



# Navigating Today's Workplace:

Explore the Challenges of AI, BYOD, Privacy and Beyond

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# Navigating Today's Workplace: Artificial Intelligence

Brian Johnston, Q.C.

# What is AI?

- Artificial intelligence is machine mimicking “cognitive” functions that we associate with human learning and problem solving
- Machines programmed with complex algorithms and learning from other machines
- AI is not incremental change; it’s exponential

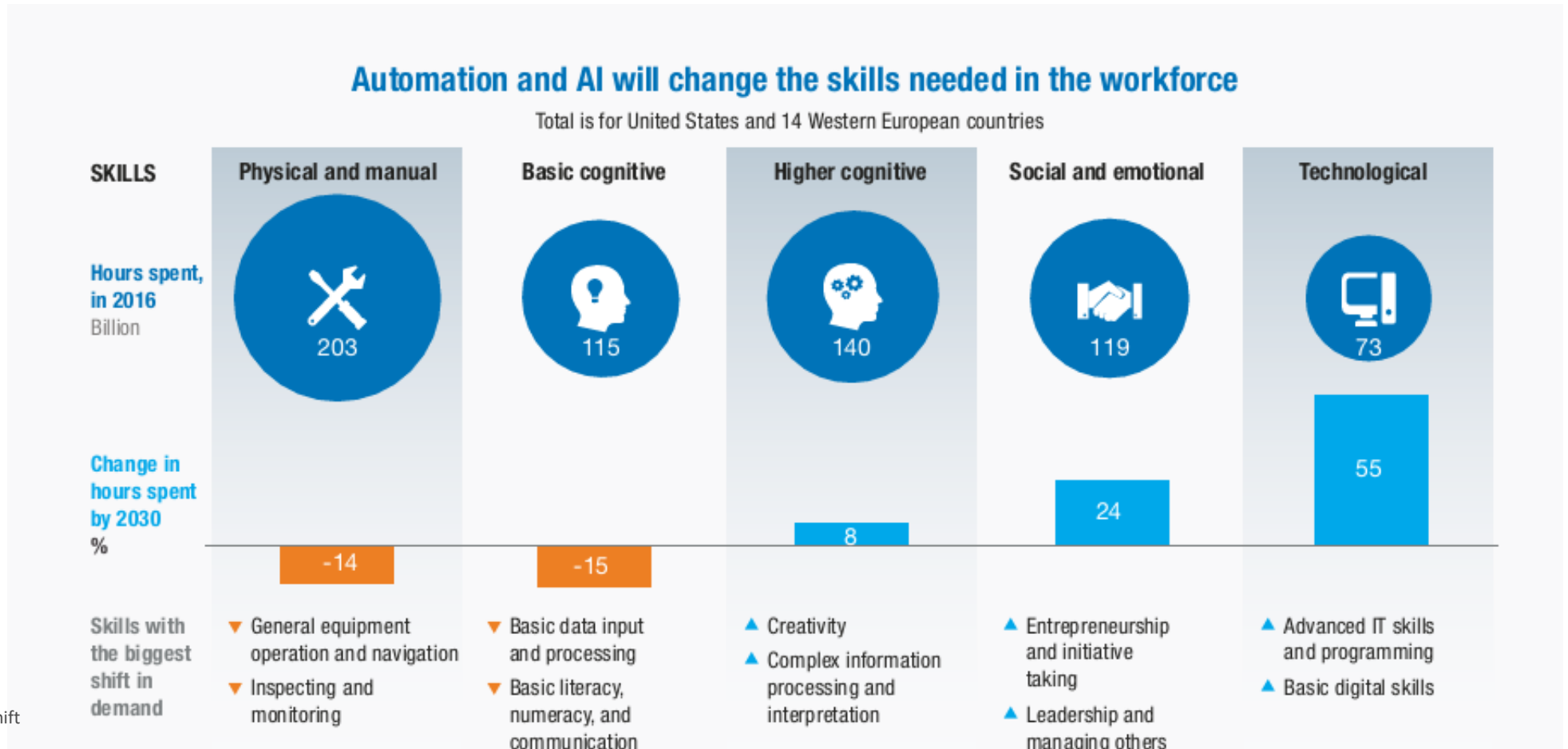


- AI has both positive and negative effects - and it's inevitable
- In the context of the workplace, AI is happening at a time when the Standard Employment Relationship (full-time, largely manufacturing and trades, sufficient \$'s to support a family) is less “standard” than it's been in a century

