

10 Areas of Employment and Labor Law



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1 **Workplace Privacy**

Many of the robotic systems being developed and AI programs collect data (often big data). This could be names, addresses, account numbers and credit card information placed in AI programs looking for buying patterns. Legally-correct notices allowing the collection and use of the information are required.

Additionally, there is responsibility and potential liability for the security of the information. If a breach occurs, there are now multiple states with notification requirements.

Depending on the country involved and the nature of the information transmitted to and from, robotics data privacy directives may apply.

The most well-known is in the EU but many other nations have implemented similar restraints on the transfer of data over national boundaries.

compensation statutes can greatly expand the market for exoskeletons.

Ekso Bionics, for example, has a mission to have 1 million people using exoskeleton technology within ten years. Such systems could greatly reduce workers' compensation claims. For those who still suffer back injuries, their return to duty could be three times faster wearing an exoskeleton robot.

Under state workers' compensation statutes, injuries caused by workplace robotics would be evaluated. Accordingly, robotics companies need to consider workers' compensation programs and law, both as a source of potential business and a liability to be quantified and minimized.

An entirely different analysis is needed regarding workers' compensation preemption and the robotics industry. Workers' compensation was legislated to provide compensation to injured workers regardless of fault. Meanwhile, employers need not fear tort actions from their workers since such lawsuits are preempted by workers' compensation statutes.

However, tort lawsuits are allowed against third parties to the workplace such as equipment manufacturers.

If an electric saw injures a worker, the employer is protected by workers' compensation but the manufacturers of the saw are not. Would the same standards apply to robots who take over jobs previously performed by humans?

Right now, the answer is yes and the potential liability could slow the adoption of robotics. Is there any

2 **Workers' Compensation (WC)**

Back injuries are the most common type of injuries covered by workers' compensation laws. One of the futuristic ways of preventing these injuries or assisting a worker with back injuries is to provide a robotic exoskeleton.

Several companies are making and marketing wearable robots. This technology promises to allow a paraplegic to walk and provide a worker with ten times their normal strength while greatly reducing strain on the lower back. A properly developed system taking advantage of workers'

potential for having robotics manufacturers become covered by the preemption that applies to employers? Is entirely new legislation needed or likely regarding workplace robotics? Would this fall under “tort reform”?

3 Health and Safety

Under OSHA, there is a legal requirement to maintain a safe workplace. Several OSHA Regulations and Guidelines already cover workplace robotics. Every manufacturer of robots for the workplace needs to be aware of these regulations and the debate that will come as new regulations are proposed and changes to existing regulations are advocated.

Ironically, workplace robots are both OSHA-regulated to protect humans from robots and in other instances, robots are needed to engage in tasks dangerous to humans. Meanwhile, robots are regulated by multiple federal and state agencies depending upon their function. Prime examples are the FDA, the FAA, and the NHTSA.

There are dozens of specialized agencies that cover various industries and practices that are now being redefined through robotics. From interstate trucking and airlines to implants and medical devices, agencies and regulations designed to protect the public will and are increasingly covering robotics.

A Boeing 777 is an example of a large robot capable of taking off and landing without human assistance. Several agencies have jurisdiction over such “robots” and many of them have a major impact on employment and labor laws.

4 State Rights Statutes

Robot technology offers employers resources that can go far beyond average human performance. New robots can make sound and video recordings of exchanges with job candidates and con-

duct interviews. State privacy statutes may require consent forms to be signed before recording candidate interviews.

The same robots could be used to measure bodily functions and provide an analysis of the truthfulness of the candidates. Does this violate state lie detector statutes? The list of state workplace laws that could be relevant to the use of robots is long and must be evaluated on a case-by-case basis.

5 Anti-Discrimination Protections

Advanced robotics and AI used in recruiting must be compliant with anti-discrimination laws. In many ways, compliance with these statutes is improved when robotic systems are implemented.

For example, questions asked by a robot in a job interview can be pre-screened to ensure legal compliance. Yet behavioral analysis and the many other forms of data acquired by robots could have a disparate impact on protected categories. This is a major area of concern.

