

Navigating the Fiduciary Minefield in the Artificial Intelligence Revolution

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Abstract

This note examines the emerging fiduciary dilemmas corporate directors face in the era of artificial intelligence (AI). As AI systems become increasingly capable, cost-effective and economically transformative, directors must confront the tension between implementing AI to create shareholder value and retaining human capital to preserve workforce stability and comply with developing legal obligations. Drawing on foundational principles of corporate fiduciary duties – including the duties of care and loyalty, along with the business judgment rule – this note analyzes how current doctrine can justify divergent approaches to AI adoption. It further evaluates how AI's projected productivity gains may pressure directors to implement automation, while countervailing considerations such as public policy, labour law and legal risk management may support continued reliance on human workers. The note also surveys existing AI regulatory frameworks, including the GDPR and California's Artificial Intelligence Accountability Act, and assesses their implications for U.S. corporations. Finally, it proposes targeted reforms to fiduciary doctrine, administrative oversight and workforce-protection statutes to better align corporate governance with rapid technological change. This analysis offers a structured framework for corporate leaders, policymakers and practitioners navigating AI's unprecedented challenges in the modern workplace.

Keywords: Artificial intelligence, corporate governance, fiduciary duties, duty of care, duty of loyalty, business judgment rule, labour law, automation, AI regulation, GDPR, workforce displacement, corporate law.

A Introduction

Corporations in the United States are bound by legal duties. In the area of corporate governance, the most prevalent is their fiduciary duty to create value for their shareholders. In 1919, the Supreme Court established that a corporation's primary

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purpose is to create value for its shareholders.¹ Corporations can create value in many ways, for example, by cutting costs and growing their sales, but one of the most transformative avenues comes through technological breakthroughs. Revolutionary technology can drive a corporation's demand and increase production. With a corporation's legal duty to create value, the development and implementation of new technology is less of a strategic decision and more of a duty. The technological revolution of artificial intelligence (AI) is already well underway. Corporations specializing in AI have skyrocketed in value, with companies such as Microsoft's OpenAI having a current valuation of US\$157 billion.² Although this figure may be speculative, it underscores an undeniable reality: the AI revolution is underway, and the legal profession must be prepared for the challenges that will accompany it.

The AI sector is in an early stage of growth that mirrors the internet boom of the early 21st century. AI has become a buzzword for every industry, from tech and finance to health and marketing. There is not a sector of modern business that will be unaffected. However, what exactly is the technology that can be expected? Will the world soon be at the mercy of machines with intelligence superior to humans? It is a possibility that can scare people. The AI that will characterize the near future will be a far cry from the androids of George Lucas' *Star Wars* or Christopher Nolan's *Interstellar*. While the average American consumer will have no access to their own "C-3PO" anytime soon, this technology is revolutionary, nonetheless. Bill Gates is among the experts who believe that the human race is on the precipice of the biggest technological revolution in human history. Bill Gates and his Windows team at Microsoft had a driver's seat during the first major technological revolution of this century with the advent of the personal computer. Gates regards the recent breakthroughs in AI to be "as fundamental as the creation of the microprocessor, the personal computer, the Internet, and the mobile phone".³

All the technology that Gates references had a substantial impact on the state of the world and even the state of the law in the United States. In 1967, the advent of the personal phone forced the Supreme Court to decide how to apply the long-established principles of expectation of privacy found in the 4th Amendment to a technology unimaginable to the drafters of the Bill of Rights.⁴ More recently, in 1997, the Supreme Court decided that the internet was a new medium and that overregulation of free speech on the internet would be a violation of the Bill of Rights.⁵ In a similar fashion, the legal world must be prepared for the novel questions of law AI poses. Businesses that use AI in any form will be affected by landmark decisions in the future.

There are two truths about AI that will be hard to refute: (1) AI will be more productive than human capital alone, and (2) the resulting rise in production will create significant value for corporations that implement it. While AI is not yet advanced enough to replace the human employee entirely, the number of tasks it stands to replace or render obsolete is staggering. This leads to the ultimate dilemma

1 *Dodge v. Ford Motor Co.*, 204 Mich. 459, 170 N.W. 668 (1919).

2 Bill Gates, *The Age of AI Has Begun*, gatesnotes.com, <https://www.gatesnotes.com/The-Age-of-AI-Has-Begun> (last visited 13 December 2024).

3 *Ibid.*

4 *Katz v. United States*, 389 U.S. 347 (1967).

5 *Reno v. ACLU*, 521 U.S. 844 (1997).

that this article seeks to analyse: if AI is cheaper and more productive, corporations will be met with a choice – keep human capital or use AI to replace human capital. This decision will have massive implications for the job market and the economy. To analyse this choice, corporations will have to consider existing legal duties, chiefly their fiduciary duty to create value.

This article will provide an overview of what AI is, how it works and what the current state of the art is with generative AI and LLMs such as ChatGPT. It will explore the implications of fiduciary duty in American jurisprudence and how companies will address the value AI can create. Ultimately, there will be two choices: a pro-AI implementation argument and a pro-Human retention argument. Finally, this article will highlight the shortcomings of current law and policy, in addition to analysing current AI legislation. The rise of AI forces corporations to balance fiduciary duties with societal impacts, while the legal system evolves to address unprecedented challenges. The legal system must evolve to address the novel questions posed by AI, ensuring that innovation does not come at the expense of fairness, stability and societal progress, while simultaneously avoiding regulation that would harm US competitive advantage.

B The State of AI

I Generative AI and LLMs

Generative AI. AI has a distinct scientific definition compared with its general public understanding. It does not refer to androids with human-like intelligence like those in science fiction and pop culture. In science, it is simply the development of computer systems that can perform tasks that had previously required human intelligence. The most common use of the term *artificial intelligence* today pertains to generative AI. This type of AI includes systems that generate a wide range of content, including text, images and even videos.⁶ In 2023, global venture-capital investment in generative AI reached approximately US\$ 21.3 billion – including around US\$ 15.3 billion contributed by mega-investments from companies such as Amazon and Microsoft.⁷ With this trend continuing upward, Goldman Sachs predicts that generative AI could lead to an increase in global GDP by US\$7 trillion over the next decade.⁸

LLMs. A subset of generative AI, the LLM is a form of AI that can generate text responses from virtually any prompt that it is given. The most notable LLM is OpenAI's Generative Pre-trained Transformer (GPT) series. The most recent publicly available version of GPT-4 supports a context window of up to 32,768 tokens – roughly equivalent to 20,000–24,000 words. The model learns through processes called machine learning (ML), tokenization and neural networks. Neural

6 *What Is Generative AI?* Gen AI Explained, AWS, Amazon Web Services, Inc., <https://aws.amazon.com/what-is/generative-ai/> (last visited 13 December 2024).

7 *Generative AI Venture Capital Investment Globally on Track to Reach \$12 billion in 2024, Following Breakout Year in 2023*, EY (2024), https://www.ey.com/en_ie/newsroom/2024/05/generative-ai-venture-capital-investment-globally-on-track-to-reach-12-billion-dollar-in-2024-following-breakout-year-in-2023 (last visited 13 December 2024).

8 *What Is Generative AI?*, *supra* note 6.

networks, inspired by the structure of the human brain, use interconnected layers of nodes to process and analyse data. Through millions of training iterations, these networks learn patterns and relationships between short groups of text called tokens.⁹ ML considers the relationship between short groups of text called tokens. Each token is either a single word or a partial word. Through ML these models can be trained to predict the next most desirable token until these tokens have been formed into full sets of text.¹⁰ LLMs have gained popularity in large part due to their flexibility. Each model can carry out a wide range of tasks. LLMs have already been used for copywriting, knowledge base answering, text classification, text generation and code generation.¹¹

II Capabilities

The AI systems currently under development are exploring capabilities that could surpass what has been achievable with previous computer programs, including natural language processing, computer vision, automated task efficiency and ML.