# It's already a different work world

- In the United States, more than 40% of the workforce (42 million people) work on a contingent basis
- More than 2/3's of millennial and generation Z workers work “side hustles” to make ends meet
- The alternative workforce is now mainstream (beyond IT) to include supply chain/procurement, sales, finance, customer service, HR, innovation, marketing, operations

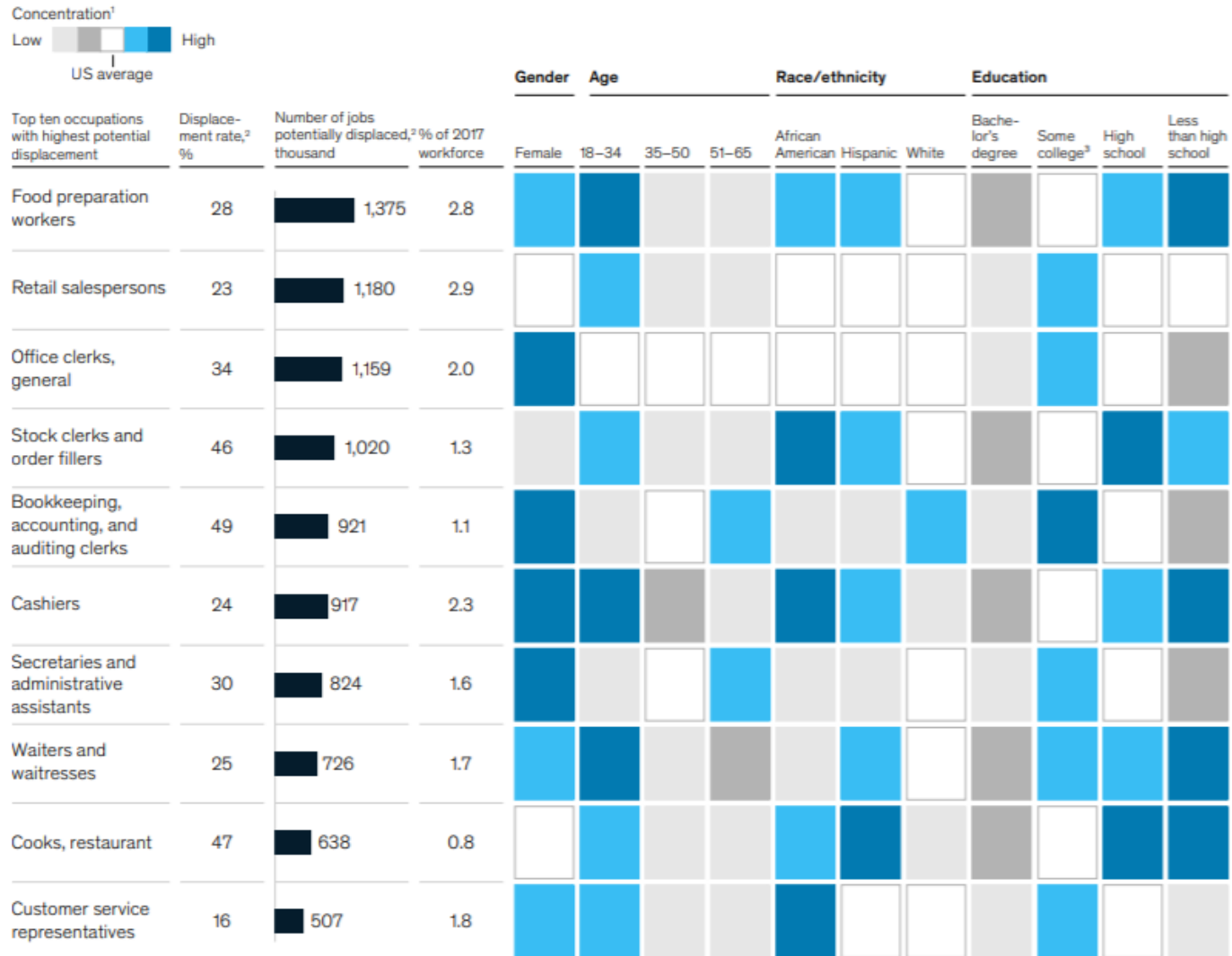
# AI will drive need for different skills



