

Commercial Surveillance ANPR, R111004

Response from the Washington Center for Equitable Growth to the FTC's Advanced Notice of Proposing Rulemaking on Commercial Surveillance and Data Security

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The Washington Center for Equitable Growth is a nonprofit research and grantmaking organization dedicated to advancing evidence-backed ideas and policies that promote strong, stable, and broad-based economic growth. Our fundamental purpose is to determine the channels through which rising economic inequality affects economic growth and stability in the United States. We have funded research and published reports analyzing workplace surveillance and algorithmic decision-making in the United States, as well as the broader structural and policy contexts shaping their impact on workers, labor markets, and equitable, broad-based economic growth. We appreciate the Federal Trade Commission's work in this area and the opportunity to comment on this important issue.

Through this comment, we will discuss the following points on the impact of commercial surveillance and algorithmic decision-making on workers and their families, in response to the FTC's questions:

- Commercial surveillance in the workplace is widespread in the United States and among U.S. companies, and the potential use of the data it generates is growing as companies and vendors seek new ways to link data and incorporate algorithmic decision-making in work processes.
- Commercial surveillance is all but impossible for most workers to avoid, both due to its ubiquity and because of the erosion of labor protections and the rise of anticompetitive labor practices that reduce workers' ability to meaningfully consent to surveillance or bargain over these issues.
- Evidence also shows that invasive workplace surveillance leads to direct and diffuse harms to workers and undermines other protections or possibilities of fairness. The dangers posed by workplace surveillance fall most heavily on the most vulnerable workers, exacerbating an array of economic inequalities and preventing these workers from challenging these increasingly invasive practices.
- Worker monitoring is part of a cycle of fractured work arrangements through which firms de-skill work and misclassify employees, allowing them to pay workers less, sidestep worker protections, and undermine workers' bargaining ability, ultimately increasing economic inequality and distorting economic growth.
- The known and potential harms to workers from surveillance and related algorithmic management practices are not justified by gains to workers, companies, or the economy, and

in fact undermine existing labor protections and contribute to the growing concentration of corporate power in the United States.¹

Commercial surveillance in the workplace is widespread, and the potential use of its data is always growing

Commercial surveillance in the workplace is not new, and does not depend on any single or specific technology. But the adoption of digital technologies throughout the personal and professional lives of U.S. workers has greatly expanded the opportunities for companies to collect and use a large amount of information about workers (including employees, independent contractors, subcontractors, and franchisees) and expanded the potential harms that workers can experience as a result. Some of the threats posed by increasingly sophisticated workplace surveillance are a direct result of the pervasive monitoring itself, while others are a result of the exploitative and often illegal practices that such surveillance enables, from health and safety harms to illegal discrimination.²

U.S. employers across industries and occupations use surveillance in many forms, with many of these practices now so routine that they seem unremarkable.³ Keycards and security cameras are common in a variety of workplaces, from warehouses to offices, from delivery trucks to private homes. Surveillance capabilities are also built into modern technological and digital infrastructure so that employers can often view phone calls, texts, emails, browser histories, sales records, and location stamps with minimal effort. U.S. employers today can easily choose to track every keystroke made on a computer or capture whatever appears on the screen.⁴ And

¹ Significant sections of this comment are excerpted from Kathryn Zickuhr, “Workplace surveillance is becoming the new normal for U.S. workers” (Washington: Washington Center for Equitable Growth, 2021), available at <https://equitablegrowth.org/research-paper/workplace-surveillance-is-becoming-the-new-normal-for-u-s-workers/>; see also Kathryn Zickuhr, “Exploring the impact of automation and new technologies on the future of U.S. workers and their families” (Washington: Washington Center for Equitable Growth, 2021), available at <https://equitablegrowth.org/exploring-the-impact-of-automation-and-new-technologies-on-the-future-of-u-s-workers-and-their-families/>.

² Key overviews of modern workplace surveillance practices and related issues include: Aiha Nguyen, “The Constant Boss” (New York: Data & Society, 2021), available at <https://datasociety.net/library/the-constant-boss/>; Annette Bernhardt, Reem Suleiman, and Lisa Kresge, “Data and Algorithms at Work: The Case for Worker Technology Rights” (Berkeley, CA: UC Berkeley Center for Labor Research and Education, 2021), available at <https://laborcenter.berkeley.edu/data-algorithms-at-work/>; Ifeoma Ajunwa, Kate Crawford, and Jason Schultz, “Limitless Worker Surveillance,” *California Law Review* 105 (2) (2017), available at <https://www.californialawreview.org/print/3-limitless-worker-surveillance/>; Center for Democracy and Technology, “Workplace Privacy: State Legislation & Future Technology Questions” (2016), available at <https://cdt.org/insights/workplace-privacy-state-legislation-future-technology-questions/>; Sam Adler-Bell and Michelle Miller, “The Datafication of Employment” (New York: The Century Foundation, 2018), available at <https://tcf.org/content/report/datafication-employment-surveillance-capitalism-shaping-workers-futures-without-knowledge/>; Darrell M. West, “How employers use technology to surveil employees” (Washington: The Brookings Institution, 2021), available at <https://www.brookings.edu/blog/techtank/2021/01/05/how-employers-use-technology-to-surveil-employees/>. For more, see Zickuhr, “Workplace surveillance is becoming the new normal for U.S. workers.”

