

CHAPTER 7

Artificial Intelligence in the Workplace and The Future of Employer-Provided Employee Benefits

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7-2**[e] Complying with Applicable Law Related to Use of AI-Based Tools****[3] What Should Employers Factor into their Strategies about Evolving Worker Models and Social Safety Net Requirements?****[a] Defining Workers****[b] System of Employer-Provided Benefits****§ 7.05 CONCLUDING THOUGHTS****§ 7.01 INTRODUCTION**

Advancements in artificial intelligence (AI), machine learning and robotics, will continue to transform the economy, every industry and workplace, and all facets of our day-to-day lives. Policymakers, educators, and industry leaders have long been aware that coordinated strategies are needed to educate and prepare new workers to enter the future workforce, re-tool and upskill the current workforce to work in digitally transformed environments, and to transition other workers from the workplace. Traditional employer-employee relationships are also evolving in the digital, “gig” economy, which calls into question the adequacy of the current social safety net. Employers have an important role to play in this historic transition because the manner in which they employ and compensate workers will have a ripple effect through the labor force and social systems.

Within the last few years, policy efforts and historic events have highlighted the need for accelerated strategy and action in this context. On December 20, 2016, the Executive Office of the President published a Report entitled “Artificial Intelligence, Automation and the Economy” which explored three main strategies to address the impact of AI-driven automation on the U.S. job market and economy: (i) advancing the AI field by investing in research and development and prioritizing diversity and inclusion in STEM fields and in the AI community, (ii) educating and training Americans for jobs of the future, expanding the availability of job-driven training and opportunities for lifelong learning, as well as providing workers with improved guidance to navigate job transitions, and (iii) taking steps to modernize the social safety net, strengthening support systems such as unemployment insurance and Medicaid, increasing wages, expanding healthcare access and building a 21st century retirement system. This Report recognized that the policy questions raised by AI would need to be continued topics for consideration by future Administrations, Congress, the private sector and the public.

As momentum concerning the debate around AI and the future of work policies continued to build, the COVID-19 pandemic arrived in 2020 requiring employers and workers around the globe to quickly pivot to continue to deliver products and services. In order for businesses to remain operational, reliance grew exponentially on many new technologies, new communications systems and cloud-based services, and a variety of AI-based tools (including those that could monitor and track remote employee activity). For those employees that were able to work from home, telecommuting and remote

working arrangements exploded. Yet, for many non-essential workers and others, business closures, furloughs, layoffs and separations from employment were a consequence of the pandemic. From an economic standpoint alone, the pandemic caused widespread devastation.

§ 7.02 RECENT LEGAL DEVELOPMENTS

Several U.S. laws were enacted to address the adverse impact of the pandemic on American workers and families including: (i) the Coronavirus Preparedness and Response Supplemental Appropriations Act of 2020¹ (*e.g.*, emergency funding to combat the pandemic), (ii) the Families First Coronavirus Response Act of 2020² (*e.g.*, emergency paid sick and family leave, coverage for COVID-19 testing, emergency funding for state unemployment trust funds), (iii) the Coronavirus Aid, Relief, and Economic Security Act (the “CARES Act”)³ (*e.g.*, business loans, tax credits, unemployment benefits, student loan payments, retirement plan distributions and loans, expanded telehealth services in Medicare), (iv) the Paycheck Protection Program and Health Care Enhancement Act⁴ (*e.g.*, additional funding for the Paycheck Protection Program and Economic Injury Disaster Loans); and (v) the Consolidated Appropriations Act of 2021⁵ (*e.g.*, small business support, stimulus checks, extension of increased federal unemployment benefits, federal aid for rental assistance programs and food stamps, funding for vaccines, testing and health providers, funding for schools and farming and ranching industry). The American Rescue Plan Act of 2021 provided further pandemic relief, including a third round of stimulus checks, expanded unemployment benefits, tax credits for paid sick and family leave, extended food stamp benefits, expanded child and dependent care tax credits, housing funding, and subsidized 100% of premiums for COBRA recipients from April 1 to September 30, 2021.⁶ The devastation brought by the pandemic necessitated the passage of these laws to provide social and economic benefits for workers and businesses to enable them to survive.

