

FROM THE JETSONS TO REALITY, OR ALMOST: WHAT EMPLOYERS NEED TO KNOW ABOUT ROBOTS AND AI IN THE WORKPLACE (PART II)

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Labor, Employment and Workplace Safety Alert

By: David J. Garraux

This is the second article in our series of three focused on the implications of robots and AI in the workplace, and potential areas of risk and exposure for employers. [Our first article](#) focused on employee hiring and termination. This article picks up the discussion with issues relating to wage and hour, collective bargaining/unionization, accommodation of employees under the Americans with Disabilities Act, Workers Compensation and regulatory considerations.

Wage and Hour

Wage and hour issues are a prime source of litigation for employers, whether they relate to individual employees or are styled as putative class actions, potentially involving hundreds, or even thousands, of current and former employees. Enterprising plaintiffs' attorneys have created a veritable cottage industry of wage and hour litigation, embracing both federal and state laws, many of which provide for penalties for violations which can far exceed the wages allegedly not paid.

Robots, of course, do not receive wages or need to keep time records. But humans—who may be responsible for controlling, programming, and/or maintaining robots and other technologies utilizing AI—do. As a result, bringing robots and AI into the workplace does not mean that an employer can dispense with or relax its wage and hour compliance program. Remaining jobs will change (potentially affecting, among other things, exempt status under the FLSA), particularly as to supervisory responsibilities and employees' individual exercise of discretion.

Collective Bargaining/Unionization

Robots, AI, and labor law? While the combination may, at first blush, sound tenuous, it is very real. For example, in mid-2018, thousands of unionized casino workers in Las Vegas announced a strike to protest the rise of automation in the city's casino industry. A strike—which could have cost casinos \$10 million per day—was ultimately avoided when a new contract was reached. In relevant part, the new contract included a pledge from the casino to shun innovations that might lead to a reduction in jobs, required notice of technological implementations that would result in displaced workers, and provided severance packages and retraining opportunities for displaced workers.[1]

A few months later, about 8,000 hotel workers nationwide did strike, in part due to a hotel chain's increasing use of and concomitant loss of jobs due to automation. Like the casino workers, the hotel workers ultimately settled

the strike, but only after the employer agreed to provide significant protections for displaced workers, including reassignment rights for workers whose jobs were eliminated by AI.

As robots and AI continue to infiltrate the workplace, these issues are likely to become more common. Employers should consider the implications of bringing robots and AI into unionized workplaces under existing collective bargaining agreements, and ensure that future agreements include provisions that will reduce the risk of strikes or other business interruptions if robots and AI are used.

Reasonable Accommodations

Another issue to consider is the impact of robots and AI on the employment of individuals with disabilities. Specifically, technologies such as robotic limbs, electrical implants, exoskeletons, self-driving vehicles and even humanoid service robots[2] are either in development or already on the market. These advancements may create unprecedented opportunities for individuals with disabilities, allowing them to work in industries and positions previously closed to them on account of their disability.

From an employers' perspective, these advancements also may impact their obligations under the Americans with Disabilities Act (ADA). As employers are aware, the ADA requires that employers provide reasonable accommodations to disabled employees if necessary to perform the essential functions of the job and if such accommodations do not impose an undue hardship on the employer. There is no exhaustive list of what qualifies as a reasonable accommodation. The analysis is dependent on a number of factors such as the particular employee, his or her limitations, the nature of the position, and the physical workplace.

Practically, some of the more highly sophisticated, emerging technologies—such as exoskeletons and service robots—are unlikely to be deemed "reasonable accommodations" for most employers in the immediate future. Nevertheless, in the future and as these technologies continue to mature, it is likely that the scope of what constitutes a reasonable accommodation will expand, as may an employer's ability to hire individuals previously foreclosed from specific positions on account of their disabilities.

Workers' Compensation

Robots and AI also have implications for employers in the areas of workers' compensation. The issues with respect to workers' compensation are two-fold. First, the technologies described above could potentially reduce workers' compensation claims and accelerate an injured employee's return to duty. According to Liberty Mutual, overexertion (injuries related to lifting, pushing, pulling, holding, carrying, or throwing) has topped the list of the most common workers' compensation injury for years, costing employers \$13.1 billion in 2018.[3] While back and lifting belts have traditionally been used to prevent these injuries, they could soon be replaced by wearable exoskeletons, which are robotic-like suits that promise to prevent injuries and also rehabilitate injured workers. Such exoskeletons are already used in the ship-building and manufacturing industries, and have also made their way, albeit in limited numbers, into the construction sector.

Second, it remains unseen how, if at all, the immunity afforded to employers under applicable workers' compensation statutes will be affected by the use of robots and AI in the workplace. Under the current workers' compensation regime, the employer of an injured worker is typically immune from civil actions brought by the employee or his/her representatives (instead, the employee's exclusive remedy is workers' compensation). This immunity does not extend to third-parties, including manufacturers and suppliers of products that may have caused the injury. If a robot or AI-enabled machine causes an injury, there's little reason to think that the legal

standard will change. As such, will manufacturers and suppliers of robots and other AI-enabled technologies attempt to minimize exposure in their agreements with employers and/or through insurance?

Regulatory Implications

Finally, robots and AI have already received attention from a regulatory perspective. The U.S. Department of Labor, for example, has already issued regulations and guidelines relating to the use of industrial robots and robot safety and the protection of human workers from robots in industrial settings. The FDA, FAA, and NHTSA have also reviewed the issue and have issued rules and guidelines regarding the use of robots in their respective fields of focus. Employers should review these regulations—and ensure compliance with any specific requirements—prior to bringing robots and AI into their workplaces.

Conclusion

As evidenced above, robots and AI present a multitude of issues that employers—whether currently using robots and AI or considering introducing such technologies—should consider. In many cases, the law, as it currently exists, has not caught up with science and may continue to evolve as the use of robots and AI becomes more prevalent.

NOTES

[1] <https://www.casino.org/news/mgm-resorts-ruffles-union-feathers-with-job-cuts-automated-services>

[2] See, e.g., ASIMO by Honda—can assist individuals in wheelchairs perform a host of manual tasks such as opening doors, turning on lights, lifting and carrying package.

[3] <https://viewpoint.libertymutualgroup.com/article/top-10-causes-disabling-injuries-at-work-2019/>.

KEY CONTACTS



DAVID J. GARRAUX
PARTNER
PITTSBURGH
+1.412.355.6580
DAVID.GARRAUX@KLGATES.COM

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