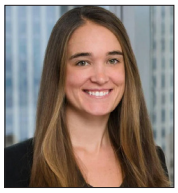
ALM | LAW.COM

New York Law Journal

LABOR RELATIONS

Uncharted Territories: Unions Versus AI in The Workplace—a Legal Battle for the Future

June 12, 2023



By **David E. Schwartz**

And **Emily D. Safko**

If you like the title, thank ChatGPT for coming up with it. Last November, ChatGPT, an artificial intelligence (AI) chatbot, was released and took the public conscious by storm. Even before that, AI had been growing in popularity and use. According to IBM's Global AI Adoption Index released in May 2022, 35% of companies are using AI in their businesses, and 44% of companies are actively planning and working on integrating AI into their businesses. The number of companies using AI will likely increase rapidly over the next few years, directly impacting workplaces.

The increased use of AI poses particular challenges for employers with unionized workforces. The introduction of new technologies is nothing new for employers and unions. However, the potential disruption that AI could cause to certain industries, including the entertainment industry, has already garnered attention.

Artificial Intelligence

Most simply, AI refers to computers synthesizing, problem solving and performing other creative tasks historically undertaken by humans. Current AI models do not "think" in the traditional sense like humans. Instead, they draw on large troves of information to find patterns and predict responses. In the employment context, some employers are using AI to assist with employment decisions including hiring and promoting employees, and some employees are using AI to assist with work. For employers with represented (unionized) workforces, AI presents important challenges.

The current writers' strike serves to illustrate some of these issues. On May 2, the Writers Guild of America (WGA), the union representing writers in the radio, film, television and online media industries, went on strike. One of the main sticking points is the use of AI in their workplace. Many believe that this strike is a harbinger of things to come for employers with unionized workers and the use of AI.

DAVID E. SCHWARTZ *is a partner at Skadden, Arps, Slate, Meagher & Flom.* EMILY D. SAFKO *is an associate at the firm.* CONNOR A. RISER, *an associate at the firm, and* ANGELA S. WHITE, *a summer associate at the firm, assisted in the preparation of this article.*

Technological Developments

AI is far from the first technological breakthrough to shake the foundations of the traditional labor market. Technological advancements reshaping labor markets and changing the dynamics of collective bargaining can be traced from the Industrial Revolution to the digital era to the rise of the gig economy. And, adapting swiftly to innovation is nothing new for the creative and entertainment industries; technical developments have jolted these sectors before. From the advent of home video in the late 20th century to the emergence of streaming and digital distributions in the 2000s, technological shifts over the years have significantly affected content consumption and the rights of creators. Some advancements, like the rise of computers and the internet, shook several industries and forever altered the nature of work. While initially viewed as dangerous and disruptive, many of these advancements eventually proved their staying power and became ubiquitous.

The introduction of new technologies is nothing new for employers and unions. However, the potential disruption that AI could cause to certain industries, including the entertainment industry, has already garnered attention.

Still, the introduction of new technology often comes with labor strife. For example, in 1960, the WGA went on strike in connection with the increase of movies aired on television. In 1981, the emergence of home video and "pay TV" was among the key issues in another WGA strike. Similarly, in 2007, the WGA strike involved issues related to the increased use of online streaming platforms.

The impact of AI is now at the center. In the case of the current writers' strike, workers fear that their work in writing scripts will be automated, without need for their input. In short, writers are concerned that AI will eventually be used to produce literary material for a film or show. The WGA seeks to limit the use of AI as a tool to augment writers' work as opposed to automate it by requiring that literary material be produced by, and credited to, a person. The WGA also seeks to limit use of unionized writers' prior work to train AI systems to produce similar material. The Alliance of Motion Picture and Television Producers (AMPTP), a trade association representing studios and networks, has so far refused to be limited in its use of AI. Instead, it has proposed annual meetings with the union to further discuss changing use of AI technology.

Bargaining Obligations

Although AI in its current form is far from developed or sophisticated enough to replace writers at this stage, the expiration of the WGA's contract with the AMPTP is the impetus for the current debate. As a general matter, the scope and duty of an employer's obligation to bargain with the union depends on whether the negotiations are taking place during the term of a contract or otherwise, and whether the matter is a "mandatory" or "permissive" subject of bargaining under applicable law.

Under the National Labor Relations Act (NLRA), unions and employers are required to bargain in good faith about "wages, hours, and other conditions of employment," otherwise referred to as

"mandatory" subjects of bargaining. With respect to these matters, an employer must bargain with the union about the decision to take a particular action. This type of bargaining is commonly referred to as "decision bargaining."

