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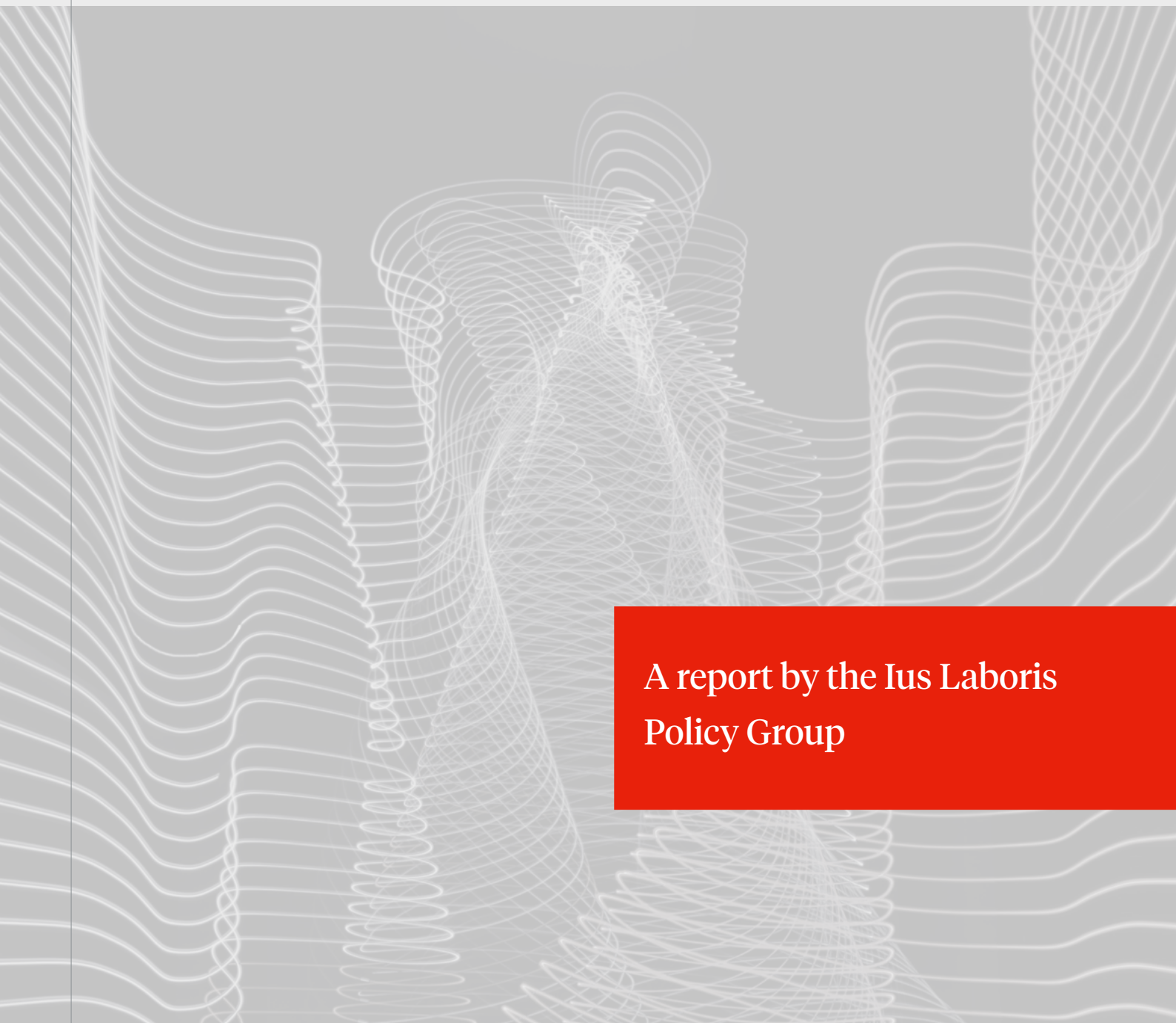
Is employment law ready for AI?



A report by the Ius Laboris Policy Group

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ABOUT THE POLICY GROUP

Ius Laboris is a global alliance of law firms specialising in employment law. In 2022 we created our Policy Group to work with institutional and third-sector partners on policy questions of interest, with a view to promoting best practice in HR around the world.

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IS EMPLOYMENT LAW READY FOR AI?

Introduction

This report is concerned with the use of artificial intelligence through the life cycle of employment: from recruitment, through management of work processes and employee progression or performance management, through to dismissal decisions or selection for individual or collective redundancies.

We do not take a view on the desirability per se of the use of AI systems in any of these areas. Instead, we aim to consider the issues that arise in this context from the perspective of a business with ongoing operations and, by extension, its legal representatives. We aim to show what businesses need to be aware of and assess the extent to which existing legal frameworks are sufficiently flexible to meet the challenges of AI. We consider that these questions are worth exploring given the significant uncertainty businesses face and given that the entry into force of comprehensive regulation in this area, where this approach is favoured, is still likely to be some years away.

The report is in two parts. The first is a research paper setting out some of the legal challenges that arise from the use of AI in an employment context, and can be expected to arise in the future, and identifies a genuine tension between the pursuit of benefits for businesses, on the one hand, and the protection of employees' rights to privacy, freedom from discrimination, and access to good quality employment, on the other. The second part of the report presents the results of a survey of 28 jurisdictions on the state of AI-specific regulation around the world, which considers any existing legal barriers to the use of this technology as well as the extent to which its use is already regulated according to general principles of civil, employment or data privacy law. While we are able to report on a number of proposals for comprehensive regulation, including in the EU, few countries have yet reached the point of enacting AI-specific measures that are legally binding.

A great deal of change is to be expected in this area. Any attempt to look to the future remains, to a considerable extent, speculative. How technology will develop, how it will affect our lives and our work, and the policy choices regulators will ultimately make cannot be foreseen with any certainty. This is not, however, a speculative report. Instead, it aims to provide part of the legal and ethical baseline that is required if certain necessary conversations are to be carried forward with proper regard for the important interests at stake.

AI and employment law

Román Gil
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1. Truth and illusion

Scientifically and technologically, artificial intelligence (AI) has made spectacular progress in recent years. This has been driven by increases in computational capacity ('Moore's Law' suggests that the number of transistors in a microprocessor should double about every two years), and the fact that we have more data than even before upon which to train machine learning algorithms. These build models based on sample data, known as training data, in order to make predictions or decisions without being explicitly programmed to do so. Technology is moving fast in this field.

1.1 LARGE LANGUAGE MODELS

The ability of AI to process natural language (NLP) has undergone a revolution in recent times. The last 4 years have seen spectacular advances in large language models (LLMs) or, as they are sometimes called, 'foundation' or 'base' models. Large language models are algorithms that learn statistical associations between billions of words and phrases so as to be able to perform tasks such as generating summaries, performing translations, answering questions and classifying texts. A base model is a large artificial intelligence model trained on a huge amount of unlabelled data on a large scale (usually by self-supervised learning), resulting in a model that can be adapted to a wide range of downstream tasks. These are gigantic neural networks with billions of parameters that create language representations of extraordinary sophistication.

Humans have many languages: natural languages like English or Spanish, the language of chemical science or the language of mathematics, among many others. We can try to teach machines to represent a given language (for example, a dictionary would be a limited representation of a natural language). A base model is created from one or more languages. From a base model, additional specific models can be created.

Before the developments of the last 4 years, a specific model had to be created for each action an AI was to perform and the model had to be trained laboriously. This meant, for example, labelling a great number of images 'by hand', one by one, if one wished to teach the model the difference between things that are stop signs and things that are not.