When behavioral data is collective and compared to similar data about successful workers, unintended correlations can emerge that negatively impact candidates. For example, use of certain software programs might be more common for younger workers yet not necessary for certain jobs under consideration.

It may be that workers who have six months of prior unemployment as a group are less desirable, but using such a criterion could adversely impact minorities. Also, several states are considering legislation to protect long-term unemployed people from being screened out on that criterion alone.

The list of ways a computer could evaluate a job candidate or existing employee needs to be reviewed to make certain that disparate impact is not occurring, or if it is, that it is justified by legitimate business requirements.

6 Wage and Hour Requirements

Robots currently are not subject to minimum wage and overtime pay requirements. However, an increasing number of robots are operated by humans located almost anywhere in the world. What wage and hour laws cover an operator who works with robots eight hours a day in a different state or country?

Currently, the most likely law to apply would be the wage and hour laws of the state or country where the operator is located. As this form of distributed work becomes more popular and productive with new generations of robots, will wage and hour laws change? Another area of great interest and a source of current litigation is the appropriateness of treating distant workers as independent contractors.

An example would be retaining a software engineer for a project over the Internet through a third-party site such as Elance and O'Desk. What if the control on the software engineer is sufficiently great that they are deemed an employee?

7 Trade Secret Protection and Covenants Not-To-Compete

This is an area of employment and labor law that has a direct application to the development of robotics. Has the robotics producer established sufficient controls to protect proprietary information and trade secrets? Can an employee of a robotics company be required to sign a non-compete agreement? In what state is the work taking place?

Like all technology companies, appropriate and legally enforceable agreements need to be in effect to protect the intellectual property of the robotics company. In what state is the work being performed? Can the employee and the robotics company agree to apply the law for a different state?

8 Unionization and Collective Bargaining Requirements

If robots are acquired to do work previously performed by unionized employees working under a collective bargaining agreement, is bargaining required? Does the collective bargaining agreement control the use of robots to perform this work? Clearly a unionized employer seeking to upgrade workplace equipment in the form of adding robots needs to address these questions.

Certain collective bargaining agreements define the work of bargaining unit members, excluding such work from being performed by others. Does this exclude robots? Does it matter whether the control of the robots is a unionized co-worker or a non-union technician? Can an employer tell employees that if they unionize or seek higher wages, the work will be moved to another location where it will be performed by robots? It does not involve much imagination to see that labor law concerns are critical regarding the use and deployment of robots in a unionized workplace.

With a little more imagination, it becomes apparent that robotics in a non-union workplace can still raise serious labor law questions and concerns. Moreover, these issues can arise in a workplace without any union involvement. For example, an upset worker meets with his manager and states “robots cannot do the highly skilled work performed by all of us in distribution—all of us in the department agree that robots should not be used.”

The employer brands the employee a trouble maker and terminates him explaining that employment is “at will.” Under the National Labor Relations Act, an employee advocating on behalf of himself and others concerning wages, hours or working conditions is protected by Section VII. Accordingly, the termination is likely unlawful.

9 *Human Displacement*

One of the most common debates regarding robotics is whether the industry creates more jobs than it eliminates. This analysis gets repeated for almost every kind of robot or AI that is introduced. Limiting regulations and legislation is commonly proposed. Legal issues immediately include obligations for notice of layoffs (WARN), applicable severance pay if any, and retraining opportunities. The more long-term issues include future regulatory or legislative restrictions on such job eliminations. This could include the requirement to show new jobs created by the use of robotics.

10 *International Standards and Agreements*

The ILO has already produced a major report on the use of robots to reduce hazardous conditions in the workplace. However, the deployment of robots is a global phenomenon. This means that the laws and practices in many countries will be significant factors in how robotics changes and develops.

It will be critical that strong voices are heard in the ILO and throughout the several institutions addressing global working conditions and trade. Reports, such as the one dated January 2014 to the EU Parliament, will greatly influence whether restrictive regulations, legislation or agreements can be expected. Littler, through its Workplace Policy Institute, will be providing frequent updates and research reports on the importance of the robotic revolution and the best workplace policies, regulations and legislation.

The balance will be between workplace safety, vastly increased productivity, retraining opportunities and technological unemployment.