In the midst of these measures, under Division E of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021 enacted on January 1, 2021,⁷ the most significant U.S. legislation concerning AI passed as of that date: The National Artificial Intelligence Initiative Act of 2020 (NAIIA). Among the

¹ Pub L 116-123 (March 6, 2020).

² Pub L 116-127 (March 18, 2020).

³ Pub L 116-136 (March 27, 2020).

⁴ Pub L 116-139 (April 24, 2020).

⁵ Pub L 116-260 (December 27, 2020).

⁶ Pub L 117-2 (March 11, 2021).

⁷ Pub L 116-283 (January 1, 2021).

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NAIIA's provisions to position the U.S. as a global leader in the development and adoption of trustworthy AI as integral to national strategy and security, are provisions to educate, train and prepare an AI-skilled workforce to create, use and interact with AI systems, to address technological displacement of workers, and for the integration of AI throughout the economy and society. The NAIIA also requires the National Science Foundation to contract with the National Research Council of the National Academies of Sciences, Engineering, and Medicine to conduct a study regarding the current and future impact of AI on the U.S. workforce. This study, scheduled to be available publicly by January 1, 2023, will include input from various stakeholders in the public and private sectors, and result in recommendations regarding the challenges and opportunities presented. The National Science Foundation will receive almost \$4.8 billion over 5 years to fund research and education in AI systems and related fields (including K-12, undergraduate and graduate programs), to develop and deploy trustworthy AI, workforce training and development of a diverse AI workforce pipeline. Legislation such as the NAIIA, as well as other bills which are making their way through Congress and will result in future laws, signal the high stakes and complexities that lie ahead.

§ 7.03 TECHNOLOGICAL ADVANCES

Many parallels can be drawn between the actual impact of the pandemic on the U.S. economy and workforce, and the anticipated impact that will come with further advancements in technology, AI, machine learning and robotics. The pandemic illuminated how quickly workplaces could be transformed and that the runway to introducing advancements in technologies and AI into the workplace had been drastically shortened. Pre-pandemic debates have also renewed regarding shifting worker models caused by advances in AI and automation, the skills needed for the future workplace, and the future social safety net. Our recent history has demonstrated how fragile the workplace, the workforce and our social safety net is, and should serve as further warning to employers and all categories of workers that vast changes are coming to our social and economic systems.

§ 7.04 EMPLOYER STRATEGIES**[1] What Role Should AI Play in the Organization's Workplace?****[a] Define Human Capital Strategy**

From this vantage point, employers and benefit plan sponsors have much to consider. Many employers have deployed their post-pandemic return-to-work strategies, but also recognize that there is much more to do to plan for long-term recovery and the effects that digital transformation will have on the economy. The actions that organizations take in the near term will influence their ability to attract, motivate and retain the highly skilled workers of the future that they desire to employ to operate their businesses.

Where decisions are made to employ individuals in non-traditional employment categories and not provide them with employee benefits, it is likely that employers will eventually be required to contribute to new and emerging social systems. Recognizing that there are many facets to this complex issue, the purpose of this article is to posit at least three high level considerations that employers should evaluate as they introduce AI in the workplace and frame their long-term organizational strategies.

An important preliminary question organizational leadership must ask concerns their overall vision and the role that AI should serve in their workplace. Moving beyond the pandemic, many organizations will increasingly analyze the role of AI in their workplaces, including how the use of AI-based tools might improve business and employee performance, as well as the organization's competitive stance domestically and internationally. The efficiencies that were gained by utilization of various technologies during the pandemic have been, and will continue to be, further explored on an accelerated basis. In some instances, organizations have already made many decisions out of necessity as to where costs would be permanently eliminated, including various worker positions. Yet, as organizations continue to transform, employers will need to assess the long-term impact of the use of AI-based tools (and machines and/or robotics as applicable) on the shape of the employer's workforce. As they transform, however, the lessons of the pandemic should not be lost. It is imperative that economic and social upheaval is minimized as we progress in the future economy. Unlike the measures taken to respond to an unexpected pandemic, a decision to digitally transform and introduce AI into the workplace can, and should, be organized and planned strategically.

