



# Law, Technology and Labour

*Edited by Emanuele Menegatti*

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*Editor*

Emanuele Menegatti  
Department of Sociology and Business Law  
Alma Mater Studiorum – University of Bologna

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Italian Labour Law e-Studies  
Department of Sociology and Business Law  
Strada Maggiore 45, Bologna (Italy)  
Alma Mater Studiorum - University of Bologna  
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## Notes on Contributors

**Théo Antunes** is a PhD candidate in Criminal law and Artificial intelligence at the University of Luxembourg and Strasbourg. He teaches corporate criminal law at the University of Luxembourg and is the coach for the René Cassin European Human right moot court competition.

**Marta Basile** is a PhD student in Political Sciences at the Department of Political and Social Sciences of the University of Catania, Italy. Actually, she is conducting part of her PhD research at the Queen's University of Belfast (Northern Ireland, United Kingdom). Sociology of Law is her disciplinary field.

**Stefano Bini** is Associate Professor of Labour and Social Security Law, Las Palmas de Gran Canaria University.

**Yiğitcan Çankaya** is a PhD candidate and research assistant in Department of Labour and Social Security Law in Atılım University Faculty of Law. He has conducted his doctoral research on Artificial Intelligence and Labour Law in Université Lumière Lyon 2, Centre de recherches critiques sur le droit (CERCRID).

**Noelia de Torres Bóveda** is a Teaching and research assistant, and PhD candidate at the Complutense University of Madrid (Spain). Her research focuses on the impact of algorithms on labour relations.

**Luigi Di Cataldo** is a PhD student in Political Sciences at the Department of Political and Social Sciences of the University of Catania, Italy. His disciplinary fields are labour law and sociology of work.

**Gianluigi Fioriglio** is Associate Professor of Legal Informatics at the University of Modena and Reggio Emilia, Italy, and Coordinator of the "Informatics Workshop - Law, Ethics, New Technologies", Interdepartmental Centre for Research on Discrimination and Vulnerability (CRID).

**Piotr Grzebyk** is Assistant professor at the Faculty of Law and Administration University of Warsaw. Head of the School of Law and Economy of China University of Warsaw 华沙大学中国法律与经济学院 and Polish Research Centre for Law and Economy of China University of Warsaw 华沙大学中国法律与经济波兰研究中心.

**Eva Lacková** holds a PhD in Labour Law and currently is a Post-Doc Researcher at the University of Campania "Luigi Vanvitelli", Italy.

**Daniela Lafratta** is Research fellow at the University of Udine.

**Mariagrazia Lamannis** is a PhD candidate in “Teoria del diritto ed ordine giuridico ed economico europeo” at University *Magna Graecia* of Catanzaro, Italy.

**Friederike Malorny** is Junior Professor at the chair for Civil Law, Labour Law and Social Law, University of Münster.

**Emanuele Menegatti** is Full Professor in Labour Law at the University of Bologna and President of the Forlì Campus Board. He is Editor-in-Chief of the Italian Labour Law e-Journal and Principal Investigator of the Jean Monnet Module “EU Law for Algorithm” – EULA.

**Kinga Moras-Olaś** holds a PhD in Labour Law, is a lecturer in postgraduate Labour Law studies at Jagiellonian University in Cracow and the author of numerous publications.

**Roberto Pettinelli** holds a PhD in Labour Law and Industrial Relations and is Research Fellow at the University of Eastern Piedmont, Italy.

**Gianluigi Pezzini** is Ph.D. candidate in the University of Udine and lawyer, studying union representation models for labor 4.0.

**Alberto Pizzoferrato** is Full Professor in Labour Law at the University of Bologna.

**Francesca Pollicino** is Research collaborator at the University of Udine.

**Ilaria Purificato** received a PhD in Labour, Development and Innovation from the Marco Biagi Foundation and the University of Modena and Reggio Emilia, Italy, is Research Fellow in Labour Law at the University of Modena and Reggio Emilia–Fondazione Marco Biagi, Italy, member of the Editorial Board of “Italian Labour Law e-Journal”, and member of the Editorial Secretariat of the journal “Diritti Lavori Mercati International”.

**Til Rieger** is Research Associate at the chair for Civil Law, Labour Law and Social Law, University of Münster.

**Fabrizia Santini** holds a PhD in Labour Law and is Full Professor at the University of Eastern Piedmont, Italy.

**Carla Spinelli** is Full Professor of Labour Law, University Aldo Moro of Bari, Italy.

**Alberto Tampieri** is Full Professor of Labour Law at the University of Modena and Reggio Emilia, Italy, and Deputy Director of the Department of Law.