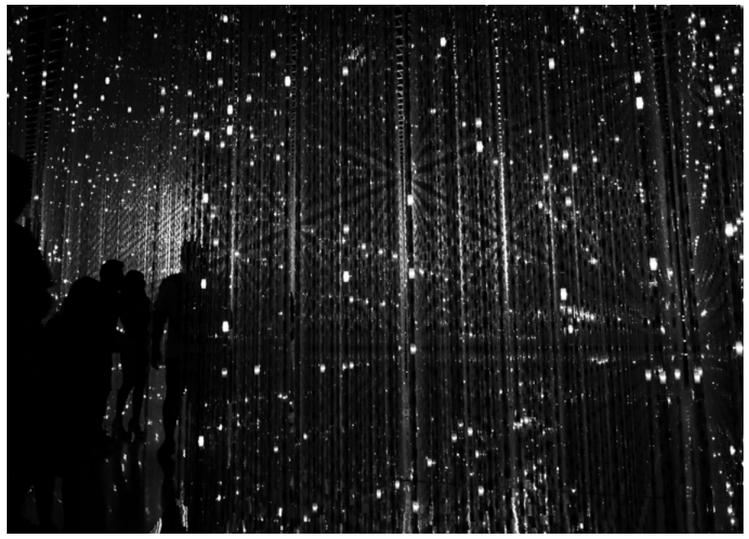
Self-monitoring models are now capable of creating base models. Billions of sentences found on the internet are aggregated. From each sentence a word is extracted. Thus, from the sentence 'a bird in the hand is worth a hundred in flight' we could remove the word 'bird'; but we keep it in the machine's memory as the correct answer. The neural network then has to provide a guess, without, initially, having access to the correct answer, which is stored in its memory; this will be checked later to find out if the guess was correct. This is called self-monitoring. The system learns by trial and error. In the end, it will have created an accurate representation of a language (e.g. general, non-specialised Spanish). That general representation can then be applied to a particular language (e.g. legal Spanish) at 100 to 1,000 times less cost, and with greater accuracy, than would have been possible before these breakthroughs in language modelling. Different languages can also be combined and mixed.

With this we can carry out tasks such as translations, summaries, questions and answers, or dialogues with a chatbot. One of the best-known examples of this is ChatGPT, a chatbot (i.e. a computer program) capable of 'conversing' with a user. This is impressive, of course, but it is still just the recreation, arrangement, modification or processing of what is already there: ChatGPT has no real creative capability.

This is already affecting computer programming. In the future, we will give instructions to AI in natural language, and the AI will simply write the code and perform the required operations. Programming will thereby be democratised. It will be able to translate between languages (and not only between natural languages). It will also correct much of what we do: we will have a dialogue with the AI as we think or write, and perhaps lawyers will ask it to suggest arguments to use in court, or in a negotiation with opposing counsel, or as part of a collective bargaining process. This would be similar to what many language processors do now, but with much more sophistication. More and more processes will be automated, and more will be managed by algorithms.

1.2 WHAT AI CANNOT (YET) DO

However, there are many very important human tasks that AI cannot yet do, and this is unlikely to change in the short (or even medium) term. What we know today as artificial intelligence is not capable of representing the world (i.e. space and time), nor of acting



with what we call common sense (operating in a complex environment in an efficient way), nor can it carry out mental experiments (something so important for science and mathematics). AI is capable of neither prudence (the ability to make the right decision in specific, unique circumstances) nor wisdom (the ability to see, to contemplate the whole). In general, it is incapable of sophisticated reasoning related to abstract ideas. AI, in its current state, is not capable of accurately imagining what will happen in circumstances that are uncommon or unusual. To get things right, it needs to have seen enough precise examples of something happening, according to certain rules. Its usefulness will therefore be limited when it comes to anticipating what will happen in a specific judicial procedure, or with respect to political decisions in moments of crisis, for example. Unsurprisingly, perhaps, algorithms lack non-algorithmic skills.

This is because the progress that is being made is still in relation to what is known as weak or 'narrow' AI. This kind of AI does not claim to have general cognitive capabilities; rather, weak AI is any program that is designed to solve exactly one problem. (Note that some academic sources reserve the term 'weak AI' for programs that do not experience consciousness or 'have a mind' in the same way people do). Strong AI, full AI or general intelligence is the ability of an intelligent agent to understand or learn any intellectual task that a human being can perform. (Again, note that some academic sources reserve the term 'strong AI' for computer programs that experience sentience or consciousness.)

1.3 LEGAL REASONING

The law, and labour law is no exception to this, rarely generates a clear and unique interpretation that could be made subject to an algorithm, except perhaps in the simplest cases (or cases on identical facts). As lawyers know, legal reasoning often considers things on a case-by-case basis, subject to ever-changing variables and specific circumstances, even if this is not always squarely acknowledged. It takes into account things like historical and social circumstances, ideology, modes of thought, and politics, as well as the facts of each specific case.

Consider the following legal example. Judges explain their decisions and lawyers devise their arguments according to norms and practices of legal reasoning. But these explanations and arguments can be imprecise and open to interpretation. Lawyers do not explain why they followed one strategy rather than another. Judges do not always give the reasons that truly motivated their decisions. It is therefore difficult to use the explanations provided to construct an algorithm in the sense described above; that is, a set of instructions designed to solve a problem. However, if a large number of court decisions based on identical or very similar facts are available, a learning algorithm can be trained to propose a solution based on previous decisions. Algorithms could then recommend solutions based on these previous, near-identical cases, but this does not mean that the use of machine learning is the same as legal reasoning, which is a more complex task.

In the past, the development of expert systems, capable of reproducing logical reasoning based on a knowledge base and an inference engine, suggested that these could be used to reproduce legal reasoning. Expert systems rewrite legal rules into computer language, in order to establish a decision tree with various branches related by conditional logic. However, they have generally been considered disappointing in the legal field, even when used to address highly technical issues where it only seems necessary to reproduce relatively simple syllogistic reasoning to reach the correct solution. This relative failure can be explained by the rather reductive reasoning of expert systems. They are unable to consider presumptions or analogies and cannot engage in the constant back-and-forth between fact and law that characterises legal reasoning. Significantly, they cannot deal with (apparently) contradictory rules. This is problematic as legal rules often lack the precision of mathematical rules and include many contradictions.

1.4 A COMPOSITE MYTH

We shouldn't forget that many have good reasons to exaggerate what artificial intelligence is and what it is likely to be today or in the foreseeable future. These are business reasons for those who offer products based on artificial intelligence, and exaggerating what can be done by a product being offered to a potential customer is nothing new in business. The media and entertainment industries have similar incentives: exaggerating and representing our worst fears has always captured our attention. But the truth is that today, we have serious reasons to continue to believe that human and machine intelligence are radically different. A myth circulates that the differences between artificial and human intelligence are only temporary and that increasingly powerful computer systems will erase them. As Erik Larson explains, there are two important aspects to this myth, the scientific and the cultural.[1]

> *"AI is capable of neither prudence (the ability to make the right decision in specific, unique circumstances) nor wisdom (the ability to see, to contemplate the whole). In general, it is incapable of sophisticated reasoning related to abstract ideas.*
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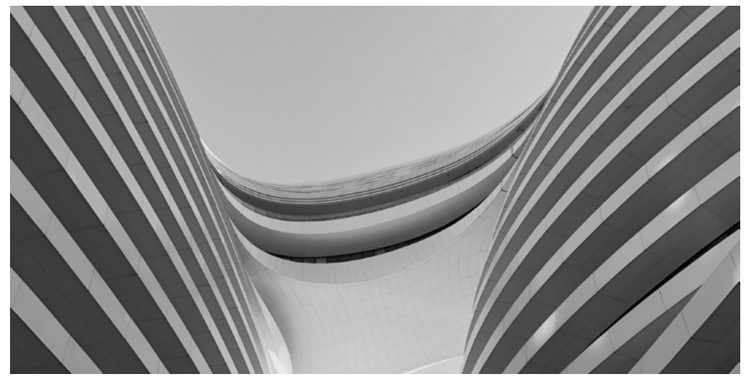
> *Román Gil*



The scientific aspect of the myth assumes that we only need to chip away at the challenge of general artificial intelligence by making progress in the field of narrow artificial intelligence (e.g. in tasks such as gaming or image recognition). This is a wrong inference. Improvements in performing concrete tasks—performing them faster, with more data, say—will not bring us any closer to general artificial intelligence. It will not allow us to leap to common sense, to have a real conversation or see a machine read a newspaper in a human way. There is no algorithm for general artificial intelligence, and it would require scientific breakthroughs that are not yet foreseeable if it were to become a reality. We should not delude ourselves into assuming that we know what we do not know, not least because this belief could well stand in the way of real scientific progress.

For now, machines are capable of two types of inferences. The first is deduction, where a conclusion follows logically from given premises, and the second is induction, where the truth of the premises supports, but does not establish, the truth of the conclusion. Machines are not capable of reasoning by abduction, as humans are able to do. Abduction is a type of reasoning where,

from the description of a fact or phenomenon (but without factual certainty from which to deduce or induce) a hypothesis can be arrived at—a conjecture, the best or most probable explanation—which explains the possible reasons or motives for some circumstance or matter. Abductive reasoning is an essential and unique feature of human intelligence.

