



**Future Workplace Policy
Council**

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A View from the U.S.: How Federal Agencies, States, and Cities Are Moving to Regulate Data and AI



AI Policy in the U.S.

- Part 1: Policy Environment
- Part 2: State Policy Landscape and Developments
- Part 3: Federal Policy Landscape and Developments
- Part 4: The Employer Response



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Part 1: Policy Environment

Media Focus

Wirecutter

Employers can see everything you write in email as well as in Slack, Google Workplace, and Microsoft Teams

The Washington Post

Democracy Dies in Darkness

Keystroke tracking, screenshots, and facial recognition: The boss may be watching long after the pandemic ends

What workers should know about corporate surveillance software as companies consider permanent remote work policies

COMPUTERWORLD UNITED STATES ▼

NEWS ANALYSIS

The rise of digital bosses: They can hire you — and fire you

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Your Boss Wants to Spy on Your Inner Feelings

Tech companies now use AI to analyze your feelings in job interviews and public spaces. But the software seems prone to racial, cultural and gender bias

Forbes

CAREERS

Emerging Technology: How It Could Lead To More Employment Discrimination

AI: The “Next Frontier for the Labor Movement”



AFL-CIO President
Liz Shuler

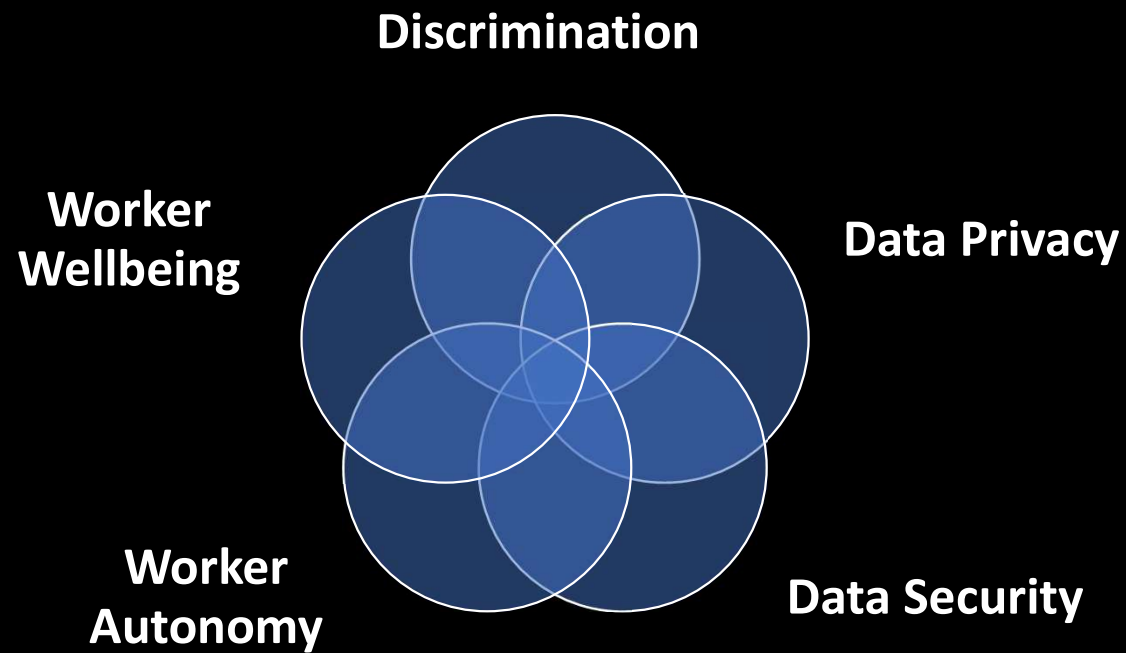
- “Artificial intelligence is the next frontier for the labor movement... at Amazon, algorithms used to manage workers was one of the biggest factors of that organizing campaign.”



