Fourth Study Commission
Public and Social Law

Questionnaire
2024

Digital Revolution Impact on the Labor Market: Platform or Gig Economy and
Artificial Intelligence

United States Federal Judges Association

1. **Provide a brief description of the presence of the "gig" or "platform" economy in your country. If possible, base your answer on official public data or academic reports, although we recognize that in some cases data may not be available.**

   Definitions.

   The gig economy is traditionally defined as a set of labor markets that match providers to consumers for an often short-term "gig," or job, on an on-demand basis.[1] In common parlance, the gig economy is generally associated with Internet and application-based platforms that connect providers to consumers to fulfill specific, short-term needs such as driver services (e.g., Uber, Lyft), delivery services (e.g., DoorDash, FreshDirect), or specialized household tasks (e.g., TaskRabbit, Handy).[2] But researchers have also defined the gig economy more broadly to encompass a larger swath of temporary and contract work that has existed for decades, such as seasonal recreational or agricultural work, freelance creative work, and project-based contractor or consulting work.[3] The gig economy goes by many names, such as the sharing, on-

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[1] Sarah A. Donovan, Jon O. Shimabukuro & David H. Bradley, Cong. Rsch. Serv., R44365, What Does the Gig Economy Mean for Workers? 1 (2018) [hereinafter Congressional Report].
[2] *Id.* at 2.
[3] Ahu Yildirmaz, Mita Goldar & Sara Klein, ADP Rsch. Inst., Illuminating the Shadow Workforce: Insights into the Gig Workforce in Businesses 5 (2020) [hereinafter Illuminating the Shadow Workforce].

demand, peer, platform, and concierge economy.[4] The gig worker, too, goes by even more names: consultant, free agent, freelancer, moonlighter, and on-call, contingent, part-time, platform, project-based, self-employed, or temporary worker.[5]

Quantification.

Perhaps because the gig economy in the United States has been defined in many ways and encompasses many different work structures and environments, measuring it has plagued researchers for years. The Bureau of Labor Statistics has not published statistics on the gig economy workforce specifically, noting a lack of an official definition of the term.[6] Instead, it has periodically published the Contingent Worker Supplement (CWS), which seeks to measure workers in alternative employment arrangements, such as independent contractors, on-call workers, temporary help agency workers, and workers employed by contract firms.[7] The most recent CWS, published in May 2017,[8] reported that there were 10.6 million independent contractors (6.9 percent of total employed), 2.6 million on-call workers (1.7 percent of total employed), 1.4 million temporary help agency workers (0.9 percent of total employed) and 933,000 workers employed by contract firms (0.6 percent of total employed).[9] The 2017 CWS also measured 5.9 million contingent workers—or workers who did not expect their jobs to last—representing 3.8 percent of the total employed.[10] This represents a continuation of a slight downward trend in the proportion of contingent workers in the workforce since the first CWS in 1995.[11] But, of course, gig workers do not necessarily view their work as temporary, nor are they certain to report themselves as independent contractors, given that the legal status of gig workers is still very much in flux.[12] The CWS is also unlikely to properly account for workers who work a full-time, wage-

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[4] *Id.*

[5] *Id.*

[6] Congressional Report, supra note 1, at 4; Commissioner's Corner, *Tracking the Changing Nature of Work: The Process Continues*, Bureau of Labor Statistics (Feb. 12, 2019), https://www.bls.gov/blog/2019/tracking-the-changing-nature-of-work-the-process-continues.htm#:~:text=The%20days%20of%20working%20the,device%2C%20and%20changing%20jobs%20frequently [hereinafter Tracking the Changing Nature of Work].

[7] Congressional Report, supra note 1, at 5.

[8] A spokesperson for the Bureau of Labor Statistics told CNN in 2023 that it was conducting a new CWS and public release of the data is expected "some time in 2024." Samantha Delouya, *The Rise of Gig Workers Is Changing the Face of the U.S. Economy*, CNN (July 25, 2023), https://www.cnn.com/2023/07/24/economy/gig-workers-economy-impact-explained/index.html. BLS has not yet published this new data.

[9] Press Release, Bureau of Labor Statistics, Contingent and Alternative Employment Arrangements (June 7, 2018), https://www.bls.gov/news.release/conemp.nr0.htm.

[10] Tracking the Changing Nature of Work, supra note 6.