Culturally, the myth of artificial intelligence is also detrimental. It would discourage real innovation in this field if we were to assume that the current path is sufficient to achieve general artificial intelligence; if we were to claim, in this way, to know what we do not really know. It is also likely to cause unnecessary fear and concern—apocalyptic anxieties which, when not due to ignorance, often express other fears or interests, and could encourage a twenty-first century Luddism which, like the old version, would not conduce to the economic and cultural betterment of humans.

2. Technological change and employment

2.1 A FOURTH INDUSTRIAL REVOLUTION

There is no doubt that the narrow artificial intelligence that already exists, is developing at great speed and is going to affect employment. As James Maniyika, Google's vice-president of technology and society has recently explained, three things will happen at once as a result of AI development. Some jobs will be created, some jobs will be lost, and some jobs will change.[2]

The Massachusetts Institute of Technology (MIT) has proposed in a recent publication on AI and the future of employment what seems to me a useful strategy for approaching this question. We should start by considering the tasks that make up each particular job and think about which of them can be done better by computers and which can be done better by people. Taking this approach would mean thinking less about people or computers and more about people and computers.[3]

In January 2016, Klaus Schwab, the founder and executive chairman of the World Economic Forum, declared that the world was entering the Fourth Industrial Revolution: 'We are on the brink of a technological revolution that will fundamentally alter the way we live, work and interact. In its scale, scope and complexity, the transformation will be unlike anything humanity has ever experienced before'.[4]

Schwab spoke of the impact of the accelerating rise of computing power and sought to alert the world to its ability to analyse and use data to take and execute decisions about us and for us. His concern was the effect this could have on all aspects of our lives if left unchecked. His aim was to stress the absolute necessity for human beings to take charge of this process and not be mere victims, arguing that 'the response must be integrated and comprehensive, involving all stakeholders in world politics, from the public and private sectors to academia and civil society'.

He concluded with a warning:

> *"In the end, it all comes down to people and values. We have to forge a future that works for everyone by putting people first and empowering them. At its most pessimistic and dehumanised, the Fourth Industrial Revolution may have the potential to 'robotise' humanity and thus deprive us of our heart and soul. But as a complement to the best parts of human nature—creativity, empathy, stewardship—it can also elevate humanity to a new collective and moral consciousness based on a shared sense of destiny. It is incumbent on all of us to ensure that the latter prevails.*
>
> *Klaus Schwab*

His warning was right then and is even more right now. Little more than five years after those words were uttered, the fact is that the Fourth Industrial Revolution is already here. By September 2020, in the EU-27, Norway, Iceland and the UK, more than 40% of companies had adopted at least one AI-based technology and a quarter at least two, with a further 18% planning to adopt AI by 2022.[5]

2.2 THE USE OF AI AT WORK

In the context of workforce management, AI systems are being used to collect and analyse data about workers and to make decisions about them that impact on their working lives. Professor Jeremias Adams-Prassl calls this process 'algorithmic management', and has studied this in the context of working in the gig economy, via digital platforms.[6]

AI-driven management practices are well established for work involving digital platforms. Algorithms operate to match service providers to tasks, monitor their activities, assign ratings (often derived from end-used feedback), offer rewards or take disciplinary measures.

These practices are by no means, however, limited to work done through digital platforms. Work that involves AI is becoming more and more common, and this has been driven, in part, by certain consequences of the Covid-19 pandemic. In June 2020, The Financial Times reported on a survey conducted by the Institute of Student Employers in the UK, which showed that in 2019 only 30% of companies conducted face-to-face interviews at the first stage of the graduate recruitment process.[7] The survey led the Institute to conclude that 'online recruitment may become the new normal'. AI-powered tools are being used at all stages of the recruitment process, from the sourcing of candidates to screening, interviewing and making job offers based on predictive modelling.

The UK Trades Union Congress (TUC) recently investigated the AI-based technologies used in the recruitment of workers. The most commonly-used systems automatically scan CVs for keywords to decide whether to take the candidate to the next stage of the process (17%), carry out automated background checks (16%) or involve 'gaming' (i.e. video simulations and game-based assessment) (14%).[8]

People are not only hired by AI, they are also evaluated, monitored and managed by it. AI-powered tools that enable analytical goal-setting and performance evaluation are also becoming more common. For example, the company BetterWorks offers an AI-based performance evaluation tool that aims to replace the traditional human-driven performance management review processes. The AI is based on a 'working graph', which maps the connection between an organisation's functions, objectives and goals. The process is continuous, with performance analysis being done in real time. Many of the AI platforms mentioned above also offer AI-based tools for team dynamics analysis, personality analysis and team coaching and restructuring.

Gamified training (the use of game-like tasks and experiences, often through simulation) seems to be on the rise. On work platforms it is common for low ratings to trigger a series of 'standard performance tests', where workers are confined to low-value tasks, or simply dismissed. There have been numerous reports in the media of automated processes being used to track and then dismiss people on productivity grounds, as well as reports of human error that can lead AI systems to make unfair termination decisions. There is a trend towards monitoring worker behaviour

in order to collect data that can then be analysed by AI. This has transformed monitoring tools into data sources. Once this data is accumulated, it is often processed by AI to reach conclusions and make decisions about workers.

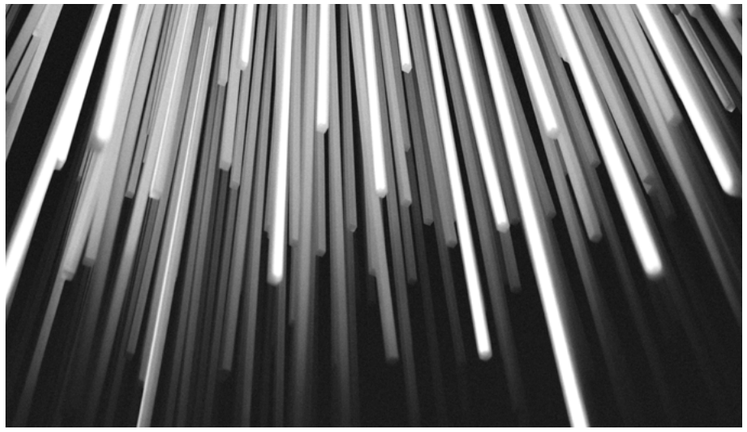
According to the CIPD, it is common for HR professionals to use people data to address important challenges facing their organisations. A CIPD survey found that 75% of HR professionals worldwide are addressing workforce performance and productivity issues using people data, illustrating the importance of this information for strategic workforce issues.

Monitoring by employers for various productivity and performance management purposes is quite common, and this includes electronic communications, computer content and social media activity. Increasingly, AI tools are being used which can collect data to assess productivity and motivation, and so be used for performance management purposes. Companies also use these technologies to monitor and evaluate the behaviour, personal qualities and characteristics of their employees. The use of biometric identification cards (with data such as fingerprints, retina or iris patterns, voice waves or DNA) is well known, as is the use of mobile tracking systems to collect location-based data, which can be used for performance and productivity management purposes. While AI health monitoring was already being used before the coronavirus pandemic, a surge in health monitoring and surveillance has been widely reported since. When it comes to health monitoring in general, many employers offer wellness apps, electronic wristbands or sleep trackers, through which employees voluntarily share data on their exercise, eating, fitness and sleep habits.

In addition to being used to perform the management functions mentioned above, another area of the employment relationship where AI is exerting influence concerns collective action and union representation. The TUC reports that in the US, it has been suggested that pre-employment screening software and the data it generates are being used to discriminate against applicants who are assessed as being more likely to become union activists.

2.3 TOWARDS REGULATION

There is a growing demand for transparency and consent in relation to the use of AI technologies at work.



The issue of consent is related to transparency. When workers are not asked for their consent before AI technologies are used to manage them, they are less likely to know when and how the technology is used. They are also less likely to be able to influence this process.

However, the liberating power of AI technology cannot be ignored, allowing for the facilitation of many routine or cumbersome tasks, as well as opening up possibilities for more mobility, flexibility and work-life balance. However, there is also a real risk of encroaching on workers' private lives, outside of the limits of the working day. Increasing digitisation, through AI and other forms of technology, is contributing to an 'always-on' culture in which employees are never completely away from their work. More than a few employers expect their workers to be easily contactable at all times. The 'right to digital disconnection' has emerged as a topic and, in some jurisdictions, been passed into law as a reaction against this.

