

National Telecommunications and Information Administration
Docket No. 230103-0001

Response of the Washington Center for Equitable Growth to the NTIA on Privacy, Equity, and Civil Rights

March 6, 2023

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 National Telecommunications and Information Administration’s work in this area and the opportunity to comment on privacy, equity, and civil rights.

Through this comment, we will discuss the following points on the impact of commercial data practices connected to surveillance and algorithmic decision-making on workers, labor markets, and the economy, in response to the NTIA’s questions:¹

- Transparency is an important first step for mitigating potential privacy harms, but transparency and consent cannot be the primary model for privacy protections, including and especially in employment contexts.
- Harmful commercial data practices in the workplace undermines worker power and change the structure of jobs and work.
- The consequences of workplace privacy harms are concentrated and compounded for marginalized workers due to discrimination, occupational segregation, and weaker bargaining power.

(1) How should regulators, legislators, and other stakeholders approach the civil rights and equity implications of commercial data collection and processing?

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/>; and the Washington Center for Equitable Growth’s recent comment letter responding to the Federal Trade Commission’s Advanced Notice of Proposing Rulemaking on Commercial Surveillance and Data Security (2022), available at <https://equitablegrowth.org/equitable-growth-delivers-comment-letter-responding-to-ftcs-advanced-notice-of-proposing-rulemaking-on-commercial-surveillance-and-data-security/>.

(1)(b) To what degree are individuals sufficiently capable of assessing and mitigating the potential harms that can arise from commercial data practices, given current information and privacy tools? What value could additional transparency requirements or additional privacy controls provide; what are examples of such requirements or controls; and what are some examples of their limitations?

Transparency is necessary but not sufficient for preventing privacy harms

As the NTIA wrote in its own recent comments to the Federal Trade Commission regarding commercial surveillance,² the notice-and-choice model cannot be the main safeguard protecting individuals from privacy harms. I would like to emphasize how limited this model is in an employment context, due to researched labor market dynamics and structural conditions affecting worker power and labor market competitiveness: Harmful data collection and processing practices, such as through workplace surveillance and algorithmic management, are all but impossible for most workers to meaningfully avoid, both due to their 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.

The first challenge for workers who may wish to avoid surveillance or resulting privacy harms is that they are rarely aware of the data collection practices to which they are subject.³ 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 monitoring 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.⁴ Yet even with notice, workers cannot possibly anticipate or adjust their conduct or decision-making to account for the many far-reaching consequences of pervasive workplace data collection. These consequences

² Comments of the National Telecommunications and Information Administration Regarding Commercial Surveillance ANPR R11004, available at

https://www.ntia.doc.gov/files/ntia/publications/ftc_commercial_surveillance_anpr_ntia_comment_final.pdf.

³ Overviews of modern workplace monitoring, algorithmic management, and related data practices and issues include: 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/>; 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/>; Wilneida Negrón, "'Little Tech' Is Coming for Low-Wage Workers: A Framework for Reclaiming and Building Worker Power" (Coworker.org, 2021), available at <https://home.coworker.org/wp-content/uploads/2021/11/Little-Tech-Is-Coming-for-Workers.pdf>; Matt Scherer and Lydia X. Z. Brown, "Warning: Bossware May Be Hazardous to Your Health" (Washington, DC: Center for Democracy and Technology, 2021), available at <https://cdt.org/insights/report-warning-bossware-may-be-hazardous-to-your-health/>.

⁴ 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), available at https://harvardlawreview.org/wp-content/uploads/pdfs/vol126_solove.pdf; Ajunwa, Crawford, and Schultz, "Limitless Worker Surveillance."

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.⁵

Though full and meaningful disclosure into workplace data collection and processing practices is not a complete or primary safeguard for workplace data collection and processing practices, it is a necessary first step to understand fully the extent and potential harms of these practices. Part of any suite of remedies should include meaningful disclosure and control over data.⁶

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

Weak worker protections and labor institutions, combined with an imbalance of power in the workplace, leave most workers vulnerable to surveillance and connected harms

Fundamentally, workplace 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. Weak worker protections and labor institutions, combined with an imbalance of power in the workplace, leave workers vulnerable to surveillance, algorithmic decision-making, and connected privacy harms.