[11] *Id.*

[12] *See infra* Section 2.

earning job but who "gig" to supplement their income, such as a public school teacher who drives for Uber on the weekends.[13]

As a result of this likely undercounting in public sources,[14] other estimates of the gig economy in the United States are far larger. ADP, for example, analyzed the payroll data of 18 million workers in large companies and found that 16 percent of those workers received a tax form consistent with "gig" work.[15] And at the high end of the estimates, results of the Enterprising and Informal Work Activities (EIWA) Survey in 2015 found that a whopping 36 percent of respondents did informal online or offline paid work activities.[16] Many EIWA respondents reported more traditional informal paid work that might not, under some definitions, be considered "gig" work, such as selling new and used goods or handicrafts, or doing informal work in the neighborhood such as house sitting, landscaping, or babysitting.[17] Similarly, McKinsey's 2022 American Opportunity Survey (AOS) simply asked respondents if their current job was "contract, freelance, or temporary" or if they "considered [themselves] a gig worker or part of the gig economy," and 36 percent of respondents identified as such, up from 27 percent in the last AOS conducted in 2019.[18] It is likely that these numbers reflect the post-COVID era.

Putting the precise numbers aside, there is no question that, for better or for worse, the proliferation of gig and platform work in the United States in the last decade has transformed the economics of American households in ways that we are only beginning to understand. These platforms are crucial sources of additional (or, in some cases, sole) income for those who cannot, or choose not to, take on more permanent

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[13] Katharine G. Abraham et al., *The Independent Contractor Workforce: New Evidence on its Size and Composition and Ways to Improve Its Measurement in Household Surveys* 2 (Upjohn Inst., Working Paper No. 23-380, 2023) [hereinafter The Independent Contractor Workforce] (noting that the CWS collects information only on "a worker's main job").

[14] A group of researchers at the Upjohn Institute partnered with Gallup to attempt to probe whether workers who reported themselves as employees were actually independent contractors; this probing revealed that the CWS questions likely resulted in significant undercounting of independent contractors because many workers were not likely to identify themselves as such until asked explicitly about the nature of their work. *See* The Independent Contractor Workforce, supra note 13, at 49.

[15] *See* Illuminating the Shadow Workforce, supra note 3, at 6 (classifying workers who receive a 1099-MISC or a short-term W-2, as opposed to a long-term W-2, as gig workers).

[16] Barbara J. Robles & Marysol McGee, Divs. of Rsch. & Statistics & Monetary Affairs, Fin. Reserve Bd., *Exploring Online and Offline Informal Work: Findings from the Enterprising and Informal Work Activities Survey* 2 (2016).

[17] *Id.* at 4.

[18] André Dua et al., *Freelance, Side Hustles, and Gigs: Many More Americans Have Become Independent Workers*, McKinsey & Co. (Aug. 23, 2022), https://www.mckinsey.com/featured-insights/sustainable-inclusive-growth/future-of-america/freelance-side-hustles-and-gigs-many-more-americans-have-become-independent-workers.

work.[19] But that flexibility can come at a significant cost: compensation that can be lower than the federal minimum wage;[20] fewer or sometimes no benefits or protections at all compared to traditional employees, depending on how gig workers are classified;[21] and increased exposure to economic fluctuations.[22]

2. How does this development affect the traditional employee/employer relationship? What is the status of platform or gig workers in your country: employees, independent contractors or a third category? Is there any jurisprudential divergence regarding the status of these workers? Cite relevant examples.

The proliferation of the gig economy has ignited a widespread and vociferous debate over the legal classification of gig and platform workers. Although major gig companies have generally classified their workers as independent contractors, the lack of benefits and legal protections have led to both litigation and policy proposals seeking to address the drawbacks of gig work.[23] Given the multiple levels of government—federal, state, and local—within the United States that are responsible for employment law, no general approach to this issue has yet taken shape. However, the dichotomy of classifying gig workers as either employees or independent workers has continued to dominate the political and legal efforts to address this issue, even as some jurisdictions attempt to create a third category whereby certain gig workers are guaranteed some protections, such as a minimum wage, while remaining independent contractors.[24]

Much of this debate over the classification of gig workers has centered on rideshare and delivery drivers, with the state of California at the forefront. In 2018, the California Supreme Court adopted the "ABC test"—which narrows the definition of an independent contractor and places the burden of proof on the hiring entity—to determine whether workers were employees or independent contractors for the purposes of wage orders.[25] Under the "ABC test," "a worker is properly considered an

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[19] *See* Fiona Greig & Daniel M. Sullivan, JPMorgan Chase Inst., *The Online Platform Economy Through the Pandemic* 3 (2021) [hereinafter The Platform Economy Through the Pandemic]; Illuminating the Shadow Workforce, supra note 3, at 12.

