IN-HOUSE COUNSEL’S
IMPORTANT ROLE IN THE AGE OF
ARTIFICIAL INTELLIGENCE

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More and more organizations are using or expanding their use of artificial intelligence (AI) tools and other advanced technologies in the workplace. Despite AI’s proven potential for enhancing efficiency and decision-making, it has raised a host of legal implications for employers.

What is AI?

Artificial intelligence, defined very simply, involves machines performing tasks in a way that is intelligent. The AI field involves a number of subfields or forms of AI that solve complex problems associated with human intelligence—for example, machine learning (computers using data to make predictions), natural-language processing (computers processing and understanding a natural human language like English), and computer vision or image recognition (computers processing, identifying, and categorizing images based on their content).

How are employers using AI?

One area where AI is becoming increasingly prevalent is in talent acquisition and recruiting. For example, some employers use AI “interview bots,” which evaluate personal characteristics such as an applicant’s facial expression, body language, word choice, and tone of voice. The software then provides employers with feedback that can be used to evaluate whether to hire a candidate. Additionally, AI tools are powering many of the increasingly common employee self-service tools that allow for quicker, more efficient answers to common employee relations questions.

What legislation applies to the use of AI in the workplace?

Though the pace of legislation has been fairly slow, there are signs that this may be changing. A number of city, state, and federal regulations have been proposed or enacted with a goal of eliminating potential discrimination and increasing transparency related to AI. For example:

- **Facial Recognition Software Bans:** In September 2019, the California legislature temporarily banned the use of facial-recognition software in body cameras and the ban will become permanent if Governor Newsom signs AB1215. Technology friendly San Francisco also banned the use of facial recognition software by police and other government agencies. These bans do not apply to private entities but may signal a trend of increasing limitations on technology that might affect private employers, such as local or state legislatures precluding the use of certain biometric devices for certain workplace uses.

- **Illinois’ Artificial Intelligence Video Interview Act,** which takes effect on January 1, 2020, is a first-of-its-kind measure that imposes restrictions on employers’ use of some AI interviewing programs. The Act requires employers to notify applicants about the use of AI technology and obtain applicants’ consent to its use. Employers must take certain defined steps before asking applicants to submit to video interviews; the law also imposes additional requirements with respect to how the data collected by the AI program is stored and maintained.
Considerations for Employers

As AI expands into modern workplaces, employers may want to consider the following questions to ensure legal and regulatory compliance from a labor and employment perspective:

- **Is data being collected, stored, or transmitted through AI technology?** Many AI systems collect, store, and/or transmit enormous amounts of data—often sensitive data. Various international, federal, and state rules and the common law govern the collection, storage, and movement of data, as well as privacy rights.

- **Is AI technology changing employees’ terms and conditions of employment?** The use of AI may lead to changed working conditions, from minor workflow alterations to more significant changes like the displacement of employees through layoffs or reductions in force. In a unionized workforce, many changes to the terms and conditions of employment are subject to the collective bargaining process. Also, changes to working conditions for unionized or non-unionized workers may implicate state and federal laws like the Worker Adjustment and Retraining Notification Act of 1988, which mandates notification obligations before certain types of workplace employee reductions.

- **Is AI technology changing the physical working environment?** Under the Occupational Safety and Health Act, employers have a legal duty to maintain a safe workplace, and there are specific standards for employers utilizing robotics to ensure that the technology is safe for employees. Depending on the nature and function of the technology at issue, various additional federal and state workplace safety laws may also be implicated.

- **Is the technology affecting employment-related decision-making?** Employers who use AI either directly or indirectly to make employment-related decisions should evaluate employment discrimination risks by, for example, understanding the data used to build out and/or train the AI at issue and regularly auditing decisions made through the use of AI. The information used to structure an AI algorithm could be unintentionally biased, which could potentially lead to discrimination claims by employees and/or applicants.

- **How is the use of AI communicated to the workforce?** The use of AI and advanced technologies in the workplace may present weighty employee relations challenges. Employees are often curious, concerned, or anxious about what technological developments will mean for their jobs. Considerations surrounding communication, timing, and information sources are important components of human resources professionals’ role relating to technology in the workplace.

Jenn Betts and Ruthie Goodboe are the hosts of Ogletree Deakins’ “Tech-Tuned Workplace” podcast series. You can learn more about AI in this podcast episode: Tech-Tuned Workplace, Episode 2: Artificial Intelligence and Its Impact on the Workplace, or visit our podcast page to access all Ogletree Deakins podcasts.
In-House Counsel’s Important Role in the Age of Artificial Intelligence

In 1984, moviegoers watched in awe as the ‘sci-fi’ spectacle of Arnold Schwarzenegger unleashed havoc on LA from the back of a Harley Davidson in ‘The Terminator’: “part man, part machine, underneath, it’s a hyper-alloy combat chassis, microprocessor-controlled, fully armored; very tough. But outside, it’s living human tissue; flesh, hair, blood- grown for cyborgs’.