³ Nguyen, “The Constant Boss”; Bernhardt, Suleiman, and Kresge, “Data and Algorithms at Work”; Adler-Bell and Miller, “The Datafication of Employment”; West, “How employers use technology to surveil employees.”

⁴ Joseph Parish, “Employee monitoring services on the rise: keystrokes, mouse movements, and screenshots,” *The Verge*, December 5, 2011, available at <https://www.theverge.com/2011/12/5/2612513/employee-monitoring-keystrokes-mouse-movements-screenshots>.

sensors built into machinery or vehicles can track a workers' output and speed, and workers may wear devices that log their location or heart rate.

Cameras are common in a variety of workplaces. As the cost of both cameras and data storage has fallen exponentially over the years, their presence and use are expanding, including in locations that previously would have been difficult to surveil. In private homes, for example, employers may hide cameras to monitor domestic workers.⁵ And the growing use of doorbell cameras, such as Google's Nest and Amazon's Ring, add another layer of surveillance for delivery drivers, maintenance workers, and others.⁶

The rise of image-recognition software and artificial intelligence also enables real-time video and audio surveillance to feed into automated management practices that may track minute movements or facial expressions. The ubiquity of preinstalled laptop cameras, as well as plug-in webcams, also means that employers can also monitor workers who are primarily computer-based, regardless of whether they work remotely or in an office setting.⁷

Some types of digital monitoring practices are already common in many industries that center around computer-based work. Employers generally have the technical and legal ability to access most types of communication that happen on their systems or devices, such as workers' emails, texts, or private Slack messages, as well as general internet activity.⁸ In addition, companies may purchase or develop services that monitor workers' "active hours" on a computer, which applications they use, or how many emails they send. Some services go even further, keeping track of every keystroke a worker makes and with what frequency, and taking screenshots of the worker's computer screen for later review.

These practices often have vaguely defined and overlapping goals that are broadly centered on the idea of "productivity tracking." These apps may be implemented with the stated goal of helping workers be more aware of their time habits, or so that workers avoid "distracting" or prohibited websites, such as social media, or to streamline records for internal timesheets or client billing.⁹ Most of these apps also include features such as keyboard and mouse activity

⁵ Alexandra Mateescu, "Nannies Already Felt Like They Were Under Constant Surveillance. The Internet Has Made It Even Worse," *Slate*, August 13, 2018, available at <https://slate.com/human-interest/2018/08/nannies-are-under-constant-surveillance-online-care-sites-are-making-it-worse.html>.

⁶ Drew Harwell, "Ring and Nest helped normalize American surveillance and turned us into a nation of voyeurs," *The Washington Post*, February 18, 2020, available at

<https://www.washingtonpost.com/technology/2020/02/18/ring-nest-surveillance-doorbell-camera/>; see also Aiha Nguyen and Eve Zelickson, "At the Digital Doorstep: How Customers Use Doorbell Cameras to Manage Delivery Workers" (New York: Data & Society, 2022), available at <https://datasociety.net/library/at-the-digital-doorstep/>.

⁷ See Sara Morrison, "Just because you're working from home doesn't mean your boss isn't watching you," *Recode*, April 2, 2020, available at <https://www.vox.com/recode/2020/4/2/21195584/coronavirus-remote-work-from-home-employee-monitoring>;

Adam Satariano, "How My Boss Monitors Me While I Work From Home," *The New York Times*, May 6, 2020, available at <https://www.nytimes.com/2020/05/06/technology/employee-monitoring-work-from-home-virus.html>; Harwell, "Managers turn to surveillance software"; Sharon K. Parker, Caroline Knight, and Anita Keller, "Remote Managers Are Having Trust Issues," *Harvard Business Review*, July 2020, available at <https://hbr.org/2020/07/remote-managers-are-having-trust-issues>.

⁸ Rebecca Heilweil, "Your Slack DMs aren't as private as you think," *Recode*, January 24, 2020, available at <https://www.vox.com/recode/2020/1/24/21079275/slack-private-messages-privacy-law-enforcement-lawsuit>.

⁹ Time-tracking applications are often used for remote teams or contractors who bill hourly but may also be used at on-site companies. See Ifeoma Ajunwa, "Algorithms at Work: Productivity Monitoring Applications and Wearable

measures, automatic screenshots, and GPS tracking, and can be installed and capture any information on a worker's laptop and mobile device.¹⁰

In addition to the data they collect directly,¹¹ companies can also obtain information about workers from other sources, such as social media information on an individual's activity, which can include deeply personal information.¹² Companies may also hire outside firms to research applicants or current workers, including information about their activities outside of work. This may also include reputational assessments sold by such these firms or other services to be used in hiring and worker evaluation; these may draw data from a variety of sources with little insight into how these scores are calculated and no recourse for inaccurate information or biased conclusions.¹³

Similarly, companies may often use background or credit checks on current or prospective workers. Current federal laws provide some guidance on how employers can use more established practices such as criminal background checks, credit histories, and drug testing in the hiring process and throughout the employment relationship, and many states provide additional protections and limits.¹⁴ And workers themselves may be encouraged or required to be an active participant in this surveillance, logging and categorizing their activities or installing applications on employer-provided or personal devices to track their work and movements.¹⁵

Another case is in customer-facing occupations where customers may be solicited for reviews of a workers' performance, which may be used to inform wages, hours, or termination decisions—

Technology as the New Data-Centric Research Agenda for Employment and Labor Law,” *St. Louis University Law Journal* 63 (21) (2019), available at <https://ssrn.com/abstract=3247286>.