**Davide Tardivo** is Researcher (RTD-A) in Labour law at Università degli Studi di Padova.

**Zahra Yusifli** is a PhD candidate in labour law at the University of Luxembourg.

## European Legislation and AI information systems applicable to HRM. Alberto Pizzoferrato \*

1. Human resources information systems. 2. European Commission's proposal for a Directive on Platform workers. 3. The amendments of Parliament's Committee on Employment and Social Affairs: lights and shadows. 4. Final remark.

### **1. Human resources information systems.**

Artificially intelligent (AI) systems are being used more and more in the area of human resource management (HRM). The so called “algorithmic management” is a process by which the AI systems are being used to assess applicants in the recruitment and selection process, allocate work, grant promotions and benefits, assign tasks, provide training recommendations, and terminate workers' employment.

Managing employees in the organization not only is a complex task, but also produces a substantial operational cost, especially when an organization has strict business and security policies of a periodical employees' (re)deployment within itself. Each activity in such process has its expense and ownership. Obviously, there is a very significant and permanent push towards business process improvements in the human resource management. It implies a continuous acceleration and enhancement of AI in HRIS to optimize and strengthen organizational productivity and efficiency. The information systems are built to assemble and elaborate data, to take fast decisions in the shortest possible time, and to be suitable and consistent with the behavioral organizational goals that the company has.

What can be said to be wrong with algorithmic management? Why is there any need to envision (legal or contractual) limits to its utilization?

In principle, artificial intelligence and information technology allow not only the monitoring and supervision of workers activities to extents that were unthinkable in past years, but also the collecting and processing of a huge amount of data on such activities. As

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\* Full Professor of Labour Law at the Department of Legal Studies, University of Bologna, Italy.  
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an example, more and more workers make use of wearable work instruments, such as sociometric badges, that make it possible to register their movements and position minute by minute, measure their work pace and assess their breaks. Such data are often analyzed by artificial intelligence to assess workers' productivity and evaluate their suitability to carry out specific tasks (in this respect, it is right to speak of electronic performance monitoring such as an operative precondition of management by algorithm).<sup>1</sup>

Such as workers in a storehouse that use automated systems of direction, also platform workers are dependent upon the app's algorithm not only to be given the next assignment, but also to be monitored with respect to the speed and diligence by which they carry out the tasks. For instance, customers' ratings and reviews can be used, in the sense that low scores assigned to the workers or a rated performance below the algorithm's standards can lead to the exclusion of the worker from the platform and thus to a "dismissal", which may be also enhanced by the supposed self-employment status of these workers.

People Analytics is among the HR practices that are based on the idea that artificial intelligence can help to manage the workforce in a better way by substituting individual biases of supervisors with metrics founded on the use of "big data", therefore supposedly more objective and neutral, to capture insights on job performance. The idea is based on the assumption that a judgment that is unstructured and subjective may not be rigorous or trustworthy enough to rightly assess talent or create human resources policies. Instead, large pools and amounts of collected data may be more objective and thus suitable to form the foundation for decision-making in the HR space.<sup>2</sup>

In any case, it is very difficult to quantify and limit in advance the flow and amount of information gathered on individuals' online and offline conducts, for instance by social networks and technological devices, given the blurring of boundaries between work and life, and the continuous interconnection with IT devices and digital services.

These systems may run the risk of reflecting their human programmers' biases, thus focusing merely on their ideas on work performance and productivity. Job candidates and workers such as, for instance, people with disabilities or with different features from those expected by the programmers, may be penalized, or rejected. Management driven by algorithm and artificial intelligence at the workplace is thus far from having neutral outcomes and reducing discriminatory practices, on the contrary it could even raise discrimination. Such risk is even more serious when artificial intelligence is self-learning, in the sense that it uses a software able to reprogram its own criteria and metrics to obtain a very general predefined outcome, such as augmenting the productivity of work.

The need for monitoring, as a matter of fact, comes from our legal understanding of employment, which is based on control: the work of an employee is controlled by his employer, who has the right to specifically direct employees' activities "that separates employees from independent contractors". The traditional foundation of the subordinate condition is, in essence, the power of the employer to give instructions and orders, to

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<sup>1</sup> See De Stefano V., "Negotiating the algorithm": *Automation, artificial intelligence and labour protection*, Working Paper No. 246, International Labour Office (ILO), Geneva, 2018, 31.

<sup>2</sup> See Pizzoferrato A., *Digitalisation of work: new challenges to labour law*, in *Argomenti di diritto del lavoro*, 6, 2021, 1340.

supervise the execution of tasks and to penalize the failure of performing work. Nevertheless, in each European Country there are laws and rules aimed at protecting workers from abuses of managerial authority at the workplace. Such provisions are meant to lower managerial powers or to introduce procedural steps to disclose the justification underlying company solutions being adopted. This regulation on one side gives management the unilateral power to control, direct and discipline work, and thus the mental and physical activities of human beings; on the other side, it has to reconcile these unilateral features still respecting workers' human dignity, which is a necessary aspect in democratic societies founded on equality principles. In that sense, rationalizing and limiting managerial prerogatives is an essential function of employment regulation.<sup>3</sup>

It is evident that those protective rules are not sufficient to face the effects of the spread of AI in HRIS because of the invasive potentiality of the new technological tools on private and social life activities; moreover, since the managerial algorithm is often bought and not built directly by the employer, it is objectively difficult to know, predict and syndicate it.