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.⁷ 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

⁵ 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/>; Solove and Citron, "Privacy Harms"; Solove, "Privacy Self-Management and the Consent Dilemma"; Ajunwa, Crawford, and Schultz, "Limitless Worker Surveillance."

⁶ Bernhardt, Suleiman, and Kresge, "Data and Algorithms at Work."

⁷ 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/>.

of perfect competition, as explained by Equitable Growth Research Associate Carmen Sanchez Cumming in a recent primer on monopsony power:⁸

Research shows that there are a number of factors that can constrain someone's ability or desire to switch jobs. Employer concentration,⁹ the time and effort it takes to find another job,¹⁰ and individual preferences or needs unrelated to pay, such as looking for part-time employment due to care responsibilities,¹¹ are some of those factors. Other factors include fears of losing employer-provided benefits,¹² noncompete contracts,¹³ economic downturns,¹⁴ and discrimination.¹⁵

This lack of bargaining power is due to many factors, such as anticompetitive employer practices that erode worker power,¹⁶ 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.¹⁷ These imbalances of power have grown in the past several decades, the result of policy choices that have led to the decline of unions,¹⁸ the erosion of wage

⁸ 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/>.

⁹ 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/>.

¹⁰ 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/>.

¹¹ 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>.

¹² 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>.

¹³ 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/>.

¹⁴ 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/>.

¹⁵ 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/>.

¹⁶ Carmen Sanchez Cumming, "Understanding the economics of monopsony."

¹⁷ 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.rsfjournal.org/content/rsfjss/5/5/147.full.pdf>.

¹⁸ "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/>.

standards,¹⁹ labor protections,²⁰ and protective institutions;²¹ the growth of extractive corporate governance strategies;²² and the rising concentration of corporate power.²³

Researchers have even been able to quantify this lack of competition in labor markets and its effects in various ways.²⁴ For instance, research by economists such as Ioana Marinescu of the 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.²⁵

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.²⁶ Periods of economic stress further heighten these dynamics, hampering economic growth and distorting labor markets when workers are already vulnerable.²⁷ Research from Rutgers University shows not only that worker power is lower during times of economic stress, such as the high unemployment levels seen during the Great Recession of 2007–2009, but also that workers in many marginalized groups are especially vulnerable: Among low-wage workers, noncitizen workers, Latino workers, Black workers, and women were significantly more likely to experience these minimum wage violations.²⁸

¹⁹ 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/>.

²⁰ 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>.

²¹ 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/>.

²² 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/>.

²³ “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/>.

²⁴ Stansbury, “Employer concentration suppresses wages for several million U.S. workers.”

²⁵ 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/>.

²⁶ 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/>.

²⁷ See, for instance, “Why is Workplace Sexual Harassment Underreported?”

²⁸ During this time, the probability that a low-wage worker was being paid below the minimum wage ranged from approximately 10 percent to 22 percent. Janice Fine, Daniel Galvin, Jenn Round, and Hana Shepherd, “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/>.

Another key piece of the lack of worker power in surveillance practices is the U.S. system of “at-will” employment, which means that workers can generally be fired suddenly and without explanation.²⁹ At-will employment further shifts the balance of power toward employers, and intersects with the dynamics of surveillance in low-wage jobs in particular, where workers have less of an ability to refuse invasive monitoring—even seeking to avoid surveillance may be seen as “suspicious”³⁰—while also being subject to intensive algorithmic management and automated decision-making practices.³¹

(1)(d) Some privacy experts have argued that the collective implications of privacy protections and invasions are under-appreciated! Strong privacy protections for individuals benefit communities by enabling a creative and innovative democratic society, and privacy invasions can damage communities as well as individuals. What's more, many categories of extractive and profitable processing rely on inferences about populations and demographic groups, making a collective understanding of privacy highly relevant. How should the individual and collective natures of privacy be understood, both in terms of the value of privacy protections; the harms of privacy invasions; and the implications of those values and harms for underserved or marginalized communities?

Privacy violations in the workplace undermines worker power and change the structure of jobs and work

There are many interconnected ways that privacy protections and invasion can have collective implications for workers and labor markets. 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.