[20] Ben Zipperer et al., *National Survey of Gig Workers Paints a Picture of Poor Working Conditions, Low Pay*, Econ. Pol'y Inst. (June 1, 2022), https://www.epi.org/publication/gig-worker-survey/.

[21] *Id.*

[22] A JP Morgan study of the effects of the pandemic on online platform workers found that those workers were much more likely than the rest of the population to receive unemployment insurance, and the effects were even more pronounced for platform workers for transportation platforms like Uber and Lyft. *See* The Platform Economy Through the Pandemic, supra note 19, at 8.

[23] Chris Marr*, Uber, Lyft Driver Pay Proposals in 2024 Shaped by New York Deal*, BLOOMBERG (Dec. 27, 2023), https://www.bloomberglaw.com/product/tax/bloombergtaxnews/daily-tax-report/X4ISDS38000000?#jcite.

[24] *Id.*

[25] Dynamex Operations W., Inc. v. Superior Ct., 416 P.3d 1, 8 (Cal. 2018).

independent contractor to whom a wage order does not apply only if the hiring entity establishes: (A) that the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact; (B) that the worker performs work that is outside the usual course of the hiring entity's business; and (C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity."[26] The court's adoption of this classification test spurred the California legislature to enact Assembly Bill 5. Under Assembly Bill 5, the legislature codified the "ABC test" and extended it to other labor and employment legislation, including workers' compensation, unemployment insurance, and disability insurance.[27] The legislature also explicitly subjected agreements between workers and referral agencies that provide delivery and transportation services to the "ABC test," creating a presumption that such gig workers should be classified as employees.[28]

But major gig companies quickly acted to stimy these efforts. In 2020, California voters approved a ballot initiative, known as Proposition 22, that amended Assembly Bill 5.[29] Proposition 22 classified platform workers as independent contractors but extended to them a guaranteed weekly earning minimum, health care stipends, and accident insurance.[30] The conflict has now moved to the courts. Rideshare and delivery companies,[31] campaign-service providers,[32] freelance writers,[33] and truckers[34] have all brought constitutional challenges to Assembly Bill 5 in federal court, but none of these challenges have been successful thus far. In the most recent case, *Olson v. California*, the Ninth Circuit Court of Appeals upheld Assembly Bill 5's differential treatment of app-based work arrangements in the transportation and delivery service industry and app-based work arrangements in other industries.[35] There, the Ninth Circuit determined that the California legislature had a rational basis for treating rideshare and delivery referral companies differently because the legislature perceived the companies as "the

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[26] *Id.*
[27] Cal. Lab. Code § 2775.
[28] *Id.* § 2777(b)(2)(C).
[29] Levi Sumagaysay, *Gig Companies Spent More than $200 Million to Write Their Own Labor Law. The State Supreme Court Could Throw It Out*, CALMATTERS (May 22, 2024), https://calmatters.org/economy/2024/05/prop-22-oral-arguments/.
[30] *Id.*; *see also* Cal. Bus. & Prof. Code § 7451.
[31] Olson v. California, 104 F.4th 66 (9th Cir. 2024).
[32] Mobilize the Message, LLC v. Bonta, 50 F.4th 928 (9th Cir. 2022).
[33] Am Soc'y of Journalists & Authors, Inc. v. Bonta, 15 F.4th 954 (9th Cir. 2021).
[34] Cal. Trucking Ass'n v. Bonta, 996 F.3d 644 (9th Cir. 2021).
[35] *Olson*, slip op. at 7.

most significant perpetrators" of work misclassification.[36] And the constitutionality of Proposition 22 is currently pending before the California Supreme Court after an appellate court upheld much of the law in the face of arguments that it intruded on the legislature's exclusive authority over a worker's compensation system.[37]

The hybrid approach of Proposition 22—maintaining the independent contractor status of gig workers while extending certain benefits—has taken hold in other states. In response to state enforcement actions against Uber and Lyft for misclassifying employees, the companies reached settlement agreements with New York and Massachusetts that allowed rideshare drivers to be classified as independent contractors while mandating that companies provide guaranteed minimum pay, offer paid leave, and contribute to state unemployment and accident insurance.[38] Also, the state legislatures in Washington and Minnesota have passed bills enacting a similar approach.[39] By tackling the classification issue through settlements and legislative action, major gig companies have avoided state court decisions that could set a precedent for classifying their workers as employees. At the same time, these efforts have only addressed rideshare and delivery workers, thereby leaving other gig workers as traditional independent contractors.