Usually, jobs are carried out through ordinary instruments that can perform a pervasive surveillance on the work execution, moreover there is a very high integration between professional and personal data that come from HRIS, and between tools that have different purposes (recruiting, talent retention, talent acquisition, payroll and HR administration, incentive award plan, promotion, dismissals, etc.). There is now, therefore, a reshaping of the protective perspective, which is moving, on one side, from the ban of remote control to the transparency of the vigilance on both collective and individual levels, on the other side from a ban to automated decision-making to a right to question the decision and call for a human action. It is also essential for any managerial decision suggested by artificial intelligence to be subject to review by human beings who remain legally accountable, together with their organization, for the decision and its outcomes. The instance that decisions are taken following machine-based procedures should never be a sufficient motive to exclude personal responsibility; even if electronic personality were to be introduced in the legal system, human beings should always remain accountable for any decision that may directly affect workers.

## **2. European Commission's proposal for a Directive on Platform workers.**

This new trend, opened by art. 22 of GDPR, has now found more consistency and boost at European level by the Proposal for a Directive of the European Parliament and of the Council on improving working conditions in platform work, 9.12.2021, COM(2021) 762 final 2021/0414 (COD).

The Draft directive on improving working conditions in platform work follows the European Commission's commitment to examine 'ways to improve the labour conditions of

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<sup>3</sup> See Hendrickx F., *From digits to robots: the privacy-autonomy nexus in new labor law machinery*, in *Comparative Labor Law & Policy Journal*, 40, 2019, 370.

platform workers' and supports the implementation of the European Pillar of Social Rights Action Plan.

It was first published by the Commission on 9th December 2021 (COM(2021) 762 final 2021/0414 (COD)) and it was submitted to the European Economic and Social Committee (EESC) for the consultation mechanism under Art. 304 of the TFEU.

The proposal aims to improve the working conditions of persons performing work via a platform by: (i) ensuring a correct employment status; (ii) promoting transparency, fairness and accountability in the algorithmic management of platform work and (iii) improving the transparency of platform work, including in cross-border situations.

With regard to algorithmic management, in particular, Chapter 3 of the proposal ensures the right to transparency regarding the use and operation of automated monitoring and decision-making systems, as well as human monitoring of the impact of automated systems on working conditions, so as to protect workers' fundamental rights and health and safety at work (*"Digital labour platforms shall not use automated monitoring and decision-making systems in any manner that puts undue pressure on platform workers or otherwise puts at risk the physical and mental health of platform workers"*). It also provides for appropriate channels to discuss, receive an explanation and request a review of automated decisions. These new rights will be granted to both employed and genuinely self-employed workers.

On 23rd March 2022 the EESC approved its final report on the draft, that supports in principle the Commission's proposal, but criticizes it for being too generic, ambiguous and at times incomplete.

In relation to the automated decision making, in particular, the EESC suggested that provisions should be added "to require digital labour platforms to: (a) develop their algorithms and systems under the "safe-by-design" principle and (b) following the rationale of the proposed AI Act, (...) require digital labour platforms to undergo a conformity assessment of their algorithms, not only before they deploy them but also during the provision of labour /or service by the worker. The conformity assessment should be carried out with a multidisciplinary approach in order to promote a joint assessment by the experts nominated by the trade unions, the platform and the labour, social protection and other relevant authorities. When a conflict arises in the review of an algorithm-assisted decision, workers should have the possibility to have access to an independent arbitration".

Such report was transmitted to the Parliament and to the Council for the first reading under the ordinary legislative procedure and, at present, the EU Parliament's Committee on Employment and Social Affairs, whose Rapporteur is Elisabetta Gualmini, is examining it together with the draft directive. Between 3rd May 2022 and 10th June 2022, The Committee published a draft report and 1023 proposed amendments, which show that while there is consensus on the high importance of the draft directive, its content is strongly debated.

### **3. The amendments of Parliament's Committee on Employment and Social Affairs: lights and shadows.**

The draft report presented at Committee on Employment and Social Affairs has proposed some relevant amendments to the original text, to reduce the information asymmetry, admit a wider access for workers and their representatives to the AI tools applicable and consent an arguing or contrast on the way of algorithm functioning. The commendable purpose is to augment transparency in the using of monitoring and decision-making systems, minimizing the opacity in algorithm-based human resource management.

