

Recommendations for Federal Administrative Actions to Ensure Worker Rights and Promote Equity in the Use of New Workplace Technologies

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Employers increasingly collect worker data, and use algorithms to make decisions based on that data, in ways that stand to have profound consequences for wages, working conditions, race and gender equity, and worker power. For example, recent reports documented that workers in Amazon's warehouses were intensively surveilled and automatically terminated based on their productivity. New hiring software such as HireVue analyzes eye contact, facial expressions, tone of voice, and word choice to rank job applicants. And algorithms are being used to predict whether workers will quit or become pregnant or try to organize a union, affecting employers' decisions about job assignment and promotion.

Without regulation and strong worker voice, including collective worker voice, the use of these technologies could lead to work intensification and speed-up; deskilling; hazardous working conditions; restructuring of the employment relationship; and suppression of the right to organize. Of particular concern is that workers of color, women, immigrants, and people with disabilities face direct discrimination via these technologies, and are also more likely to work in occupations at the front lines of experimentation with artificial intelligence.

Public policy has a pivotal role to play in ensuring that new AI-based technologies serve and respond to workers' interests and increase race and gender equity. Laying the groundwork for regulation and legislation protecting workers should be an administrative priority; the federal government has an opportunity to lead and set the national tone protecting workers in the rapidly evolving data-driven workplace. To that end, we propose the following four administrative priorities:

I. Strengthen Government Expertise and Capacity on New Workplace Technologies

The federal government currently does not have the expertise and capacity to effectively oversee regulation of AI-based technologies; identify the misuse of those technologies to evade employment and labor laws; identify other harms that require new laws or rule-making; or use these technologies in its own workplaces. Given the speed of technological change in workplace management -- which by all accounts has only accelerated during the COVID crisis -- the federal government must prioritize investments in staff training, research, and development of best practices.

1. The USDOL (including OSHA), EEOC, and NLRB should establish, and Congress should fund, units of specialized investigators who are trained on existing and emerging AI-based technologies that impact

workers and employers' compliance with employment and labor laws, including explicit training on the impacts of AI on equity (and centering equity in enforcement more broadly).

2. The USDOL should establish, and Congress should fund, a Worker Council on New Technology.

- Based on workers' experiences, the Council would provide information on emerging AI-based technologies that the agencies should investigate; provide worker evidence on the impact of those technologies; give workers' assessment of new regulations; and help to shape the below research projects.
- The worker members of the Council should represent a broad mix of industries and geographies, and include both unrepresented and represented workers, chosen worker representatives, and chosen worker advocacy groups. To the extent that the Council might be required to have employer representatives (to fulfill the Federal Advisory Committee Act's balance requirements), high-road employers should be chosen.
- The Council would report to enforcement staff members from the USDOL, the EEOC, and the NLRB.
- The Council's work products should be released to the public in order to help curb low-road employment practices.

3. The USDOL should commission a series of applied, fast-turnaround research projects on data collection, electronic monitoring, and algorithmic management in the workplace, with a focus on low-wage industries and occupations.

- Research projects should identify and analyze the technologies that are currently being used as well as those being developed; how employers are using them; and the actual and potential future effects on workers, independent contractors, and job applicants, including on equity involving race, gender, and disability.
- The effects on workers to be studied should include (a) whether new digital technologies are enabling employers to violate anti-discrimination, wage and hour, health and safety, and right to organize laws, as well as (b) a broader set of effects that could erode labor standards even without violating the law (i.e. deskilling, productivity speed-ups, outsourcing).
- The technologies to be studied should include and prioritize technologies that are currently of particular concern, such as facial recognition, invasive surveillance, behavioral analytics, psychological profiling software, COVID-related technology, and others.
- In parallel, the USDOL and other relevant agencies should conduct a series of industry-specific random workplace audits (as appropriate under their authorizing laws) to establish whether and how often these technologies are used to violate or evade employment and labor laws.
- In particular, the USDOL/OSHA should in short order begin to regularly audit the use of COVID-related workplace technologies (such as thermal scans, contact tracing apps and social distancing bracelets), which are seeing rapid adoption with very little regulatory oversight, and assess their impacts on workers with disabilities.