NLP. NLP is AI's ability to interact with human language. It is the program's ability to understand, interpret and generate human language. It is the skill that has allowed products like ChatGPT to explode in value. A natural language processor such as OpenAI's GPT series or Google's LaMBDA can respond to human prompts in a fraction of a second. If a user prompted a model such as ChatGPT to "write me an essay on Robert H. McKinney", within a few short moments the user would have a composed piece of text highlighting his time as a lawyer, his major contribution to the Indiana University-Indianapolis law school and nearly any other information the prompt requested. The text will seem nearly indistinguishable from human-produced text. This does not mean that the NLP is some sentient robot that pondered the prompt and responded as a human would. NLP models are trained using large datasets of text to learn patterns and relationships in language.¹² This means that the NLP was not composing the language but was making a highly educated guess on what the next word in a strand of text should be. The training process typically involves collecting and preparing data, transforming it into a format that the model can understand, choosing an appropriate model architecture, feeding the data to the model for learning and fine-tuning the model based on results and feedback.¹³ A leading NLP, OpenAI's ChatGPT has been trained on over 570 gigabytes of data.¹⁴ If the entirety of the data were compiled into one Word document, it would span over 600 million pages.

ML. Another major advancement in AI's potential is its ability to improve upon itself. This process is known as machine learning. These algorithms are designed to

9 *What is a Neural Network?*, IBM (2021), <https://www.ibm.com/think/topics/neural-networks> (last visited 13 December 2024).

10 *What is LLM?, Large Language Models Explained*, AWS, Amazon Web Services, Inc., <https://aws.amazon.com/what-is/large-language-model/> (last visited 13 December 2024).

11 *Ibid.*

12 Bart Scheerder, *How Do You Train Natural Language Processing Models?* LinkedIn, <https://www.linkedin.com/advice/0/how-do-you-train-natural-language-processing> (last visited 13 December 2024).

13 *Ibid.*

14 *Ibid.*

analyse data and learn from it to make predictions. The ML models improve by training with large datasets. There are three steps in ML: supervised, unsupervised and reinforcement learning. Imagine a major email provider developed an AI to sort through spam emails. During the supervised learning stage, the model is trained on pre-labelled data to teach it how to make predictions.¹⁵ In this stage the email provider would train the model by showing it massive amounts of emails labelled spam and not spam. The model learns from this dataset the basic characteristics of the data it is tasked with. The next stage is unsupervised learning.

III Limitations

These tools utilized by the procurers of AI are helping their systems to advance every day and that list is by no means exhaustive. However, despite AI's vast and exciting capabilities, they are not without limitations. As it stands, current AI tech can also be characterized by its data dependency, lack of common sense and creativity and lack of transparency and explain ability.

Data Dependency. As mentioned previously in this section, AI systems are trained through processes such as ML that require massive amounts of training data to reach any useful level of intelligence. OpenAI's ChatGPT has been trained on over 570 gigabytes of data.¹⁶ During this stage, the model looks at unlabelled data to find hidden patterns or structures.¹⁷ This stage is where the AI's capabilities even surpass human pattern recognition. For the email spam sorter, this could consist of the AI noticing a large number of emails that feature the prospect of "winning", a common element of spam emails. The final stage is reinforcement learning, which is similar to human trial-and-error learning. The model will take its understanding of the labelled dataset provided during the supervised stage and apply the patterns and rules it discovered during the unsupervised stage. For the email sorter, this would involve the model considering the pattern of the prospect of "winning" in the dataset to assign emails to spam based on this pattern. As the model repeats the steps it will continue to find more patterns between viable and spam emails. The ML capabilities of AI allow it to continuously refine its predictions and adapt to new data, improving its accuracy and efficiency over time.

Computer Vision. Natural language processors allow an AI to understand language, and ML allows it to learn patterns, both of which attempt to mirror human cognition. However, cognition is not the only human capability AI attempts to replicate. Computer vision attempts to match the human sense of sight by analysing visual data. It is the process of teaching computers to make sense of digital images.¹⁸ While AI has been quick to understand tasks such as spam sorting with limited variables, sight poses a challenge. Humans develop their ability to decipher information through vision from the moment they open their eyes for the

15 Ori Sagi, *Three Types of Machine Learning You Should Know*, Pecan AI (2024), <https://www.pecan.ai/blog/3-types-of-machine-learning/> (last visited 13 December 2024).

16 Scheerder, *supra* note 12.

17 Sagi, *supra* note 15.

18 Hmrishav Bandyopadhyay, *What Is Computer Vision? [Basic Tasks & Techniques]*, V7 Labs, <https://www.v7labs.com/blog/what-is-computer-vision> (last visited 13 December 2024).

first time. This gradual process of learning enables humans to recognize, interpret and respond to visual stimuli with remarkable precision, a feat that AI is now striving to replicate. Additionally, the ability to learn from image patterns through computer vision has led to the rise of ever-advancing image generators, such as OpenAI's DALL-E, which can create detailed, realistic images based on textual descriptions.

This vast quantity of data comes from a wide range of sources, with the majority originating from the internet, where information is often freely accessible. Accessing and addressing the ownership of this data is already raising concerns. In December 2023, the *New York Times* sued OpenAI for using its articles in the ChatGPT training corpus on the grounds of copyright infringement.¹⁹ This along with similar lawsuits could impose even stricter access to data for AI developers. This dependency on data has also created a competitive advantage for the few companies worldwide with access to the microdata required for development and the countries where data is more available and less legally restricted.

Lack of Contextual Understanding and Creativity. Two of the aspects that differentiate humans from the rest of the animal kingdom and now AI as well are humans' ability to think creatively and understand data in the context of broader situations. Humans excel at grasping subtleties and nuances in language and situations, which AI struggles to fully comprehend.²⁰ AI is currently most useful for narrow data-driven tasks. If an AI system is given the task of sorting 50 cities in Indiana based on population, a basic language model (LLM) could return the task in a short time with few to no errors. The answer to this prompt had an objective and concrete answer. However, if one asked the same model to create a marketing slogan for a new product, the AI's results would be less impressive. Success in creative tasks tends to be more subjective than objective. Creativity often involves subjective judgment and intuition, qualities that AI lacks, as its decision-making processes are based on patterns and data rather than innovative thought. In the near future, this gives humans a competitive edge over AI capital. Human creativity will need to continue to be utilized in conjunction with AI.

Lack of Transparency and Explainability. While AI can excel in data-driven tasks, the manner in which it succeeds can be opaque. Understanding ML is an important precursor to understanding the final limitation this article will discuss, specifically the unsupervised stage where AI is identifying patterns. AI uses pattern recognition to inform its decision-making. These decision-making processes can be difficult for humans to understand. In the industry this is known as the "black box" issue.²¹ As Professor Samir Rewashed of the University of Michigan-Dearborn explains, this leads to a major problem in addressing unwanted outcomes.²² If an AI reaches an

19 *N.Y. Times Co. v. OpenAI, Inc.*, No. 23-cv-10587 (S.D.N.Y. December 2023).

20 Ron Carucci, *In the Age of AI, Critical Thinking Is More Needed Than Ever*, *Forbes* (2024), <https://www.forbes.com/sites/roncarucci/2024/02/06/in-the-age-of-ai-critical-thinking-is-more-needed-than-ever/> (last visited 13 December 2024).