¹⁰ Ajunwa, Crawford, and Schultz, “Limitless Worker Surveillance”; Ajunwa, “Algorithms at Work.” See also, for instance, Kaveh Waddell, “Why Bosses Can Track Their Employees 24/7,” *The Atlantic*, January 6, 2017, available at <https://www.theatlantic.com/technology/archive/2017/01/employer-gps-tracking/512294/>.

¹¹ See also Ifeoma Ajunwa, Kate Crawford, and Joel Ford, “Health and Big Data: An Ethical Framework for Health Information Collection by Corporate Wellness Programs,” *Journal of Law, Medicine and Ethics* (44) (2016), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2837797.

¹² See, for example, John Weber, “Should Companies Monitor Their Employees’ Social Media?” *The Wall Street Journal*, October 22, 2014, available at <https://www.wsj.com/articles/should-companies-monitor-their-employees-social-media-1399648685>.

¹³ Some reputational searches and algorithmic ratings may not even be based on the activities of the workers themselves, but are instead drawn from analyses of the social media activity of other people in their personal networks, potentially leading to “networked” privacy harms. See danah boyd, Karen Levy and Alice Marwick, *The Networked Nature of Algorithmic Discrimination, Data and Discrimination: Collected Essays*, eds. Seeta Peña Gangadharan and Virginia Eubanks (Washington: New America, 2014), pp. 43–57, available at <https://www.newamerica.org/oti/policy-papers/data-and-discrimination/>, cited in Mary Madden, “Privacy, Security, and Digital Inequality” (New York: Data & Society, 2017), available at https://datasociety.net/wp-content/uploads/2017/09/DataAndSociety_PrivacySecurityandDigitalInequality.pdf.

¹⁴ Ajunwa, Crawford, and Schultz, “Limitless Worker Surveillance.” While these laws do not protect workers from all forms of workers, or all forms of discrimination—and are often lacking meaningfully robust enforcement—the rise of algorithmic hiring and evaluation practices makes the application of these laws even more difficult.

¹⁵ Ibid. For examples, see Allen Smith, “Walmart Adopts Bring-Your-Own-Device Policy,” *SHRM*, October 26, 2018, available at <https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/walmart-bring-your-own-device-policy.aspx>; Jamie Grill-Goodman, “Walmart Unveils Associate App, Giving 740,000 Associates Smartphones,” *RIS News*, June 4, 2021, available at <https://risnews.com/walmart-unveils-associate-app-giving-740000-associates-smartphones>; and Sarah Krouse, “How Google Spies on Its Employees,” *The Information*, September 23, 2021, available at <https://www.theinformation.com/articles/how-google-spies-on-its-employees>.

and which are a potential source of illegal discrimination or bias.¹⁶ Such algorithmic management systems highlight the precarity of platform-based “gig” workers, who are usually excluded from discrimination protections due to their worker classification and who generally may lack the ability to meaningfully challenge these decisions.¹⁷

Commercial surveillance is all but impossible for workers to meaningfully avoid

The first challenge for workers who may wish to avoid commercial surveillance is that they are rarely aware of what surveillance or monitoring practices they are subject to. Companies generally do not inform workers of surveillance practices, particularly details of what methods are used and how the information gathered could be used in the future. As a result, workers may be unaware of any surveillance until it is used against them through disciplinary action or firing. Others may never be made aware of whether or how they are being monitored, but still experience the harms of surveillance-enabled discrimination or control.¹⁸

Of course, many workers are aware that they are being watched in a general sense, but without specifics of what information is gathered and how it can be used. This may allow companies to claim they are being transparent about monitoring practices, but in a way that is impossible for their workers to fully understand or consent to, in part because the harms from this surveillance can be difficult to precisely identify or quantify. Workers cannot possibly anticipate or adjust their conduct or decision-making to account for the many far-reaching consequences of pervasive workplace surveillance. These consequences can extend far into the future and even extend beyond the workplace, as in most states these data may be kept, used, repurposed, and even sold at any point in time, in perpetuity.¹⁹

Though full and meaningful disclosure into workplace surveillance practices is not a complete solution to check the harms of commercial surveillance, it is a necessary first step to fully understand the extent and potential harms of these practices. Part of any suite of remedies should include meaningful disclosure and control over data. Understanding exactly how companies

¹⁶ Luke Stark and Karen Levy, “The surveillant consumer,” *Media, Culture & Society* (2018), available at <https://doi.org/10.1177/0163443718781985>; Nguyen, “The Constant Boss.” Evidence of customer bias may also be seen in, for instance, literature around discrimination in tipping behavior. See, for instance, Lu-in Wang, “At the Tipping Point: Race and Gender Discrimination in a Common Economic Transaction,” *Virginia Journal of Social Policy and the Law* (21) (1) (2014), available at https://scholarship.law.pitt.edu/fac_articles/163.

¹⁷ Alex Rosenblat, Karen E.C. Levy, Solon Barocas, and Tim Hwang, “Discriminating Tastes: Uber’s Customer Ratings as Vehicles for Workplace Discrimination,” *Policy & Internet* (9) (3) (2017): 256-279, available at <https://doi.org/10.1002/poi3.153>; Mateescu and Nguyen, “Algorithmic Management in the Workplace”; Corey Husak, “How U.S. companies harm workers by making them independent contractors” (Washington: Washington Center for Equitable Growth, 2019), available at <https://equitablegrowth.org/how-u-s-companies-harm-workers-by-making-them-independent-contractors/>.

