People Analytics

The opportunities and legal risks of a brave new world

Freshfields Bruckhaus Deringer

Advances in technology and artificial intelligence (AI) are allowing companies to solve strategic issues in ever quicker, more innovative ways.

These advances are just as applicable to people management – technology which collects, processes and interprets people data can allow employers to make better HR decisions and to run their businesses more efficiently.

People Analytics is the application of digital tools and algorithms to data about or relating to people, including through profiling, with the aim of extracting 'actionable insights'. These insights can allow businesses to improve people management processes and enhance operational capabilities.

Increased efficiencies

Cost reductions

Risk mitigation

Over the past few years this type of data analysis has become an essential part of people management. But there are legal risks associated with its use which should be addressed by employers before implementing any People Analytics tools.

There are numerous People Analytics tools available in the market that filter, connect and analyse huge amounts of data to deliver actionable insights.

These tools can:

conduct sentiment analysis of emails to determine what mood people are in

analyse voices to determine the honesty of someone's statements (eg in an interview process)

match employees with roles based on their skills, removing subjectivity

predict who will be a top performer or who might leave and when

highlight that a specific team is communicating only with some departments and neglecting others

calculate how much time should be spent on a particular task and measure productivity (eg through the use of wearable devices)

The use of People Analytics tools also offers real benefits to the workforce.
It can help an employer to provide a more supportive work environment through
feedback from the tools on which practices lead to a 'happy' and productive workforce.

They can assist employers to identify employees with complementary personalities/working methods which can be useful when building teams.

They can also reveal a lot about the health of a company's workforce by gathering data about sickness-related absences, to help mitigate or prevent work-related health conditions.

Also, ironically, AI-enabled systems may introduce more 'humanity' into hiring by reducing unconscious human biases, eg against minority ethnic groups.

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The EU General Data Protection Regulation (GDPR)

The data privacy landscape has been significantly enhanced by the coming into force on 25 May 2018 of the GDPR, regulating how personal data can be processed (including automated processing).

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Making individual decisions based on automated processing

GDPR prohibits the taking of any decision 'based solely' on automated processing, including profiling, which produces 'legal effects' concerning an individual or 'similarly significantly' affects them (Article 22 GDPR).

- This prohibition is very likely to apply to decisions made using People Analytics tools which have a significant impact on the individual, such as denying them an employment opportunity or putting them at a serious disadvantage, if those decisions are 'based solely' on the automated processing (meaning there is no human involvement in the decision making process).

- To qualify as 'human involvement', it must be meaningful and be carried out by someone who has decision making authority.

Exceptions to the general prohibition apply where the automated processing is:

- necessary for the entering into or performance of a contract between the data subject and controller;

- authorised by law; or

- based on explicit consent — the consent exception is, however, unlikely to be available in the employment context (as explained below).

Making individual decisions based on automated processing

Before implementing any People Analytics tools, an employer should consider the impact of any decision and, if it could be significant, ensure that a human being is involved in the final decision in a material sense.

Whenever automated processing is used, an employer must provide specific information to employees about the processing, give them the right to obtain human intervention, to express their point of view, to obtain an explanation of the decision and to challenge it.

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Legal grounds for processing

Before a People Analytics tool starts to process employee data, an employer must be able to justify that processing by reference to to one of the prescribed legal grounds (Article 6 GDPR). These are most likely to be that:

The processing is necessary for the performance of a contract to which the employee is party (usually the employment contract).

The processing 'is necessary for the purposes of [the employer's] legitimate business interests'. In this case, a balancing exercise between the legitimate interests of the employer and the interests and fundamental rights and freedoms of the data subject must be performed.

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Consent and employee data

In many situations employers will not be able to rely on the consent of their employees or job applicants to data processing. Consent must be 'freely given' and it may be challenged whether employees can give their consent freely, given the imbalance of power between employer and employee (Guidelines on Consent adopted by the Article 29 Working Party in April 2018).

These issues could be bypassed by anonymising the data, as the GDPR requirements above would not then apply. However, this will not be an option for People Analytics projects where the aim is to take decisions affecting identified individuals (eg CV selection or individual performance management). Also, data will only be 'anonymised' for GDPR purposes if it is incapable of being reconstructed to identify individuals; this may be difficult to achieve.

GDPR also raises other issues, eg the Article 5 principles of purpose limitation and data minimisation

Purpose limitation

The principle of purpose limitation requires that personal data shall be collected for specified, explicit and legitimate purposes only and not processed in a manner that is incompatible with those purposes. If businesses have collected HR data for a specific purpose, they will only be able to use it for another purpose if this is compatible with the original one.

Data minimisation

The principle of data minimisation requires that personal data shall be adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed. This principle could conflict with the use of People Analytics tools if they process more data than is strictly necessary in relation to the purpose for which they are being used – this may be the case if they leverage large and evolving data sets from various sources of information.

Data access requests

Another issue relates to the right under GDPR for individuals (job applicants, current and former employees) to request access to their personal data. Before introducing any People Analytics tool, employers should consider how they would deal with such data subject access requests.

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Managing GDPR risks

The evolution of data collection technologies also raises broader security-related challenges. If a business is proposing to introduce new sign-in methods using biometrics (eg fingerprints or iris recognition), it should consider carefully the security implications of storing this type of data – the potential repercussions if this type of data is hacked or misused could be significant.

Given the hefty potential fines for GDPR infringement, it is crucial that businesses introduce appropriate technical and organisational measures to safeguard individuals' rights and freedoms when carrying out automated processing or profiling. When introducing any form of People Analytics processing, an employer should also carry out an assessment of the impact of the processing operations on the protection of personal data (Article 35 GDPR). This will give the employer the opportunity to work through the various GDPR requirements to ensure they are fully complied with.