At the federal level, ambiguity over gig workers' status—and the applicability of laws such as the Fair Labor Standards Act ("FLSA") and the National Labor Relations Act—has continued. While Congress has provided no guidance on this issue, executive action has attempted to favor one status over the other. At the end of the Trump administration, the Department of Labor ("DOL")—which enforces labor standards—issued a regulation that would have allowed companies to use an updated "economic realities" test that would have favored the classification of gig workers as independent contractors.[40] However, the Biden administration rescinded this regulation.[41] Instead, the DOL recently finalized a rule that requires equal consideration of each factor in the "economic realities" test, which many view as an attempt to classify a broad swath of

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[36] *Id.* at 8.

[37] Sumagaysay, supra note 29.

[38] Erik Larson & Natalie Lung, *Uber, Lyft to Pay $328 Million in Back Pay to NY Drivers*, BLOOMBERG (Nov. 2, 2023), https://www.bloomberglaw.com/product/tax/bloombergtaxnews/daily-tax-report/X588MJTG000000?#jcite; Nate Raymond & Daniel Wiessner, *Uber, Lyft Agree to Minimum Pay for Massachusetts Drivers to Settle Lawsuit*, REUTERS (June 28, 2024), https://www.reuters.com/legal/massachusetts-top-court-allows-dueling-gig-worker-ballot-measures-proceed-2024-06-27/.

[39] Max Nesterak, *Here's What's in the Bill Regulating Uber and Lyft Driver Pay and Labor Standards*, MINN. REFORMER (May 21, 2024), https://minnesotareformer.com/2024/05/21/heres-whats-in-the-bill-regulating-uber-and-lyft-driver-pay-and-labor-standards/.

[40] Ben Penn, *Biden Axes Trump Gig-Worker Rule, Favoring 'Employee' Model*, BLOOMBERG (May 5, 2021), https://www.bloomberglaw.com/product/tax/bloombergtaxnews/daily-tax-report/XLG0340000000?#jcite.

[41] *Id.*

gig workers as employees.[42]   Although several groups have challenged the agency's procedures in promulgating the rule as well as its constitutionality in multiple federal courts, the rule is in effect as of March 2024.[43]

Similarly, the National Labor Relations Board ("NLRB")—which oversees unions—has recently switched its position on the opportunities for gig workers to organize. In 2019, the NLRB's general counsel issued an advice memo stating that Uber drivers were not employees, citing an NLRB decision that elevated a worker's "entrepreneurial opportunity" as the key factor in determining a worker's employment status.[44] But in 2023, the NLRB reversed the prior decision, broadening the factors to be considered.[45] Now, the NLRB has opened the door for gig workers to be classified as employees and unionize.

While serving as the venues for many challenges to both legislative and executive attempts to classify gig workers, the federal courts have had little to say about the classification debate itself thus far. Gig workers have brought suits under the FLSA, but gig companies' settlement and arbitration efforts have meant that no court rulings have been made.[46] However, the DOL rule and the NLRB decision may mean that the federal courts may ultimately consider the classification issue should an enforcement challenge be appealed.

Ultimately, the classification of gig workers remains uncertain, given the divided and overlapping nature of American governance. Still, it is clear that the gig economy may very well transform the understanding of worker classifications by either altering the scope of the definitions of employees and independent contractors or leading to the rise of a third category that maintains the independence of gig workers while extending legal protections to them.

3. **What is the impact of artificial intelligence on the labor market of your country? If possible, base your answer on official public data or academic reports. Outline the positive and negative impacts.**

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[42] Rebecca Rainey, *Challenges to DOL's Contractor Rule: Mounting Lawsuits Explained*, BLOOMBERG (Mar. 5, 2024), https://news.bloomberglaw.com/daily-labor-report/challenges-to-dols-contractor-rule-mounting-lawsuits-explained.

[43] *Id.*

[44] Lauren Kaori Gurley, *Gig Workers Could Find It Easier to Unionize Under New Ruling*, Wash. Post (June 13, 2023), https://www.washingtonpost.com/business/2023/06/13/gig-workers-unions-independent-contractors-nlrb-ruling-uber-lyft/.