¹⁸ Solove and Citron, “Privacy Harms”; Solove, “Privacy Self-Management and the Consent Dilemma”; Ajunwa, Crawford, and Schultz, “Limitless Worker Surveillance.”

¹⁹ Daniel Solove and Danielle Keats Citron, “Privacy Harms,” *GW Law Faculty Publications & Other Works* (2021), available at https://scholarship.law.gwu.edu/faculty_publications/1534; Daniel J. Solove, “Privacy Self-Management and the Consent Dilemma” (November 4, 2012). 126 *Harvard Law Review* 1880 (2013), https://harvardlawreview.org/wp-content/uploads/pdfs/vol126_solove.pdf; Ajunwa, Crawford, and Schultz, “Limitless Worker Surveillance”; Laura M. Alexander, “Privacy and Antitrust at the Crossroads of Big Tech” (Washington: American Antitrust Institute, 2021), available at <https://www.antitrustinstitute.org/work-product/aai-issues-report-antitrust-and-privacy/>.

collect, store, analyze, and use data about their workers is important not only for regulators, policymakers, and workers, but for researchers, unions, and others who can uncover harmful practices and exert a level of oversight over these companies.

More fundamentally, however, commercial surveillance should not be viewed as solely an issue of information asymmetry, of data collection and security, or even of workplace analytics and performance measurement. Without legal protections or meaningful bargaining power, the only recourse many workers have is to seek employment and better working conditions elsewhere; in practice, however, this take-it-or-leave-it dynamic is a false choice for many workers.²⁰ This means that even if workers are fully informed of the extent of the surveillance they are under and how it is being used to track and evaluate their actions, most cannot meaningfully consent to invasive surveillance practices.

Evidence shows that workers' decisions about whether to stay in their jobs or leave them are more constrained than what idealized labor market models may show when assuming conditions of perfect competition, as explained by Equitable Growth Research Associate Carmen Sanchez Cumming in a recent primer on monopsony power:²¹

Research shows that there are a number of factors that can constrain someone's ability or desire to switch jobs. Employer concentration,²² the time and effort it takes to find another job,²³ and individual preferences or needs unrelated to pay, such as looking for part-time employment due to care responsibilities,²⁴ are some of those factors. Other

²⁰ Solove, "Privacy Self-Management and the Consent Dilemma." For one recent example, see Lauren Kaori Gurley, "Amazon Delivery Drivers Forced to Sign 'Biometric Consent' Form or Lose Job," *Motherboard*, March 23, 2021, available at <https://www.vice.com/en/article/dy8n3j/amazon-delivery-drivers-forced-to-sign-biometric-consent-form-or-lose-job>. For more on the lack of bargaining power for low-wage workers, see Marta Lachowska, Alexandre Mas, Raffaele Saggio, and Stephen Woodbury, "Wage bargaining is an important, yet unavailable, tool for many U.S. workers to increase their incomes" (Washington: Washington Center for Equitable Growth, 2021), available at <https://equitablegrowth.org/wage-bargaining-is-an-important-yet-unavailable-tool-for-many-u-s-workers-to-increase-their-incomes/>, and Kathryn Zickuhr, "New research highlights the necessity of improving wage standards and bargaining power for low-wage workers in the United States" (Washington: Washington Center for Equitable Growth, 2021), available at <https://equitablegrowth.org/new-research-highlights-the-necessity-of-improving-wage-standards-and-bargaining-power-for-low-wage-workers-in-the-united-states/>.

²¹ Carmen Sanchez Cumming, "A primer on monopsony power: Its causes, consequences, and implications for U.S. workers and economic growth" (Washington: Washington Center for Equitable Growth, 2022). Available at <https://equitablegrowth.org/a-primer-on-monopsony-power-its-causes-consequences-and-implications-for-u-s-workers-and-economic-growth/>.

²² Anna Stansbury, "Employer concentration suppresses wages for several million U.S. workers: antitrust and labor market regulators should respond" (Washington: Washington Center for Equitable Growth, 2021), available at <https://equitablegrowth.org/employer-concentration-suppresses-wages-for-several-million-u-s-workers-antitrust-and-labor-market-regulators-should-respond/>.

²³ Carmen Sanchez Cumming, Kate Bahn, and Kathryn Zickuhr, "How new job search technologies are affecting the U.S. labor market" (Washington: Washington Center for Equitable Growth, 2022). Available at <https://equitablegrowth.org/how-new-job-search-technologies-are-affecting-the-u-s-labor-market/>.

²⁴ Céline Detilleux, Nick Deschacht, "The causal effect of the number of children on gender-specific labour supply elasticities to the firm." *Industrial Relations Journal*, 52 (2021): 2-24, available at <https://doi.org/10.1111/irj.12314>.

factors include fears of losing employer-provided benefits,²⁵ noncompete contracts,²⁶ economic downturns,²⁷ and discrimination.²⁸

This lack of bargaining power is due to many factors, such as anticompetitive employer practices that erode worker power,²⁹ as well as companies' use of subcontracting and other arrangements to avoid accountability and further prevent workers from responding to the mechanisms of power that affect their working conditions.³⁰ These imbalances of power have grown in the past several decades, the result of policy choices that have led to the decline of unions;³¹ the erosion of wage standards,³² labor protections,³³ and protective institutions;³⁴ the growth of extractive corporate governance strategies;³⁵ and the rising concentration of corporate power.³⁶

Researchers have even been able to quantify this lack of competition in labor markets and its effects in various ways.³⁷ For instance, research by economists such as Ioana Marinescu of the

²⁵ Brigitte C. Madrian, "Employment-Based Health Insurance and Job Mobility: Is There Evidence of Job-Lock?" *The Quarterly Journal of Economics* 109, no. 1 (1994): 27–54, available at <https://doi.org/10.2307/2118427>.