Apple Unionizing Effort Leader
Jay Hedgpeth

- Cited increasingly metrics-driven culture that has left employees feeling disconnected from their work. “Everything that happens in an Apple Store is metrics driven these days... Everything is geared toward getting those numbers as high as possible”

U.S. Policy Areas of “Focus”



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Part 2: State Policy Landscape and Developments

U.S. State and Local Developments

- N.Y.C. Local Law No. 144
 - Covers employers' use of "automated employment decision tools," defined as "any computational process, derived from machine learning, statistical modeling, data analytics, or artificial intelligence."
 - Prohibits use of such technology unless the tool(s) are certified as "unbiased" following a "bias audit" by independent auditor.
 - Requires employers to notify candidates **ten business days** prior to use of AI tool with respect to them

U.S. State and Local Developments

- Illinois Artificial Intelligence Video Interview Act of 2019
 - Employers must provide advance notice to applicants that the employer will use video interview technology
 - Employers must also explain to applicants how the AI works and what general characteristics it will use to evaluate applicants
 - Employers must destroy video files, including all backup copies, within 30 days of job applicant's request
 - **Law fails to define AI, and is silent on penalties, enforcement, an applicants' right to sue, and whether employers may refuse to consider applicants who decline consent**

U.S. State and Local Developments

- California Privacy Rights Act
 - Added “profiling” definition to California Consumer Privacy Act
 - “Profiling” includes analyzing or predicting “aspects concerning an individual’s performance at work, economic situation, health, personal preferences, interests, reliability, behavior, location or movements.”
 - Newly-established California Privacy Protection Agency to issue regulations granting employees, contractors, and applicants opt-out rights regarding businesses’ profiling via use of “automated decision-making technology”
 - To include meaningful information about the logic involved in those decision-making processes, description of the likely outcome of the process with respect to the consumer.
 - Like GDPR, “automated decision making” technology not defined

U.S. State and Local Developments

- State Privacy Proposals
 - Of 15 comprehensive consumer data privacy bills, 13 would cover the use of artificial intelligence
 - Typically focus on discrimination concerns, with several requiring that companies respect individual's request to opt out
 - Several would cover the employment context, including in Mississippi, Oklahoma, and New York



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Part 3: Federal Landscape and Developments

Executive Branch: Whole-of-Government Approach

- White House Office of Science & Technology Policy
- U.S. Equal Employment Opportunity Commission
- Federal Trade Commission
- Department of Justice
- U.S. Office of Federal Contractor Compliance Programs
- National Labor Relations Board
- Department of Commerce's National Institute of Science and Technology

Breaking it down: major current laws impacting employer use of AI

- **Title VII of Civil Rights Act of 1964**
 - Protects employees and applicants against discrimination based on race, color, sex, national origin, and religion
 - Enforced by EEOC
- **Americans with Disabilities Act**
 - Prohibits employers from discriminating in employment against certain persons with mental and physical disabilities
 - Enforced by EEOC
- **Age Discrimination in Employment Act**
 - Prohibits employment discrimination against persons 40+ years of age
 - Enforced by OFCCP

Breaking it down: major current laws impacting employer use of AI

- **Executive Order 11246**

- Prohibits employment discrimination and establishes affirmative action requirements for government contractors, subcontractors
- Enforced by OFCCP

- **National Labor Relations Act**

- **§ 8(a)(1)**: Employers may not "interfere with, restrain, or coerce employees in the exercise of" bargaining, organizing rights
- Designates NLRB to arbitrate labor-management disputes, guarantee democratic union elections, and penalize unfair labor practices (as defined by NLRA) by employers

EEOC: Initiative on AI

- 2021: Launched initiative “to guide applicants, employees, employers, and technology vendors in ensuring that these technologies are used fairly, consistent with federal equal employment opportunity laws.”
- Technical guidance on the use of AI and complying with the ADA
 - Employers should have a process in place to provide reasonable accommodations when using algorithmic decision-making tools;
 - Without proper safeguards, workers with disabilities may be “screened out” from consideration in a job or promotion even if they can do the job with or without a reasonable accommodation; and
 - If the use of AI or algorithms results in applicants or employees having to provide information about disabilities or medical conditions, it may result in prohibited disability-related inquiries or medical exams.
- Recent hearing lacking in employer-friendly voices raises concern over future guidance or assistance in this area