McKinsey Global Institute – “Skill Shift Automation and the Future of the Workforce” May, 2018



## Some occupations with high displacement potential have skewed demographic concentrations.



<sup>1</sup> Measured by comparing share of persons fitting each demographic profile in an occupation with share in total US workforce.

<sup>2</sup> 2030 midpoint adoption scenario.

<sup>3</sup> Includes associate's degrees.

Source: US Bureau of Labor Statistics, Integrated Public Use Microdata Series (IPUMS ACS) 2017; McKinsey Global Institute analysis





# Workforce Implications of AI

- Less than 5% of occupations can be totally automated
- But 60% of jobs can have 30% of their activities automated by adapting currently available technologies
- As some jobs decline, the economy will create others and technologies themselves will give rise to new occupations
- Workers need to adapt - machines take over routine and some physical tasks; demands grow for work involving socio-emotional, creative, technological and higher cognitive skills

# Negatives of AI

- Obviously, job loss with greatest impact on those with only high school education
- Further hollowing out of the middle class
- “On the job” learning is more difficult
- Harder for young people trying to get a start...
- Will require huge investments in lifelong learning and workforce re-tooling

# AI as an Enabler

- Artificial intelligence is enabling work from home, or anywhere...
- Flexible work hours...or 24/7...always “ON”
- The platform economy...think *Uber*
- Automated hiring without bias?

# HOW WORKFORCE SKILLS WILL SHIFT

## MINDSET SHIFT

Instilling a culture of life-long learning and providing training opportunities for employees

## ORGANIZATIONAL SET-UP

More agile corporate structures featuring less hierarchy and more collaborative team networks

## "NEW COLLAR" JOBS

Activities will be reallocated between workers with different skill levels, creating a new set of middle-skill positions

## WORKFORCE COMPOSITION

The booming gig economy will lead to a rise in the use of independent contractors and freelancers

## C-SUITE AND HR CHANGES

Senior leadership and key functions will also need to adapt, including a change in CEO mindset and talent strategies to orchestrate the changes

Structural design changes to cope with the realities of shifting skill needs

Five options for companies to build their workforce for the future

## RETRAIN

Raise skill levels of employees by teaching them new or more advanced skills

## REDEPLOY

Shift parts of the workforce by redefining work tasks or redesigning processes

## HIRE

Acquire individuals or teams with the requisite skills, increasing the workforce

## CONTRACT

Leverage external workers, such as contractors, freelancers, or temporary workers

## RELEASE

Remove skills not needed by freezing new hiring, waiting for normal attrition and retirement, or, in some cases, laying off workers

## Competition for talent

To recruit the people they need for a new era of automation, companies say they will



# Human Resource Focus

- Enabling worker learning
- Developing organization leadership
- Talent mobility within organization
- Talent access
- Rewards....individualized
- Building “super jobs” and teams
- Being strategic and not transactional with alternative workers



# Questions?





# Navigating Today's Workplace: Bring Your Own Device (BYOD) Policy Considerations

Annie Gray

# BYOD

## Overview

- Pros
- Cons
- Implementation



# BYOD

## **Pros – Why BYOD policy?**

- Increased job satisfaction and flexibility
- Increased efficiency and responsiveness
- Reduced expenses
- Formalize and address existing employee behaviours

# BYOD

## Cons – Potential pitfalls

- Potential hours of work, overtime violations
- Privacy, security and confidentiality issues
- Potential liability regarding data collection, retention and destruction
- Potential liability for employee misuse
- Issues arising when employees leave a company