Organizations must define their human capital strategy and align it with efforts to introduce and expand AI in the workplace. Organizations will need to consider how to attract, motivate and retain workers for new types of positions and the actions it will take to foster their professional development in these new jobs and roles. Decisions will also likely be made as to whether the organization will employ traditional full-time workers to fulfill its positions, or whether it will employ workers through various models including traditional full-time and/or part-time employees, independent contractors, workers employed through staffing agencies, and hybrid models including partial on-site and off-site work weeks. Thought should be given to whether human workers will work in the organization independently from AI-based tools and machines, along-side AI-based tools and machines capable of data-driven decision making in certain functional areas, use them to augment their own capabilities, or whether human workers will be replaced in certain functions. Many organizations will consider introducing AI-based tools into a select few functional areas at a time but, all roles and job descriptions will likely need to be updated and revamped. Certainly, a strategic and staged approach would be more digestible, provide workers with more time to adjust,

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and allow the organization time to determine what benefits and efficiencies the changes have brought to the organization before they are rolled out more widely.

[b] Define the Scope of AI in the Workplace

In tandem with human capital strategy, organizations will need to determine the types of AI-based tools, machines and robotics they desire to introduce and utilize, the scope of their usage, the costs and benefits associated with such workplace transformation, and budget accordingly. This includes an analysis, at a minimum, regarding how much it will potentially cost (and the associated benefits) to (i) build/update the appropriate infrastructure for networks, servers, internet-of-things, data management and privacy procedures for advanced technologies and AI-based tools, (ii) update cybersecurity practices and breach response procedures to account for these changes, (iii) engage and manage vendors and third party service providers, (iv) acquire and implement AI-based tools, machines and/or robotics across the organization or in selected functional areas through a phased approach, (v) train employees to use these tools and devices, (vi) correct any errors that could result from use of the tools and devices, and (vii) sever and/or replace employees impacted by the workplace transformation. Processes and procedures will also need to be in place to evaluate and monitor the AI-based tools, machines and robotics themselves and a governance structure should be established for this purpose. If they have not already done so, organizations should assemble a multidisciplinary team comprised of professionals from areas such as IT, risk management, data privacy and security, compliance, legal, human resources, and desired outside advisors to make informed decisions on the overall strategy.

[c] Bring the Analyses Together

An important part of an overall strategy is to balance the human capital considerations with the AI in the workplace transformation cost/benefit analysis. Execution of such a strategy requires management of many moving parts across many disciplines that should be well-planned and coordinated. Decisions made today will have a ripple effect in communities and across industries; consideration should be given to industry-wide, geographic and societal implications of these decisions beyond the organization's own insular perspective. To minimize unanticipated consequences, organizations should consider participating in shaping prudent policies in this area and executing their strategic plans accordingly.

[2] What Can Employers Do to Prepare their Workers for the Future Workplace?**[a] Building Trust and Properly Handling Data**

Workers will likely have different points of view when it comes to working with AI-based tools, machines and robots in the workplace. Some may find it fascinating and evolutionary. Others may feel uneasy about increased surveillance, and potential

adverse impact that AI may have on them in the workplace including loss of privacy/security, potential bias embedded in data used in algorithms, and the potential workplace safety issues that robotics raises, as applicable. Many will also be concerned about the security of their jobs and their long-term safety net. There are many concerns that employers should evaluate, and it would be prudent for organizations to develop a well-reasoned approach to manage these concerns and address these issues.

Organizations will need to garner trust from their employees regarding the use of the data that are collected about them in the environments in which they work. Various systems and sensors within organizations can collect data about employees, which became highlighted when employers sought ways to perform contact tracing during the pandemic. Worker on-site and remote activities are increasingly being tracked through their interactions with these systems, including their log-in times, overall computer usage, and online activities, and being used to determine employee performance. Organizations will need to build trust in employees as their work activities and productivity are being tracked, traced and analyzed by new tools. An employee communications plan should be considered to address these issues. Employers should also evaluate the potential risks involved in using these tools and the potential for claims such as those alleging bias and discrimination and/or privacy violations. Further, given that AI algorithms are trained on data, the data that an organization uses to train these algorithms should be appropriately sourced and in proper order, whether the organization utilizes internal or external data, or a combination of both. If a dataset used to train an algorithm has data missing, it contains errors, or it is imbued with certain biases, this will adversely affect the AI-based tool's machine learning and the organization's data-driven decision-making outcomes. Organizations need to determine how they want to harness data collected in the workplace and use data in a meaningful and secure way.