By contrast, employers are generally not required to bargain prior to making core managerial decisions pertaining to the operation of the business. These types of matters are generally referred to as "permissive" subjects of bargaining. Nonetheless, employers are required to bargain about the effects of major operation changes that will affect the terms and conditions of employment. This type of bargaining is commonly referred to as "effects bargaining."

Employers with unionized workforces should also consider their bargaining obligations with respect to the impact of using AI in hiring and promotions.

During the term of a collective bargaining agreement, an employer cannot unilaterally change the terms and conditions of employment or the terms of the collective bargaining agreement without first negotiating with the union, and neither party is required to negotiate with respect to matters covered by the agreement. If a matter is not covered by the agreement, employers must negotiate with the union over mandatory subjects of bargaining and the effects of any permissive subjects of bargaining. Notably, employers may reserve the right within a collective bargaining agreement to make certain decisions related to the operation of the business during the term of the collective bargaining agreement without first negotiating with the union. These clauses are typically referred to as "management rights" clauses. Once a contract expires, employers must honor the terms of the expired agreement while negotiating with the union over the terms of a new agreement until the parties reach impasse.

An employer's decision to introduce new technology in the workplace has typically been considered a permissive subject of bargaining. Therefore, absent a provision in the applicable collective bargaining agreement, employers are generally not required to bargain with unions over the decision to introduce new technology in the workplace. Nonetheless, because of the potential of AI to change the dynamics of work, its use in the workplace could require an employer to engage in effects bargaining, which could—depending on the circumstances— involve discussions on issues like job security, opportunities for retraining and job displacement caused by the implementation of new technology. Because use of AI is likely a permissive subject of bargaining, the WGA is currently looking to add language to the applicable collective bargaining agreement to limit the use of AI.

Given the increasing prevalence of AI across industries, other unions may follow WGA's lead. Future labor negotiations are likely to include demands similar to those being made by the WGA, and such demands are likely to become commonplace as unions seek to adopt provisions in collective bargaining agreements that limit the use of AI. These discussions are particularly likely to emerge in creative and professional industries, and it is anticipated that there will be an increased demand for agreements that preserve creative control and utilize AI as a tool, not

a replacement. Notably, as with prior WGA strikes, other labor unions representing employees in the entertainment industry have made their support for the WGA known, including the Screen Actors Guild—American Federation of Television and Radio Artists (SAG-AFTRA), whose contract with AMPTP expires at the end of June. Interestingly, on June 3, the Directors Guild of America (DGA) announced that it reached a tentative deal for a new three-year collective bargaining agreement with AMPTP, which would provide that AI is not a person and cannot replace the work performed by the members.

Looking Forward

AI has already begun flexing its power as a transformative force for both employers and unions, and its integration into workplaces is expected to reshape and redefine labor dynamics.

Demands for AI to be restrained are expected to increase in the future, particularly in the creative and professional spaces; the writers' strike will likely prove to be only the first of many union challenges to the implementation of AI. Issues such as job security and creative control will likely emerge at the forefront of labor negotiations. As AI continues its rapid evolution with no signs of slowing, employers in industries across the board must be ready and willing to embrace new opportunities and mitigate potential challenges with the aim of creating a future where both humans and AI can coexist in the workplace.

Against this backdrop, employers of both unionized and nonunionized workforces should also be mindful of the changing legal landscape with respect to use of AI. Notably, New York City Local 144, which sets forth limitations and requirements for employers using automated employment decision tools (AEDTs) to screen candidates for hire or promotion for a position physically located in New York City, will become enforceable as of July 5. The law prohibits use of AEDTs unless the tool has been the subject of an independent bias audit within the past year. The law also requires that employers or employment agencies make public on their website the results of the most recent bias audit and the AEDT's distribution date. On April 6, the city issued final rules on the law that defined terms and clarified the requirements for conducting a bias audit, for publishing the results of a bias audit and for providing notices to employees and candidates for employment and articulated additional obligations with respect to the use of AEDTs.

Employers with unionized workforces should also consider their bargaining obligations with respect to the impact of using AI in hiring and promotions. Like use of AI to augment employees' work, this type of usage would also likely be a permissive subject of bargaining. However, the determination would depend on the facts and circumstances of the change and its potential impact, and regardless, employers would still be required to bargain over the effects of the change.