What was once a humorously fanciful and nightmarish vision of the future is the new reality, with defense contractors around the world creating cyborgs to equal the second and third generation of the Terminator.

Even if it’s not in the form of a square-jawed Austrian weightlifter with an Uzi 9mm most lawyers will be familiar with the regular press warnings that artificial intelligence (“AI”) will be coming for them some time soon. What does this mean for the role of the lawyer in the future, and, more specifically, for that of the in-house counsel?

Firstly, it is worth distinguishing true AI from some of the computer functions that are routinely referred to as AI, but which are often simply retrieving information automatically from a database or the ability of computers to operate within a fixed set of parameters e.g. by playing a game with preset rules, such as Solitaire. True AI has been made possible by high-speed computing, access to big data and advanced algorithms. True AI is the ability of machines to learn based on experience, as a human does, and to extrapolate the potential consequences of decisions and processes that it undertakes without human instruction.

The European Commission has even attempted to set down a generally accepted definition as follows:

“AI refers to systems that display intelligent behavior by analysing their environment and taking actions- with some degree of autonomy – to achieve specific goals”

In 2016 an Oxford University study entitled, “The future of employment: How susceptible are jobs to computerization” predicted that the chance of lawyers being made redundant by technology in the following 20 years was approximately 3%. In contrast, low-skilled jobs such as telesales faced a 93% chance of being made obsolete by AI over the same period. A survey of the attitudes of the legal profession in Europe conducted by Thompson Reuters in 2018 showed that 67% of EU lawyers expressed confidence in their ability to experiment with legal AI solutions. It seems, therefore, that lawyers and AI are destined to coexist together in the professional sphere for some time to come, so what then may be the advantages to the profession of adopting AI technologies?

Reduction in routine tasks

Currently, AI is most evident in the legal sphere in tools available to assist lawyers, and in house counsel in particular, to carry out routine tasks such as filling in standard forms, contract reviews, due diligence and disclosure exercises. To some extent, AI may be better at these types of repetitive and routine tasks, which by their very nature can dull the attention span or prove
sleep inducing! AI is increasingly freeing up valuable time from routine tasks leaving only sophisticated legal analysis to be completed by skilled legal staff.

The reduction in routine tasks, whilst unlikely to make lawyers redundant may, however, see a reduction in the size of legal teams as there is less lower value work to filter down to junior lawyers and paralegals particularly in the in-house environment. In-house lawyers will therefore have train up their team to work smarter sooner. They will also have to become masters of the technology including bots that they will be ‘supervising’.

Legal Research

The use of predictive algorithms and intelligent linking programs is already increasing the speed and efficiency with which legal research can be conducted, and, as these systems evolve through greater exposure to legal databases, the accuracy with which they are able to identify resources relevant to a case or project will only increase. AI has the ability to analyze data to help find relevant case law and to find helpful arguments. There will, however, remain a role for the trained legal professional in ascertaining the authoritative legal sources from those that are merely persuasive particularly within common law jurisdictions.

Litigation Strategy

Further, for in house lawyers whose companies are litigious the use of AI to cross-reference matter files, industry data, and lines of argument that have proven successful or unsuccessful in previous cases has the potential to allow for sophisticated estimates of successful litigation outcomes to be formulated.

AI can be used in assessing the outcome of a case and the risks or advantages of settling by analyzing how similar cases were decided or what damages were paid. Of course, there may well be the decisive unique point of difference that it will still take the human brain to spot and assess.

So when combined with enhanced spend analysis AI will allow corporate counsel and their partner firms to make better tactical decisions and avoid wasted litigation costs and risk exposure for their businesses.

Contract Assembly, Review and Analysis

AI has also proven itself valuable to lawyers in the field of contract construction and analysis. Simple, standard form agreements can now be constructed in a minimal timescale via use of databases of key clauses that can construct standard documents with very minimal parameters input by human operators.

AI can also reduce time spent on contract analysis by scanning agreements and comparing them against a data bank of key clauses normally found in like agreements. This then provides a human analyst with a set of red flags found in a contract by the computerized systems. Whilst not a substitute for skilled legal analysis these systems augment the work of counsel by minimizing time spent on onerous tasks like document review.
Rather than using generic sample precedents from scratch or the ‘one you used last time’, AI can scan hundreds of thousands of documents within seconds to find one closest to your current needs. With the use of anonymization this could be not only the work of internal colleagues by possible from a whole industry sector through shared platforms.