²⁶ Evan Starr, "The Use, Abuse, and Enforceability of Non-Compete and No-Poach Agreements: A Brief Review of the Theory, Evidence, and Recent Reform Efforts" (Washington: Economic Innovation Group, 2019) available at <https://eig.org/non-compete-brief/>.

²⁷ Gordon B. Dahl and Matthew Knepper, "Why is Workplace Sexual Harassment Underreported? The Value of Outside Options Amid the Threat of Retaliation" (Washington: Washington Center for Equitable Growth, 2022). Available at <https://equitablegrowth.org/working-papers/why-is-workplace-sexual-harassment-underreported-the-value-of-outside-options-amid-the-threat-of-retaliation/>.

²⁸ Kate Bahn, Mark Stelzner, and Emilie Openchowski, "Wage discrimination and the exploitation of workers in the U.S. labor market" (Washington: Washington Center for Equitable Growth, 2020). Available at <https://equitablegrowth.org/research-paper/wage-discrimination-and-the-exploitation-of-workers-in-the-u-s-labor-market/>.

²⁹ Carmen Sanchez Cumming, "Understanding the economics of monopsony: How labor markets work under imperfect competition" (Washington: Washington Center for Equitable Growth, 2022), available at <https://equitablegrowth.org/understanding-the-economics-of-monopsony-how-labor-markets-work-under-imperfect-competition/>.

³⁰ David Weil, "Understanding the Present and Future of Work in the Fissured Workplace Context," *RSF: The Russell Sage Foundation Journal of the Social Sciences* (5) (5) (2019): 147-165, available at <https://www.rsfsjournal.org/content/rsfjss/5/5/147.full.pdf>.

³¹ "Factsheet: How strong unions can restore workers' bargaining power" (Washington: Washington Center for Equitable Growth, 2020). Available at <https://equitablegrowth.org/factsheet-how-strong-unions-can-restore-workers-bargaining-power/>.

³² Arindrajit Dube, "Rebuilding U.S. labor market wage standards" (Washington: Washington Center for Equitable Growth, 2020). Available at <https://equitablegrowth.org/rebuilding-u-s-labor-market-wage-standards/>.

³³ John Godard, "Do Labor Laws Matter? The Density Decline and Convergence Thesis Revisited," *Industrial Relations* (42) (3) (2003): 458-492, available at <https://doi.org/10.1111/1468-232X.00300>.

³⁴ David Howell, "Low Pay in Rich Countries: Institutions, Bargaining Power, and Earnings Inequality in the U.S., U.K., Canada, Australia and France" (Washington: Washington Center for Equitable Growth, 2021). Available at <https://equitablegrowth.org/working-papers/low-pay-in-rich-countries-institutions-bargaining-power-and-earnings-inequality-in-the-u-s-u-k-canada-australia-and-france/>.

³⁵ Kate Bahn and Carmen Sanchez Cumming, "How corporate governance strategies hurt worker power in the United States" (Washington: Washington Center for Equitable Growth, 2022). Available at <https://equitablegrowth.org/how-corporate-governance-strategies-hurt-worker-power-in-the-united-states/>.

³⁶ "Kate Bahn testimony before the Select Committee on Economic Disparity and Fairness in Growth on imbalance of power" (Washington: Washington Center for Equitable Growth, 2022). Available at <https://equitablegrowth.org/kate-bahn-testimony-before-the-select-committee-on-economic-disparity-and-fairness-in-growth-on-imbalance-of-power/>.

³⁷ Stansbury, "Employer concentration suppresses wages for several million U.S. workers."

University of Pennsylvania shows that the rise of employer concentration in the United States further limits workers' employment options, especially for low-wage workers in more rural areas.³⁸

Research also shows that workers already facing persistent barriers and forms of discrimination by race, sex, and other characteristics are already more vulnerable to this power imbalance.³⁹ Periods of economic stress further heighten these dynamics, hampering economic growth and distorting labor markets when workers are already vulnerable.⁴⁰

Surveillance leads to direct and diffuse harms to workers, particularly already marginalized workers, and undermines other protections or possibilities of fairness

Workplace surveillance both directly harms workers and fundamentally shifts the dynamics of power in the workplace in favor of firms in ways that distort labor markets and drive inequitable growth.

In "Data and Algorithms at Work: The Case for Worker Technology Rights," for instance, Annette Bernhardt, Lisa Kresge, and Reem Suleiman at the University of California, Berkeley Labor Center explain that employers' use of data-driven systems can significantly harm workers through a variety of channels, including enabling discrimination and through health and safety harms from intense rates of work, along with losses of privacy and autonomy.⁴¹ Current protections and regulatory approaches have not fully captured these and other harms that workers experience from surveillance, including the harms from the chronic stress of surveillance, which are connected to psychological and physical harms, or the more long-term harms to worker power and the de-skilling of work.