21 *AI's Mysterious 'black box' Problem, Explained*, University of Michigan-Dearborn NEWS (2023), <https://umdearborn.edu/news/ais-mysterious-black-box-problem-explained> (last visited 13 December 2024).

22 *Ibid.*

unwanted outcome and the developers are not fully capable of looking into the AI's decision-making process, it makes it difficult to end the situation. If an AI is trained to sort spam and a spam email makes it through, it can be challenging when there is no indication as to why. In a more serious example, if the AI coded for a self-driving car experiences the "black box" issue and is impossible to troubleshoot, that poses a serious safety risk. Current AI can be trained on massive datasets but the real world is varied and lacks the uniformity in patterns that AI requires to train its decision-making. Permutations of every situation exist, and without transparent decision-making by AI, its uses will be materially limited.

IV Artificial General Intelligence (AGI) – What the AI of Today Is Not

Artificial General Intelligence. It is worth acknowledging not only AI's capabilities but also its current limitations. Present-day AI systems, despite their impressive functionalities, do not possess human-level cognition. The notion of an AI with full human-like reasoning and capabilities is known as artificial general intelligence (AGI). AI investors like Elon Musk believe, "If you define AGI as smarter than the smartest human, that feat will be reached within the next 2 years".²³ This prediction would have AGI arriving in 2025 or 2026, although experts' opinions on this matter are varied and merely subjective.

V Major Players in the AI Industry

Despite the extensive applications and value creation of AI, only a small number of firms have successfully entered the AI development market globally. The barriers to entry include high capital requirements for infrastructure and training models, limited access to large datasets necessary for competitive AI, need for specialized talent in AI fields and massive computational power required for model training. As a result, the only firms making real headway are some of the largest companies in the world already: firms like OpenAI, Microsoft, Apple, Google, Meta and Nvidia are dominating the AI market.²⁴ The current state of AI can be characterized in many ways, but none more accurate than by its rapid growth. Advancements in generative AI in the form of LLMs have fuelled billions in investment. While these models still have limitations, their capabilities have near-endless business applications. AI has the potential to create value for the companies that develop and utilize it. For Microsoft, Google and the like, it already has. However, when considering the potential value AI can create, legal implications must be considered as well. AI can create a lot of benefits for companies, but that value comes with responsibility, namely, fiduciary duty. The following section will dive deeper into the legal duties of businesses and how AI may complicate the status quo.

23 Eric Siegel, *Elon Musk Predicts Artificial General Intelligence in 2 Years. Here's Why That's Hype*, Forbes (2024), <https://www.forbes.com/sites/eric siegel/2024/04/10/artificial-general-intelligence-is-pure-hype/> (last visited 13 December 2024).

24 Kif Leswing, *Tech's Splurge on AI Chips Has Companies in "arms Race" That's Forcing More Spending*, CNBC (2024), <https://www.cnbc.com/2024/07/25/techs-splurge-on-ai-chips-has-meta-alphabet-tesla-in-arms-race.html> (last visited 13 December 2024).

C The Fiduciary Dilemma

I Introduction to Fiduciary Duty

The rise of AI presents a pivotal challenge for corporate leadership when businesses must respond to its potential for value creation. Whether a corporation chooses to adopt AI or not, there will be potential legal implications tied to those decisions. Public corporations, which are owned by their shareholders, have a legal fiduciary duty to create value for those shareholders.²⁵ While corporate directors have broad authority to act in the best interests of their companies, their responsibilities remain grounded in the duty to create and preserve value. This notion has been reinforced by case law into a strong statement: shareholder value reigns supreme. This presents a dilemma for companies that are faced with implementing AI. As established in the previous section, AI and its increasing capabilities can and indeed already has created shareholder value.

The dilemma arises when directors are pitted between retaining or replacing human capital. Imagine the issue of AI implementation through a hypothetical scenario. Say John Doe is a shareholder in “T.E.C.H. 4 Good”, a publicly traded company in which John owns significant shares. After a recent board of directors meeting, John has learned that the board has decided against implementing AI, expressly citing its commitment to preserving jobs for its workers. Under *Dodge v. Ford*, John Doe would have the right to bring a derivative action suit.²⁶ If directors want to fulfil their duty to create value, it would seem the logical choice to implement AI. However, what about the human cost? Is there a legal precedent that would allow directors to champion human capital? While AI would present a novel issue for courts, case law presents the best indicator of how courts will respond. The case law surrounding this dilemma is overwhelming in its support of value creation, even at the cost of humanitarian pursuits.

Case Law. The legal concept of fiduciary duty to shareholders has been indoctrinated in the United States for nearly a century. The most cited authority for this doctrine is the 1919 case of *Dodge v. Ford Motor Co.* The Ford Motor Company was experiencing massive success due to a revolutionary technology developed in the assembly line, and the company’s value was high. Henry Ford, the company’s director, planned to stop paying special dividends to shareholders. Henry Ford intended to run the company not solely for the benefit of shareholders but also for the betterment of his workers, the community and society. At the time, the Dodge brothers were minority shareholders in the Ford Motor Company. The brothers commenced an action against Ford Motor Co., asserting that the company should not take action that harms its shareholders in the name of humanitarian concerns.²⁷ The Dodge brothers persuaded the Supreme Court in Michigan. The court held that a business corporation is organized primarily for the profit of its stockholders, and the discretion of the directors is to be exercised in the choice of

25 *Dodge v. Ford Motor Co.*, 204 Mich. 459, 170 N.W. 668 (1919).

26 *Ibid.*

27 *Ibid.*

means to attain that end.²⁸ This means that directors are required by law to run their company in a manner that creates value for the shareholders.

Supremacy of Value. The principles of value preservation and creation extend beyond routine business decisions to significant corporate actions, such as mergers and acquisitions, corporate sales and hostile takeovers. The judiciary has held that when a company is up for sale, the directors' fiduciary duty shifts to securing the highest value reasonably attainable for the shareholders. In *Revlon Inc. v. MacAndrews & Forbes Holdings, Inc.* (1986), the Delaware Supreme Court ruled that when a company is in the process of being sold, the board's fiduciary duty shifts to ensuring that the highest value possible is achieved for the shareholders.²⁹ Even at the end of a company's life, when a director's duties in governance are near an end, the director cannot sacrifice shareholder value. The directors must govern the sale in a way that maximizes value for the shareholders. This notion remains true even under dire circumstances for a corporation, such as a hostile takeover. In *Unocal Corp. v. Mesa Petroleum Co.* (1985), the Delaware Supreme Court emphasized that even in the face of a hostile takeover, the board's primary responsibility is to protect the corporation's value for the shareholders. The court held that directors may take defensive measures, such as adopting poison pills, to prevent a takeover that would undervalue the company, reinforcing that shareholder value must remain paramount, even when confronted with aggressive external threats.³⁰

While the sale of a business or the defence against a hostile takeover may seem unrelated to the decision to implement AI, these cases underscore the principle that, regardless of a business's stage or the nature of its decisions, shareholder value remains paramount. While these cases give a strong picture of the shareholder's value in corporate governance, they do not speak directly to corporate decisions between shareholder value and more humanitarian-driven advocacy. Along with *Ford*, the case of *eBay Domestic Holdings, Inc. v. Newmark* provides a relevant parallel to decisions involving AI implementation versus human retention. In this case, controlling shareholders Craig Newmark and his partner James Buckmaster were sued by eBay, a minority shareholder in the corporation. Craig and Jim were opposed to a profit-making corporation and planned to maintain Craigslist as a community service. eBay argued that the owner's plan directly conflicted with the duties imparted to them by cases such as *Ford*.³¹ The court ultimately agreed and found that in addition to their duty to create shareholder value as directors, Newmark and Buckmaster, as controlling stockholders, were fiduciaries of their corporation's minority stockholders.³²

1 Additional Fiduciary Duties

Duty of Care. The directors' duty to their company as fiduciaries can be broken down into two primary duties: duty of care and duty of loyalty. The duty of care

²⁸ *Ibid.*

²⁹ *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986).