[b] Training Workers and Providing Educational Assistance

Many organizations will need to recruit new workers, or upskill existing workers, for the challenges of managing and operating in an AI-based workplace, from the very technical-side to the positions that will simply require new skills in order to be able to work with and along-side machines. Notably, part of the National AI Initiative under the NAIIA is to develop educational and training programs to prepare the workforce to create, use, and interact with AI systems. Anticipating the educational and training needs on the horizon, employers should consider programs and benefits to assist employees such as tuition reimbursement and student loan debt repayment programs that will assist workers to train for future job skills and ease burdens of existing debts.

For example, employers can implement programs such as qualified educational assistance plans that, under current law, can provide tuition reimbursement, as well as payments toward employees' student loans, up to an overall \$5,250 for the calendar

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year through December 31, 2025.⁸ In addition, changes in law must be monitored, such as Congressional bills to allow employers to design 401(k) plans to treat an employee's student loan payments as elective deferrals for purposes of eligibility to receive employer matching contributions, so that employer programs can be designed or updated accordingly.⁹ Working condition fringe benefits, under Code Section 132, may also include educational costs that maintain or improve required skills or are a condition to maintain a particular job as defined under Section 162 of the Internal Revenue Code of 1986 (the "Code") and regulations thereunder. As it becomes increasingly more important for certain employees to re-skill and re-tool to work alongside machines, employer provision of the requisite education to perform these new jobs may qualify as a working condition fringe benefit.

For workers without access to employer-provided programs, costs for education and training will need to be borne through other means. Future legislation will likely address educational costs for young students as well as seasoned workers that need to upskill and re-tool. Employers may be required to partner with high schools, colleges and universities for job training, internships, and research endeavors to prepare workers for the future of work. Government, businesses, and educational institutions will likely need to come together to prepare and upskill the workforce and ensure that there is a pipeline of workers with the requisite skills for future jobs. These measures will need to be monitored.

[c] Developing a Workplace Transition Policy

Employers that determine that workers will need to be transitioned involuntarily from the workforce should consider developing a workplace transition policy, and clearly communicate the policy to workers. As employers manage multiple generations in the workforce from the traditionalists, baby boomers, Generation X, Millennials, and Generation Z, and as society shifts to new workplace employment models, including use of AI-driven automation, impact on existing traditional-model workers should also be carefully addressed in such policies. Immediate issues to consider include proper management of employee reductions and retirements, including fair and reasonable severance and related benefits (such as career transitioning and re-training assistance), potential voluntary retirement window programs, incentives for transfer of knowledge between generations (which may require ongoing consulting arrangements or staggered retirements), guidance for younger generations managing older generations and/or cobot relationships (which may require leadership training or new models of management training which address the newly envisioned workplace), integration of flexible

⁸ Section 120 of the Taxpayer Certainty and Disaster Tax relief Act of 2020 (under Division EE of the Consolidated Appropriations Act of 2021), Pub L 116-260 (December 27, 2020).

⁹ See e.g., Securing a Strong Retirement Act, HR 2954 (May 4, 2021); Retirement Security and Savings Act of 2021, S 1770 (May 20, 2021).

work arrangements and job sharing, and deployment of AI and workplace technologies (with commensurate training and accommodations for their use). Improper handling of these issues can implicate allegations of violations of various employment laws from age, gender and disability discrimination to interference with rights to attain certain employee benefits.

