

10 Pitfalls of AI in the Workplace



Artificial Intelligence ("AI") is increasingly used across various levels of the workplace, particularly to optimize and accelerate work processes. In Human Resources, AI can assist with tasks such as recruitment, workforce planning, and performance management. Employees may also use AI systems for their work, whether permitted or not. However, the introduction and use of AI in the workplace is not only technically challenging but also legally complex. From an employment law perspective, various requirements must be followed, requiring employers to take proactive measures. Effective AI governance is crucial for employers to harness AI responsibly and effectively.

1 Failing to Provide Clear AI Usage Guidelines

Without formal directives, employees may act autonomously, potentially leading to employment law conflicts – for example, when the employer assumes that work was personally performed by an employee when it was actually generated by AI. Employers should clearly regulate AI usage, whether prohibiting or permitting it. AI policies can be implemented through workplace directives based on the employer's right to give instructions under Sec. 106 of the German Trade Regulation Act (*Gewerbeordnung* – "**GewO**"). A ban should be documented in the employment contract or a works council agreement, with internal system-based restrictions considered for enforcement. Permitting AI usage can be regulated through guidelines or also a works council agreement. Policies should specify which AI tools are covered, who may use them, for what purposes, what input and output are allowed, disclosure obligations regarding AI usage, the duty to verify AI results, handling of AI errors, data usage, and ultimate responsibility for work results.

2 Ignoring Employer Obligations Under the EU AI Act

Many companies already use AI systems in recruitment, performance evaluation, or talent development – often without realizing that they are legally considered "deployers" under the EU AI Act (Regulation (EU) 2024/1689 – *Verordnung über künstliche Intelligenz*). Many AI systems used in HR are classified as high-risk. For high-risk systems, deployers have specific obligations. Employers must monitor the system's operation and implement technical and organizational measures to ensure AI is used according to its intended purpose. A trained person for human oversight must be appointed. Employees affected by high-risk AI systems must be informed in advance. If a works council exists, it must also be informed. Deployers must ensure that input data under their control aligns with the intended purpose of the system and is sufficiently representative. Violations can result in substantial fines.

3 Deploying Prohibited AI Practices

AI practices that pose unacceptable risks are prohibited under Article 5 of the AI Act. This includes AI systems for emotion recognition in the workplace, such as detecting happiness, sadness, or anger, unless used strictly for medical or safety purposes. Also prohibited is the use of AI systems to evaluate employees solely based on profiling or personal characteristics to predict criminal behavior, which may arise, for example, in internal investigations.

4 Assuming Employees' AI Actions Won't Create Employer Liability

When employees use AI in the workplace – for example, for text creation, data analysis, or decision-making – the employer often bears the legal consequences. Employers can be held liable to third parties for actions performed by employees using AI. Specific laws explicitly define employer liability for employee violations. Liability risks are particularly high in cases of data protection breaches, copyright infringement, or disclosure of trade secrets. Employers must also consider that, internally, employee liability may be limited according to principles of intra-company compensation for damages. Employers should mitigate liability risks through AI policies, employee training, and works council agreements.

5 Failing to Ensure Adequate AI Competence Among Employees

If employers are subject to the AI Act, they must ensure that employees operating AI systems possess sufficient AI competence (Art. 4 AI Act), regardless of the system's risk level. Competence includes the skills, knowledge, and understanding necessary to use AI systems effectively, as well as awareness of opportunities, risks, and

potential harms. Employers are responsible for providing appropriate training. Other measures to ensure AI competence include internal guidelines, certification programs, or appointing an internal AI officer.

6 Underestimating Discrimination Risks in AI-Powered Recruitment

The General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz* – “AGG”) applies to all recruitment processes, including those using AI for creating job advertisements or pre-selecting applicants. Anti-discrimination provisions must be observed regardless of the technology used. Applicants must not be discriminated against, directly or indirectly, based on race, ethnic origin, gender, religion or belief, disability, age, or sexual identity. Employers cannot absolve themselves of responsibility by using AI. AI can create impermissible correlations between protected characteristics and seemingly neutral criteria even without discriminatory instructions. Employers should require quality checks from providers, carefully prepare training data, and continuously review and correct results.

7 Allowing AI to Issue Instructions Without Ensuring Reasonableness

Employers' right to issue instructions can be exercised through AI, for example, in shift planning, personnel deployment, or selection decisions. Legal limits must be observed. Instructions issued by AI must comply with the principle of “reasonable discretion” (Sec. 106 GewO), which requires balancing individual circumstances and mutual interests. This is subject to full judicial review, with the employer bearing the burden of proof. Given AI's limitations, it is doubtful whether systems can properly weigh all relevant factors. Employers should equip instructing AI systems with an appeal mechanism and encourage employees to use it if they consider AI instruction unreasonable.

8 Failing to Involve the Works Council

The use of AI in the workplace can trigger various participation rights of the works council under the Works Constitution Act (*Betriebsverfassungsgesetz* – “**BetrVG**”) – from information and consultation rights (Sec. 90 BetrVG) to co-determination rights (Sec. 87, 94, 95 BetrVG). Particularly relevant is the works council co-determination when AI creates selection guidelines or evaluation principles itself or when it is suitable for performance and behavior monitoring (Sec. 87 para. 1 Nr. 6 BetrVG). Also, in the case of fundamental operational changes (Sec. 111 BetrVG) or the introduction of new work procedures, its involvement is mandatory. If the works council is not involved in a timely and correct manner, conflicts, delays, and legal disputes are imminent. Early coordination and, if necessary, involving experts (Sec. 80 para. 3 BetrVG) are therefore essential.

10 Underestimating Data Protection and Security Risks

AI systems process large amounts of employee and candidate data. Employers must comply with the GDPR and the Federal Data Protection Act (*Bundesdatenschutzgesetz* – “**BDSG**”). This includes ensuring a valid legal basis for processing (such as legitimate interests or contractual necessity, as consent from employees is often not freely given), ensuring data minimization, and implementing appropriate technical and organizational security measures. Failure to comply can result in substantial fines.

9 Relying on Fully Automated Decisions in HR

Fully automated decisions in individual cases are generally prohibited under Article 22 of the GDPR (*Datenschutz-Grundverordnung* – “**DSGVO**”). In HR, hiring or rejection decisions made without meaningful human involvement are generally inadmissible. AI may automate invitations to interviews, but final hiring or dismissal decisions must involve human discretion. Employers are advised to integrate human oversight into HR processes and to document final decision-making authority. AI may support human decisions but cannot replace them entirely.

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contracts, terminations, and litigation, while ensuring compliance and risk mitigation. With deep expertise in restructuring, corporate transactions, and works constitution law, Christian and his team support smooth workforce transitions and offer strong legal protection—both in and out of court.

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