# BYOD

## Implementing BYOD

- Start with company-specific risk assessment
- BYOD program should have 3 pillars:
  - Policy
  - Training
  - Technology

# BYOD

## **Specific considerations – Labour standards compliance**

- Blurred personal/professional divide carries risks for:
  - Recordkeeping
  - Overtime & wages for work performed
  - Rest periods
- Consider both policy and tech solutions

# BYOD

## **Specific concerns – Personal information**

- Employers have a right to monitor/access devices used for work, BUT
- Be aware of risks re. collection of employee personal data
  - Privacy, human rights considerations
  - Intrusion upon seclusion potential
- Address issues re. employee access to 3<sup>rd</sup> party personal information
- Consider both policy and tech solutions



# BYOD

## **Specific concerns – Employer data and security**

- Amount and sensitivity of employer information involved is relevant for BYOD assessment
- Need measures to protect company information
- Potential liability for data breaches/ use of confidential information
- Incident management
- Consider both policy and tech solutions

# BYOD

## **Other Concerns**

- Address ownership and payment
- Implement and enforce consequences for breach
- Obtain acknowledgement of policy



# Questions?



# Navigating Today's Workplace: Privacy, Confidentiality and Harassment Investigations

Rick Dunlop

# Privacy and Confidentiality Challenges in Harassment Investigations

- In the #MeToo era, harassment investigations are the “new norm” in today’s workplace.
- Many jurisdictions have legislative and regulatory provisions designed to address workplace harassment. An example of the most robust legislative and regulatory change are the proposed federal *Workplace Harassment and Violence Prevention Regulations*.



# Privacy and Confidentiality Challenges in Harassment Investigations

- If not handled properly (and even if handled properly) a harassment allegation (and the investigation process) can destroy reputations and careers.
- The investigation and post-investigation process has to be conducted in a manner that respects privacy and confidentiality of all those involved: the complainant; respondent; and witnesses

**CONFIDENTIAL**

# Privacy and Confidentiality Challenges in Harassment Investigations

## Galloway Case

- Galloway, a former UBC professor, was alleged by another faculty member to have engaged in a sexual assault.
- Galloway was suspended and then his employment was terminated.
- An investigation was conducted by a former BC judge and it was determined that the allegations were not substantiated.
- The allegations that were ultimately not substantiated was the subject of substantial social media discussion by faculty members, former students, and the complainant.





# Privacy and Confidentiality Challenges in Harassment Investigations

## **Galloway Case con't**

- Galloway brought a grievance against UBC for the manner in which the allegations were communicated.
- An arbitrator awarded Galloway \$167,000.00 in damages.
- The arbitrator issued the decision in summary form and the parties were cautioned that the proceeding was to remain strictly confidential.
- A UBC representative told the Vancouver Sun reporter that the “allegations of sexual misconduct were not the only issues [UBC] examined during its review of [Galloway’s] employment.”
- Galloway brought another grievance for this breach of confidentiality and was awarded \$60,000.

# Privacy and Confidentiality Challenges in Harassment Investigations

Upon receiving complaint, think hard about how you are going to protect the privacy and confidentiality of all those involved?



# Privacy and Confidentiality Challenges in Harassment Investigations

## Set the confidentiality and privacy rules

- Tell the complainant, respondent, and witnesses (and reinforce in writing) that they are not to discuss anything related to the investigation with anyone.
- Ensure support persons (who may attend the interview) are bound to a confidentiality agreement.
- Set expectations as to what information about the outcome that those involved will be provided. The witnesses will likely receive nothing. The complainant and respondent may not receive the investigation report.

# Privacy and Confidentiality Challenges in Harassment Investigations



Remember the respondent (who has been accused of something serious) may not process the information after they are told, so confirmation of privacy and confidentiality obligations in writing is vital.

# Privacy and Confidentiality Challenges in Harassment Investigations

- Witnesses are likely fellow employees.
- Witnesses like to talk (gossip) and tell other employees what is happening.