[d] Addressing Employee Health and Wellness

Organizations should also be mindful of the impact these seismic changes will have on the well-being of their workforce and determine ways to support workers through this transformation. Disruptive changes will likely cause widespread mental health challenges. Researchers have found that the rise of automation in sectors such as manufacturing has played a role in fading economic opportunity and led to two significant trends faced by working-age adults in the United States: 12% rise in drug overdose mortality between 1993 and 2007, and rising rates of application for Social Security Disability Insurance (SSDI) (increase of 12%) and Supplemental Security Insurance (SSI) (increase of 22%) between 2000 and 2007.¹⁰ During the pandemic, the Centers for Disease Control and Prevention addressed the conversation about stress, coping skills and mental health by providing resources on its website, highlighting the importance of these issues.¹¹ Legislation was also passed during the pandemic expanding paid sick and leave time.¹²

Employers can take measures to assist employees manage their stress and challenges, such as by providing employees with Employee Assistance Plans which can offer employees many services to work through life's challenges and depending on their design, may be considered ERISA plans. It is also common for employer-provided group health plans to offer mental health benefits but, when employers offer group health plans that provide group health coverage for mental health/substance use disorders ("MH/SUD"), they must maintain parity between such benefits and their medical/surgical benefits as required by The Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008 ("MHPAEA") and subsequent guidance.¹³ Complexities around these programs and offering these benefits is increasing in tandem with those surrounding their need.

¹⁰ See *Research Report: "Economic Opportunity, Drug Overdose Mortality, and Disability"*, Atheendar Venkataramani (University of Pennsylvania), Elizabeth Bair (University of Pennsylvania), Rourke O'Brien (Yale University), Center for Financial Security, University of Wisconsin-Madison (2020).

¹¹ www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/managing-stress-anxiety.html.

¹² See *e.g.*, on a national level, the Families First Coronavirus Response Act of 2020, Pub L 116-127 (March 18, 2020). On a State and local level, additional, and varying, temporary mandates were passed to require employers to provide sick and leave time for illness, need to quarantine, testing or vaccination. Paid sick and leave time mandates vary by locale.

¹³ For example, among new requirements, Section 203 of Title II of Division BB of the Consolidated

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Employers also recognize that while employees need competitive compensation and benefits, it is becoming apparent that they also need the tools to understand how to manage their money and save for retirement, health care, and overall financial needs. The shifting tides will likely require individuals to be financially educated and to save in their own health, retirement, and other insurance type vehicles apart from any employer-provided benefits. Employers that can assist their employees with competitive wages and benefits, as well as mechanisms to understand their finances and reduce their financial stress, will increase productivity in the workplace and their bottom line, reduce turnover and absenteeism, reduce health care costs and disability claims, increase retirement plan participation and actual retirements, and improve overall employee wellness.

[e] Complying with Applicable Law Related to Use of AI-Based Tools

Organizations must also be mindful that federal, state, local and international laws continue to evolve, including those that will impact AI, data privacy and security, employment, compensation and benefits, and be careful that use of AI-based tools in the workplace, especially those that make employment-based decisions, do not cause them to violate applicable law. Misuse of AI-based tools will adversely impact employee morale and can lead to litigation. For example, organizations should be cautious that use of an AI-based (i) recruitment/selection tool does not result in disparate treatment or have a disparate impact on protected groups, or violate disability or privacy/security laws, (ii) compensation management tool does not violate pay equity laws, prior salary history laws, or give rise to compensation discrimination claims, or (iii) chatbot used in the human resources department does not misrepresent benefit plan terms or information when answering employee questions. The increased use of AI-based tools and machines in the workplace will lead to new legal questions as individuals are required to work with, or become displaced by, these tools. Organizations should ensure that they remain in compliance with all applicable and evolving laws and execute their workplace strategies with the utmost ethics.

[3] What Should Employers Factor into their Strategies about Evolving Worker Models and Social Safety Net Requirements?

[a] Defining Workers

While AI in the workplace may create certain efficiencies in production and the provision of services, it also has the potential to raise complex issues for the construct

Appropriations Act of 2021 amended the MHPAEA, in part, by expressly requiring group health plans that offer both medical/surgical benefits and MH/SUD benefits, and that impose non-quantitative treatment limitations (“NQTLs”) on MH/SUD benefits, to perform and document their comparative analyses of the design and application of NQTLs. These comparative analyses must be made available upon request to The Department of Labor (DOL), Health and Human Services (HHS), and the Treasury.

of the social safety net. As organizations focus on their competition, and momentum builds to transform the workplace and deploy AI-based solutions, it can be easy to lose sight of the large-scale impact these organizational decisions will have not only on the organization's own workers, but overall. Organizations should be mindful that their workplace transformation decisions, as well as those of their peers, will have long-range effects on society.