One avenue is the fact that pervasive workplace monitoring is a component of the broader shift to fractured employment relationships, which are becoming more commonplace throughout the U.S. economy. 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.³²

²⁹ Workers cannot be explicitly fired because of their race, gender, religion, or national origin, but the lack of “just cause” protections for most workers means that those who are fired may never know what the actual reason was behind their firing. See 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/>.

³⁰ Michel Anteby and Curtis K. Chan, “Why Monitoring Your Employees’ Behavior Can Backfire,” *Harvard Business Review*, April 25, 2018, available at <https://hbr.org/2018/04/why-monitoring-your-employees-behavior-can-backfire>.

³¹ Tung, Sonn, and Odessky, “Just Cause Job Protections”; 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>.

³² Joelle Gamble, “The Inequalities of Workplace Surveillance,” *The Nation*, June 3, 2019, available at <https://www.thenation.com/article/archive/worker-surveillance-big-data/>; Rogers, “The Law & Political

Worker surveillance and data collection is also necessary for firms and corporate headquarters to exert fine-grained control on subcontractors and franchisees.³³ Georgetown Law Professor Brishen Rogers has described how employers use data-driven technologies like algorithmic management both to de-skill work and undermine worker power, as employers use technology to reduce demand for cognitive skills and redistribute tasks among multiple, lower-paid workers.³⁴ This drives down job quality but also often resulting in a less efficient processes or lower-quality outputs.³⁵ 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.³⁶

Another avenue is through undermining workers' collective bargaining power. First, as described above, the ubiquity of technologically enabled workplace monitoring and lack of privacy protections continues a harmful cycle: Pervasive surveillance not only undermines worker power but also adds to the already-weakened state of worker power in the United States that allows firms to further surveil and exploit workers.³⁷

Second, 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.³⁸ 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.³⁹

Economy of Workplace Technological Change"; Zickuhr, "Exploring the impact of automation and new technologies on the future of U.S. workers and their families."

³³ Callaci, "Puppet Entrepreneurship: Technology and Control in Franchised Industries."

³⁴ Rogers, "The Law & Political Economy of Workplace Technological Change"; "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/>.

³⁵ Rogers, "The Law & Political Economy of Workplace Technological Change."

³⁶ 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, 2023), available at <https://equitablegrowth.org/is-there-a-skilled-labor-shortage-the-economic-evidence-on-skills-gap-and-labor-shortage-concerns/>.

³⁷ Rogers, "The Law & Political Economy of Workplace Technological Change."

³⁸ Tung, Sonn, and Odessy, "Just Cause Job Protections."

³⁹ 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/>.

Many invasive surveillance and algorithmic management practices are used to monitor workers who are not employees of the surveilling company, due to the company misclassifying them as independent contractors or due to franchise or subcontracting arrangements that reduce the lead firm's accountability. Gig workers, who are frequently misclassified as "independent contractors,"⁴⁰ are particularly vulnerable to harms from these practices, often finding their entire work processes overseen by algorithms.⁴¹

Workers classified as employees have more legal protections than independent contractors or gig workers, but most still have little power to stand up to employers. Only 11.3 percent of U.S. workers—and just 6.8 percent of private-sector workers—were represented by a union in 2022, according to the Economic Policy Institute.⁴² Again, however, even unionized workers do not have a defined legal right⁴³ to bargain over surveillance or other technologies.⁴⁴

(3) Are there any contexts in which commercial data collection and processing occur that warrant particularly rigorous scrutiny for their potential to cause disproportionate harm or enable discrimination?

(3)(a) In what ways can disproportionate harm occur due to data collected or processed in the context of evaluation for credit; healthcare; employment or evaluation for potential employment (please include consideration of temporary employment contexts such as so-called "gig" or contract workers); education, or in connection with evaluation for educational opportunities; housing, or evaluation for housing; insurance, or evaluation for insurance; or usage of or payment for utilities?