The need to regulate the application of AI in the workplace, and in general, is both obvious and pressing. On 28 February 2022, a 'Call for AI Ethics' was signed by the Pontifical Academy for Life, Microsoft, IBM, the FAO and the Italian government's Ministry of Innovation. The 'Call' was intended to promote an ethical approach to artificial intelligence. The underlying idea was to promote a sense of shared responsibility among international organisations, governments, institutions and the private sector in an effort to create a future in which digital innovation and technological progress proceed in a way that recognises the central importance of humanity. Concerning the development of new algorithms, the signatories pledged to call for the development of artificial intelligence that serves individuals and humanity as a whole, respects human dignity so that every individual can benefit from advances in technology, and does not aim solely for greater profits or at the gradual replacement of people at the workplace.

The guiding principles are those of:

- **Transparency:** AI systems must be understandable to all.
- **Inclusiveness:** AI systems must not discriminate against any person, because all human beings are equal in terms of dignity.
- **Accountability:** There must always be a human to take responsibility for what a machine does.
- **Fairness:** AI systems must not be biased, or create biases.
- **Reliability:** AI must be reliable.
- **Security and privacy:** AI systems must be secure and respect the privacy of users.

IS EMPLOYMENT LAW READY FOR AI?

3. The challenges of AI throughout employment

Artificial intelligence is transforming the way we work. It is significantly increasing productivity in some areas, and offers opportunities that could improve (some) workers' lives. At the same time, it also gives rise to concerns about inequality and discrimination, security and privacy, working conditions and the possible loss of a clear division between our work and private lives. These are but examples.

As has already been noted, automated work monitoring systems already exist and will undoubtedly be more widely implemented in a number of areas, most significantly in work carried out with automated production systems or through digital platforms. These systems can affect working conditions, assign tasks, and determine remuneration for services provided. They can also affect health and safety at work, working time and whether the employment relationship—if it is an employment relationship—will continue (on the same terms). Professor Jaime Cabeza has referred to the 'great regulatory challenge' of addressing the opacity, complexity, possible bias, unpredictability and partially autonomous behaviour of certain artificial intelligence systems, to ensure their compatibility with fundamental rights and facilitate the application of legal rules, without excessively hindering technological development and without excessively increasing the cost of bringing artificial intelligence solutions to market.[9]

3.1 ACCESS TO EMPLOYMENT: THE USE OF AI IN RECRUITMENT

The use of artificial intelligence tools in personnel selection processes is notoriously useful, given their capacity to act with great precision, speed and efficiency in the detection of candidates with the characteristics that the potential employer believes they need. These tools can be particularly useful where there is a large talent pool, or groups of potential applicants. They are already used by many large employers; this is known as 'people analytics' or 'Big Data HR'.

Systems can work in different ways, and some of these differences are legally relevant. First, a system could operate by directly detecting the characteristics that the programming of the algorithm has determined will be those of optimal candidates. This would allow perfectly objective criteria to be applied, with no biases other than those that the programmer themselves has, where appropriate, included in the programme (via indicators known as 'proxies', which are the factual assumptions fed into the decision-making process). These criteria would be, subject to parameters, neutral, purely deductive, and incapable of any discrimination or objectionable subjectivity. In some ways this would be good: an algorithm is incapable of acting based on hunches, impressions or prejudices. As EU regulators have long noted, automated decisions based on objective profiles potentially allow for greater consistency and fairness in the decision-making process. At the very least, this kind of decision-making would remove opportunities for human error, discrimination or the deliberate abuse of power.

An alternative and more complicated route is also available. Rather than looking for potential employees' characteristics directly, induction could be applied, based on the characteristics of previous or current employees who have performed well. The system would search for characteristics similar to those of workers who have turned out to be valuable to the company, and, through this process, ascertain the criteria that should be applied. These criteria might

not even be knowable (in natural language); they will not, of course, have been set by a human programmer in advance. All we will know is that the machine's analytical capacity has identified the candidates most similar—in some way—to workers who have already shown their worth to their employer. While this way of operating is, in one way, objective, it may also reproduce biases or consolidate criteria which, despite their usefulness, could be unlawfully discriminatory. It may even reinforce the existing stereotypes we have in society. We need to engage, in any event, with the complex debates over what is socially desirable, what works and what has been economically efficient or productive so far: the questions are familiar, and bear upon the tension between calls for market freedom, on the one hand, and legitimate regulation, on the other.

The EU's General Data Protection Regulation (GDPR) provides that, in relation to automated decisions, every data subject shall have the right not to be subject to a decision based solely on automated processing, including profiling, which produces legal or other similarly significant effects. In principle, this would apply to algorithmic selection (or promotion) processes in the employment context. However, the GDPR also contains an exception for cases in which the decision is necessary for the conclusion or performance of a contract between the data subject and a controller. This seems to allow for algorithmic selection processes, subject to the controller taking appropriate measures to safeguard the rights, freedoms and legitimate interests of the data subject. These would include, at least, the applicant's right to have human intervention from the data controller's side, the right to express their point of view and to contest any decision, as permitted by applicable law.

Automatic decisions may not be taken based on data that reveals a person's racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, and the processing of genetic data, biometric data intended to uniquely identify a natural person, data concerning health or data concerning a person's sex life or sexual orientation is not allowed, except with the explicit consent of the data subject or where processing is necessary for reasons of essential public interest, or otherwise authorised by law, subject to requirements of proportionality and data protection as well as the interests and fundamental rights of the data subject.

The proposed EU AI Regulation (the 'AI Act') declares artificial intelligence systems that relate to employment, employee management and access to self-employment to be 'high risk'. We anticipate a regulatory framework for AI automation practices in the recruitment process where potential employers are not required to provide complex mathematical explanations of how their algorithms or machine learning systems work. Instead, they may need to state the categories of data used in the profiling or decision-making process, the rationale for this, the rules that have been applied, the reasons for the relevance of a particular profile for the automated decision process, and how that profile is used in making a decision.

3.2 ENSURING EQUALITY IN HIRING AND AT WORK

3.2.1 THE CHALLENGE OF ALGORITHMIC DISCRIMINATION

Legal rules on equality and non-discrimination apply to the use of AI, and both direct and indirect discrimination must not occur. Concerning direct discrimination, it is obvious that algorithms may not be used or programmed to select against any characteristic protected under the law. With indirect discrimination, there is no deliberate, conscious, discriminatory intent.

A well-known example of indirect discrimination in this area is what happened to Amazon in 2015, when the company realised that a new system was not acting in a gender-neutral way in assessing the qualifications of candidates for software development and other technical jobs. Computer models had been taught to screen applicants by looking at CVs submitted to the company over a ten-year period. The majority of these were from men, due to the prevalence of men in the technology industry at the time.[10]

Algorithms might not be developed or programmed with discriminatory intentions, but they may still generate indirectly discriminatory conclusions. The reality is that in the past, much discrimination occurred, and algorithms trained on old data will also learn old discriminatory tendencies. In responding to this, there are complex balances that must be struck. It should not be forgotten that making a lawful, non-discriminatory decision may have a cost in terms of money or opportunity.

The EU's 'Guidelines on automated individual decisions and profiling for the purposes of Regulation 2016/679' make clear that 'profiling and automated decisions may pose significant risks to the rights and freedoms of individuals."[11] Algorithmic discrimination in access to employment is becoming a reality and individual rights must be appropriately protected in this context. It should come as no surprise that there is a call for more input from workers' representatives on these issues.

3.2.2 REGULATORY DESIDERATA

Consider the recommendations of the Spanish data protection authority's (AEPD) technical guide on data protection in labour relations. First, the decision on the criteria to be considered by an algorithm must be taken by a responsible (and identifiable) human being, not by an AI system or algorithm. The system or algorithm can help—it can carry out an initial screening—but the ultimate decision is and must be that of the responsible person in the company. This is in line with the recommendation that provides both for a general prohibition on decisions based 'solely' on automated processing where this produces legal (or other similarly significant) effects on employees, as it would when determining the outcome of a selection or promotion process.

There is an exception for fully automatic processing that is necessary for the performance of a contract. However, this exception must be interpreted restrictively, and it is necessary to restrict fully automatic processing to decisions that respond to demonstrable and clear conditions (e.g. whether certain permits, qualifications or certifications are held). It should always remain possible to involve a human if need be. This is consistent with the Spanish Charter of Digital Rights, which provides that Individuals should have the right to request human supervision and intervention and to challenge automated decisions taken by artificial intelligence systems that have an impact on their lives and their rights.