Shifting worker models caused by advances in automation will accelerate with the transformations that will be ushered into the workplace with AI, machines and robots that perform many current jobs and will perform jobs of the future. The increased use of automation and the demand for highly-skilled workers and those capable of abstract thinking and creativity will result in the displacement of many workers who perform routine tasks and hold lower-skilled jobs. It is only a matter of time before robots are built with the manual dexterity to perform an even wider range of physical labor jobs than they are already performing. As society advances and deploys AI-driven automation, worker models, the educational system and the social safety net will be re-shaped. These developments will impose new requirements on organizations beyond their own workforce goals.

In recent years, the traditional employer-employee relationship has changed and the numbers of self-employed, freelance and temporary workers have continued to rise in the U.S.¹⁴ Some workers have chosen this autonomous path as their primary means of income, others have followed it to supplement income, and yet others have had no other choice and would prefer a traditional job with fair wages and benefits. As a result of the pandemic, many have also found themselves thrust into the independent worker model and have had to navigate new ways to generate income. Advancements in technology have also transformed how work is performed and goods and services are bought and sold enabling the rise of the "gig worker". Yet not everyone is capable of managing themselves as an independent business. There is concern that the independent worker model is more appropriate for highly-skilled workers who have special skills and can manage multiple engagements which they have cultivated and that are well paid. For the majority of entry-level or non-specialized workers, however, this model may drive down wages and leave many others unemployed, with added strain on social welfare systems. Further, it is unclear how independent workers will be protected from pay disparities, discrimination, compensated for sick time or work injuries, provided

¹⁴ There are various surveys and reports providing statistics on contingent workers, alternative employment, and the gig economy. The U.S. Bureau of Labor Statistics reported in May 2017 that 3.8 percent of workers (5.9 million persons) held contingent jobs, there were 10.6 million independent contractors (6.9 percent of total employment), 2.6 million on-call workers (1.7 percent of total employment), 1.4 million temporary help agency workers (0.9 percent of total employment, and 933,000 workers provided by contract firms (0.6 percent of total employment). See www.bls.gov/news.release/archives/conemp_06072018.htm.

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unemployment compensation, contribute to the social security and Medicare systems, and how they will obtain benefits for such needs as health care, retirement, or disability.

Employers that have moved toward retention of independent workers avoid certain employment responsibilities, but these arrangements also erode the traditional employer-employee relationship and provision of employee benefits. Under Secretary of Labor Marty Walsh’s leadership, the Department of Labor is poised to further evaluate the access that independent or gig workers have to reasonable wages, sick time, health care and other benefits. This will likely lead to further review of constructs such as unemployment insurance benefits and debates regarding the mechanisms that will need to be devised to ensure that these workers have access to such benefits. The legislation that was passed during the pandemic to provide wide-scale unemployment benefits may portend future efforts in this regard in the absence of an alternative solution, which can also lead to the potential for workers to not desire to return to work which was also experienced by employers unable to find enough workers to return when they were able to re-open. Another related issue concerns calls for the rise in the federal minimum wage. If more of the economic burden will fall on individuals to not only afford to live but also to save for all of their needs including health care, retirement, and periods of unemployment without employer assistance, fair wage initiatives will increase and arguably require employers to contribute to the eroding social safety net for all workers with increased wages.

Under the current Administration, there also appears to be a policy shift leaning toward classifying more independent contractors or gig workers as traditional employees. Recently, the U.S. Department of Labor (Wage and Hour Division) announced the withdrawal of the Independent Contractor Status Under the Fair Labor Standards Act rule (IC Rule) effective as of May 6, 2021, to maintain workers’ rights to the minimum wage and overtime compensation protections of the Fair Labor Standards Act (FLSA).¹⁵ The DOL provided several reasons for the withdrawal of the IC Rule, including that the IC Rule (i) was in tension with the FLSA’s text and purpose, as well as relevant judicial precedent (ii) prioritized two core factors for determining employee status under the FLSA that would have undermined the longstanding balancing approach of the economic realities test and court decisions requiring a review of the totality of the circumstances related to the employment relationship; and (iii) would have narrowed the facts and considerations comprising the analysis of whether a worker is an employee or an independent contractor, resulting in workers losing FLSA protections.

