catalog and assess employee data and even to develop employee wellness plan.
- Systems can track worker movements and identify inefficiencies.

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Dangers of AI in Wearable Technology

- In workplace, wearable AI raises privacy, security concerns, and HIPPA concerns.
- Privacy – Monitoring employee locations, email, and telephonic communications
- Security – data breaches
- HIPPA – limits on data collection, how information can be used, who it will be shared to, and notice that must be given.


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Managing Employee Privacy Concerns

- Employees have a “reasonable expectation of privacy.”
- So far, courts have not found that tracking employees’ locations in public areas violates their privacy rights.
- Some states do still require businesses to obtain worker consent before monitoring employee location.

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Monitoring Employee Locations and Communications

- Consider creating clear privacy policies that provide:
 - Notice of tracking
 - Business reasons for doing so
 - Methods for safeguarding employee data
 - Limits on monitoring (i.e. tracking only during working hours)
- Obtain employee acknowledgment consenting to the monitoring.
- Disclaim any expectation of privacy in use of company systems.


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Other Workplace Implications

- Employers need skilled workers to make the most out of AI
 - Training workforce to use AI (i.e. offshore drilling, medicine)
- Reputational considerations
 - Dual use of AI can be a PR nightmare
 - CEOs now implementing technology with potential use for things such as warfare (i.e. drones)

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Integrating AI into your interaction with the Employment Lawyer

- Discovery in employment litigation produces staggering amount of data.
- Lawyers expected to locate and review efficiently.
- AI analyzes larger quantity in faster amount of time.

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Integrating AI into your interaction with the Employment Lawyer

Sources HR must think about at the beginning of a case or in providing information to lawyer when seeking counsel

- CRM data
- Slack
- Email
- Texts
- Computer sign offs/on
- Security badge data for entering/exiting

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Final Questions?

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