

# Is AI coming for our jobs? And does it have to WARN us?

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Generative Artificial Intelligence (“AI”) programs, such as ChatGPT, have the ability to create written works that can rival those of human creation. AI technologies have also recently greatly improved automated conversation tools that can be used to engage in discussions with human users and can provide functions such as customer support assistance. In a recent study, only 60% of participants correctly guessed that they were engaged in a conversation with an automated system, as opposed to an actual human being. (Gil Press, “Is It An AI Chatbot or A Human? 32% Can’t Tell,” Forbes, Jun. 1, 2023, <https://bit.ly/3JGO4zR>)

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The widespread availability of such AI programs may make businesses wonder if AI can replace human employees. For many employers, AI has some apparent advantages over human employees, the most obvious of which is labor cost. Many AI programs are free, whereas compensation and benefits for human employees requires significant expenditures, including costs to recruit, hire, train, and retain employees. Some AI programs can also create content much faster than human workers, digesting and analyzing troves of information unfathomable to the human mind within minutes.

There are numerous cautionary tales, however, as to why AI might not be an ideal replacement for human employees. Infamously, in the case of *Mata v. Avianca Inc.*, the United States District Court for the Southern District of New York ordered sanctions against a lawyer who used ChatGPT to prepare legal papers, after the Court discovered that the cases ChatGPT cited were completely fabricated by the chatbot.

Other uses of Generative AI have similarly drawn negative press, such as an eating disorder helpline’s use of chatbots that gave advice contradictory to the organization’s stated principles. (Catherine Thorbecke, “National Eating Disorders Association Takes its AI Chatbot Offline After Complaints of ‘Harmful’ Advice,” CNN, June 1, 2023, <https://bit.ly/3NRWZ3R>)

As with the advent of other technologies that have impacted the workplace over the last century, fear that AI is completely replacing human workers is overblown. At the same time, however, there will undoubtedly be functions in the future that will be transitioned from human workers to automated tools simply for efficiency.

Companies may also decide to use AI tools after a reduction in their workforce, to fill roles that those employees used to perform. For example, e-Commerce company Shopify has considered the use of AI translation tools to provide customer support in multiple languages, following employee layoffs earlier this year. (Madeline Stone, “Shopify Asks its Customer-Support Staff to Test New AI Tools Weeks after Laying Off Thousands of Employees,” Business Insider, June 21, 2023)

Companies that are undeterred from replacing human employees with AI should keep in mind certain laws regarding layoffs. At the federal level, the Worker Adjustment and Retraining Notification (WARN) Act requires certain employers to notify employees of plant closings and mass layoffs.

The WARN Act, 29 U.S.C. § 2101, covers businesses (including non-profit organizations) with 100 or more full-time workers (not including workers who have been with the employer for less than six months and workers who work fewer than 20 hours per week), when the employer:

- Closes a facility or operating unit, permanently or temporarily, that leads to the layoff of at least 50 people at a single site of employment;
- Lays off more than 500 workers at a single site during a 30-day period, or lays off 50+ workers if that constitutes 33% or more of the employer’s total active workforce at the site;
- Reduces work hours for 50 or more workers by more than 50 percent for each month during a six-month period.

Unless certain exceptions are present, the employer must provide at least 60 days’ notice to employees who will be laid off, as well as to the state’s Rapid Response Dislocated Worker Unit and the local chief elected official. Notices to employees must include a statement of whether the planned action is permanent or temporary (including if the entire plant is closing), the expected dates on which layoffs will commence and when the employee will be separated, whether “bumping rights” exist (referring to a seniority system in which senior workers can avoid layoff by bumping junior workers from their positions) and the name and telephone number of a

company official to contact for further information. Notices to state and local government are required to include similar information, as well as the name and address of the site of the layoffs.

In most cases, an employer's increased reliance on AI will not lead to a worksite closing or the layoff of 50 or more employees. However, even if AI-related reductions in force are not large enough to trigger the federal WARN Act, many states have their own "mini" WARN laws, which have additional requirements and/or lower thresholds to protect employees from abrupt layoffs.

For example, New York's WARN Act, N.Y. Labor Law § 860 *et seq.*, applies to business with 50 or more full-time employees in the state, and requires employees and state governmental agencies to be notified at least 90 days in advance of: mass layoffs involving 25 or more full-time employees if those individuals comprised at least 33% of the employees at that site; mass layoffs of 250 or more full-time employees (regardless of the percentage of the workforce those workers comprise); or when there are certain relocations or reductions in work hours.

In California, the state's WARN Act covers employers of 75 or more employees, and requires 60 days' advanced notice of plant closings, mass layoffs (50+ employees, regardless of the percentage of the workforce), relocation of all or substantially all employees beyond 100 miles, or relocation of a call center facility.

It is also possible that states will amend their WARN laws in response to AI-related layoffs. For example, California's WARN Act was expanded in January 2023 to require that employers notify employees when a customer service call center is relocated to another country. Given the increased reliance on chatbots to provide front-line customer service assistance, it is possible that states like New York and California will soon amend their WARN laws to require certain notifications when customer service centers are not relocated abroad but result in the replacement of human workers with chatbots or other forms of AI.

When conducting layoffs, employers should also review the criteria used to determine which positions are eliminated and confirm that all such factors are business-related and applied in a fair, non-discriminatory manner. Because employers can be held liable for unintentional "disparate impact" if layoffs disproportionately impact a protected group and lack sufficient business justification, employers exploring whether to engage in layoffs may wish to consult with counsel before replacing these employees with chatbots or other forms of AI.

For example, if a company decides to eliminate most of its marketing department and instead rely on AI to create promotional content, the company should consider working with counsel to explore whether the proposed layoffs would disparately impact a particular group of workers, such as women or employees over the age of 40.

Finally, although it may seem tempting to use AI tools to conduct the aforementioned analysis or to even simply draft dozens or hundreds of WARN notices, it would be imprudent for employers to rely on these tools for such purposes. First and foremost, by having discussions that take place strictly between companies and their counsel, analyses and legal advice are privileged and can be maintained in confidence, whereas information provided to AI tools might become part of the tool's body of knowledge and disclosed to unintended third parties. As with the lawyer who used ChatGPT to prepare a brief, there is no guarantee that WARN notices prepared by AI tools will be legally compliant or even contain accurate information.

Frank Lloyd Wright once commented that, "If automation keeps up, man will atrophy all his limbs but the push-button finger." While AI certainly has advantages for employers, it does have its limitations, and even when a company seeks to use AI to replace employees, there is and always will be a need for human insight and analysis when it comes to employee layoffs.

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