³⁰ *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985).

³¹ *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1 (Del. Ch. 2010).

³² *Ibid.*

requires that directors make informed and prudent decisions. The director has acted with care if the act was “(1) in good faith and (2) in a manner the director reasonably believes to be in the best interests of the corporation”.³³ This means that directors deciding on the prospect of implementing AI must do so without any fraudulent motives and keep the company’s best interests in mind.

This may include conducting extensive research on the effects of AI implementation and weighing both risks and benefits. Directors have been held liable for breach of their fiduciary duty by failing to adequately inform themselves before making significant decisions.³⁴ Thus, directors must familiarize themselves with AI, its limitations and its capabilities. For corporations as big as the ones in the AI market like Microsoft, directors cannot possibly inform themselves of each individual detail. Luckily, directors and officers are entitled to rely, in good faith, on information from trusted sources.³⁵ Directors tasked with considering AI implementation can cover their duty of care by thoroughly researching its effects, and this data can come from trusted and reliable sources within the company, not necessarily from their conduct.

Duty of Loyalty. When directors are met with the possibility of all the value AI could create for their corporation, they must be wary of using that information for personal gain. Under the duty of loyalty, directors may not pursue a business opportunity that rightfully belongs to the corporation.³⁶ This is known as the corporate opportunity doctrine. In this context, the doctrine prohibits directors from using insider knowledge of AI initiatives – acquired through their duties – for their own benefit or for the benefit of third parties. This would be self-dealing and is widely prohibited. The duty of loyalty concerns the relationship between the director and the corporation and not necessarily with its shareholders. However, breaches of loyalty can have a direct impact on the shareholder. If not for the corporate opportunity doctrine, a director could leverage his role to take an AI-related business opportunity from the corporation itself. This is the opposite of what a director should do for the shareholder under *Dodge v. Ford*. In sum, AI can create immense shareholder value, but directors must resist short-term self-serving temptations to maintain this focus.

Conclusion on Fiduciary Duty. It is clear that directors must consider carefully the potential surrounding AI implementation in order to fulfil their fiduciary duties. The duty of care requires directors to make informed decisions about AI implementation while weighing its risks and benefits in good faith. The duty of loyalty requires directors to act in the best interest of the corporation and refrain from exploiting AI opportunities for personal gain. These notions have been reinforced through case law and support the primacy of shareholder value. The rise of AI introduces both challenges and opportunities for corporate governance. To navigate this, directors must determine whether implementing AI fulfils their legal mandate to maximize shareholder value. The answer is likely yes. The following

33 Model Bus. Corp. Act § 8.30(a) (2021).

34 *Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985).

35 Del. Code Ann. tit. 8, § 141(e) (2023).

36 *Guth v. Loft, Inc.*, 5 A.2d 503 (Del. 1939).

section will explore the evidence showing how AI creates value, demonstrating why it may be indispensable for forward-looking corporations.

II *AI's Value Creation and Workplace Impact*

1 *Business Advantages of AI*

Efficiency and Cost Reduction. AI can automate routine tasks in a manner that makes work more efficient. Some experts predict “AI-powered automation can reduce operating costs by up to 20% to 30%”.³⁷ These can include situations where AI fully automates tasks as well as those where tasks are made more efficient. Specific fields have already turned to full AI automation, replacing the need for human intervention. These tasks tend to be narrower in scope and less desirable for human staff, such as customer service calls and data entry. AI chatbots can handle customer enquiries and customer service issues through live chats. Through the use of LLMs, traditional chatbots have been able to evolve. As a result, full AI integration into customer service has gained popularity for major corporations.³⁸ Full AI integration can also efficiently reduce the time and expense required for data entry through robotic process automation (RPA). This process uses intelligent automation technologies to perform repetitive office tasks of human workers.³⁹

Through RPA, AI can be trained to complete tasks through established rules. Programs such as RPA reduce the need for human capital, which can significantly reduce costs. For more complex and specialized tasks, various fields have turned to AI to enhance human capabilities. The legal field is an example of such innovation. Legal research has been revolutionized through tools such as LexisAI+. Developers programmed this tool to brief cases, answer questions of law and even analyse fact patterns. Tools such as these do not aim to replace human involvement in the desired task but rather enhance capability and efficiency. In basic economics, if a business can cut costs while producing the same outcome, its profit should rise. As directors are bound to create shareholder value, AI automation and enhancement could become a priority of prudent corporate governors.

Accuracy and Consistency. Perhaps the most significant difference between human and AI capital capabilities is the AI's accuracy and consistency level. Unlike humans, bound by their biological need for rest, AI operates without fatigue. Thus, AI can be relied on for consistent results without diminishing returns. AI can eliminate human errors, reduce operational costs and minimize financial and reputational risks for a corporation. The systems can review millions of documents in a fraction of the time it takes humans and with a higher degree of accuracy”.⁴⁰

37 *The Role of AI-Driven Insights*, Zeda.io (2024), <https://zeda.io/blog/ai-driven-insights> (last visited 13 December 2024).

38 Sunil Rajaraman, *AI-Driven Customer Service Is Gaining Steam*, Forbes (2024), <https://www.forbes.com/sites/sunilrajaraman/2024/06/18/ai-driven-customer-service-is-gaining-steam/> (last visited 13 December 2024).

39 *What Is Robotic Process Automation (RPA)?* IBM (2021), <https://www.ibm.com/topics/rpa> (last visited 13 December 2024).

40 *The Role of AI-Driven Insights*, *supra* note 37.

Suppose the AI is more accurate than a human, and it has less overall cost to the company; in that case, it will be challenging for directors to justify the retention of human capital in that business area.

Enhanced Decision-Making. AI can be a tool not only for the minute but also broad business tasks. In addition to improving a company's ability to perform narrow functions, AI can assist in business decision-making. As mentioned previously, AI has advanced capabilities to analyse data. Corporations can utilize this to analyse large datasets in shorter amounts of time. It can be a tool for turning to the future as it supports predictive analytics, helping corporations anticipate market shifts and mitigate risks. According to a recent survey, "79% of corporate strategists noted that AI will be critical to their success in strategic planning and execution in the next few years".⁴¹ This ability to make faster, data-driven decisions directly supports the fiduciary duty of care, as directors must make informed decisions that align with the corporation's best interests. By leveraging AI for strategic planning, directors can enhance their decision-making process, ensuring that they act prudently and in the best interest of shareholders.

2 Business Impact of AI

Complement Over Replacement. While the capabilities of AI offer significant advantages for businesses, they still have notable limitations compared with human capital. As previously mentioned, AI is inferior to human capital in certain areas, including data dependency, lack of contextual understanding and creativity and lack of transparency and explain ability. Until the state of the art nears AGI, human employees will have a competitive advantage. Humans are more capable of adapting to uncertainty. Developers train AI models on massive amounts of data, but none are as comprehensive as the data humans retain naturally. When faced with incorrect or incomplete data, an AI will struggle. Additionally, current AI technology is incapable of inherently human traits of emotion and creativity. Emotional intelligence can be equally crucial to success as AI's strengths of efficiency and accuracy. Human creativity is still superior to that of any software, in part because creativity is inherently subjective. An AI trains on objective data points, and its ability to innovate is limited. With each source of capital possessing inherent advantages and detrimental flaws, the most likely outcome is that AI is used to complement human capabilities instead of replacing them. When AI enhances human abilities, allowing individuals to accomplish tasks they previously could not, it creates a complementary relationship between humans and machines.⁴² This collaboration between AI and human capital promises a powerful synergy, where AI tools complement human capabilities, enhancing efficiency and accuracy, while humans provide adaptability, emotional intelligence and creativity.