4. OPM should work with the USDOL, federal employee unions, and federal agencies to develop and test robust guidelines to ensure that government purchases of workplace technologies benefit rather than harm workers.

- The federal government should be a model employer in its use of workplace technologies, but currently does not have evaluation systems or the expertise to evaluate them.

- This program would provide funding for the development of internal expertise and development of evaluation guidelines for government purchases of AI-based systems that impact federal workers. This could take the form of agency-specific pilot programs.
- Potential benchmarks could include:
 - Full impact assessments of any worker data collection, electronic monitoring, or algorithmic management systems that the government is considering
 - Public notice of those impact assessments.
 - Worker consultation and engagement in the selection and implementation of these systems.
 - Mitigation of any harmful effects of these systems, including ceasing the use of systems that pose significant risk of economic, discriminatory, health and safety, and privacy effects on workers.

II. **Launch Government-Wide Initiative to Promote Equity in the Use of Workplace Technologies**

As part of a government-wide effort to ensure the equitable use of artificial intelligence (AI) across sectors, the Administration should launch an initiative to promote equity in the use of new technologies in employment.

Even the most sophisticated technology firms have faced hurdles in designing AI systems that are not discriminatory. Two years ago, Amazon abandoned an AI screening program because the system taught itself to prefer male candidates over women, based on the company’s past hiring patterns. This illustrates the significant risk that algorithmic systems may make employment decisions on biased data that can reproduce inequity by incorporating discrimination from past hiring decisions, and it is not hard to imagine these systems incorporating discrimination relative to other aspects of identity, from gender identity and sexual orientation to immigration status and identification as a person with a disability. The use of opaque “black box” automated hiring systems exacerbates this issue as neither employees nor government enforcement agencies have information about how these systems actually make hiring decisions. In the age of COVID, the use of new technologies can extend beyond hiring, for example, as health monitoring is increasingly used and thereby bringing into the workplace a host of other inequities that may not have been a part of the process of assessing, evaluating, promoting, or even terminating individuals.

As part of a government-wide effort, **DOJ-Civil Rights Division, OFCCP, OPM, and the EEOC (if the independent agency seeks to join) should launch a workplace technology and equity initiative:** 1) investigating potential discrimination proactively through Commissioner charges and other types of directed investigations, 2) providing guidance to promote bias auditing, 3) conducting research studies, and 4) collecting data on employers’s use of hiring technology.

1. Investigations: The Commission should use its authority to proactively investigate employment systems by authorizing [Commissioner charges](#) under Title VII, the ADA and GINA, as well as directed investigation authority under the ADEA and EPA to investigate algorithmic employment systems, including requesting applicant data from employers or hiring assessment vendors to conduct tests to determine whether the assessment tools may produce a disparate impact. The Commission can provide

guidance on the information that should be retained by employers to allow for an audit of any tech hiring system. Title VII authorizes the Commission to have access to any evidence of any person being investigated that relates to unlawful employment practices relevant to the charge under investigation.

2. Guidance: In 1978, the EEOC, Department of Justice (DOJ), Department of Labor, and the then existing Civil Service Commission adopted the Uniform Guidelines on Employee Selection Procedures. These guidelines provide unified principles to determine whether a test or selection procedure is nondiscriminatory and explain methods for validating selection procedures where a test has a disparate impact based on race, sex or ethnicity. They should be updated based on the latest scientific knowledge from the fields of industrial and organizational psychology as well as computer science, including how to evaluate “business necessity” as well as “a less discriminatory alternative.”

