

Lawyer Insights

Viewpoint: Union Strategies to Confront Automation in the Workplace

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The acceleration in the 21st century of automation, artificial intelligence (AI) and emerging technology in the workplace has required U.S. labor unions to create new playbooks to defend their members' interests. Union concerns center around three central innovations: automation, AI performance tracking and workplace monitoring.

McKinsey & Co. projects that by 2030, roughly 40 million U.S. workers, many of them union members, will have been replaced by robotics and automation. Unions are challenged in blunting this impact because an employer often may introduce new technology into its operations without union consent or bargaining.

A new generation of performance tracking technology has created novel burdens and risks for workers. Many employers are abandoning traditional approaches to time and motion studies that require significant time investment by engineers and rely upon manual input and analysis methods. To replace them, employers are introducing AI and machine learning tools that generate data in greater detail more quickly and reduce human bias. In some workplaces, individual productivity reportedly is tracked by robots that deliver warnings and termination decisions accordingly, without human input. This translates into more ways to identify a worker's productivity shortfalls in a shorter period of time and removes subjectivity from assessments.

The third area of concern is workplace monitoring, which includes the vulnerability of employee privacy rights and the potential for prohibited surveillance and intimidation under the National Labor Relations Act. The popularity of new tools such as wearables, remote activity trackers and workplace video cameras increasingly make an employee's whereabouts, activity level and physical condition an open book.

The workplace health concern presented by COVID-19 has resulted in the introduction of infrared cameras to perform temperature checks on workers, and apps to measure employees' health conditions,

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symptoms and virus exposure. Tools that trace location and interaction with others may be used to enforce social-distancing mandates and productivity expectations.

Labor's Strategies for Blunting the Impact

Even though unions often do not have a statutory right to bargain over, or be consulted on, an employer's introduction of technology in the workplace, they are leaning heavily on traditional collective bargaining rights to reduce its impact. The most common bargaining demand is for robust retraining of union members to improve their suitability for new jobs that emerge from the introduction of technology. Similarly, unions seek reskilling of their members to be able to operate the new technology as a part of their roles.

Bargaining teams are also seeing increased requests for advance notice of technology implementation, especially when the technology could lead to worker displacement. A recent example of tech-focused bargaining priorities is the 2018 negotiations between the [Culinary Workers Union Local 226](#) in Las Vegas and local hotels. The union won six months' notice of the introduction of new technology that might result in worker displacement, reskilling to use the technology at no cost to the employees and no-cost training for any new jobs generated by technology.

Beyond collective bargaining opportunities, unions are looking to the tech industry itself to make their case. Unions are advocating that publicly funded research pursue technology goals and products that broadly benefit rank-and-file workers, and that labor representatives be included in initial concept discussions with the tech industry. As outlined [in a report last year by the AFL-CIO](#), "The labor movement should ... engage with technology leaders early in the process of research and development, including through applying for federal grant money; exploring avenues for funding research and development designed to benefit working people; and exploring various models for ensuring that publicly funded or assisted research and development has broad societal benefit."

Labor Considerations for Employers Planning Technology Implementation

Whether considering the introduction of robotics, monitoring tools or productivity innovations, both unionized and nonunionized employers should consider their approach to union-related concerns.

For nonunion employers, the introduction of technology at U.S. workplaces has resulted in union pressure and organizing campaigns using the new technology as a wedge between the workforce and the employer. In this way, unions are emphasizing workers' concerns about job security, safety and privacy to promote the unions' relevance, attract new members and win an organizing foothold in workplaces. As

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with any union activity, an employer's advance creation of reassuring affirmative messaging can determine the outcome of an organizing campaign. The employer's communication team, human resources and labor counsel should be involved in this design.

Next, and specific to unionized workplaces, employers should fully understand how new technology impacts their collective bargaining obligations. In 1981, the U.S. Supreme Court held in *First Nat'l Maintenance Corp. v. NLRB* that some business decisions are not mandatory subjects of bargaining. The court stated that bargaining regarding "management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business." This standard likely will determine whether tech introduction requires bargaining and to what extent.

Finally, employers should consider the potential advantages of engaging the union early on about tech changes regardless of formal bargaining obligations. There are advantages in learning how the workforce might be less negatively impacted and how union concessions might achieve some of the desired goals of the new technology. Further, if a dispute arises later about whether bargaining should be mandated, the employer's good-faith efforts at collaboration will be meaningful in that analysis.

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