⁴⁰ See Washington Center for Equitable Growth comments on the U.S. Department of Labor's proposed rule to revise the guidance on how to determine who is an employee or an independent contractor under the Fair Labor Standards Act (2022), available at <https://equitablegrowth.org/equitable-growth-delivers-comment-letter-responding-to-u-s-department-of-labors-advanced-notice-of-proposed-rulemaking-on-classifying-employees-and-independent-contractors/>; and 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/>.

⁴¹ From Kathryn Zickuhr, "Automated and algorithmic management is already here, invisibly shaping job quality for U.S. workers" (Washington: Washington Center for Equitable Growth, 2023), available at <https://equitablegrowth.org/automated-and-algorithmic-management-is-already-here-invisibly-shaping-job-quality-for-u-s-workers/>.

⁴² Heidi Shierholz, Margaret Poydock, and Celine McNicholas, "Unionization increased by 200,000 in 2022" (Washington: Economic Policy Institute, 2023), available at <https://www.epi.org/publication/unionization-2022/>.

⁴³ Ajunwa, Crawford, and Schultz, "Limitless Worker Surveillance."

⁴⁴ Lisa Kresge, "Union Collective Bargaining Agreement Strategies in Response to Technology." Working Paper (University of California, Berkeley, 2020), available at <https://laborcenter.berkeley.edu/wp-content/uploads/2020/12/Working-Paper-Union-Collective-Bargaining-Agreement-Strategies-in-Response-to-Technology.pdf>.

The consequences of worker surveillance are concentrated and compounded for marginalized workers due to discrimination, occupational segregation, and weaker bargaining power⁴⁵

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.⁴⁶ And overall, workers of color account for more than 80 percent of workers who pack and package items by hand.⁴⁷

The collection and use of extensive worker data creates possibilities for other forms of discrimination by giving companies direct or indirect access to sensitive or protected information. This might include biometrics and other forms of health data, as well as information about a workers' religion, family structure, or sexuality.⁴⁸

This reliance on opaque algorithms with dubious predictive abilities, including those created and maintained by third parties, also creates new avenues for firms to unintentionally discriminate by race, sex, age, and other factors. This might include software and apps promising to predict “trustworthiness” or measure soft skills in job candidates, or the use of hiring algorithms to sort job applicants.⁴⁹

Similarly, so-called “emotion recognition” technologies, which claim to automatically evaluate workers based on their speech patterns, facial expressions, or tone of voice, are another area of potential discrimination.⁵⁰ 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 based on biometric information, such as their facial expression or voice inflection,

⁴⁵ 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/>.

⁴⁶ 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>.

⁴⁷ 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/>.

⁴⁸ Nguyen, “The Constant Boss”; Ajunwa, “Algorithms at Work”; Ajunwa, Crawford, and Schultz, “Limitless Worker Surveillance.”

⁴⁹ Todd Feathers, “This App Claims It Can Detect 'Trustworthiness.' It Can't.” *Motherboard*, January 19, 2021 available at <https://www.vice.com/en/article/akd4bg/this-app-claims-it-can-detect-trustworthiness-it-cant>; Alex Engler, “Auditing employment algorithms for discrimination” (Washington: The Brookings Institution, 2021), available at <https://www.brookings.edu/research/auditing-employment-algorithms-for-discrimination/>.

⁵⁰ 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/>.

thought the scientific evidence underlying these technologies is far from proven.⁵¹ These “Emotional recognition” systems are built on facial recognition and voice recognition technologies,⁵² both of which have significant problems with racist and sexist biases, and both of which are especially bad at interpreting people of color’s faces or women’s voices, especially Black women.⁵³

Conclusion

The evidence discussed here shows that there is a clear and needed role for greater protections over data collection and processing in the workplace as invasive data collection and automated decision-making have become unavoidable for many workers, especially low-wage and marginalized workers. Mounting evidence shows that companies’ decisions in employing data practices connected to surveillance and automated 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’ data 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 in an employment context. 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 groups.⁵⁴

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

Sincerely,

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⁵¹ 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/>.

⁵² 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>.

⁵³ 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 features or facial movements on Black people’s faces due to being trained on datasets of White faces. Crawford, *Atlas of AI*.

⁵⁴ Bernhardt, Suleiman, and Kresge, “Data and Algorithms at Work.”

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