An update to the Guidelines would require the federal agencies to come together to reach an agreement, which can be a lengthy and time intensive process. Another option is for EEOC to issue [subregulatory guidance](#), which could make clear that validation requires more than correlation alone and could establish standards for the sufficiency of evidence to demonstrate a causal relationship, or at a minimum a sound theory to explain the relationship between the screen’s inputs and its decisions. Otherwise systems may rely on correlations that may be arbitrary or discriminatory.

3. Research: The Commission should use its authority “to make such technical studies as are appropriate to effectuate the purposes and policies of this title and to make the results of such studies available to the public,” in order to conduct studies of algorithmic systems to better understand the systems used by employers by analyzing open source data and other publicly available information and by engaging with employers and vendors to voluntarily provide information. In addition, the Commission could launch a testing project, where it could study the impact of different hiring technology systems such as resume screens, video based interviews or gamified assessments through “matched pair” testing, which involves using a pair of testers who have similar qualifications, but differ in a characteristic such as race, gender or disability, to apply for employment to identify discriminatory practices. The researchers could use resumes or live trained testers to do a video interview and focus on a characteristic, such as race, gender, disability, or prior conviction, to document where systems create differential outcomes for similarly qualified candidates.

4. Data Collection: Title VII provides the Commission with authority to collect data to support its enforcement, so the EEOC could require employers to disclose the kinds of automated systems they use in hiring and performance. To collect information from 10 or more organizations the Commission would need to follow the Paperwork Reduction Act (PRA) process, which requires agencies to obtain approval from OMB to collect certain types of information from the public.

III. Launch a Cross-Agency Task Force on Workplace Technology and Privacy

All major agencies that oversee federal worker protections (the DOL, EEOC, and NLRB) – along with the White House – should in the first year be engaged in a joint project to address employers’ use of new digital technologies and their impact on workers. Key technologies include electronic monitoring devices (including those related to fighting the spread of COVID-19), data analytics processes including machine learning and artificial intelligence, automated management systems around timekeeping and payroll,

facial recognition technology, and other uses of algorithms to make decisions about hiring, discipline, firing, wage-setting, scheduling, and other managerial functions. These technologies can exacerbate inequalities facing workers of color, immigrants, women, workers with disabilities, LGBTQ+ workers, and others.

The Secretary of Labor should lead a standing cross-agency task force on workplace technology to implement a multi-stage process to address these issues.

- The first stage would rely on the Section I(3) recommendation to establish specialized investigative units that study and assess the use of workplace technology in coordination with worker councils on technology.
- In the second stage, the cross-agency task force would develop a set of common principles and goals for appropriate uses of workplace technology under current law. The White House may also develop recommendations for Congressional action to create new standards and regulations as necessary.
- In the third stage, the agencies would engage in administrative rulemaking and related efforts such as the development of advice memoranda to address substantive threats to worker rights identified in the first and second stages.

Each agency should explore the opportunity to take specific actions within its purview while continuing to meet as a cross-agency task force. Some recommended actions are:

- The EEOC should revise its Uniform Guidelines on Employee Selection Procedures to reflect the new reality of automated hiring.
- The NLRB should engage in rulemaking around the use of work surveillance technologies to prevent unionization or worker collective action, and should ask its General Counsel to prioritize cases that raise such issues.
- The Wage and Hour division of the DOL might engage in rulemaking around timekeeping matters, and/or issue new Administrator Interpretations as needed.
- OSHA should create clear guidelines regarding the required duties of employers to prevent the transmission of airborne infectious diseases (such as COVID-19).
- The remainder of the work of the task force should be released publicly to help workers understand, organize collectively, and advocate for themselves.