[45] The Atlanta Opera, Inc., 372 N.LR.B. 95 (2023).

[46] Congressional Report, supra note 1, at 11–12.

For a technology that most Americans only recently became familiar with by name, generative AI has already shaken up the U.S. workforce. That said, most of the current effects of this technology have come in the form of anxiety, uncertainty, and (at least some) excitement over its potential impacts on the labor market in both the near and distant future, as opposed to any large-scale present disruption. Whether they optimistically welcome AI or approach the technology with wary hesitancy, one thing that most Americans can agree on: AI will have a major impact on U.S. jobholders in the coming years and decades.[47]

To be sure, U.S. workers and employers are not complete strangers to the use of AI. Employers have for years utilized earlier versions of the technology to assist with tasks such as screening online job applications—using so-called "predictive hiring tools" that rapidly comb through and evaluate résumés and cover letters to find keywords and other attributes that the employer has identified as desirable.[48] Even though AI is thus not a completely new technology, the rapid introduction of advanced generative AI tools like ChatGPT has the potential to create a paradigm shift in the day-to-day lives of U.S. workers and employers.

This potential sea change concerns many. Polling data reveals that "Americans are wary and sometimes worried" about the potential impacts of generative AI on the workplace.[49] This concern echoes workers' views when computers were introduced. Now, nearly a quarter of American workers worry that the technology will make their jobs obsolete.[50] Opposition centers on some uses of AI, such as employers using the technology to: make final hiring and firing decisions; review job applications and determine whether a worker should be promoted; and track worker behavior, such as workers' movements and facial expressions while they are at work.[51]

The widescale rollout of generative AI comes just on the heels of one of the most volatile periods in recent U.S. workforce history, making anxieties over the technology all the more acute. During the COVID-19 pandemic, "the US labor market saw 8.6

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[47] PEW RESEARCH CENTER, AI IN HIRING AND EVALUATING WORKERS: WHAT AMERICANS THINK (2023), https://www.pewresearch.org/internet/2023/04/20/ai-in-hiring-and-evaluating-workers-what-americans-think/ (sixty two percent of "Americans believe AI will have a major impact on jobholders overall in the next 20 years") [hereinafter "Pew Research AI Report"].

[48] Julie Weed, *Résumé-Writing Tips to Help You Get Past the A.I. Gatekeepers*, N.Y. TIMES (Mar. 21, 2021), https://www.nytimes.com/2021/03/19/business/resume-filter-articial-intelligence.html.

[49] Pew Research AI Report, *supra* note 47.

[50] Lydia Saad, *More U.S. Workers Fear Technology Making Their Jobs Obsolete*, GALLUP (Sept. 11, 2023), https://news.gallup.com/poll/510551/workers-fear-technology-making-jobs-obsolete.aspx.

[51] Pew Research AI Report, *supra* note 47.

million occupational shifts, 50 percent more than in the previous three-year period."[52] The American economy thus finds itself face-to-face with the forthcoming era of generative AI just as the dust is only beginning to settle after the disruptive years of the pandemic.

Americans' concerns over generative AI have already come to a head in one industry. Last year's 148-day Hollywood screenwriters' strike represented "one of the first major labor battles over AI in the workplace."[53] "During the five-month walkout"—which centered on a host of issues from streaming-era economics to new technology—"[n]o issue resonated more than the use of AI in script writing," which became an "existential rallying cry" for screenwriters.[54] Ultimately, the Writers Guild of America approved a contract agreement with studios that secured, among other guarantees, regulation and control over the use of AI in generating storylines.[55] "Many experts see the screenwriters' deal as a forerunner for labor battles to come," as workers and employers alike grapple with how best to integrate generative AI into their work and structure needed guardrails to ensure the technology's responsible and mutually beneficial implementation.[56]

Anxiety amongst Hollywood screenwriters—and U.S. workers more generally—is not unfounded. According to a McKinsey Global Initiative report, by 2030, activities that account for up to 30 percent of hours currently worked across the U.S. economy could be automated (a trend, the report notes, that may be sharply accelerated by generative AI).[57] And according to a Goldman Sachs report, roughly two-thirds of current jobs are exposed to some degree of AI automation.[58]

The biggest future job losses are expected to occur in office support, customer service, and food services—jobs that involve "a high share of repetitive tasks, data collection, and elementary data processing, all activities that automated systems handle

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[52] KWEILIN ELLINGRUD ET AL., MCKINSEY GLOBAL INSTITUTE, GENERATIVE AI AND THE FUTURE OF WORK IN AMERICA iv (2023), generative-ai-and-the-future-of-work-in-america-vf1 (1).pdf [hereinafter "McKinsey AI Report"].