3.3 ALGORITHMIC MANAGEMENT: DIRECTION AND CONTROL

The delegation of management decisions to an AIS or algorithm is particularly relevant when thinking about new forms of work. Though this is often talked about in companies that manage work through the use of digital platforms (i.e. systems that assign tasks based on productivity optimisation criteria), it is by no means restricted to this context.

Artificial intelligence systems are present in countless companies. Algorithmic management makes it possible to process data concerning the provision of services by employees, to assign and supervise tasks, to give direct instructions and to evaluate performance. It could even make decisions about transfers and relocations, career advancement or the termination of a contractual or employment relationship. Using AI in this way amounts to a delegation of certain management functions that might otherwise have been performed by middle management. The expression 'my boss is an algorithm' has already gained currency.[12]

3.3.1 EARLY ATTEMPTS AT REGULATION

The draft EU Regulation on AI identifies as a high-risk system AI intended to be used to make decisions relating to the entry into and the termination of employment relationships, the allocation of tasks, and the monitoring and evaluation of the performance and conduct of individuals in the context of the employment relationship. The same cautions and safeguards should be required when considering automated decisions on access to and promotion in employment. The AEPD's guide to data protection in the labour sphere establishes the same rules with regard to automated employment management decisions as it does with regard to access: in both cases, decisions cannot be taken by an algorithm alone.

Spanish collective bargaining has already incorporated provisions relating to algorithmic business management. The 24th Collective Bargaining Agreement for the Banking Sector (2021) regulates what it calls 'digital rights' and 'law in the face of artificial intelligence', stating that new tools based on algorithms can contribute to better and more efficient corporate management. However, 'the growing development of the contribution of technology requires careful implementation when applied in the field of people.' It has been agreed that workers have the right not to be subject to decisions based solely and exclusively on automated variables, except in those cases provided for by law, and to be protected against unlawful discrimination. Even where algorithmic decision-making is used, there is the right to involve a responsible human.

3.3.2 AI AS AN AMPLIFIER OF NEW AND EXISTING TECHNOLOGIES

Beyond algorithmic management, but still reflecting the characteristic dependence and inequality of the employment relationship, the control of work may also become more stringent and less comfortable. AI-enhanced tools will make remote and computerised control even easier, and also facilitate monitoring of all kinds. Undesirable behaviour will be identified, measured and tracked, and workers will learn to work better under this system of hypervigilant control. Workers themselves will become hypervigilant, all this in the name of the 'scientific organisation of work'. Professor Mercader Uguina, with echoes of Bentham and Foucault, has rightly described this as 'panoptical'.[13]

It is not in for nothing that article 20 of Spain's Employment Law is followed

by article 20 bis, which refers workers' privacy rights and the right to disconnect. When it comes to the use of geolocation and video surveillance devices, these regulations could conceivably be extended even further, drawing on the well-known criteria laid down by the Spanish Constitutional Court in relation to the invasion of spaces protected by fundamental rights. Protection could be afforded to at least some other departments of the panopticon.

3.4 ALGORITHMIC MANAGEMENT: OCCUPATIONAL HEALTH AND SAFETY

Finally, occupational safety is an area in which artificial intelligence can play a positive role, and this has been expressed in regulatory and contractual terms. Professor Ana Belén Munõz Ruiz notes that since July 2022 it has been mandatory to have a fatigue and drowsiness detector in new vehicles.[14] This involves both geolocation and remote surveillance which, in this case, is considered legitimate in view of its purpose. Spanish collective bargaining has already provided for geolocation (GPS) in certain vehicles; this is not permissible only for health and safety purposes but also for the coordination of production and even for disciplinary purposes.[15]

4. Conclusion: a challenge to human dignity

Time and again, law manifests itself as a coercive order, requiring us to strike balances in ways that are as difficult to decide upon as they are unavoidable, all this against the moving backdrop of our fundamental rights. Mercader Uguina is right to point out that the GDPR, in order to guarantee the protection of rights and freedoms in relation to the processing of workers' personal data in the field of employment requires rules in this area to include 'appropriate and specific measures to preserve the human dignity of the persons concerned as well as their legitimate interests and fundamental rights'. It is for law to strike this balance, which it will do by determining the scope of citizens' and employees' rights as well as employers' rights of direction and control at work. New technologies will mean new possibilities, and new choices will need to be made. Technology may well drag us down the road to dystopia. There is genuine tension between the power of company management to determine how to do business under market capitalism and the notion of inalienable human dignity. Human dignity is not, in my view, compatible with every kind of high-tech, insomniac Big Brother.

AI survey of 28 countries

Navigating the regulatory landscape

As swift technological advancements come to affect more and more aspects of our lives, the imperative for a regulatory framework for AI grows more urgent. However, formulating such a framework requires a multidimensional approach. On the one hand, AI policy should mitigate risks, while on the other, it must allow ample room for the continued development of AI technologies.

There is currently no global consensus around a single approach to regulating AI. Different countries are at different stages of their legislative processes, and will adopt different regulatory approaches. The EU, for example, will regulate based on the different levels of risk posed by AI systems, and it seems likely that Australia will follow the EU closely in the regard. On the other hand, the UK intends to remain 'technologically agnostic', and merely extend existing, general principles in response to new challenges. These are but two possible approaches.

In a recent study of 'AI and employment in 2023', Ius Laboris conducted research across 28 countries to assess the state of AI regulation in recruitment and work management. When asked whether there are specific legal provisions regulating the use of AI in recruitment and work management in their jurisdictions, all 28 countries responded that there were not. Respondents reported that at present, general rules relating to data protection and privacy, consumer law, anti-discrimination and copyright, among others, apply to AI tools and their use.

When it comes to the use of AI in recruitment and work management, the regulatory landscape varies. Out of 28 countries, nine stated that there is a legal requirement to inform candidates about the use of AI in recruitment. Of these, seven were EU member states. Only five countries, including 3 from the EU, stated that the law obliges employers to provide alternative means if a candidate chooses not to undergo an AI assessment or screening process. Regarding legal requirements or guidelines on the use of AI for work management (e.g. analysing employee workload, monitoring and evaluating performance, and making decisions on promotion or disciplinary actions), only five of 28 countries responded with a 'yes' (of which three in the EU).

3/28

respondents indicated that there are legal provisions or guidelines prohibiting the use of AI for terminations.

5/28

respondents indicated that there are legal requirements or guidelines on the use of AI for the management of work.

When considering the use of AI in termination processes, only three countries—Germany, Austria, and Kazakhstan—reported having legal provisions or guidelines prohibiting this. Regarding the legal obligation to inform candidates about the use of AI in terminations, five out of 28 countries were able to point to such regulations. Further, five out of 28 countries confirmed having legal requirements or guidelines concerning the process to follow if an employee requests a review of an AI-generated conclusion leading to termination. None of the countries reported a legal requirement for independently auditing AI tools used in recruitment, work management, and HR processes, including terminations. We present our findings as well as descriptions of the regulatory landscape in some of the surveyed countries below.

Survey outcomes

Countries	Flag	Are there legal provisions regulating the use of AI in recruitment?	Is there a legal requirement to inform candidates of AI use in recruitment?	If candidates do not want to be subject to an AI assessment, does the law require employers to provide alternative means?	Are there any legal requirements or guidelines on the use of AI for the management of work?	Are there legal provisions or guidelines prohibiting the use of AI for terminations?	Is there a legal requirement to inform candidates of AI use in terminations?	Are there legal requirements or guidelines about the process to follow if an employee requests a review of an AI-generated conclusion leading to termination?	Is there a legal requirement for AI tools used in recruitment, work management and HR processes to be independently audited?
Argentina		No	No	No	No	No	No	No	No
Australia		No	No	No	No	No	No	No	No
Austria		No	Yes	No	Yes	Yes	Yes	No	No
Belgium		No	Yes	No	No	No	No	No	No
Brazil		No	Other	No	No	No	No	Yes	No
Bulgaria		No	Yes	No	No	No	No	No	No
Canada		No	No	No	No	No	No	No	No
Chile		No	No	No	No	No	No	No	No
Cyprus		No	Yes	Yes	No	No	No	No	No
Finland		No	No	No	No	No	No	No	No
France		No	No	No	No	No	No	No	No
Germany		No	Yes	No	Yes	Yes	Yes	Yes	No
Hungary		No	No	No	No	No	No	No	No
India		No	No	No	No	No	No	No	No
Italy		No	Yes	Yes	No	No	Yes	No	No
Kazakhstan		No	Yes	Yes	Yes	Yes	Yes	Yes	No
Latvia		No	No	No	No	No	No	No	No
Mexico		No	No	No	No	No	No	No	No
Netherlands		No	No	No	No	No	No	No	No
Peru		No	No	No	No	No	No	No	No
Poland		No	Yes	Yes	No	No	No	Yes	No
Romania		No	No	No	No	No	No	No	No
Slovenia		No	No	No	No	No	No	No	No
Sweden		No	No	No	Yes	No	No	Yes	No
Switzerland		No	Yes	Yes	Yes	No	Yes	No	No
Thailand		No	No	No	No	No	No	No	No
Türkiye		No	No	No	No	No	No	No	No
Ukraine		No	No	No	No	No	No	No	No