Some of the individual harms from pervasive monitoring can be difficult to identify in a single outcome. When workers are constantly surveilled and those data are stored in perpetuity, anything they do could potentially be associated with a production target, performance metric, or reason for termination,⁴² now or in the future.⁴³ This on its own can lead to overwork and unsafe

³⁸ Ioana Marinescu, "Boosting wages when U.S. labor markets are not competitive" (Washington: Washington Center for Equitable Growth, 2021), available at <https://equitablegrowth.org/boosting-wages-when-u-s-labor-markets-are-not-competitive/>.

³⁹ Kate Bahn and Mark Stelzner, "How racial and gendered pay discrimination persists under monopsony in the United States" (Washington: Washington Center for Equitable Growth, 2020), available at <https://equitablegrowth.org/how-racial-and-gendered-pay-discrimination-persists-under-monopsony-in-the-united-states/>.

⁴⁰ See, for instance, "Why is Workplace Sexual Harassment Underreported? The Value of Outside Options Amid the Threat of Retaliation" <https://equitablegrowth.org/working-papers/why-is-workplace-sexual-harassment-underreported-the-value-of-outside-options-amid-the-threat-of-retaliation/> and Janice Fine and others, "Maintaining effective U.S. labor standards enforcement through the coronavirus recession" (Washington: Washington Center for Equitable Growth, 2020), available at <https://equitablegrowth.org/research-paper/maintaining-effective-u-s-labor-standards-enforcement-through-the-coronavirus-recession/>.

⁴¹ Annette Bernhardt, Lisa Kresge, and Reem Suleiman, "Data and Algorithms at Work: The Case for Worker Technology Rights" (Berkeley: University of California, Berkeley, 2021), available at <https://laborcenter.berkeley.edu/data-algorithms-at-work/>.

⁴² See also Esther Kaplan, "The Spy Who Fired Me," *Harper's*, March 2015, available at <https://harpers.org/archive/2015/03/the-spy-who-fired-me/>.

⁴³ Solove and Citron, "Privacy Harms."

behaviors, contributing to workplace injuries and other physical harms.⁴⁴ And the uncertainty and opacity that arise from being surveilled also imposes a constant cognitive “tax” on workers, which can be harmful to individuals and have counterproductive workplace effects.⁴⁵

The consequences of worker surveillance are concentrated and compounded due to occupational segregation.⁴⁶ Low-wage workers are traditionally more likely to be surveilled, and workers of color and immigrant workers are most likely to be working in many of the low-wage jobs with immediate and severe consequences of surveillance, such as automatic firings due to missing productivity targets. Black workers and Hispanic workers, for example, are overrepresented among drivers and truckers and cashiers.⁴⁷ And overall, workers of color account for more than 80 percent of workers who pack and package items by hand.⁴⁸

Pervasive workplace surveillance, and the potential uses and abuses of the data it generates, also further undermines workers’ bargaining power and enables other coercive and harmful practices. The data collected by such surveillance also allows companies to retroactively find a productivity-related pretext to terminate a worker, a strategy that can be used, for example, to justify a firing motivated by discrimination or sidestep a just cause protection in a workers’ contract.⁴⁹ They may also be used explicitly to undermine workers power, even before a workers is hired: Some employers, such as Walmart Inc., also use personality tests or specific screening questions in the hiring process to evaluate potential workers for their propensity to unionize, further attempting to undermine worker power.⁵⁰

⁴⁴ Will Evans, “Ruthless Quotas at Amazon Are Maiming Employees,” *The Atlantic*, November 25, 2019, available at <https://www.theatlantic.com/technology/archive/2019/11/amazon-warehouse-reports-show-worker-injuries/602530/>; Shannon Liao, “Amazon warehouse workers skip bathroom breaks to keep their jobs, says report,” *The Verge*, April 16, 2018, available at <https://www.theverge.com/2018/4/16/17243026/amazon-warehouse-jobs-worker-conditions-bathroom-breaks>;

⁴⁵ Harwell, “Managers turn to surveillance software.”

⁴⁶ Kate Bahn and Carmen Sanchez Cumming, “Factsheet: U.S. occupational segregation by race, ethnicity, and gender” (Washington: Washington Center for Equitable Growth, 2020), available at <https://equitablegrowth.org/factsheet-u-s-occupational-segregation-by-race-ethnicity-and-gender/>.

⁴⁷ U.S. Census Bureau, “Characteristics of Driver/Sales Workers and Truck Drivers” (n.d.), available at <https://www.census.gov/data/tables/2017/demo/industry-occupation/truckers-acs17.html>; U.S. Census Bureau, “Retail Workers: 2018” (n.d.), available at <https://www.census.gov/library/publications/2020/demo/acs-44.html>.

⁴⁸ Hye Jin Rho, Hayley Brown, and Shawn Fremstad, “A Basic Demographic Profile of Workers in Frontline Industries” (Washington: Center for Economic and Policy Research, 2020), available at <https://cepr.net/wp-content/uploads/2020/04/2020-04-Frontline-Workers.pdf>. These trends are apparent within companies as well; see Katherine Anne Long, “New Amazon data shows Black, Latino and female employees are underrepresented in best-paid jobs,” *Seattle Times*, April 14, 2021, available at <https://www.seattletimes.com/business/amazon/new-amazon-data-shows-black-latino-and-female-employees-are-underrepresented-in-best-paid-jobs/>.