# Privacy and Confidentiality Challenges in Harassment Investigations

## Written confirmation of confidentiality and privacy obligations

- The key messages in the written confirmation of confidentiality and privacy obligations:
  - Retention of investigator.
  - Reference any confidentiality provisions in the Policy that applies to the investigation.
  - Confidentiality is crucial to fair and effective investigation.
  - Refrain from discussing the investigation or the allegations with anyone other than personal representative (if they have one).
  - You will keep all information you discuss during your meeting with the investigator confidential.
  - You shall not ask anyone if they have participated in the process nor speak to any individuals who may participate in the process about the subject matter of the investigation or the contents of discussion with the investigator.
  - Recognize that process is stressful and if they wish to speak to someone they can speak to X.

# Privacy and Confidentiality Challenges in Harassment Investigations

## The report – Who gets what?

- Consider the law
  - Statute (e.g. Proposed *Canada Labour Code* Regulations have strict requirements as to the form of the Report and who receives what type of Report).
  - Policy
  - Collective Agreement
- Consider the unique circumstances that may cause you to re-evaluate your approach? (e.g. has the rumour mill run wild?).
- Various options on communication of Report:
  - Complainant and respondent see entire report
  - Executive summary provided to complainant and respondent only.
  - Different summary reports – one for the respondent and one for the complainant. Personal information is redacted.
  - Union representatives see report, but only after signing confidentiality agreement.
  - Investigator provides brief letters containing high level overview of findings and outcomes.
  - Respondent may agree to disclosure of consequences.



# Privacy and Confidentiality Challenges in Harassment Investigations

## After the investigation

- Investigations are divisive.
- Employees take sides.
- How are you going to “get back to normal”
  - Consistent “checking in” with members of team.
  - EAP – offer EAP to all those involved.
  - Workplace mediation
  - Coaching
  - Training
  - Establish process for receiving feedback on investigation.
  - Team building initiatives.
- Policy review – Did the policy work? How can the policy be improved?







# Questions?



# Navigating Today's Workplace: ...And Beyond – Flexible Work Arrangements

Mark Tector

# Beyond . . . Flexible Workplace

Want flexibility – different arrangements

- Employees:
  - FT
  - PT
  - Term
- Independent Contractors
- Dependent Contractors



# Beyond . . . Employees

- Have employment agreements!
- From 2 page hire letter to detailed executive agreement
- Practical strategies:
  - Change
  - Termination provision(s)

# Beyond . . . Employees

- Legal concerns with change:
  - Constructive dismissal
  - Limitations under NS Labour Standards Code (concern similar in other provinces) and Canada Labour Code
- So, “bake in” change:

“we are a dynamic business in a dynamic industry. . . Accordingly, you agree that your responsibilities, duties, title, etc. may change from time to time” (subject to statutory minimums)

# Beyond . . . Employees

- Termination Clauses!
- Need legal advice on this – it's tricky and evolving
  - Meet minimum standards
  - Clear
  - Cap on notice

# Beyond . . . Employees

- Fixed term employees (fixed end date):
  - Nothing owed after end date
  - But, potentially less flexibility during term;
  - No mitigation;
  - Renewals can get tricky
- Strategies:
  - Should you have other employment arrangement?
  - Early out clause

# Beyond . . . Independent Contractors

- Have an independent contractor agreement
- Very important to have it in writing (one of the factors)
  - Clear statement that independent contractor (not employee or dependent contractor!)
  - Indemnity provision
  - Term provision
  - WCB clearances



# Beyond . . . Dependent Contractor

- Evolving rights and protections
- Not quite employees not quite independent contractors
- Key is degree of exclusivity

# Beyond . . . Dependent Contractor

- *Thurston v. Ontario (Children’s Lawyer)* 2019
  - Lawyer sole practitioner
  - Worked for children services for 13 years with renewing contracts
  - Work accounted for 40% of her billings
- Overturned by Ontario CA:
  - “need complete or near-complete exclusivity”
  - Case by case, but requires “substantially more” than 50% of billings

# Beyond . . . Dependent Contractors

- Practical:
  - Agreements with termination provisions!
  - Watch out for exclusivity!

# Beyond . . .

- Options available!
- Agreements – better protection and less headache in long run
- Changes to legislation?



# Questions?



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