In the DOL’s new release regarding the withdrawal of the IC Rule, Labor Secretary Marty Walsh noted that too often, workers lose important wage and related protections

¹⁵ 86 FR 24303, May 6, 2021.

when employers misclassify them as independent contractors and he reiterated a commitment to ensuring that employees are recognized clearly and correctly when they are employees so that they receive the protections of the FLSA. These protections, which do not apply to independent contractors, include those that require covered employers to pay employees at least the federal minimum wage for every hour they work and overtime compensation at not less than one-and-one-half times their regular rate of pay for every hour they work over 40 in a workweek. In addition to maintaining the scope of workers covered by FLSA wage and hour protections, the DOL also noted that it anticipates that the IC Rule's withdrawal will avoid a reduction in workers' access to employer-provided benefits such as health insurance and retirement plans, and avoid a reduction in other benefits such as unemployment insurance and workers compensation coverage. Thus, the worker-classification issue alone appears to dovetail with an underlying concern and implication that in the absence of another viable and economically sound mechanism to provide social safety net benefits, the traditional employer-employee relationship, and the employer-provided system of providing or contributing to benefits, should be preserved. The effort to classify workers properly and to provide access to benefits in new ways will continue to evolve, and tensions will ensue where related social safety net issues are concerned.

[b] System of Employer-Provided Benefits

Possibly in anticipation of the economic shifts that would occur with advancements in AI and automation, movement has been afoot for many years calling for more government-run forms of benefits in the U.S. These models are also controversial for numerous economic and political reasons. Yet, these legislative efforts demonstrate that without a private system of employer-provided benefits such as health care coverage or retirement benefits to cover all of an employer's workers, government forms will be enacted for workers requiring private employer contributions in one manner or another for their support.

On the healthcare front, this controversy has been illustrated by the passage of the Affordable Care Act, the disputes and Supreme Court challenges over the legislation, and the resounding debates about universal health care coverage as well as those concerning association health plans.¹⁶ Local ordinances, such as those in San Francisco and Seattle, are also being enacted requiring certain employers subject to those ordinances to make health care payments for covered workers (e.g., by paying direct compensation to the workers, making payments to third parties such as an insurance carrier, or through certain monthly expenditures for their health care services). These ordinances have been challenged as preempted by the Employee Retirement Income

¹⁶ See e.g., On March 28, 2019, in *State of New York v. United States Department of Labor*, the United States District Court for the District of Columbia vacated portions of the Department of Labor's final rule on Association Health Plans.

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Security Act of 1974 (“ERISA”), but to date these cases have not been successful as the courts have found that the ordinances did not require employers to create ERISA plans nor did the law have an impermissible “connection with” or “reference to” them.¹⁷

On the retirement front, it is widely noted that the erosion of employer provided pensions has contributed to the retirement crisis. Employer sponsored programs that address retirement savings provide a crucial safety net for workers. Policy makers continue to propose ways to improve defined contribution programs that are provided to workers, such as requiring coverage for part-time workers, automatic enrollment constructs, and increased portability.¹⁸ In addition, policy makers continue to put forth ideas for a system of portable benefits for independent workers which may include multiple employer programs, association retirement and pooled plans, and various types of government funds.¹⁹

More States, and cities, such as New York City, are also enacting legislation and proposals for automatic payroll-IRAs managed by states or local governments, and there are concerns regarding the lack of uniformity this causes, especially where some programs are voluntary and others are mandatory, creating a national patch work of requirements.²⁰ For example, the U.S. Court of Appeals for the Ninth Circuit held in *The Howard Jarvis Taxpayers Association v. Cal. Secure Choice* case that the CalSavers Retirement Savings Program in California (“CalSavers”) was not pre-empted by ERISA primarily because employers maintaining ERISA retirement plans are exempted from the CalSavers requirements and CalSavers is not “established or maintained by an

¹⁷ See e.g., San Francisco Health Care Security Ordinance, Administrative Code Chapter 14 and *Golden Gate Restaurant Association v. City & County of San Francisco*, 546 F3d 639 (9th Cir 2008); Seattle Municipal Code 14.28 and *ERISA Industry Committee v. City of Seattle*, 2020 US Dist LEXIS 81750, 2020 WL 2307581 (WD Wash May 8, 2020).