[53] Jake Coyle, *In Hollywood Writers' Battle Against AI, Humans Win (For Now)*, ASSOCIATED PRESS (Sept. 27, 2023), https://apnews.com/article/hollywood-ai-strike-wga-artificial-intelligence-39ab72582c3a15f77510c9c30a45ffc8.

[54] *Id.*

[55] Andrew Dalton, *The Hollywood Writers Strike is Over After Guild Leaders Approve Contract with Studios*, ASSOCIATED PRESS (Sept. 26, 2023), https://apnews.com/article/writers-strike-deal-hollywood-vote-actors-d3119d670a4fd3449773bf8f4026fb2b.

[56] Coyle, *supra* note 53.

[57] McKinsey AI Report, *supra* note 52, at iv, 5.

[58] JAN HATZIUS ET AL., GOLDMAN SACHS, THE POTENTIALLY LARGE EFFECTS OF ARTIFICIAL INTELLIGENCE ON ECONOMIC GROWTH 1 (2023), https://apnews.com/article/writers-strike-deal-hollywood-vote-actors-d3119d670a4fd3449773bf8f4026fb2b (based on statistics for U.S. and Europe).

efficiently."[59] Experts predict that workers in low-wage jobs and those without college degrees will be more likely to need to change occupations by 2030.[60] White-collar workers, on the other hand, are expected to be less affected—though generative AI does pose some risk, as it can automate "some of the activities of knowledge workers at the higher end of the income spectrum" such as computer programmers, scientific researchers, and financial advisers.[61] At any rate, it seems likely that at least some portion of the U.S. workforce will need to prepare to make occupational transitions as a result of changes brought on by generative AI.

Despite this understandable wariness over AI, there is some optimism in the U.S. labor market over the positive developments and workforce improvements that the technology could bring. "While generative AI is still in the early stages, the potential applications for businesses are significant and wide-ranging," from using the technology to "write code, design products, create marketing and content strategies, streamline operations, analyze legal documents, provide customer service via chatbots, and even accelerate scientific discovery."[62] Naturally, the large-scale adoption of generative AI also has the potential to create new job opportunities, particularly in AI development and related fields.[63] Generative AI also promises to streamline tasks and increase productivity, provided workers are equipped with the appropriate training needed to develop new skills and to learn how to mitigate and control any risks associated with the use the technology.[64] With AI potentially able to shoulder certain tasks (*e.g.* administrative and reporting duties), workers may be left with more time to do interesting, collaborative work. And productivity boosts from the integration of generative AI in American workers' daily lives could potentially help compensate for declining productivity and employment growth as the U.S. population ages.[65] AI may even help chip away at complex sociocultural issues, insofar as it presents a potentially "promising way to address the issue" racial and ethnic bias in hiring—an issue that Americans widely believe is a problem.[66]

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[59] McKinsey AI Report, *supra* note 52, at 8 (estimating that demand for administrative office support could decrease by 1.6 million jobs, in addition to losses of 830,000 for retail salespersons, 710,000 for administrative assistants, and 630,000 for cashiers).

[60] McKinsey AI Report, *supra* note 52, at 2, 47.

[61] McKinsey AI Report, *supra* note 52, at 23, 34.

[62] McKinsey AI Report, *supra* note 52, at 4.

[63] Austine Unuriode et al., *The Impact of AI on US Labor Markets* 1 (Austin Peay St. Univ. Working Paper, 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4742319.

[64] McKinsey AI Report, *supra* note 52, at 10.

[65] McKinsey AI Report, *supra* note 52, at 36.

[66] Pew Research AI Report, *supra* note 47; McKinsey AI Report, *supra* note 52, at 57.

In short, much of the impact of generative AI on the U.S. labor market is yet to be seen. Depending on who you ask, the potential future applications of this technology might spark excitement—or seemingly more commonly, anxiety. Regardless of where on that spectrum they fall, American workers and employers seem mostly in agreement on one point: a sea change is on the horizon.