**Increased oversight of billing and legal risk**

In house counsel and the firms they instruct, now have access to a wealth of billing and time recording data that can be tracked and analyzed to provide ever more detailed cost estimates and utilization rate projections for large legal projects based on cross-referencing of data from previous cases. Algorithms be used to adjust pricing structures according to large data sets rather than the traditional method of negotiating fees on an ad hoc basis with limited experience to guide cost estimates.

**Are we ready for AI?**

In a Microsoft UK research paper in 2018 ‘Maximising the AI Opportunity’ only 8 % of HR professionals in the UK believed their organization has an AI strategy in place, and in Deloitte’s Tech Trends 2018 survey only 17% of respondent said they are ready to manage a workforce in which people, robots and AI work side by side and yet by 2036 100,000 current legal roles will be automated.

So have we reached the tipping point for a move towards AI and a reduction in the need for the ever onwards march of the lawyer? If the answer is yes, then it is clear that the challenge of the in house lawyer is to make AI work for them and their corporate client rather than allow AI to control them.

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http://sparshv2/Pages/Home.aspx

**The European Commission Independent High Level Expert Group on Artificial Intelligence**


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Simon is an experienced employment and data privacy law practitioner. He was called to the Bar in 1995, and subsequently qualified as a solicitor while working in the employment and incentives team of a major global law firm. He has advised on the employment aspects of many major international and multi-jurisdictional mergers and acquisitions. He also has a wide range of experience in advising companies on change management, particularly in relation to acquired rights, pensions and benefits. Simon advises on the increasingly complex issues arising on data privacy and data protection in the workplace and is a Certified Information Privacy Professional and a member of the International Association of Privacy Professionals. He is a trusted advisor to many employers on all their people management issues and has particular expertise in investigations including those relating to potential business ethics violations. Simon is a trained mediator and is also a senior reservist officer in the military.
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Rosamund Browne (nee Cresswell) is a qualified lawyer admitted to practice in England & Wales, Hong Kong and Ireland with over 18 years of international experience. Rosamund advises in a general counsel role on employment law (both contentious and non-contentious), regulatory and compliance, corporate governance, data privacy and commercial law issues on a global basis. Her multi-jurisdictional and international cross border experience includes, in particular, Europe, Middle East and Africa, Asia Pacific and Latin America. Rosamund has extensive and genuine experience of a wide variety of sectors, in particular, technology, multi-media, logistics and aerospace, financial institutions and professional service firms (especially legal and accountancy firms). Rosamund also has significant management experience, having established and led a number of teams in both Asia Pacific and Europe. Rosamund was awarded the Association of Corporate Counsel European in house individual employment counsel award in 2016. Rosamund’s team was also nominated for the Association of Corporate Counsel Asia Pacific in house employment and litigation team award in 2011.
Nicholas Clements

A graduate from Columbia University and UC Davis Law School, Nick has been practicing law since 2009. He started as an associate at Seyfarth Shaw, LLP with a focus on labor, employment, and ERISA litigation and counseling. In November 2015, Nick jumped at the opportunity to move in-house with the ridesharing company Lyft, Inc. At Lyft, Nick assists with the Company’s independent contractor/driver litigation and product counseling, and leads the Company’s internal employee counseling and litigation efforts. Nick originally hails from Boise, Idaho and naturally has an affinity for the outdoors. He also enjoys cooking, running, wine and travel.
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Carolyn Knox is a member of the Cross-Border Practice group, which provides our clients with labor and employment law support in more than 100 countries. Carolyn works with clients in a variety of jurisdictions across South America, Europe and Asia-Pacific.

Carolyn has broad experience in both US employment and benefits law, as well as cross-border employment issues. Over the course of her 20+ year career as an employment lawyer, she has practiced in the United States, Europe, and Brazil. In her practice, she regularly provides advice and counsel on cross-border human resources law issues to human resources professionals and in-house employment counsel managing workforces outside of their home country jurisdictions.

Her expertise includes development and roll-outs of global and regional handbooks, the localization and implementation of employment policies and procedures, codes of conduct, workplace audits, employment agreements, commercial representative agreements, workplace investigations, employee and non-employee benefit plans, hiring and termination issues, and M&A due diligence. In addition, her strong litigation background enables Carolyn to identify issues and assist clients in managing litigation outside the United States.