41 Gaurav Sharma, *How AI Helps with Data-Driven Decision-Making*, DataFloq (2024), https://datafloq.com/read/how-ai-helps-with-data-driven-decision-making/#google_vignette.

42 Erik Brynjolfsson, *The Turing Trap: The Promise & Peril of Human-Like Artificial Intelligence*, Stanford Digital Economy Lab (2022), <https://digitaleconomy.stanford.edu/news/the-turing-trap-the-promise-peril-of-human-like-artificial-intelligence/> (last visited 13 December 2024).

Together, they can cover each other's flaws, driving innovation and success in ways neither could achieve alone.

Downsizing. While a synergistic view of AI-human productivity is positive, it will have negative impacts on the increased production. If the level of human production is increased with the help of AI, it could justify downsizing human personnel, as the following hypothetical scenario demonstrates:

Hypo. If AI increases human productivity, it could justify downsizing, as fewer workers would be needed to achieve higher output. For example, imagine a company where ten employees each produce one widget per day, resulting in 10 daily widgets of production. Say an AI is introduced and increases productivity by a factor of 4. With the implementation of AI, a mere three employees could produce four widgets daily for 12 daily widgets of output. Let us assume that each worker costs the company US\$100 per day in salary and that the AI costs US\$300 per day to operate. Without AI, ten employees' total daily labour cost would be US\$1,000 (US\$100 per day * 10 workers). With the implementation of AI, the total cost for three workers and the AI would be US\$600 (US\$100 per day * 3 workers + \$300 per day for the AI).

This hypothetical scenario may be an oversimplification of the complexities of the workplace, but it demonstrates the very real possibility that AI will financially justify the downsizing of human capital. It is a dilemma that corporations will find themselves in on a much larger scale. Corporations must adhere to their fiduciary duties when confronted with such a choice. A recent study by the McKinsey Global Institute suggests that up to 30% of human work hours will be automated by the end of this decade.⁴³ This statistic underscores the reality that automation should not just be a hypothetical concern.

Conclusion. Corporate directors have a fiduciary duty to create shareholder value and preserve that value at all stages of a business's lifespan, which puts corporate governors at the centre of a growing legal and ethical dilemma posed by AI integration into the workforce. AI offers a wide range of business applications that will inevitably create value and cut costs through increased efficiency. However, this rise in efficiency will come with a price of its own in the form of a difficult question. Corporations must grapple with whether they can justifiably retain human capital and, if so, how to justify it legally. While the evidence for AI implementation is clear, the law was created by and for the benefit of human society, not for AI. As such, there are existing legal tools for both sides of the dilemma. Ultimately, navigating this dilemma will require balancing the fiduciary

43 Eric Hazan, *Human Capital for the Age of Generative AI*, McKinsey (2024), <https://www.mckinsey.com/mgi/overview/in-the-news/human-capital-for-the-age-of-generative-ai> (last visited 13 December 2024).

obligation to shareholders with broader ethical and practical considerations regarding the evolving role of human-AI collaboration in the workplace.

D The Two Choices

I Choosing to Protect Human Capital

Introduction. With the high likelihood that AI will increase productivity and has a high potential to create value for corporations, directors will face new strategic questions about how best to integrate AI into their businesses. There are existing sources of law that could justify this decision for directors in each camp of thought. Directors must balance innovation with fiduciary duties to act in the corporation's best interests. This choice will have broad implications for individual corporations, and as many corporations will be making this decision at once, it will have broad societal implications in addition. Technological advancement through AI will have a direct impact on the size and manner of the workforce.

For directors advocating for the retention of human capital in the face of AI advancements, existing legal principles such as the business judgment rule (BJR) provide strong justification for their decisions. Courts generally refrain from second-guessing business decisions in good faith, a principle rooted in a well-established body of case law beginning with *Shlensky v. Wrigley*.⁴⁴ Moreover, directors favouring human retention can leverage public policy arguments emphasizing the social and economic benefits of preserving the workforce. Additionally, they can point to the legal risks associated with AI implementation – such as compliance and liability concerns and ethical considerations – as further justification for their decisions. These legal frameworks and policy considerations offer directors a compelling foundation to champion human capital amidst technological advancements.

1 Legal Justifications

Business Judgment Rule. The most potent tool for the human-advocating director is the BJR, a common law concept. The rule is a rebuttable presumption that corporate directors act in good faith, with adequate information and the corporation's best interests in mind.⁴⁵ In practical terms, courts will not litigate the merit of a business decision as long as the decision was made without any fraudulent or otherwise unlawful influence. The business decision analysis is not backward looking; it is an analysis of the decisions at the time they were made.⁴⁶ The challenged decision must have been made by directors acting in good faith while exercising reasonable care with a rational basis that is in the company's best interest. To act in good faith, directors must demonstrate honesty in decision-making, without fraud, self-dealing or conflicts of interest. In alignment with their fiduciary duty of care, under the BJR, directors must act with the level of care a prudent person would

44 *Shlensky v. Wrigley*, 95 Ill. App. 2d 173, 237 N.E.2d 776 (1968).

45 Black's Law Dictionary 83 (3d Pocket ed. 2006).

46 ALI Principles of Corporate Governance § 4.01(c) (1994).

exercise in similar circumstances.⁴⁷ A significant factor in this analysis is the diligence directors exercised in making themselves informed before making the decision.⁴⁸ Finally, the directors must establish a rational basis between the decision and the company's best interests. It is worth noting that a decision need not have been successful to have a rational basis for the company's interest. The court will not substitute its judgment for that of the company if the organization's decision can be tied to any rational business purpose.⁴⁹ The burden in a BJR protection claim falls on the party challenging the company's decision to prove that any of the elements were absent.⁵⁰ Failure to satisfy any element can expose a decision to liability, stripping it of BJR protection. While this rule is not codified in any official act, the body of case law surrounding the rule is well established and further justified and grounded in public policy.

Public Policy Justification of BJR. On a practical level, the BJR aims to preserve the right of business leaders to take risks. It acknowledges the significant uncertainty inherent in the business sector and reinforces that making a poor business decision should not be considered unlawful. Corporations would be greatly disincentivized from taking business risks if they were exposed to legal liability for well-thought-out decisions made in good faith that ultimately do not work out. Similarly, qualified professionals might be discouraged from assuming corporate leadership roles without the protections offered by the BJR. This rule is not only justified from the directors' perspective but also serves a practical purpose for judges and litigants. Judges are trained to litigate and analyse the law, not the merits of a business decision. Thus, courts prefer not to interfere with corporate management, as they are ill-equipped to evaluate the wisdom of business decisions.⁵¹

Case Law. The BJR was established in a case involving the owner of the Chicago Cubs, Philip Wrigley. At the time of the dispute, Wrigley Field had no field lights and strictly played day baseball games. It is worth noting that a majority of the major league baseball clubs had installed lights by 1968.⁵² Wrigley countered that night games would negatively impact the surrounding neighbourhood and harm the Cubs' reputation. Ultimately, the Illinois Court of Appeals refused to interfere because Wrigley's decision had a rational basis in the company's best interest.⁵³ In business, there will always be many paths a corporation can choose. Under the BJR and case law such as *Wrigley*, courts will typically refrain from interfering with

47 *Seidl v. Am. Century Cos., Inc.*, 799 F.3d 983, 990 (8th Cir. 2015).