FTC: Considering Rulemaking

- **ANPR targets employee surveillance, use of AI in the workplace, particularly focusing on discrimination risk.**
 - Features 95 questions over broad range of issues
 - “Commercial surveillance” defined so broadly as to encompass nearly any conceivable use of employee data
 - ANPR clarifies it “does not identify the full scope of potential approaches the Commission might ultimately undertake by rule or otherwise. It does not delineate a boundary on the issues on which the public may submit comments. Nor does it constrain the actions the Commission might pursue in an NPRM or final rule.”

NLRB: Framework on AI and Employee Monitoring

- General Counsel Jennifer Abruzzo recommended “new framework for protecting employees from intrusive or abusive forms of electronic monitoring and automated management.”
- Employers presumed guilty where “the employer’s surveillance and management practices, *viewed as a whole*, would *tend* to interfere” with employees’ rights to bargain/organize
- All companies must:
 - Prove use of technology is “narrowly tailored” to address “legitimate business need,” or
 - Disclose to employees the technologies it uses to monitor and manage them, its reasons for doing so, and how it is using the information it obtains
- Serious questions regarding authority under NLRA

OFCCP: Government Contractors Requirements

- **Proposed Changes to OFCCP Scheduling Letter**
 - Contractors would be required to provide: “Documentation of policies and practices regarding all employment recruiting, screening, and hiring mechanisms, including the use of artificial intelligence, algorithms, automated systems, or other technology-based selection procedures.”
- **OFCCP FAQ on Validating AI-Based Selection Procedures**
 - **Director Jenny Yang:** “It is important to ensure that selection procedures that rely on technology are designed to promote equity rather than reinforce bias.”

White House: “Blueprint for an AI Bill of Rights”

- Document “is non-binding and does not constitute U.S. government policy”
 - However, EEOC Commissioners have cited it in considering guidance or technical assistance
- Blueprint offers five principles:
 - Safe and effective systems
 - Algorithmic discrimination
 - Data privacy
 - Notice and explanation
 - Human alternatives, consideration, and fallback

National Institute of Standards and Technology Guidance

- AI Risk Management Framework designed to help organizations analyze AI's unique risks, bolster AI trustworthiness

Trustworthy AI is:

- Valid, reliable
- Safe
- Secure, resilient
- Accountable, transparent
- Explainable, interpretable
- Privacy-enhanced
- Fair (harmful bias managed)

Four pillars for managing AI risk:

- **Govern:** Create clear processes around AI risk management
- **Map:** Understand context, use circumstances, and impact
- **Measure:** methods to analyze, monitor AI risks, related impact
- **Manage:** Direct response to risks

Congress:

- **Algorithmic Accountability Act of 2022 (H.R. 6580)**
 - Requires FTC to promulgate regulations requiring companies to conduct impact assessments of “automated decision systems”
 - Will be reintroduced in 2023
 - Expect additional changes in new version

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Part 4: The Employer Response

CHRO Survey, March 2022

- What risks associated with the use of HR technologies are you most concerned about?
 - 42%** - Bias in recruiting, interviewing, hiring, and/or managing workers
 - 23%** - Increased legal scrutiny and government regulation
 - 15%** - Negative impact on corporate culture
 - 9%** - Losing out on needed talent
 - 9%** - Not sure
 - 1%** - Shareholder proposals on AI governance
 - 1%** - Reputational damage

Implications for Large Employers

1. The HR function will become more technical, cross-functional with IT
2. California development assures future HR privacy/AI policymaking
3. Employers could be subject to multiple, overlapping, and potentially conflicting requirements



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Questions?



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