⁴⁹ Irene Tung, Paul K. Sonn, and Jared Odessky, “Just Cause Job Protections: Building Racial Equity and Shifting The Power Balance Between Workers And Employers” (New York: National Employment Law Project, 2021), available at <https://www.nelp.org/publication/just-cause-job-protections-building-racial-equity-and-shifting-the-power-balance-between-workers-and-employers/>.

⁵⁰ Aaron Rieke, Urmila Janardan, Mingwei Hsu, and Natasha Duarte, “Essential Work: Analyzing the Hiring Technologies of Large Hourly Employers” (Washington: Upturn, 2021), available at <https://www.upturn.org/work/essential-work/>; Aaron Rieke and Miranda Bogen, “Help Wanted: An Examination of Hiring Algorithms, Equity, and Bias” (Washington: Upturn, 2018), available at <https://www.upturn.org/work/help-wanted/>; Nathan Newman, “How Workers Really Get Canceled on the Job,” *The American Prospect*, April 6, 2021, available at <https://prospect.org/labor/how-workers-really-get-canceled-on-the-job/>.

The known and potential harms to workers from surveillance and related algorithmic management practices are not justified by gains to workers, companies, or the economy

In addition to general privacy intrusions upon workers, workplace surveillance enables and encourages exploitative management practices that harm workers and worsen job quality—often but not always through algorithmic management.⁵¹ These algorithmic management practices include many harmful scheduling and timekeeping requirements, such as unpredictable scheduling, split shifts, or narrow definitions of “work time” within a shift.⁵² This can lead to various economic harms, such as wage theft or the loss of jobs, or health and safety harms, such as pressure to meet impossible production targets or a lack of meaningful breaks.

Companies often justify the collection of data about workers as necessary for business performance monitoring and productivity improvement, but without evidence behind such claims. Instead, the use of “productivity” management tools may lead to inefficiencies, unsafe practices, poor products or services, and even systematized illegal discrimination among workers.⁵³

For instance, to monitor and manage workers in customer-facing occupations, such as low-wage jobs in call centers and retail, employers are turning to so-called emotion recognition technologies that automatically evaluate workers based on their speech patterns, facial expressions, or tone of voice.⁵⁴ Many start-up firms and established companies sell such services, which claim to use machine learning and artificial intelligence to identify an individual’s emotions or affect based on biometric information, such as their facial expression or voice inflection, though the scientific evidence underlying these technologies is far from proven.⁵⁵ “Emotional recognition” systems are built on facial recognition and voice recognition technologies.⁵⁶ They both have significant problems with racist and sexist biases, as Ruha Benjamin details in *Race After Technology*, and are especially bad at interpreting people of color’s faces or women’s voices, especially Black women.⁵⁷

⁵¹ Mateescu and Nguyen, “Explainer: Algorithmic Management in the Workplace.”

⁵² Available at <https://equitablegrowth.org/research-paper/unboxing-scheduling-practices-for-u-s-warehouse-workers/>. For more on the link between surveillance and scheduling practices, see Weil, *The Fissured Workplace*; Rogers, “The Law & Political Economy of Workplace Technological Change”; Ajunwa, Crawford, and Schultz, “Limitless Worker Surveillance.”

⁵³ Zickuhr, “Exploring the impact of automation and new technologies on the future of U.S. workers and their families.” See, for instance, Dzieza, “How hard will the robots make us work?”; Ajunwa, Crawford, and Schultz, “Limitless Worker Surveillance”; Rogers, “The Law & Political Economy of Workplace Technological Change.”

⁵⁴ Tim Simonite, “This Call May Be Monitored for Tone and Emotion,” *Wired*, March 19, 2018, available at <https://www.wired.com/story/this-call-may-be-monitored-for-tone-and-emotion/>.

⁵⁵ Kate Crawford, *Atlas of AI: Power, Politics, and the Planetary Costs of Artificial Intelligence* (New Haven, CT: Yale University Press, 2021), excerpt available at <https://www.theatlantic.com/technology/archive/2021/04/artificial-intelligence-misreading-human-emotion/618696/>.

⁵⁶ Joan Palmiter Bajorek, “Voice Recognition Still Has Significant Race and Gender Biases,” *Harvard Business Review*, May 10, 2019, available at <https://hbr.org/2019/05/voice-recognition-still-has-significant-race-and-gender-biases>; Angela Chen, “Why companies want to mine the secrets in your voice,” *The Verge*, March 14, 2019, available at <https://www.theverge.com/2019/3/14/18264458/voice-technology-speech-analysis-mental-health-risk-privacy>.

⁵⁷ Benjamin, *Race After Technology*. For instance, companies today can use facial recognition technology to track whether a driver is keeping their eyes on the road, but such technologies often have difficulty identifying or reading

As with other automated management technologies, emotional recognition metrics can also drive service workers to perform their jobs in counterproductive ways that satisfy the algorithm, not the customer. Journalist Josh Dzieza, for example, describes how call-center workers can be punished for otherwise-effective speaking styles:

Angela's other metrics were excellent, but the program consistently marked her down for negative emotions, which she found perplexing because her human managers had previously praised her empathetic manner on the phone. No one could tell her exactly why she was getting penalized, but her best guess was that the AI was interpreting her fast-paced and loud speaking style, periods of silence (a result of trying to meet a metric meant to minimize putting people on hold), and expressions of concern as negative.⁵⁸