48 *Brehm v. Eisner*, 746 A.2d 244 (Del. 2000).

49 *Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361 (Del. 1995).

50 *Ibid.*

51 Aurelio Gurrea-Martinez, *Re-Examining the Business Judgment Rule from a Comparative Perspective: Is It Really in the Shareholders' Interest?* The CSL Blue Sky Blog (2016), <https://clsbluesky.law.columbia.edu/2016/02/26/re-examining-the-business-judgment-rule-from-a-comparative-perspective-is-it-really-in-the-shareholders-interest/> (last visited 13 December 2024).

52 Chad Horton, *NLRB General Counsel Targets Employers' Use of Electronic Monitoring and Algorithmic Management Technologies*, Shawe Rosenthal LLP (2022), <https://shawe.com/articles/nlrb-general-counsel-targets-employers-use-of-electronic-monitoring-and-algorithmic-management-technologies/> (last visited 13 December 2024).

53 *Ibid.*

corporate decisions made by directors. This principle allows directors the flexibility to pursue long-term goals without fear of judicial second-guessing.

Application to AI Dilemma. The BJR can be a strong tool for corporations to retain human capital. If a corporation should choose that route, there is a rebuttable presumption that the decision was made in good faith. The directors must adhere to the three elements of the rule to ensure protection. To uphold the good faith requirement of AI, directors must approach the decision with honesty and sincerity, ensuring that they prioritize the company's best interests rather than personal gain. They must avoid fraud, self-dealing or decisions influenced by conflicts of interest, such as individual investments in AI companies. Directors must exercise the level of care that a reasonably prudent person would in similar circumstances. This could include conducting thorough research into the potential benefits, risks and costs of implementing AI. Directors should seek expert advice, analyse industry trends and fully understand how AI might impact the company's operations, workforce and long-term objectives. Finally, the decision to forgo AI must be grounded in a rational connection to the company's best interests. In the context of AI, corporations could justify the decision with a rationale related to practical business reasons for retaining human capital, such as the need for specialized employee expertise, the importance of emotional intelligence in customer relations, the value of human-driven innovation and creativity and the ethical and legal considerations that require human judgment.

Application in the Future. Looking to the future, as AI continues to advance rapidly, the first two elements of the BJR, acting in good faith and exercising reasonable care, will remain relatively manageable for directors to satisfy. Directors will still be expected to approach decisions honestly and diligently and consider the company's best interests. However, as AI becomes more advanced and increasingly widely implemented, the justification of the rule's third element becomes more onerous. As AI becomes more capable and widespread, the business case for relying on human employees instead of AI could diminish, putting pressure on directors to find new, compelling reasons to prioritize human workers. This shift may require directors to emphasize ethical, legal or cultural considerations and the long-term strategic advantages of human capital to maintain a rational basis for their decisions. It is important to note that the BJR is a stagnant analysis, reflecting decisions made at the time. For instance, despite the rational basis for Wrigley's decision in 1968, the Cubs have since adopted night games starting in 1988. Just as business environments evolve, so too can the rationale that supports a director's decision under the BJR.

National Labor Relations Act (NLRA) Implications. Pro-human-retention directors can also find support in the strong warnings and consequences outlined by the NLRA and enforced by the National Labor Relations Board (NLRB), using these obligations to justify avoiding the risks associated with unionized workplaces. One significant consideration is the duty to engage in collective bargaining when implementing new technologies materially affecting working conditions.⁵⁴

54 NLRB General Counsel Issues Memo on Unlawful Electronic Surveillance and Automated Management Practices, National Labor Relations Board, Office of Public Affairs (2022), <https://www.nlrb.gov>

Employers may need to engage in collective bargaining negotiations in unionized workplaces regarding implementing new technologies that significantly impact working conditions. This requirement provides a strong rationale for directors to avoid pursuing AI implementation, as it allows them to sidestep potential disputes with unionized workers and ensures compliance with employees' rights to bargain collectively. By prioritizing human retention, directors can mitigate these legal and operational risks while maintaining stability within the workforce.

2 Non-Legal Justifications

Legal Risk Management. Implementing AI carries inherent risks because it is an emerging technology with minimal case law or established legal regulations governing its use. Despite its capabilities, several AI developers have already been sued in major lawsuits. As previously alluded, in December 2023, the *New York Times* filed a lawsuit against OpenAI, alleging copyright infringement for using *New York Times* articles in the ChatGPT training corpus.⁵⁵ While this case involves litigation against an AI developer rather than an implementer of AI, there is no guarantee that corporations implementing AI will not face similar liability if the AI they use is alleged to have infringed upon another party's intellectual property. The lack of litigation leads to uncertainty about how courts will rule. Directors can cite the legal risk of implementation as a justification for choosing to retain human capital.

Public Policy. A litany of public policy arguments can support directors' arguments for human retention. Massive-scale layoffs of human capital could be disruptive to the stability of the economy at large. The resulting unemployment could be staggering if AI is implemented as a complete replacement for human jobs in enough markets. Implementing AI poses a threat to the retention of human skills and knowledge. According to a recent study by the McKinsey Institute, 30% of the hours worked across the US economy could be automated by 2030, primarily motivated by AI implementation.⁵⁶ Each corporation may not employ the workforce in its entirety, but larger employers especially should consider the stability of the workforce as a whole. Maintaining employment levels is crucial for overall economic health by protecting the spending power of consumers. Socially, widespread layoffs could lead to civil instability as employees lose access to their livelihood at the hands of AI. When a displacement of such magnitude occurs, companies will face changes in public policy due to the resulting decline of population and local supporting economies.⁵⁷ Therefore, prioritizing human retention safeguards the economic stability and social well-being of communities and aligns with the

/news-outreach/news-story/nlrb-general-counsel-issues-memo-on-unlawful-electronic-surveillance-and (last visited 13 December 2024).

55 General Data Protection Regulation, Regulation (EU) 2016/679.

56 Implications of the GDPR, <https://media.squirepattonboggs.com/pdf/misc/GDPR-Implications.pdf>.

57 *Ibid.*

broadier public interest, reinforcing the critical role corporations play in sustaining a balanced and equitable society.

II Choosing to Implement AI

Introduction. Directors looking to innovate through AI can turn to its benefits of increased productivity, cost reduction and enhanced competitive advantage as a general business justification for implementation. The growing potential earnings surrounding AI puts pressure on directors to implement it in the name of shareholder and company value. Directors in this position have a strong legal argument in the name of fiduciary duty. The fiduciary duty of directors has been codified in a body of case law beginning with *Dodge v. Ford Motor Co.* This duty can be a twofold justification as it serves as a justification for implementation and a warning against the consequences of inaction. In addition, the BJR can be utilized by pro-implementation directors just as it could be by their counterparts championing human retention, as long as the decision to implement is made in good faith. Beyond legal justification, the implementation of AI aligns with the goal of technological advancement and the market's current demands. As a result, directors are increasingly compelled, legally and strategically, to view AI implementation as a critical business decision that aligns with corporate objectives while mitigating risks.

1 Legal Justifications

Fiduciary Duty as a Pro-AI-Implementation Argument. As established in the section on fiduciary duty, directors have a duty to act in the best interests of shareholders, which often translates to maximizing financial returns.⁵⁸ This principle is a strong tool for directors focused on AI implementation. Directors can argue that they are obligated to implement AI by demonstrating a direct shareholder value gain. This value can be demonstrated in various ways, such as increased productivity, cost reduction or enhanced competitive advantage in the market through innovative applications of AI technology. For directors uninterested in using a fiduciary obligation argument, it would still be wise to heed fiduciary duty as a warning against shareholder action. Shareholders can bring derivative actions against the corporation for failing to create value for the company.

