

## ARTIFICIAL INTELLIGENCE AND EMPLOYMENT LAW: A NEW STRATEGY FOR A NEW REVOLUTION?

*“Right now, people are on the beach: they are gazing at the waves rippling on the shore and do not see the enormous tsunami coming”.* These words from Charles-Édouard Bouée, President of Roland Berger consulting firm, regarding **the inherent challenges of the rise of artificial intelligence**, are unambiguous.

This depicts the idea that the **disruption** engendered in the growth of artificial intelligence is far more important than that of the birth of Internet, which has already turned both our professional and personal lives upside-down for the past 20 years.

Chatbot, Skypod, Vera, and other robots are continuously appearing on the market. Artificial intelligence, which can be described as **all technologies aiming at automating cognitive tasks usually performed by human beings**, should fully revolutionize our society, notably regarding employment and work conditions.

Impact assessments and reports are multiplying on the matter, raising as much fear as enthusiasm, i.e. reports from the French Orientation on Employment Council (2017), a report from “France Stratégie” (2018), or even a report from the French deputy and famous mathematician Cédric Villani (2018).

According to their first conclusions, the majority of jobs are expected to be largely transformed:

- **10 % of positions are expected to face great difficulties** from automation;
- **50% of positions are expected to see their tasks significantly changed** within 15 years.

This evolution should **encourage companies to anticipate these changes and adapt accordingly**.

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### Is the implementation of artificial intelligence within the company compatible with the French Labor Code?

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Job terminations, job content changes, job creations, reorganizations ... the implementation of artificial intelligence within a company must be conducted with caution to avoid being subject to future litigations.

However, **French employment law already provides many tools to control and secure these operations** that relate to both the companies’ day-to-day life, and the exceptional situations they may face.

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### Day-to-day artificial intelligence

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As soon as it is implemented in a company, artificial intelligence in everyday life raises new legal challenges and questions.

- **Hiring employees**

The employer can use artificial intelligence in order to be **assisted in recruitment**.

Some algorithms allow the automatic elimination of certain job applications, according to predefined criteria. Robots can also “replace” the employer or the human resources manager during the job interview. For example, the Vera robot is able to conduct job interviews alone by asking questions identical to those of a human recruiter, and will soon be able to detect the applicant’s emotions.

**Safeguards** provided by law must be complied with:

- Article 10 of the Data Protection Act of 1978, **prohibits a machine from taking, without human intervention, decisions that trigger important consequences for employees:** “no decision having legal effects for or significantly affecting a person, can be taken solely on the basis of automated processing of personal data, including profiling”;
- Articles L. 1221-8 and L. 1221-9 of the French Labor Code, which give jobseekers the right to be **informed “prior to their implementation, of the use of methods and techniques for recruitment assistance”, as well as information gathering devices** that collect data on them;
- Article L. 1132-1 of the French Labor Code, which sets out the **general principle of non-discrimination from the recruitment procedure onward**.

- **Assessing employees**

Similarly, if the employer uses artificial intelligence to **assess** its employees, he must inform them **prior to the implementation** of these methods and evaluation techniques (French Labor Code, Art. L. 1222-3 and L. 1222-4).

The methods and techniques used will need to be considered **pertinent** with regards to the contemplated purpose.

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## **Professional training**

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The issue of the **professional training of employees, whose position will be modified or terminated**, must not be neglected.

Please note that the employer has the **obligation to ensure the adaptation of its employees to the evolution of their jobs** and to ensure “*their continuous ability to perform a job, especially regarding the evolution of job positions, technologies and organizations*” (French Labor Code, Art L. 6321-1). On the other hand, the employer does not have to provide the employee with a qualification that the latter does not have.

In companies with more than 300 employees, the “**GPEC**” (**provisional management of employees and their abilities**) **could be used as a tool** to foresee the evolution of businesses and implement measures to support this evolution with professional training.

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## **Job content modification**

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Some tasks may be withdrawn from employees as soon as they become automated. The question raised is to what extent the employer can impose upon its employees the evolution of their functions - and thus to determine if it is a **simple change of work conditions or a modification of their employment contract** (which implies the approval of the employee in the second case).

In order to limit legal debates over the nature of employment transformations to come, several solutions could be contemplated, including:

- the use of a **company-wide collective bargaining agreement** to determine the content of jobs impacted by new technologies; and/or

- the use of an **industry-wide collective bargaining agreement** on classifications to take into account new tasks, notably numerical ones, in the job description.

In his report (“*Giving a meaning to artificial intelligence: for a national and European strategy*”), Cédric Villani suggests modifying the content of the annual negotiation on professional equality and life quality at work, to **take into account skills evolution, and the complementarity between employees and robots**, due to the introduction of new technologies.

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## **Job position termination and redundancies**

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If the development of artificial intelligence is to lead to the termination of some positions, companies may consider **redundancies for economic reasons**.

In this respect, the second of the four grounds provided in Article L. 1233-3 of the French Labor Code could be of great interest: technological changes.

If the company does not expect to face economic difficulties, nor competitors who will quickly seize artificial intelligence, nor does it foresee having to reorganize in order to safeguard its competitiveness, **the introduction of new technologies could be qualified as a technological change**.

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## **What role for the employee representatives?**

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Other litigations could also arise **related to the consultation of the employee representatives**. The first case law decisions, however, demonstrate pragmatism, French judges obviously intending to avoid opening the door too widely for purely opportunistic litigation.

The French Supreme Court (“Court de Cassation”) rendered a decision on April 12, 2018 regarding the **Watson** program, developed by IBM, and implemented within a French bank (“Caisse de Credit Mutuel du Sud-Ouest”). This program sorts e-mails received by account managers and redirects some of them to handling employees. It suggests an order of priority for the treatment of the remaining emails based on the matter’s urgency, and suggests preformatted answers.

The Health and Safety Committee of the bank, which was consulted on the consequences of the implementation of this program, had **appointed an expert to study possible impacts on health, safety and working conditions**. Hearing the case in summary proceedings, the president of the Lyon High Court (“Tribunal de Grande Instance”) **canceled this appointment**. The French Supreme Court upheld this ruling, considering that the Health and Safety Committee failed to demonstrate **the existence of an important project modifying the working conditions of the employees**.

In other cases involving the implementation of the same device, French judges adopted the same ruling (TGI Nantes, 24 Nov. 2016, CA Rennes, 29 Sept. 2016, n°16/09377), with the exception of one court decision (TGI Paris, 3 Nov. 2016, n°16/58942).

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## **Conclusion**

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**Regardless of the scale of change artificial intelligence will generate, French employment law already seems largely operational to help companies manage its implementation.**

Of course, everything is not perfect, but this observation is already excellent news in a context wherein French companies need flexibility to adapt to the looming global change.

In any event, **only companies that seize in advance the tools offered by artificial intelligence will benefit from it, notably in the determination of their strategies and the implementation of their human resources policies.**

As is often the case, the optimized implementation of French employment law is above all a matter of anticipation. It goes without saying that it is also likely to be the case with regards to artificial intelligence.

