

Can technology keep the workforce safe?

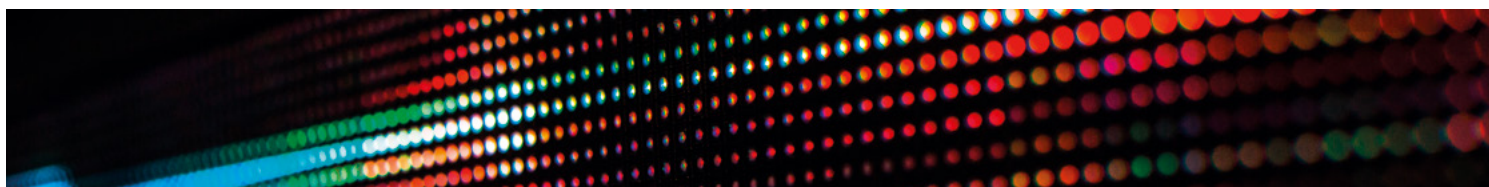
Many employees who have been working from home or been furloughed throughout the past few months will be anxious about returning to their workplace. The government's message to employers is clear: the health, safety and wellbeing of all is paramount. What role could AI and technology play in helping employers ensure a safer workplace? AI has been around for some time and is already widely used by many organisations, for example, in their recruitment practices. But in many industries AI is not commonplace in monitoring the wellbeing of employees. In this article, we explore the role of AI and other types of technologies that could provide significant benefits for employers in the COVID-19 landscape and highlight some associated legal risks and cultural implications which should be considered upfront.

Thermal cameras and temperature testing

Temperature testing is now the 'new normal' at many airports, aimed at detecting one of the key symptoms displayed by those infected with COVID-19. But most employers have historically relied on employees to self-report symptoms, rather than taking over the responsibility to check employee health themselves. However, in this global pandemic government guidance requires employers to ensure that they have assessed the risks at their workplace and taken reasonable preventative measures to protect workers from harm. With a view to avoiding legal liability for health and safety claims, arguably employers should be taking a more pro-active stance.

Key considerations

- Undertake a workplace risk assessment to ensure reasonable preventative measures are adopted to protect workers from harm.
- Understand what 'protective technology' options are available and adopt those best suited for your workplace environment.
- Consider adopting an effective contact tracing app to assess who is most 'at risk' and take the required action to mitigate further workplace risk.
- Consider other technological options that encourage employees to comply with essential health and safety rules.



One type of 'protective technology' is the use of thermal cameras installed at the entrance of a workplace and embedded with algorithms that measure individuals' forehead temperature. If the temperature is not within the 'normal' range, the operator is notified. In some cases, this may be sufficient to prevent an employee from being allowed to enter the premises. In other cases, further checks may be undertaken, and referrals made to HR and management.

The benefit to employers of this sort of technology is clear. It is a relatively simple way to seek to reduce the spread of coronavirus. Anxious employees are likely to feel safer returning to work if they, and those around them, have been temperature-checked. Using an automated camera to test employees as they arrive at work reduces the human input required by using a hand-held temperature scanner or thermometer. It may also encourage employees to stay home when they suspect they are unwell, effectively decreasing the likelihood of them coming into contact with others either during their commute or in the workplace.

Processing sensitive health-related data requires employers to adhere to higher standards of care under data protection regulations and regulators may take the view that monitoring may not be appropriate for some employers who can adopt less intrusive measures than temperature testing, for example, social distancing or self-reporting.

If employers do decide to adopt temperature testing, in addition to data protection requirements they should ensure that their practice is applied consistently across the workforce. They should avoid directly or indirectly discriminating against some groups of employees, for example, by treating older and younger workers differently, notwithstanding the fact that statistically older workers may have a higher risk profile for COVID-19.

However, temperature testing is not a failsafe method as it is widely reported that some individuals with COVID-19 are "silent spreaders". Some do not have a raised temperature and others may be asymptomatic. It could also have an unnecessary adverse impact on productivity. A temperature is a common symptom of many other ailments, which may not require workers to stay away from the workplace. Some employees may refuse to be tested due to data privacy or human rights concerns. This raises tricky cultural and employee relations issues for employers considering imposing checks, with or without a contractual right in their employment contracts to submit employees to a medical examination. In addition to discontent and grievances, employers may face constructive dismissal claims.