OSHA/DOL should evaluate COVID-19-related work technology:

Many workplaces are adopting technology meant to prevent the spread of COVID-19. These technologies range from thermal scans that check the temperature of workers to social distancing bracelets. There have been reports that such technologies are inaccurate (thermal scanners read some people as having higher temperatures), have been used in improper ways (some employers set the temperature threshold on thermal scanners too low), or are assumed to be more effective than they are (thermal scanners do not identify asymptomatic cases and distancing measures do not address airborne transmission). OSHA/DOL should release a statement with clear guidelines regarding the use of such technologies, and should check for compliance during enforcement inspections and voluntary audits of employers. NIOSH should also play a key role in evaluating these technologies and their appropriate uses and limitations. Finally, OSHA/DOL should promote the use of worker health and safety committees that provide worker voice on safe workplace practices and monitor compliance with OSHA guidelines.

IV. Host a White House Policy Summit on Workers and Technology

The White House should host an in-depth summit of industry leaders, administration officials, worker advocates, and policy experts to explore the challenges and opportunities posed by the datafication of employment and rapid increases in the use of workplace technologies. This summit should bring together individuals who represent the spectrum of workers who are impacted by changing technology, including Black workers, women, immigrants, and people with disabilities. The summit would lay the foundation for federal policy responses and the development of legislation such as a Workers' Bill of Technology Rights.

The two-day summit should be held as soon as practicable in the first year of the administration and should address the following topics:

1. Access and transparency around worker data, electronic monitoring, and algorithms - topics could include:

- How to ensure workers' full data access and transparency around employer and third party data practices, such as:
 - requiring notice of all worker data collected by employers or third parties (subcontractors, software vendors, data brokers, other entities), the purposes for which it is collected, and the likely effects of its use (including all forms of electronic monitoring).
 - requiring notice about all algorithms used in employment-related decisions, including those affecting wages, benefits, hours, schedules, performance evaluation, hiring, discipline, promotion, termination, job content, productivity, health and safety, and the right to organize.
- Limitations of employers' transfer of worker data to other entities, and banning the sale of worker data.
- Data portability for workers.

2. Regulation of employers' use of AI-based technologies - topics could include:

- The dangers and opportunities that digital technologies represent for workers, in terms of their privacy, civil rights and civil liberties (including deepening inequities based on race, gender identity, ability, and immigration status), economic security, workplace autonomy, mental and physical health and safety, and even rights to collective action (given how much virtual and physical activism is being organized online).
- Identification of specific technologies that pose substantial risks to workers, such as facial recognition technologies; automated hiring, disciplinary, or firing algorithms; electronic monitoring for the purposes of suppressing the right to organize; behavioral analytics or psychological profiling software, and other algorithms that rely on questionable scientific foundations.
- Potential federal regulation of employers' data collection, electronic monitoring, and algorithmic management, such as:
 - requiring employers to independently assess all employment-related decisions informed or assisted by algorithms or by data gathered via electronic monitoring

- o limiting when health and biometric data is collected, and how it is used
- o establishing employer and third party liability
- o requiring impact assessments of data collection and algorithmic systems
- o banning the use of high-risk and high-harm systems

4. Workers' ability to contest data collection practices and employment-related decisions made by algorithms - topics could include:

- Workers' ability to review personal data collected by employers or third parties, and to delete/correct inaccurate, misleading, or irrelevant data.
- Differing impacts of data collection and algorithms by race, gender identity, ability, and immigration status.
- Workers' ability to contest employment-related decisions that are made, assisted, or influenced by algorithms and electronic monitoring.
- The potential channels by which workers could pursue relief (e.g. in the courts, or by bringing complaints or investigation requests to the USDOL).
- How agencies can protect, educate, and support these rights after legislation is passed.

5. Empowering workers to shape the use of data and algorithms in their workplace - topics could include:

- Strategies for incorporating worker voices in decisions around data collection practices and algorithms in the workplace.
- Potential structures for worker engagement.
- Potential worker rights in the era of big data, such as:
 - o the right to bargain over new technologies via unions or other worker organizations
 - o an active role in determining what data is collected at work, who owns it, and how it is stored, processed, and used
 - o an opportunity to provide significant input on the use of any algorithms that affect employment-related decisions
 - o a mandatory review period of new workplace software or technology
 - o protection from employer retaliation