This example also illustrates how attempts to automate management can have counterproductive effects on workplace productivity. Dzieza goes on to document how the call-center workers, without any guidance on what specific aspects of their behavior were "wrong" or what they should change, attempted to meet the algorithms' expectations. This included peppering conversations with unnecessary apologies, confusing customers, or trying to maintain an upbeat tone of voice that was incongruous with the content of the conversation.⁵⁹

More broadly, research suggests that workers are more productive when they have greater privacy.⁶⁰ In many cases, with the combination of extensive surveillance and algorithmic management—including automated firing in response to mistakes or deviation from a strict standard—workers must choose between competing priorities. For instance, when retail workers are pressured to keep lines moving during the holiday rush, they may enter inaccurate item information if an item's tag is not in the system or enter their personal email address instead of a customer's to keep a faster pace of output.⁶¹

The ways companies use surveillance and algorithmic management can also harm workers and the broader economy through de-skilling and fissured work arrangements, leading directly and indirectly to job loss and lower wages. Surveillance both enables and is necessary for precarious and fissured work arrangements, with firms using worker-generated data to further de-skill jobs that can be rigorously monitored by automated management systems.⁶² Associate professor at Georgetown Law Brishen Rogers explains that employers use data-driven technologies like algorithmic management both to de-skill work and undermine worker power, driving down job

features or facial movements on Black people's faces due to being trained on datasets of White faces. Crawford, *Atlas of AI*.

⁵⁸ Josh Dzieza, "How hard will the robots make us work?" *The Verge*, February 27, 2020, available at <https://www.theverge.com/2020/2/27/21155254/automation-robots-unemployment-jobs-vs-human-google-amazon>.

⁵⁹ Dzieza, "How hard will the robots make us work?"

⁶⁰ Ethan S. Bernstein, "The Transparency Paradox: A Role for Privacy in Organizational Learning and Operational Control," *Administrative Science Quarterly* 57 (2) (2012), available at <https://doi.org/10.1177/0001839212453028>.

⁶¹ Madison Van Oort, "The Emotional Labor of Surveillance: Digital Control in Fast Fashion Retail," *Critical Sociology* 45 (3) (2018), available at <https://doi.org/10.1177/0896920518778087>.

⁶² Joelle Gamble, "The Inequalities of Workplace Surveillance," *The Nation*, June 3, 2019, available at <https://www.thenation.com/article/archive/worker-surveillance-big-data/>; Brishen Rogers, "The Law & Political Economy of Workplace Technological Change," *Harvard Civil Rights-Civil Liberties Law Review* 55 (2020), available at <https://harvardcrcl.org/wp-content/uploads/sites/10/2020/10/Rogers.pdf>; Zickuhr, "Exploring the impact of automation and new technologies on the future of U.S. workers and their families."

quality but also often resulting in a less efficient processes or lower-quality outputs.⁶³ As a result, employers often use technology to reduce demand for cognitive skills and redistribute tasks among multiple, lower-paid workers.⁶⁴ This redistribution and reorganization of work and tasks has had harmful effects on low-wage workers through declining job quality and economic mobility, which is tied to harms to the broader economy through increased turnover, volatile employment and staffing shortages, and supply chain issues.⁶⁵

Conclusion

The evidence discussed here shows that there is a clear and needed role for the Federal Trade Commission in regulating workplace surveillance and companies' use of algorithmic decision-making, which are becoming increasingly common and unavoidable for many workers. Mounting evidence shows that companies' decisions in employing surveillance and algorithmic decision-making can and do cause immediate and long-term economic and health and safety harms to workers and their families, as well as undermining existing labor and consumer protections and contributing to discriminatory practices and anticompetitive labor markets.

Transparency and reporting on companies' surveillance and algorithmic management practices is a vital first step in strengthening worker protections and informing future actions. But the evidence is clear that transparency alone cannot lead to fair practices; a range of evidence from economics and other fields shows that the lack of worker rights and protections and disproportionate corporate power constrain workers' employment options and bargaining ability, which prevents them from meaningfully avoiding or consenting to these practices.

Therefore, beyond transparency, workers need robust and enforced protections around how their data is collected, stored, and used, as well as proactive investigation of unfair and discriminatory practices that can have disproportionately harmful impacts on the most vulnerable workers. In addition, the Federal Trade Commission should also continue to work with other agencies to address other sources of anticompetitive and discriminatory labor practices, such as misclassification, that will in turn be supported by rulemaking in this area.

Thank you for the opportunity to comment on this important issue.

Sincerely,

Kathryn Zickuhr
Senior Policy Analyst
Washington Center for Equitable Growth
kzickuhr@equitablegrowth.org

⁶³ Rogers, "The Law & Political Economy of Workplace Technological Change."

⁶⁴ Ibid.; "Is there a skills gap in the U.S. labor force or instead de-skilling?" (Washington: Washington Center for Equitable Growth, 2014), available at <https://equitablegrowth.org/skills-gap-u-s-labor-force-instead-de-skilling/>.

⁶⁵ Susan Helper, "Transforming U.S. supply chains to create good jobs" (Washington: Washington Center for Equitable Growth, 2021), available at <https://equitablegrowth.org/transforming-u-s-supply-chains-to-create-good-jobs/>; Kathryn Zickuhr, "Is there a skilled labor shortage? The economic evidence on skills gap and labor shortage concerns" (Washington: Washington Center for Equitable Growth, 2022), available at <https://equitablegrowth.org/is-there-a-skilled-labor-shortage-the-economic-evidence-on-skills-gap-and-labor-shortage-concerns/>.