The most important amendment extends the obligation of human review to all workers who have to interact with algorithms in their work environment without dealing with a platform. For instance, that would be the case for Amazon's warehouse workers, who are constantly monitored and instructed by AI-power tools. It appears clear how these provisions are highly relevant not only for people performing platform work (independently of their employment status) but for every worker whose working conditions are affected by those systems. Indeed, the pandemic has even accelerated the so-called phenomenon of "platformisation" of the economy, which refers to the increasing use of those systems to organize and control work also far beyond platform business. The directive norms on algorithmic management could become a standard, a general framework for all kind of employers, regardless of their legal nature, dimensions, activities.

All the algorithm's elements to assess the workers' performance should be subject to a prior collective information and consultation process, and subsequent collective bargaining. The obligation of information shall concern: "(a) as regards automated monitoring systems: (i) the fact that such systems are in use or are in the process of being introduced; (ii) the categories of actions monitored, supervised or evaluated by such systems, including evaluation by the recipient of the service; (b) as regards automated decision-making systems: (i) the fact that such systems are in use or are in the process of being introduced; (ii) the categories of decisions that are taken or supported by such systems; (iii) the main parameters that such systems take into account and the relative importance of those main parameters in the automated decision-making, including the way in which the platform worker's personal data or behavior influence the decisions; (iv) the grounds for decisions to restrict, suspend or terminate the platform worker's account, to refuse the remuneration for work performed by the platform worker, on the platform worker's contractual status or any decision with similar effects".

The draft report fosters a social dialogue between the workers and the platforms and empowers the workers to freely communicate among themselves, a measure intended to enable them to unionize and lay the foundation for a new right to be interconnected.

A measure covering subcontracting has also been added to prevent the platforms from circumventing the directive (*"That information shall be provided irrespectively of the automated or semiautomated monitoring and decision-making systems being managed by the digital labour platform or a subcontracted service provider which sells its management services to the platform"*).

Last, but not least, the draft report proposes that algorithms should not be able to decide on their own on the dismissal of workers or the organization of their working schedule

*(“Decisions that have an impact on working conditions, health and safety and on the contractual relationship or introducing changes to the agreed terms of the employment relationship, and decisions suspending or terminating the contractual relationship and the platform worker’s account, shall not be taken by automated or semi-automated monitoring and decision-making systems and shall be taken in line with national law and collective agreements”).*

The proposed amendments are consistent with the declared purpose. The extension of the directive scope of application to all enterprises using AI instruments, the enlargement of the information obligation, on a subjective basis, to workers’ representatives, and, on an objective basis, to examination and consultation, the institutional support given to collective bargaining, are all measures converging to the agreed aim of reducing parties’ imbalances and preserving human dignity, safety and health at workplace. The new text recognizes the key role of collective regulation and social partners in governing automation and the impact of technology at the workplace, stressing that involvement of workers’ representatives in managing and preventing job losses is crucial and that collective actors should actively participate in the governance of technology-enhanced management systems, to ensure a vital “human-in-command” approach and moving away from a purely unilateral dimension of AI work governance.

What is hard to imagine could work, is the provision that bans automated decision-making systems in a large and too much comprehensive area consisting of working conditions, health and safety, the contractual relationship, changes to the agreed terms of the employment relationship, suspension, or termination of the contractual relationship. This is equivalent to assert that automated decision-making systems are not allowed to operate in HRM, which is anachronistic, simply inconceivable and leads to dangerous anti-competitive drifts in contrast with the freedom of economic initiatives.

#### **4. Final remark.**

An appropriate human oversight of the decisions taken by algorithms, a specifically regulated human right of intervention and review, a full involvement of the workers’ representatives in the acquisition and testing of AI systems with a legislative reinforcement of collective bargaining, are all good legal instruments, in line with the main purposes of the proposed act, to be implemented in the employment relationship practices. Anyway, we don’t have to be tempted to embrace an ideological and unrealistic perspective, which is not only ineffective, but even counterproductive because it undermines the stability and impact of the whole regulatory framework.

The directive should keep a fair balance between efficiency, productivity, and the right to decent working conditions. The algorithmic management environment should be regulated and oriented in a human-centered approach, given that ethics-based auditing is not enough to preserve this effective balance; but AI tools should not be banned or unduly restricted in the area of HRM to avoid the adverse effect of business escaping from legal rules and

constraints, vanishing all the efforts done for a guided (in terms of ethics and constitutional values) evolution of AI.<sup>4</sup>

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<sup>4</sup> Similarly, see Zampini G., *Intelligenza artificiale e decisione datoriale algoritmica. Problemi e prospettive*, in *Argomenti di diritto del lavoro*, 3, 2022, 486: “In effetti, le proposte della Commissione UE sono lontane dal prospettare uno stravolgimento dei rapporti di forza nel sistema capitalistico globalizzato, ma offrono meritoriamente una base minima di diritti fondamentali ...”.