

Technology and the Future of Work

BY CHRIS KWOK

A 2017 survey by McKinsey & Company about technology and the future of work showed that people are feeling increasingly gloomy about the future and believe that the next generation will enjoy a lower quality of life. Up to 45 percent of the working-age population globally may be “underutilized,” which is defined as “unemployed, inactive, or underemployed.” Wages have been stagnant for decades; social scientists have different theories as to why.

According to artificial intelligence (AI) expert and author Kai-Fu Lee, automation has been accelerated by an AI improvement called deep learning, which uses statistics to find patterns in large data sets. Propelled by increases in computing power and available data, this advance has been applied to different contexts, such as the recommendation systems of Netflix, YouTube and

Amazon. Some argue that this technological automation has eliminated jobs. It is also transforming the very nature of our work, as well as the way we find work. For the approximately 500 million users on LinkedIn, AI is used to match job listings with candidates. This may lead to a day when the phrase “looking for work” will be an anachronism, as jobs will come looking for us. Companies like pymetrics, which brings together job-seekers and opportunities, will “interview” potential hires, with the promise that the hiring process of the future will be free of bias and discrimination.

Others point instead to the transformation of work organizations wrought by the “fissured workplace,” a term used by David Weil in his book *The Fissured Workplace*. Similar to an iceberg that develops a crack that will grow and one day break it apart, our corporations are



fissuring. Through contracting, franchising and global supply chains, large corporations have shed employees considered peripheral to their core businesses. Where IBM once directly employed thousands of workers—ranging from engineers to janitors—separate companies now provide those same workers on a contract basis. Jobs that once promised a solid middle-class lifestyle no longer exist. Legal obligations may now be

spread across multiple organizations, resulting in a lack of clarity as to which organization(s) bears the responsibility of enforcing worker protections.

This fissured workplace has intersected with automation to create the gig economy, where all workers are independent contractors who use digital platforms to get work. However, the flexibility and freedom of being an independent contractor come with a social price: These workers are not covered by social insurance programs like unemployment insurance, do not have employer-provided health insurance and cannot depend on a steady income stream. Because they are independent contractors, most labor and anti-discrimination laws do not apply to them.

No matter the cause of this workplace transformation, the undeniable reality is that the workplace is changing—and perhaps not for the better. What does this mean for employment lawyers? The fissured workplace has fundamentally altered the employment relationship and decreased the need for human resources (HR) management. Businesses with HR departments and in-house labor

and employment counsel are becoming more the exception rather than the rule. They are now the province of deep-pocketed financial, educational and health care institutions. Many HR functions are being outsourced, resulting in very less continuity and institutional knowledge.

Traditional corporations as we know them are going extinct. Laws and regulations were created with the characteristics of these entities in mind, but their regulatory efficacy has been reduced because of the corporate fissure. Is society better off as a result? Some of these issues are being litigated right now, although a courtroom is not the optimal venue for these critical debates. We need to have policy discussions as we consider new ways of ensuring that we are building a society that will serve the needs of the next generation.

Employment law counsel will have to become well versed in crafting algorithms that direct deep learning design, in order to ensure fairness and avoid claims of employment discrimination. Deep learning has been shown to replicate real-world bias. The type of data collected can be non-representative of reality

and reflect existing prejudices. For example, according to a February 4, 2019, article on AI bias in *MIT Technology Review* by Karen Hao, because there is far more data on the faces of Caucasians, using facial recognition to unlock a smartphone can be less effective and slower for African Americans.

The fissured workplace has created distinct winners and losers in our new economy, and we should be careful about where we are headed. Employment law mediations can not only help solve the specific issue that presents itself, but can allow for a considered approach to the future trends that are shaping the future of employment law and our workplace.

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