4. **Do you have any laws regulating and/or relevant judicial decisions about artificial intelligence on the labor market? What are the challenges for employers, such as privacy, transparency, secrecy, plagiarism, and the claim that artificial intelligence will be replacing workers? What are the concerns of employees?**

The United States, unlike Europe, does not have comprehensive AI law. However, President Biden's Executive Order, issued October 30, 2023, outlines basic principles for AI. It highlights the great potential of AI but warns that "irresponsible use [of AI] could exacerbate societal harms such as fraud, discrimination, bias, and disinformation; displace and disempower workers; stifle competition; and pose risks to national security."[67] It then articulates broad guidelines to safeguard the development, evaluation, and implementation of AI.

In addition, an increasing number of states have minted brand new artificial intelligence laws regulating the use of AI. Many of these new laws attempt to mitigate the risks that AI poses to employees and consumers, placing the onus on employers to safeguard its use of AI. For instance, AI is not only automating jobs out of existence, but also being used to make hiring and firing decisions.[68] As a result, there is potential that discrimination is embedded in AI models that will adversely impact current or prospective employees. Similarly, data dumped into unsecured AI tools implicates grave privacy concerns and leaves employees and consumers vulnerable to personal information leaks. In short, the cost of indiscriminately using AI often falls on consumers and employees, and new laws on AI erect guardrails to protect those vulnerable groups.

A few themes have emerged from these new state statutes. First, many laws nest AI regulations into existing consumer protection law. These laws tend to focus on notice to the consumer and reiterating companies' liability for violating consumer protection laws. For instance, Utah now requires companies in regulated industries (e.g., healthcare, accounting, and architecture) to "prominently" disclose that consumers are

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[67] Exec. Order No. 14110, 88 Fed. Reg. 75191 (November 1, 2023).
[68] *See* Jack Kelly, *How Companies Are Hiring and Reportedly Firing with AI*, Forbes (Nov. 4, 2023), How Companies Are Hiring And Reportedly Firing With AI (forbes.com).

interacting with AI.[69] Further, companies cannot use generative AI to distance themselves from liability.[70] In other words, reliance on AI is not a defense to violating consumer protection laws. Similarly, a handful of states have enacted laws aimed at protecting consumers' data privacy—a more established battleground in consumer protection law.[71] A new bill is moving through the California Legislature that prohibits companies from using the personal data of children below the age of 16 in AI models without parental authorization.[72]

Second, several states enacted statutes that create the administrative infrastructure to further develop AI regulations and statutes. For instance, Texas's law established an interdisciplinary AI advisory council,[73] and Utah's law creates a new Office of Artificial Intelligence Policy within the Utah Department of Commerce.[74] These new entities study AI to expand the regulatory scheme. Indeed, some states have created entities specifically charged with creating a "code of ethics" for AI.[75] In this way, these laws are not *solutions* to the risks of AI, but rather they create a *process* for finding solutions.

Finally, at least one state law not only ties into consumer protection law, but also sounds in tort law. Colorado's Artificial Intelligence Act, which will be effective February 1, 2026, regulates high-risk systems by requiring notice to consumers, impact assessments, and anti-discrimination duties.[76] The developers of AI have a "duty to avoid algorithmic discrimination."[77] These developers "shall use reasonable care to protect consumers from any known or reasonably foreseeable risks of algorithmic discrimination arising from [use of the AI system]."[78]

These new state laws present challenges for employers. To begin, the patchwork of statutes and regulations regarding AI makes things difficult for employers working across multiple states. Not only is this area of law changing rapidly, but each state is developing its own regime of regulation. Companies must studiously track this changing and varied landscape to avoid liability. Moreover, because the statutes are all relatively

[69] Utah Artificial Intelligence Policy Act, S.B. 149, 2024 Gen. Sess. (Utah 2024).
[70] *Id.*
[71] Rachel Wright, *Artificial Intelligence in the States: Emerging Legislation*, The Council of State Governments (Dec. 6, 2023), Artificial Intelligence in the States: Emerging Legislation - The Council of State Governments (csg.org).
[72] Maggie Fusek, *CA Bill to Protect Children's Data from AI Moves Forward*, Patch (May 21, 2024), https://patch.com/california/lamorinda/ca-bill-protect-childrens-data-ai-moves-forward.
[73] H.B. No. 2060, 88th Leg. Sess., Reg. Sess. (Tex. 2023).
[74] Utah Artificial Intelligence Policy Act, S.B. 149, 2024 Gen. Sess. (Utah 2024).
[75] *See* Wright, *supra* note 71.
[76] Artificial Intelligence Act, S.B. 24-205, 2024 Gen Assem., Reg. Sess. (Co. 2024).
[77] *Id.*
[78] *Id.*

new, there is a dearth of caselaw interpreting them. This creates a degree of uncertainty. For instance, Utah's law does not define what it means to "prominently" disclose the use of AI,[79] and no courts have yet interpreted this phrase. Employers are left to guess. Similarly, it may soon become clear what it means for an outcome to be "foreseeable" when it comes to an AI algorithm. But today, much remains uncertain. For now, employers must move with caution in developing and using generative AI models.