Source: Ius Laboris survey

Australia

In Australia, while there are no specific laws to regulate how AI tools operate or how organisations may use them in recruitment, the department of Industry, Science and Resources has developed an AI ethics framework, which includes principles relevant to its use in an employment context (e.g. transparency, explainability, accountability and privacy, and compliance). The framework is voluntary. The current legislative state of play in Australia is therefore limited to the extent in which general laws relating to data protection and privacy, consumer law, anti-discrimination and copyright extend to cover AI tools and use.

Australia's anti-discrimination laws provide little guidance as to how AI should be regulated in the recruitment process as Fair Work Australia's hiring and discrimination guidance is silent on the use of AI in the recruitment. Fairwork's online Hiring Employees course does not provides guidance specific to the use of AI in the recruitment process and instead focusses on general and substantive (rather than tool-specific) anti-discrimination learning tools. Fair Work's guidance only extends to general information about anti-discriminatory practice and identifying behaviour and does not expressly mention discriminatory behaviour, tools or recruitment practices involving AI.

Job seekers, in Australia, have no legal right to be told when AI is used to assess them in the hiring process. Nor are they required to be given an explanation of how an AI recruitment tool will assess them. However, a limited form of notice that an algorithmic hiring system (AHS) will be used in the recruitment process is often provided by employers or recruitment agencies when complying with the requirements of the Privacy Act 1988 (Cth).

There are no legal provisions which require employers to provide alternatives to individuals who do not wish to be subject to an AI assessment or screening process. The extent to which the Australian law protects individuals who do not wish to be subject to such assessment tools or screening processes is limited to the extent in which the Privacy Act 1988 offers protective mechanisms for the data used in these tools/processes. Unlike other jurisdictions (e.g. the EU and the UK), the Australian Privacy Act does not expressly distinguish between data 'controllers' (the entities responsible for determining, how personal information of individuals will be handled) and 'processors' (the entities responsible for handling that information on behalf of and in accordance with the controller's instructions). Therefore, all entities who collect, use, disclose, hold or otherwise handle personal information are subject to the Privacy Act's requirements.

Legal gaps

While there are complex act-specific gaps, a common gap across all legislative schemes in relation to the use of AI at work appears in relation to determining who, if anyone, is liable for unlawful decisions made by AI systems.

Across all areas of law, this gap arises due to the widespread use of the term 'person'. Given that AI systems are not legal persons or entities, the current extended liability provisions found in Australian anti-discrimination statutes do not apply to this situation. The attributed liability provisions deem only acts committed by another legal entity (an 'employee' or 'agent' or, in some statutes, a 'director, employee or agent of a body corporate') to be the act of an employer (or principal or body corporate).

Legislative proposals

In Australia, regulators are yet to undertake a comprehensive and detailed analysis of the legal issues and challenges posed by the use of AHSs by employers. Existing guidance is currently voluntarily-framed and broadly stated. Apart from the Department of Industry, Science and Resources AI ethics framework and the guidelines published by the Merit Protection Commissioner there are no current employment-specific guidelines that apply to both private and public sector organisations. While these general principles and guidelines canvas reforms that could affect recruitment and HR processes (e.g. algorithmic hiring systems), there is very little discourse on AI-assisted work management by Australian regulators. Australia's Fair Work Commission has not published guidelines on these issues.

The Privacy Act Review Report (published 16 February 2023) outlines recommendations that specifically target the Privacy Act. While the Privacy Act is aptly placed to address issues of information collection and disclosure practices relating to discrimination in decision-making and the recruitment process, the proposals regarding AI-imposed risks do not deal with employment law regimes (e.g. the Fair Work Act) or practices in detail.

In relation to the submissions sought by Attorney-General's Department to inform the Government response to the Privacy Act Review Report it is worth noting that the only express mention of 'recruitment' in the report was in the context of the proposal for how Australian law could address multi-party breaches by creating a distinction between data controllers and data processors. The report also recommends the introduction of a right for individuals to request meaningful information about how substantially automated decisions with legal or similarly significant effects are made. Entities will be required to include information in privacy policies about the use of personal information to make substantially automated decisions with legal or similarly significant effects. This proposal should be implemented as part of the broader work to regulate AI and ADM, which includes the consultation currently being undertaken by the Department of Industry, Science and Resources.

The AHRC has called for AI anti-discrimination guidelines. The Australian Human Rights Commission (AHRC), in its Human Rights and Technology final report (2021) recommended that the Australian Government resource it to 'produce guidelines for government and non-government bodies on complying with federal anti-discrimination laws in the use of AI informed decision-making'.

Belgium

A recent survey by Manpower showed that while 31% of Belgian companies already use AI in their recruitment processes, there are no specific legal provisions in Belgium regulating the use of AI in recruitment (except for the general prohibition for decision-making based solely on automated processing under EU data protection law). This prohibition is only applicable when there is no meaningful human intervention in the process and the processing could have legal consequences or consequences of similar importance. In Belgium, the use of AI in a recruitment context will most likely fall under this prohibition. The GDPR provides for three exceptions to this general rule. The most important one in this context is when automatic decision-making is necessary for the performance of a contract, where regular human intervention is deemed to be impractical or impossible.

The guidelines endorsed by the European Data Protection Board give the example of a popular employer that receives thousands of job applications and uses automated decision-making (driven by AI) to make a pre-selection of possible candidates. The employer then needs to take suitable measures to safeguard the candidates' rights and freedoms. The employer first needs to inform the data subject that they have an automatic decision-making process, then provide information on the system's underlying logic and explain the consequences of its use.

The candidate has the right to notice of the decision, to request human intervention and to contest the decision. The person intervening should be someone that has the authority to change the decision and must evaluate the relevant personal data including any information the data subject has shared subsequently.

While there are no specific obligations to provide alternative means if candidates do not want to be subject to an AI assessment or screening, the general prohibition on decision-making based solely on automated processing applies. There are three exceptions to this general prohibition: where the automatic decision-making is necessary for the performance of a contract where regular human intervention is deemed to be unpractical or impossible; where the data subject has provided explicit consent; and where it is permitted by a law that provides suitable safeguards. When one of these exceptions applies, the employer can use AI. The candidate then has the right to contest the decision and obtain human intervention.

Legal gaps

There is no specific legislation regulating the use of AI at work in Belgium. When the GDPR was implemented, AI was briefly mentioned during the debates in the Chamber of Representatives but nothing was enshrined in the final text of the implementing law. This might be due to the fact that the GDPR aims to be technology-neutral and the fact that GDPR rules on profiling and automatic decision-making are also applicable to AI.

Legislative proposals

In Belgium, there is currently no clear picture of how often and in what ways AI is already being used in the workplace. There is currently very limited legislation on the topic, apart the GDPR. A collective agreement of 1983 (CBA no. 39) on the introduction of new technologies in the workplace also applies. For specific situations involving the use of cameras in the workplace there is specific legislation (CBA no. 68).

In our view, Belgium is taking a wait-and-see attitude while waiting for regulation at the European level. On 10 February 2023 a proposition for a resolution was submitted before the Belgian Chamber of Representatives concerning a proactive policy and a coherent strategy regarding the use of algorithms, data and artificial intelligence in the workplace. This provides a starting point that may lead to further research as well as soft law measures.