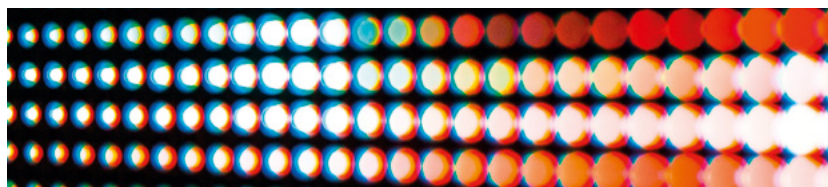
Contact tracing apps

Some employers may wish to adopt their own contact tracing app within their organisation either in addition to, or instead of, 'protective technology'. Such apps, often using Bluetooth technology, can monitor which areas of the workplace infected employees have visited and with whom they have come into contact, so that users who have reported symptoms can be traced. Algorithms are then used to decide who is most 'at risk' and therefore needs to be notified that they have been in contact with an infected individual.

From an operational perspective, there are clear benefits to employers of contact tracing. When one employee tests positive, organisations can minimise disruption to productivity and reduce anxiety amongst other workers by specifying who has been in contact with the infected individual, and who needs to self-isolate. It also could help to identify the areas of a workplace that need to be deep cleaned. This technology could be particularly helpful in keeping operations running, when there is further easing of lockdown measures and if there is a second wave of COVID-19 cases.

However, again, employers need to carefully consider the privacy and data protection implications of contact tracing. One particular cultural concern is the risk of 'scope creep' – employers may introduce the technology for one purpose and then, post-pandemic, use it for another. For example, by monitoring the presenteeism of employees in an office and their productivity by time spent at their desk or in break-out areas.

Currently, this type of monitoring may be more difficult to justify from a privacy and data protection perspective, but culturally things may be about to change? As employers' thoughts turn to the medium- and long-term implications of the pandemic, it is clear that many people's attitudes towards flexible and remote working have transformed significantly. Such a shift in normal working practices requires employers to manage employees, monitor their behaviour and measure their productivity in different ways. Could CCTV be commonplace in workers' home offices?



Devices used to influence behaviour

A further category of technology that may push the boundaries from a cultural perspective is 'controlling technology' focused on affecting workers' behaviour to encourage them to comply with rules. Products include hand washing compliance monitors, wearables such as bracelets or necklaces that monitor and warn employees, for example, by alerting them if they are too close to another worker, and systems created to notify management if too many employees are congregating in one area.

Devices acting as a reminder to employees to practise social distancing and good hygiene may assist employers in complying with their health and safety duties. But excessive monitoring is likely to be unpopular and culturally may be more difficult to enforce in an adhococracy than a hierarchical organisation or one which is heavily regulated. Transparency is a key requirement for monitoring from a data protection perspective and something which many employees will be keen to ensure is at the forefront of employers' minds when they are deploying any such technology. Employers will be well advised to conduct an impact assessment and document its findings.

Will the employer subsequently use controlling technology for other purposes? Employees may fear that once this technology is in place, 'big brother' will be watching them – their movement will be tracked and results used as evidence in grievance hearings, whistleblowing investigations or even disciplinary proceedings, for example, if footage shows that an employee is breaching social distancing requirements.

Will it be 'fair' for employers to discipline, or even dismiss, employees relying solely on data collected through technologies which monitor their behaviour? If the collection of data infringes the employee's rights under national and international human rights laws, this may influence the reasonableness of any alleged unfair dismissal. Data protection legislation renders it unlawful, in most cases, for employers to make key decisions concerning employees solely through automated processes, meaning that any decisions should ultimately have some element of human decision-making.

Conclusion

AI and technology have the potential to facilitate a smoother return to work for many anxious employees and to assist employers in complying with government guidance and their legal health and safety obligations. However, it raises some important cultural and legal implications for employers to navigate due to the significant data protection and privacy implications.

We know that businesses are taking, and will continue to take, a wide range of different approaches when it comes to returning employees to their workplace and some may adopt new technologies. We would be very interested to hear whether your organisation plans to use AI and other technology in response to the current pandemic and the opportunities and challenges that you foresee in this area.



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