

# Employment law in the AI era: the constructive dismissal problem

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The July 2, 1978 issue of the *New York Times* was the final one the paper sent to print under the linotype process. After decades of relying on Gutenberg printing press-style technology, the newspaper invested in a computerized method that would eliminate the need to physically cast each letter of every page into lead plates for the presses.

The automation and digitization of the “hot type” process did not leave linotype operators jobless, however. Those same employees who had run the hot metal typesetting machines were sitting in front of computers the next day, typing stories into a digital format rather than hammering them into place. Asked what the technological upgrade would mean for him personally, one employee responded, “it means I’ll have to learn a new process.”<sup>1</sup> Automation helped these workers print newspapers more efficiently but it did not replace them.

Automation driven by artificial intelligence is likely to result in similar experiences for millions of workers. While AI may render some jobs currently performed by people redundant, it will also create new positions that do not presently exist and expand the significance of many that already do. AI will lead to layoffs, but it will also require employers to retrain employees into new or different jobs.

## 60% of jobs could have at least one third of their constituent activities automated.

McKinsey suggests fewer than five percent of occupations can be fully automated given currently demonstrated technologies. However, 60% of jobs could have at least one third of their constituent activities automated. This implies a substantial workplace transformation, requiring as many as 375 million people to switch occupational categories by 2030.<sup>2</sup> Indeed, of those executives surveyed by McKinsey, 62% believe they will need to retrain or replace more than a quarter of their workforce between now and 2023 because of advancing automation. Eighty-two percent of executives at companies with more than \$100 million in annual revenues believe retraining and reskilling must be at least half of the answer to addressing this skills gap.<sup>3</sup>

Transitioning existing employees into new roles can have legal consequences. If handled improperly, one such outcome could be a claim for constructive dismissal by an employee as a result of this transition. Employers who expect to retrain and redistribute employees as a result of automation should equip themselves to proactively address issues surrounding constructive dismissal.

## What constitutes constructive dismissal?

Constructive dismissal occurs where an employer demonstrates an intention to no longer be bound by the employment contract. It is distinct from a formal dismissal and is the result of either a breach by the employer of an express or implied fundamental term of the employment contract or, even though a specifically breached term may

not be identifiable, cumulative employer conduct that generally shows an intention not to be bound by the employment agreement.

An employee must show two things to establish constructive dismissal: (i) the employer unilaterally breached the employment contract and (ii) the breach substantially altered a fundamental term of the contract. The breach may be immediate or it may be anticipatory, such as an announcement by the employer that it intends to make a fundamental change to the terms of employment at a future date. Importantly, the breach of contract must be made unilaterally by the employer. A change that falls within the scope of the employment agreement's terms or one that is accepted by the employee will not be unilateral. The breached term must also be a fundamental one, such as compensation, hours of work, seniority, or job duties, and the fundamental term must be substantially breached such that the employer appears to intend to cease its obligations under the employment contract. Absent a particular breach of a specific term, an employer's conduct may generally show the employer does not intend to be bound by the employment agreement, and may give rise to a claim for constructive dismissal.

## Significant transitions of employees into new roles is just one of the ways automation driven by artificial intelligence will affect the workplace.

Faced with a change amounting to constructive dismissal, the employee must treat the change as a repudiation of the employment contract, object to the change, and either resign or continue working in mitigation of their damages. If an employee can show constructive dismissal, damages are assessed against the employer as if the employee was wrongfully dismissed, typically calculated from the date of the employer's breach of the employment contract rather than the date the employee resigned.

## How can employers mitigate risk?

A constructive dismissal analysis is highly fact-driven. The particular employment agreement, including written offers, written promotion letters, and verbal representations, as well as the reality of the situation must be considered. In the context of transitioning existing employees into new roles, care needs to be taken to respect the fundamental terms of the employment contract regarding compensation, hours of work, location, seniority, and job duties. If the employment contract permits the employer to change an employee's job duties, the employer should ensure other fundamental terms are changed as little as possible when modifying employee roles. If the change in duties is likely to be a substantial unilateral breach of a fundamental term, employers should consider a number of strategies to reduce their potential liability for constructive dismissal. Advance notice of the change consummate to the employee's entitlement to reasonable notice for dismissal should be provided if possible, and it should be made clear that the employee will be terminated at the end of that period if they do not accept the new terms. Where possible, written employee consent to the change should be sought. Where multiple employees will be affected, the employer should consider whether the change will have a discriminatory outcome.

Significant transitions of employees into new roles is just one of the ways automation driven by artificial intelligence will affect the workplace. Mass terminations, hiring practices, employee privacy, wages and benefits, occupational safety, and other issues will require careful and novel consideration by employers. We will all have to learn a new process.

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<sup>1</sup> [Farewell, Etaoin Shrdlu](#), dir. David Loeb Weiss (*The New York Times*, 1978), film.

<sup>2</sup> James Manyika and Kevin Sneider, "AI, automation, and the future of work: ten things to solve for," McKinsey Global Institute, June 2018, <https://www.mckinsey.com/featured-insights/future-of-work/ai-automation-and-the-future-of-work-ten-things-to-solve-for>.

<sup>3</sup> Pablo Illanes et al, "Retraining and reskilling workers in the age of automation," McKinsey Global Institute, January 2018, <https://www.mckinsey.com/featured-insights/future-of-work/retraining-and-reskilling-workers-in-the-age-of-automation>.