Brazil

In Brazil there are no specific legal provisions that explicitly regulate the use of artificial intelligence in recruitment. However, the Brazilian General Data Protection Law (Lei Geral de Proteção de Dados or LGPD), which came into effect on 18 September 2020, has implications for the use of AI in recruitment as this involves the processing of personal data. In other words, the use of AI tools is legally permissible in Brazil, provided that additional actions are taken prior to deployment for compliance with the LGPD. These actions include:

- Having an adequate legal basis for each of the data processing activities involved
- Being transparent and providing clear, precise, and easily accessible information as to how personal data is processed (e.g. through a comprehensive privacy policy for candidates and/or employees)
- Being able to demonstrate the adoption of measures which are efficient and capable of proving compliance with the rules of personal data protection, including the efficacy of such measures (e.g. by documenting the criteria used by the tools for ranking the candidates and/or the employees)
- Guaranteeing data subjects (i.e. the candidates/employees) the right to request the review of decisions made solely based on automated processing of personal data affecting their interests, including decisions intended to define their personal, professional, consumer and credit profile, or aspects of their personality.

If the data subject requests it, the controller shall provide clear and adequate information regarding the criteria and procedures used for the automated decision, subject to rules on confidentiality and trade secrets. Additionally, the use of AI in recruitment should avoid discriminatory practices, as discrimination in employment is generally prohibited under Brazilian labour laws. AI algorithms should thus be designed and used in a way that does not lead to unfair or biased hiring practices that discriminate against certain groups.

Legal gaps

Since there is no specific legislation or guidelines on use of AI at work in Brazil, the rules to be followed will fall under the general rules of Brazilian labour and data protection law. On the other hand, the authority to be nominated as regulator of AI in Brazil (probably the ANPD), under the terms of the Law Bill No. 2,338/2023, may issue specific rules on the application of AI in the labour environment.

Legislative proposals

Law Bill No. 2,338/2023, which intends to regulate the use of AI in Brazil and consolidates other laws on the same topic, was presented by the Senate in May 2023, and is currently under discussion in the Brazilian Temporary Internal Commission on Artificial Intelligence (Comissão Temporária Interna sobre Inteligência Artificial no Brasil or CTIA). Among other things, the Law Bill No. 2,338/2023 states that persons affected by AI systems have the following rights, to be exercised in the manner and under the conditions described in the Law Bill:

- the right to prior information regarding their interactions with AI systems
- the right to an explanation of the decision, recommendation or prediction made by AI systems
- the right to challenge decisions or predictions made by AI systems that produce legal effects or significantly impact the interests of those affected
- the right to human determination and participation in decisions made by AI systems, taking into account the context and state of the art of technological development
- the right to non-discrimination and the correction of direct, indirect, illegal or abusive discriminatory biases
- the right to privacy and the protection of personal data, under the terms of the relevant legislation.

The Bill states also that AI systems used for 'recruiting, screening, filtering and assessing candidates, making decisions on promotions or terminations of employment relationships allocation of tasks and monitoring and evaluation of the performance and behaviour of people affected by such artificial intelligence applications in the areas of employment, employee management and access to self-employment' shall be considered as high-risk AI systems, concerning which the AI provider must conduct an algorithmic impact assessment and to adopt the governance measures foreseen in the Law Bill (including transparency, data management, and information security).

The AI agents, as defined in the Law Bill, shall adopt governance structures and internal procedures encompassing:

- transparency measures regarding the use of AI systems in interaction with natural persons, which include the use of appropriate human-machine interfaces that are sufficiently clear and informative
- transparency regarding the governance measures adopted in the development and use of the AI system by the organisation
- adequate data management measures to mitigate and prevent potential discriminatory biases
- legitimacy of data processing in accordance with data protection legislation, including through the adoption of privacy by design and by default measures and the adoption of techniques that minimize the use of personal data
- adoption of appropriate data segregation and organization parameters for training, testing and validation of system results
- the adoption of adequate information security measures from the conception to the operation of the system.

Kazakhstan

In Kazakhstan, there are no specific requirements or regulations explicitly mentioning the use of artificial intelligence in recruitment. However, there are general requirements and prohibitions related to the use and protection of information systems and personal data. The requirements for protection, collection and processing of personal data are quite broad, and include technical, organisational and legal requirements.

One of the important prohibitions concerns the use of AI without personal data consent: owners or controllers of electronic information resources are prohibited from making decisions based solely on automated processing, including by means of an intelligent robot, as a result of which the rights and legitimate interests of personal data subjects arise, change or terminate, except in cases when the specified decision is made with the consent of the personal data subject or in cases provided for by the legislation of the Republic of Kazakhstan.

AI is a computer program that works with candidates' personal data. Therefore, the employer must obtain the written consent of the candidate for the collection and processing of their personal data, including by means of information systems.

Any actions to collect and process personal data can be carried out by a potential employer with the written consent of the candidate. In addition, a potential employer has the right to request from a candidate only a small list of documents required for employment, as defined by law. If the AI uses video surveillance, then the candidate must be notified that video surveillance and video recording is in use.

The candidate has the right to refuse to provide any additional data not provided for by the Labour Code. Therefore, in the process of selecting candidates, AI can be used for various purposes only with candidates' consent (AI in this case acts as a form or method of collecting and processing personal data).

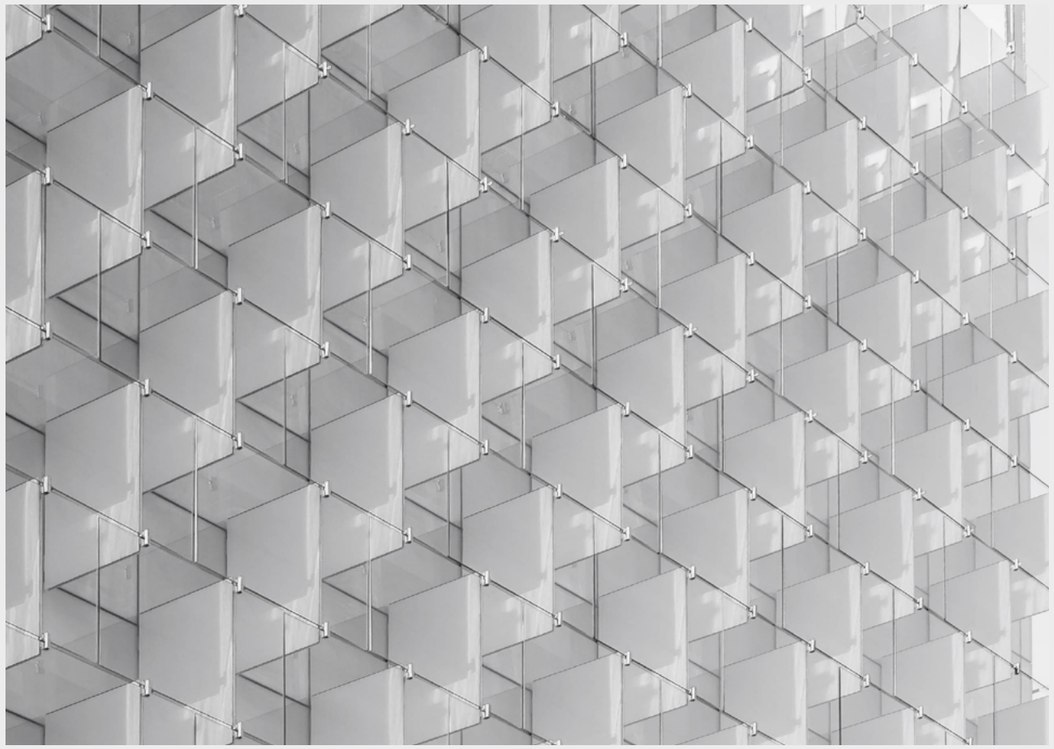
If the candidate does not give consent to the use of AI, then the employer cannot refuse to hire this employee on this basis, since such a fact can potentially be seen as discrimination. In such cases, the employer will be forced to use traditional methods of collecting and processing the candidate's personal data, although this situation is not directly regulated by the law.

In Kazakhstan, there are specific procedures to terminate labour contracts under the Labour Code. According to this procedure, only an authorised representative of an employer can sign relevant documents to formalise the termination process. Therefore, it is impossible to make such processes automatic (i.e. without a human decision and signature).

Legal gaps

The need for legal regulation of artificial intelligence and robotics arises primarily due to the need to determine legal responsibility for any harm they cause, as well as the need to determine the ownership of intellectual property rights in works created with the help of AI.