To date, most court challenges apply older, pre-existing laws to AI. In particular, there has been a flurry of litigation under copyright law. Copyright holders have filed lawsuits attempting to slow the proliferation of AI in their spheres of content. Some cases relate to the copying or replication of copyrighted works—in other words, the *output* of AI tools. For instance, newspaper publishers have sued OpenAI and Microsoft for "purloining millions of the Publishers' copyrighted articles without permission and without payment to fuel the commercialization of their generative artificial intelligence."[80] In another case, Getty Images accused Stability AI of copying more than 12 million photographs from its collection and infringing on its trademark.[81]

Other cases concern the *input* to AI models. Several courts have considered liability for AI companies that use copyrighted works of art to "train" their AI models to produce output images or content "in the style" of particular artists.[82] The courts have grappled with the information imbalance—must plaintiffs know *what* works were used to train the model?[83] As this body of caselaw is developing, many questions remain unanswered.

In sum, for those companies developing and using AI models to streamline or generate work, potential liability could arise from brand new and untested laws and from older laws newly applied to AI.

Employees that use AI in their work must be careful as well. The use of non-secure AI, like ChatGPT, has landed some employees in hot water. Samsung reportedly banned its staff from using ChatGPT to prevent its data from leaking.[84] This was in response to several Samsung engineers inadvertently leaking internal source code by uploading it to ChatGPT.[85] For Samsung, the data related to trade secrets in its source

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[79] Utah Artificial Intelligence Policy Act, S.B. 149, 2024 Gen. Sess. (Utah 2024).
[80] Complaint, *Daily News, LP v. Microsoft*, No. 24-3285, at *1 (S.D.N.Y. April 30, 2024).
[81] Amended Complaint, *Getty Images (US), Inc. v. Stability AI, Ltd.*, No. 23-1235 (GBW), at *1 (D. Del. Mar. 29, 2023).
[82] *See Andersen v. Stability AI Ltd.*, No. 23-CV-00201-WHO, 2023 WL 7132064, at *1 (N.D. Cal. Oct. 30, 2023).
[83] *Id.* at *4.
[84] Ben Wodecki, *Samsung to Fire Employees Caught Using ChatGPT*, AI Business (May 2, 2023), Samsung to Fire Employees Caught Using ChatGPT (aibusiness.com).
[85] *Id.*

code; for other companies, leaks have ranged from sensitive customer data and sales figures to financial data and government information.[86] Additionally, generative AI tools have been known to have "hallucinations," meaning the data is inaccurate.[87] Indeed, a judge sanctioned two lawyers in New York for submitting a brief written by ChatGPT, which cited to nonexistent cases.[88] In this way, careless reliance on these tools may lead to costly mistakes, termination, and monetary fines.

In short, the opportunity that AI presents to employers and employees comes with risks and liabilities. As laws develop and cases play out, these risks will become clearer. But for now, much remains uncertain.

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[86] Eileen Yu, *Employees Input Sensitive Data into Generative AI Tools Despite the Risks*, ZDNET (Feb. 22, 2024), Employees input sensitive data into generative AI tools despite the risks | ZDNET; Sam Sabin, *Researchers Uncover Servers Filled with Government Secrets*, Axios (Apr. 30, 2024), Researchers find AI training data, employee credentials in exposed government contractor database (axios.com).

[87] Zoe Schiffer & Casey Newton, *Amazon's Q Has 'Severe Hallucinations' and Leaks Confidential Data in Public Preview, Employees Warn*, Platformer (Dec. 1, 2023), Amazon's Q has 'severe hallucinations' and leaks confidential data in public preview, employees warn (platformer.news).

[88] Sara Merken, *New York Lawyers Sanctioned for Using Fake ChatGPT Cases in Legal Brief*, Reuters (June 26, 2023).