Fiduciary Duty as a Warning Against Inaction. If directors are reluctant to frame AI implementation as a fiduciary obligation, they should still view fiduciary duty as a warning against inaction. Shareholders can bring derivative actions against directors for failing to create value for the corporation if AI implementation is shown to increase shareholder returns. In such instances, the BJR becomes a critical safeguard. To avoid liability exposure, directors must ensure that any decision not to implement AI meets the rule's requirements: acting in good faith, exercising reasonable care and establishing a rational basis for their decision that aligns with the company's best interests. A failure to meet these standards could

⁵⁸ Senate Bill No. 896, 2024 Cal. Stat. ch. 928 (approved by Governor Sept. 29, 2024, filed with Secretary of State 29 September 2024).

leave directors vulnerable to claims of breach of their fiduciary duty. Thus, even if fiduciary duty is not used as a direct justification for adopting AI, the potential legal and financial risks of failing to implement it could provide a separate argument to compel directors to seriously consider implementation from a legal risk management standpoint.

Case Law. Corporate officers can turn to precedent in case law to support a fiduciary duty argument. There is a strong existing body of cases that support the notion that shareholder value is the primary function of a corporation.⁵⁹ As discussed in detail, landmark cases such as *Dodge v. Ford Motor Co.*; *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*; *Unocal Corp. v. Mesa Petroleum Co.*; and *eBay Domestic Holdings, Inc. v. Newmark* uphold the notion that maintaining shareholder value is a high priority for directors in various stages of a business's lifespan.

NLRA Implications. The implementation of AI, especially by large employers, can affect large numbers of unionized workers. Unions in the United States are governed by the NLRA and overseen by the NLRB. The NLRA allows employers to change workplace conditions through technological upgrades as long as this does not violate existing union contracts or prevent employees from exercising their rights.⁶⁰ The NLRA generally permits employers to implement new innovative technology if they can show a legitimate business purpose. The NLRB has found that the implementation of tech must be narrowly tailored to address this business need.⁶¹ As a result, directors in favour of implementing AI have the burden of proving that automation serves a legitimate business purpose.

2 Non-Legal Justifications

Technological Advancement. Outside of legal justifications, directors can use practical business justification to support their decisions further. Implementing AI in the workplace aligns with the goal of technological advancement. AI advancements can lead to improved quality of life, including healthcare and medical services, transportation, security and disaster management.⁶² This list is not exhaustive, as AI's application will become more limitless as its capabilities continually improve. Directors can aim for these societal improvements as justification for AI implementation. Significant for directors in this position is dedication to implementation in a responsible manner.

Conclusion. The decision to prioritize human retention in the workforce or implement AI involves a complex balancing act between innovation, legal considerations and corporate responsibility. Directors advocating for human

⁵⁹ *Ibid.*

⁶⁰ Kweilin Ellingrud, *Generative AI and the Future of Work in America*, McKinsey (2023), <https://www.mckinsey.com/mgi/our-research/generative-ai-and-the-future-of-work-in-america> (last visited 13 December 2024).

⁶¹ Kevin Frazier, *Modernizing the WARN Act to Protect US Workers from AI Displacement*, Tech Policy Press (2024), <https://techpolicy.press/modernizing-the-warn-act-to-protect-us-workers-from-ai-displacement> (last visited 13 December 2024).

⁶² Chris Toner, *Surveillance in the Workforce: An Update from the NLRB*, Axley Brynerson, LLP (2023), https://www.axley.com/publication_article/surveillance-in-the-workforce/ (last visited 13 December 2024).

retention can rely on the BJR, public policy and risk management arguments to justify their decisions while addressing workforce stability's broader economic and social implications. Conversely, directors favouring AI implementation can draw upon fiduciary duty, shareholder value and the potential of technological advancements to support their position. Both choices present unique risks and opportunities, underscoring the need for directors to act in good faith, exercise reasonable care and establish a rational basis for their decisions. As corporations navigate these dilemmas, the evolving legal, technological and societal landscapes will continue to shape the frameworks within which these critical decisions are made.

E Current AI Regulation

I Current Regulatory Efforts

General Data Protection Regulation (GDPR). Implemented by the European Union (EU), this is the first significant piece of legislation pertaining to the regulation of AI. Some of its key implications include direct liability for data processors, data breach reporting requirements, expansion of individual consumer rights to privacy, appointment of data protection officers and consequences for data transfers outside of the EU.⁶³ The GDPR also provides the right to object to automated decisions, including profiling, by AI systems, ensuring that individuals are not subject to decisions that could significantly impact their lives without human oversight.⁶⁴ This regulation may be implemented in the EU, but it has significant implications for American corporations as well. It affects any firm doing business in Europe. This is a sizable share of U.S. economic activity, as U.S. goods and services exports to the European Union totaled nearly \$600 billion in 2022.⁶⁵ Firms implementing AI that have helped account for this figure should exercise caution.

California Artificial Intelligence Accountability Act (CAIAA). This is the first substantial legislation on AI in the United States. It was passed in late 2024 but will not take effect until 2026. Some of the key obligations of the CAIAA include the development of AI detection tools, the requirement of manifest and latent disclosures, the possibility of licence revocation for noncompliance and the enforcement of penalties.⁶⁶ The Act's requirement for AI detection tools aims to have developers create technology that is freely accessible to the public and can detect whether AI has been used in generating content.⁶⁷ This would significantly improve consumer protection by giving the consumer a tangible tool to fight misinformation and other AI-generated content pitfalls. The following requirement

63 Investopedia, *What Is the GDPR?*, INVESTOPEDIA (last updated Aug. 8, 2025), <https://www.investopedia.com/terms/g/general-data-protection-regulation-gdpr.asp>

64 *First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666 (1981).

65 Office of the U.S. Trade Representative, *European Union*, <https://ustr.gov/countries-regions/europe-middle-east/europe/european-union> (last visited Dec. 13, 2024).

66 Mark Minevich, *How to Contribute to Better Quality of Life with Responsible AI*, Forbes (2021), <https://www.forbes.com/sites/markminevich/2021/12/15/how-to-contribute-to-better-quality-of-life-with-responsible-ai/> (last visited 13 December 2024).

67 *Ibid.*

is manifest disclosures of AI content. This would require AI-generated content to be expressly conveyed as such by the AI provider. This includes the name of the AI provider and specifications of the system used to create the content.⁶⁸ This would further regulate AI content and, in conjunction with the development of AI detection tools, would continue to give the consumer means to decipher AI-generated content as it becomes increasingly difficult to discern. The following two requirements involve penalties against AI providers for noncompliance. The CAIAA would impose licence revocations on AI providers who modify their system in a way that removes mandatory disclosure.⁶⁹ In addition to revocation, those found responsible for infractions can be assessed monetary penalties enforceable through civil action.⁷⁰

Administrative Action – NLRB Crackdown. The NLRB has already pushed back against AI implementation in the labour market. The board is an administrative agency responsible for protecting worker rights and deterring unfair labour practices. The board can have director authority over AI implementation and how it affects the rights of current employees. The NLRB General Counsel announced a “crackdown” on employers for their increased use of AI and other automated technologies.⁷¹ General Counsel Jennifer Abruzzo urges the NLRB to consider new frameworks with the advent of AI and other automation.⁷² The NLRB and other agencies with the power to regulate the job market, such as the Department of Labor and the Federal Trade Commission, will play a pivotal role in protecting workers from AI replacement and ensuring that AI implementation is done in a manner that protects the right.