These problems are noted in the 'Concept of legal policy of the Republic of Kazakhstan until 2030' and are identified by experts as the most relevant challenges in the field. Of course there are various other practical problems. Possible inconsistencies in legislation may be identified in the future as the use of AI at work develops.



Also, owners or controllers of electronic information resources are prohibited from making decisions based solely on automated processing, including by means of an AI system, as a result of which the rights and legitimate interests of personal data subjects arise, change or terminate, except in cases when the decision is made with the consent of the data subject or in cases provided for by the legislation of the Republic of Kazakhstan.

A person has the right to access their own personal data, and this opportunity should be provided free of charge. The request of the subject (or their legal representative) regarding access to their own personal data shall be submitted to the owner and/or operator in writing or in the form of an electronic document or in any other way.

As for audit, for private companies that do not have integration with government information systems, an independent audit of the software used is not mandatory but can be done voluntarily.

However, companies should provide the State Technical Service with access to their systems for inspection (if an inspection is conducted). Following an inspection, the State Technical Service will report and may make recommendations for eliminating non-compliance, where this is necessary. The legislation does not contain deadlines for conducting such an inspection. It appears that these will be carried out as determined by the State Technical Service.

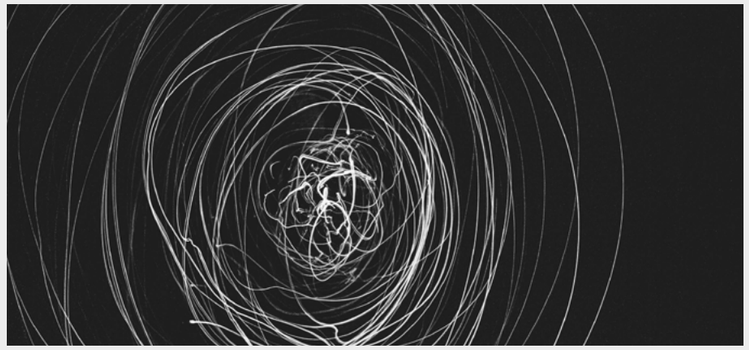
Netherlands

The use of AI in recruitment as such is not yet regulated in the Netherlands. Recruitment with the use of AI must still comply with general Dutch legislation in respect of recruitment and selection. For example, there is an increased risk of AI (unconsciously) being biased, due to the training of machine learning algorithms on discrimination-laden datasets. Discrimination, whether direct or indirect, is prohibited by Dutch law. Therefore, when using AI in recruitment, employers must ensure that this will not lead to breaches of the existing legal framework. There is also a non-binding code of conduct for recruitment and selection in the Netherlands, established by the NVP (Dutch Network for HR Professionals) that contains basic rules about 'fair' recruitment. This code of conduct provides rules on the use of AI in recruitment: if the organisation uses data in pre-selection processes (e.g. digital assessments, AI or algorithms), these should be validated and transparent. If the organisation uses AI/algorithms, the potential risks and shortcomings of these should be clear. At all times, care and confidentiality should be guaranteed and no questions related to health should be asked. The applicant must receive a reasoned result after participation, upon request. Although these rules are non-binding, in practice most companies follow this code in connection with their application processes.

There is no specific legal requirement to inform candidates of AI use in recruitment. As for the dismissals, in the Netherlands, it is necessary to obtain prior approval from the court or the UWV (Dutch social security agency), depending on the reason for dismissal. To get this approval, the employer must show that the conditions for one of the statutory grounds for dismissal have been met. For this reason, employees do not need to request a review of AI-generated conclusions leading to a termination, as the employer will already have had to pro-actively substantiate these conclusions in the dismissal procedure, and these conclusions will have been assessed by the court or UWV. Employees have the opportunity to contest any AI-generated conclusions as part of that procedure.

Legislative proposals

The Supervision on Equal Opportunities in Recruitment and Selection Bill is pending in the Dutch senate. If this bill is adopted, it will, among other things, provide for specific rules regarding the use of AI in recruitment: if the employer uses a computerised system when offering a job or filling a vacant position, it must ensure that the results do not, as far as it can reasonably assess, amount to labour market discrimination.



Slovenia

There are no national law provisions directly concerning the use of AI in recruitment. Nevertheless, general restrictions on the use of artificial intelligence in all areas of employment law may be extrapolated from fundamental principles of employment law found in the Slovenian Employment Relationships Act (ZDR-1). For instance, the principle of non-discrimination clearly applies (article 6 ZDR-1). This would limit the use of AI in recruitment if a candidate were to demonstrate discriminatory behaviour by the AI system. The question of discrimination and bias in AI has been presented by legal theorists as one of the main issues in AI, particularly in employment law.

In Slovenian law the burden of proof in discrimination claims lies with the employer. This means that if a candidate/employee were to provide a sufficient basis for allegations of discrimination, the employer would have to prove that no discrimination took place. Given the lack of caselaw on this issue it is not clear what this entails regarding AI systems, especially those where identifying the exact procedure which led to the decision is impossible. This would likely also be problematic for employers, as they would be required to explain how a decision was made, yet be unable to do so.

Legislative proposals

In 2021, the Slovenian government released the National Programme for AI 2025, in which they foresaw the adoption of new legislation to promote the development and use of AI in a socially acceptable manner. Particular emphasis was placed on privacy and personal data protection, the principle of non-discrimination, the validation of operational compliance and quality of service, and the certification of systems. However, no laws have been proposed on this topic so far.

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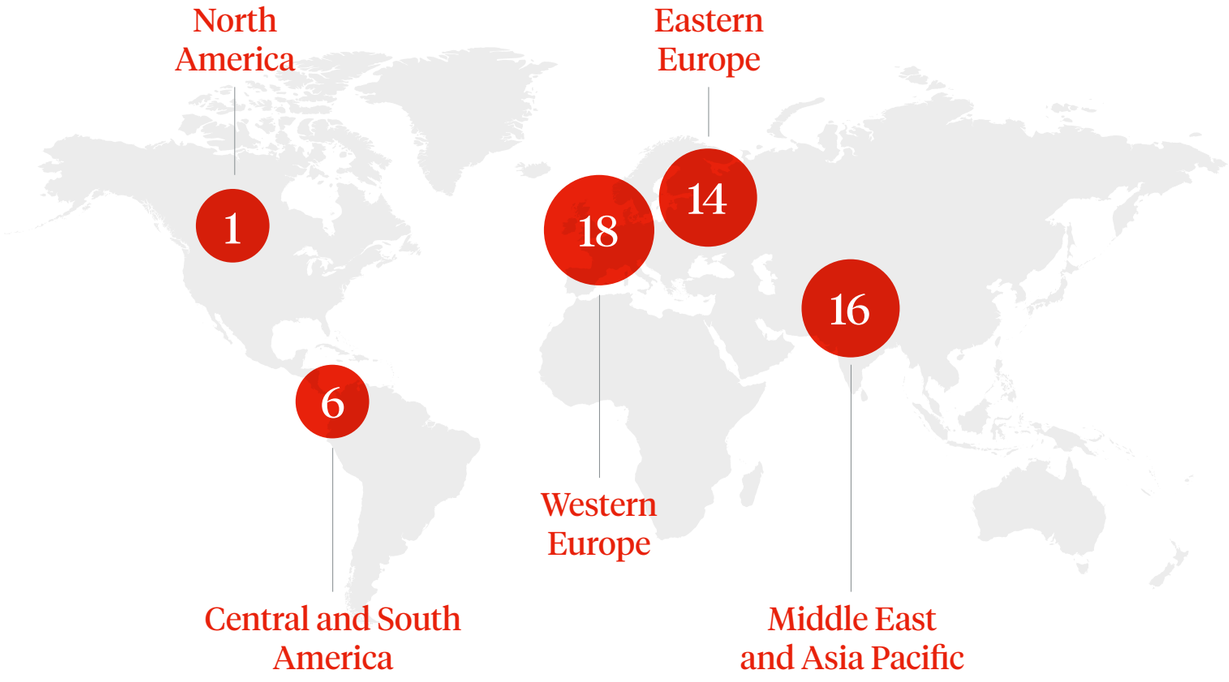
Geographical Coverage



We understand the challenges of managing a national and international workforce

- Ius Laboris is a close-knit alliance of leading employment law firms working together in one global practice.
- Ius Laboris brings together the finest team of dedicated specialists, advising multinational companies in the major commercial centres across the world, from immigration to individual contracts, and from restructuring to pensions, our expertise covers all aspects of HR law.
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