¹⁸ See the Setting Every Community Up for Retirement Enhancement Act of 2019 (SECURE Act) and proposals such as Securing a Strong Retirement Act of 2021 (SECURE Act 2.0).

¹⁹ See e.g., Definition of “Employer” under Section 3(5) of ERISA—Association Retirement Plans and Other Multiple-Employer Plans, 29 CFR Part 2510, 84 Fed Reg 37508 (July 31, 2019) (effective Sept. 30, 2019) (The regulation was prompted, at least in part, by an executive order directing the DOL to consider expanding the circumstances under which employees of different private-sector employers could participate in a single plan. Executive Order on Strengthening Retirement Security in America (Aug. 31, 2018); see also Setting Every Community Up for Retirement Enhancement Act of 2019 (SECURE Act) and Registration Requirements for Pooled Plan Providers, 29 CFR Part 2510, 85 Fed Reg 72934 (Nov. 16, 2020). Commencing in 2021, Section 101 of the SECURE Act provides that unrelated employers may more easily participate in the same multiple employer plan (MEP) which may assist in reducing plan management costs.

²⁰ Payroll-Deduction IRA Programs are active in California, Oregon, Illinois, Massachusetts and Washington, and in various stages of progress in Colorado, Connecticut, Delaware, Maine, Maryland, New Jersey, New Mexico, New York, Vermont, Virginia, Seattle, New York City. New legislation continues to be introduced for these types of programs in additional States.

employer,” such that it would be preempted by ERISA.²¹ Thus, for employers operating in different States, these developments raise the risk that employers will be subject to different mandates depending on where their workers are located.

When it comes to new concepts for benefits approaches for different types of workers, debates, court and other challenges ensue, yet all of these ideas and constructs are trying to expand access for workers to crucial benefits such as health care coverage and retirement savings where there are gaps in the traditional employer provided system. A potential consequence of continued challenges to the rules and regulations for these types of approaches, or absence of workable solutions, can be reduced to a somewhat straightforward observation: if workers are not classified as employees with eligibility and access to important employer-provided benefits, or other approaches do not develop into viable options to fill in the gaps for workers, the alternative appears to be an across-the-board government provided system to provide such social safety net programs as unemployment insurance, retirement income and security, health insurance, disability insurance, and workers’ compensation, just to name a few. This would be in addition to the existing social welfare programs. Funding such a system would require substantial taxation of individuals and businesses and tremendous loss of autonomy, individual decision-making, and control. Employers who do not provide benefits will likely be required to contribute to government models. The important takeaway is that organizations and workers must understand that there are large scale implications and social and political trade-offs associated with these workplace changes that will be difficult to reverse.

§ 7.05 CONCLUDING THOUGHTS

While the co-working relationship between humans and machines has yet to be defined, and the role of AI in the workplace is evolving, it is clear that new approaches to work and benefits will require thoughtful planning and navigation of existing and new laws. Questions loom regarding employment and benefit policies, discrimination, disparate impact, and fairness as society advances in the Digital Age. Transitioning workers from the workplace will also require careful consideration, including desired severance and retirement programs. As businesses gain from the increased profitability that is promised by the use of AI-driven automation, it is imperative for employers in all industries to contribute to the policy debates and find ways to contribute to the economic security of the individual workers. The decisions that organizations make today will have long-standing impact on the human workforce, the meaning of the future workplace, the role of the employer-provided system of benefits, and the social safety net.

²¹ *HJTA v. Cal Secure Choice* (9th Cir 20-15591) (May 6, 2021).