II Suggested Changes in Policy

Redefining Fiduciary Duties. The current state of fiduciary duty, which prioritizes creating value for shareholders as the default purpose of a corporation, should be reevaluated in the light of emerging technologies like AI. AI presents an unprecedented opportunity to generate value without relying on human capital, fundamentally altering traditional business models. This shift necessitates reconsidering fiduciary duty to ensure that the pursuit of monetary value aligns with the broader value for human employees. By redefining fiduciary obligations, corporations can balance the benefits of AI-driven efficiency with the ethical mission to support and protect their workforce. This change would come through legislative action or judicial interpretation. Through legislative action, new laws could be enacted federally or at the state level to redefine the obligations of corporations to include a broader benefit to stakeholders beyond strictly shareholders. Members of Congress, such

68 *Ibid.*

69 *Ibid.*

70 *Ibid.*

71 Hope Anderson, *Raft of California AI Legislation Adds to Growing Patchwork of US Regulation*, White & Case (2024), <https://www.whitecase.com/insight-alert/raft-california-ai-legislation-adds-growing-patchwork-us-regulation> (last visited 13 December 2024).

72 *What Is the WARN Act and What do Employers Need to Know About It*, Thomson Reuters (2024), <https://legal.thomsonreuters.com/en/insights/articles/what-is-the-warn-act> (last visited 13 December 2024).

as Elizabeth Warren, have attempted to do just that through proposed legislation such as the Accountable Capitalism Act.⁷³ The Act looks to impose a duty on directors in large corporations to consider the impact of business decisions on the stakeholders materially affected.⁷⁴

The second route would be through judicial review of cases codifying traditional notions of fiduciary duty, such as *Dodge v. Ford Motor Co.* This route has proven unsuccessful in recent attempts by individuals to impose obligations on directors outside their own company.⁷⁵ In the 2024 case of *McRitchie v. Zuckerberg*, the Delaware Court of Chancery declined to hold that Meta director Mark Zuckerberg had an obligation to consider the societal impact of decisions in addition to economic interest.⁷⁶ Efforts to redefine fiduciary duty through legislative initiatives like the Accountable Capitalism Act and judicial review in cases such as *McRitchie v. Zuckerberg* highlight a growing push to shift corporate focus away from pure shareholder value. However, neither approach has succeeded thus far in altering the traditional emphasis on shareholder primacy.

Administrative Oversight. As AI becomes more ingrained with labour, the relevant Executive Agencies of the US Government will need to adjust. The Department of Labor would be best equipped to handle the implications of AI on the workforce. By developing regulations around the implementation of AI in the workforce, focusing on how it affects employee rights, job displacement and workforce retraining, the department can ensure AI implementation standards that protect the worker without restricting the business's ability to innovate. Alternatively, the revolutionary nature of AI could necessitate creating a new executive agency solely devoted to regulating AI. This notion has precedent. The Federal Communications Commission was created in direct response to the rise of radio and eventual television broadcasting in 1934 through the Federal Communications Act.⁷⁷ The Department of Homeland Security was created in 2002 in direct response to threats of terrorism in response to the 9/11 attacks on New York City.⁷⁸ Similarly, Congress could call for the creation of a new Department of Artificial Intelligence Regulation.

Revitalization of WARN Act. AI can potentially lead to massive layoffs, significantly impacting the workforce across various industries, as automation replaces human roles at an unprecedented scale. The Worker Adjustment and Retraining Notification (WARN) Act has become increasingly relevant in the light of this looming threat. The Act is a federal labour law requiring certain employers

73 Sen Bernie Sanders, *Bernie Sanders: It's Time for a 4-Day Work Week*, CNN (2024), <https://www.cnn.com/2024/04/03/opinions/32-hour-work-week-sanders/index.html> (last visited 13 December 2024).

74 *Ibid.*

75 The Communications Act of 1934, 47 U.S.C. § 151 et seq.

76 *Creation of the Department of Homeland Security*, Homeland Security, <https://www.dhs.gov/creation-department-homeland-security> (last visited 13 December 2024).

77 S. 3348, 115th Cong. (2018).

78 Randall Chase, *Judge Dismisses Meta Shareholder Lawsuit Claiming That Directors' Obligations Extend Beyond Company*, AP News (2024), <https://apnews.com/article/meta-zuckerberg-corporate-responsibility-shareholders-45ad3083e42c448368a5c4d45067ca0c> (last visited 13 December 2024).

with 100 or more employees to provide 60 days' notice before a qualifying plant closing or mass layoff.⁷⁹ While this law applies federally, multiple states have codified their mini WARN Acts, which impose stricter requirements on employers.⁸⁰ Currently, the WARN Act mandates employers to explain their planned actions in "clear and specific language that employees can understand", which, in this case, would include AI implementation. As AI reshapes the employment landscape, amendments to the WARN Act could impose additional obligations on employers, such as requiring a more detailed explanation of why AI is being implemented, the specific skills it has rendered obsolete and suggestions for displaced workers to retain employment through training in AI. These updates would help ensure that workers are informed of upcoming changes and given resources to adapt to the evolving job market.

Modification of Modern Work Week. With the substantial increase in work productivity that AI can bring, it may be time to reassess the viability of the modern workweek. The 40-hour work week was established to protect employees during the early 20th century who had been experiencing workdays of over 12 hours. In 1916, Woodrow Wilson enacted legislation to codify the 8-hour workday. In 1926, Ford Motor Company adopted a five-day, 40-hour workweek, becoming one of the first major U.S. firms to do so and helping popularize the standard workweek structure that endures today.⁸¹ These norms have remained in place a century later despite the increase in output by workers through advancements in technology. With AI looming shortly, corporations will see a boom in production. Senator Bernie Sanders is among those in Congress looking to adjust the work week to 32 hours to reflect this change.⁸² The United States can look to its counterparts in the EU for guidance as multiple jurisdictions, including France, Denmark and Belgium, have already implemented similar measures.⁸³

F Conclusion

The AI revolution is poised to change society significantly in both human life and the workforce. This necessitates a swift legal response by corporate leadership. Corporations that consider the legal implications of AI implementation with the most depth and understand the weight of this decision most clearly will be poised to succeed in this new age of AI. AI's impact is imminent, and its rapid development will undoubtedly lead to substantial changes in human life and the nature of the workforce moving forward. This change will force directors of corporations to inevitably face the decision of whether to retain human capital, implement AI as a replacement or find a compromise between the two. In dutiful consideration of the two options, directors must understand AI's potential to create value for

79 *McRitchie v. Zuckerberg*, C.A. No. 2022-0890-JTL (Del. Ch. 2024) (unpublished).

80 *Ibid.*

81 History.com Editors, *Ford Factory Workers Get 40-Hour Week*, HISTORY (May 1, 1926), <https://www.history.com/this-day-in-history/may-1/ford-factory-workers-get-40-hour-week>

82 Thirty-Two Hour Workweek Act, S. 3947, 118th Cong. (2024).

83 J. Cabrita, *Four Days a Week? Europe Debates Shorter Working Times*, Eurofound (2025).

their companies. Under existing principles of fiduciary duty, the implementation of AI can be justified through its potential for value creation. Alternatively, the BJR provides a route for companies to retain human capital, as long as the company can justify its decision with a legitimate business purpose. While both sides of the argument can be justified legally, the arguments must consider the stakeholder and incorporate public policy considerations to be rendered most effective. This issue has led to the early stages of regulation both within the United States and abroad. Despite these efforts, further policy efforts are vital to fully address the complex issues arising from AI integration into the workforce.