Hefty fines

Higher of

€20m

and

4%
of global annual turnover

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Other people risk areas

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Discrimination risk

As AI becomes more prevalent, concerns are growing that algorithms used to analyse people data could reinforce discrimination. For instance, algorithms which focus on certain character traits or qualities in job applicants may inadvertently discriminate against working mothers or applicants with disabilities.

In countries with robust anti-discrimination laws, such as the UK, this may lead to claims of less favourable treatment due to the use of discriminatory algorithms. In the UK, there is no cap on unlawful discrimination damages. In Germany, 'digital discrimination' may trigger compensation rights under the German General Equal Treatment Act (Section 15).

For these reasons, it is important that companies constantly monitor the algorithms used in their People Analytics tools so that they can show that they do not operate in a discriminatory way.

Infringement of the right to protection of personality

In Germany, People Analytics tools which allow an employer to conduct an all-encompassing character screening may infringe the general right to protection of personality (German Constitution, Articles 1.1 and 2.1).

Labour relations

A business which is proposing to introduce People Analytics tools is likely to find implementation easier if it holds a proper, transparent dialogue with its workforce to allay fears and establish trust in their use.
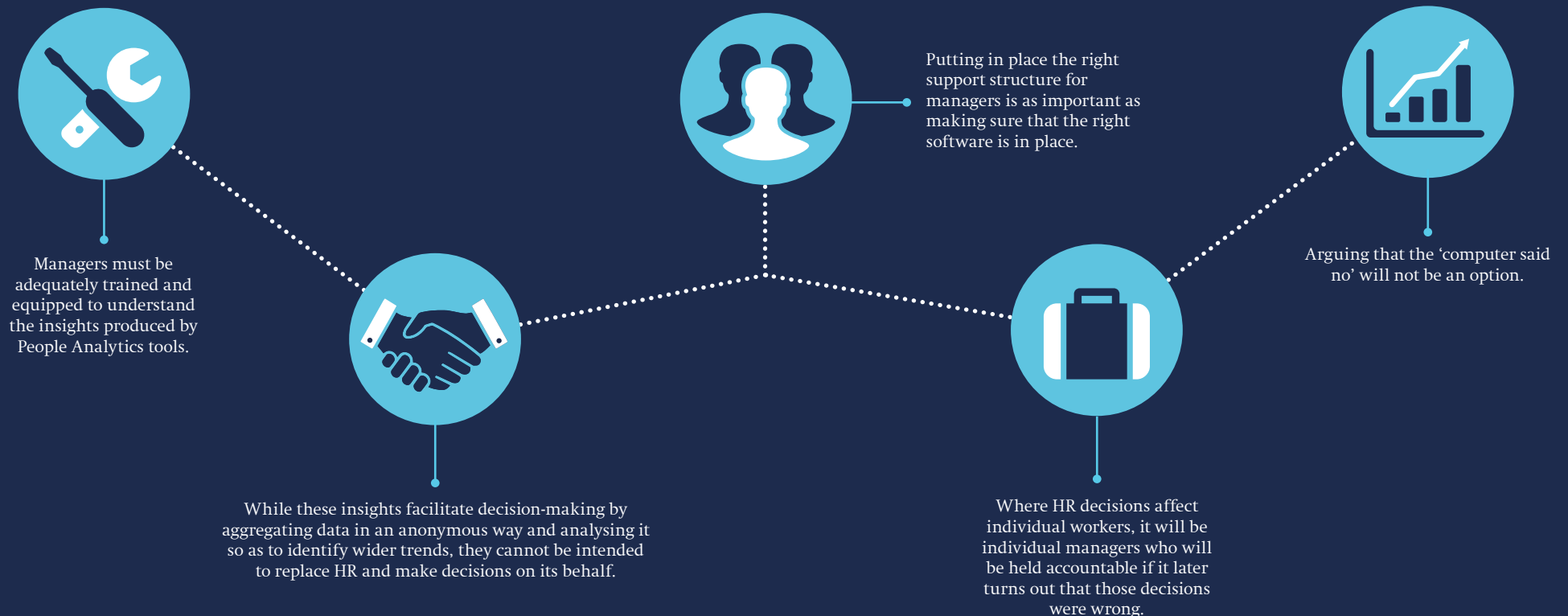
The influence of AI in the world of work is high on union agendas. UNI Global Union has issued a set of principles ('Top 10 principles for ethical artificial intelligence') which it urges unions, shop stewards and global alliances to implement in collective agreements, global framework agreements and multinational alliances. These principles provide that workers should be consulted on the implementation, development and deployment of AI systems. They also provide that workers have the right to understand exactly how and why an AI system has made a decision, and the right to appeal it.

Under the German Works Constitution Act, the works council has co-determination rights with regard to the implementation and use of technical devices that can control the conduct or performance of employees – People Analytics tools usually fall within this category. The works council's co-determination rights may also be triggered where a recruitment tool contains questions the applicant has to answer during the online application process from which a People Analytics algorithmic tool then selects successful job applicants.

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A way forward

The advent of People Analytics has brought with it many exciting opportunities and it is right that businesses should seek to harness these. But businesses should be careful to find the right mix of people and technology when it comes to making decisions which affect individuals.

Managers must be adequately trained and equipped to understand the insights produced by People Analytics tools.

Putting in place the right support structure for managers is as important as making sure that the right software is in place.

Arguing that the 'computer said no' will not be an option.

While these insights facilitate decision-making by aggregating data in an anonymous way and analysing it so as to identify wider trends, they cannot be intended to replace HR and make decisions on its behalf.

Where HR decisions affect individual workers, it will be individual managers who will be held accountable if it later turns out that those decisions were wrong.

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