Request for Information (RFI) on Public and Private Sector Uses of Biometric Technologies: Responses

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January 15, 2022

Submitted via BiometricRFI@ostp.eop.gov < RFI Response: Biometric Technologies >

Re: The Office of Science and Technology Policy (OSTP) requests input from interested parties on past deployments, proposals, pilots, or trials, and current use of biometric technologies for the purposes of identity verification, identification of individuals, and inference of attributes including individual mental and emotional states.

The IBT and Its Interest

The International Brotherhood of Teamsters (“IBT” or “Teamsters”) submits this Comment in response to OSTP’s request for input. The IBT is a labor organization founded in 1903. It represents more than 1.4 million hardworking men and women in various industries across the United States, Canada, and Puerto Rico. For over a century, the IBT and its members have worked to guarantee workers a living wage and the benefits they deserve, both through negotiating strong collective bargaining agreements and by supporting employment legislation that lifts all workers. The IBT has a strong interest in ensuring that A Bill of Rights for an Automated Society is equipped to address the difficult challenges presented by new emerging technologies.

Technological developments in the form of automation, artificial intelligence, and robotization are having a profound impact on our country’s economy, labor market, and workforce. The undeniable impact can in significant part be attributed to incongruous laws and regulations pertaining to employee surveillance and employee health and safety, and the reduction in the labor workforce for certain industries. While there is no denying that with modern day technology, innovation and opportunity are endless, these new tools have also led to serious problems that must be addressed to prevent and decrease the disproportionate effect on marginalized workers, individuals, families, and communities. The following sections discuss priority issue(s) for the labor community concerning the use of artificial intelligence and similar computer-based programs. Furthermore, each section seeks to clearly identify and define an issue resulting from the misuse of technology, briefly discuss the ramifications of the issue, and discuss any practical solutions for combating the harmful impact each issue has on Labor. For this comment, technology shall generally mean any automated or algorithmic; system, database, or program, driven by artificial intelligence.

Unlawful Surveillance of Workers

Federal laws and regulations, as currently enforced, fails to account for the ability of employers to utilize technology as a means of unlawfully surveilling workers and union activity. Section 7 of the National Labor Relations Act (NLRA) grants employees the rights to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection; and
Section 8 forbids employers "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7."\(^1\) When assessing these protections from a surveillance viewpoint, the National Labor Relations Board\(^2\) (NLRB) takes two approaches: the literal surveillance of workers, such as the photographing or videotaping of employees engaged in protected activities; and the promulgation, maintenance, or enforcement of work rules that create an impression of surveillance.\(^3\) Of course, the capabilities of modern technology have left employers with little need to engage in the literal surveillance of workers, as most employers can make use of technology to implement otherwise justifiable work rules for the real purpose of illegal surveillance. Charges brought against employers under a theory of creating an impression of surveillance also face significant hurdles before finding success as legal precedent provides inapt consideration to an employer rule's connection to employers' right to maintain discipline and productivity in their workplace; and whether the potential adverse impact on worker rights is outweighed by justifications associated with the rule.\(^4\)

Under the current legal framework, surveillance of employees is widespread as employers are allowed to search employees' personal property, including their vehicles, whenever on company premises; and monitor employee activity on any company issued communication devices, computer systems, or network.\(^5\) Tools such as navigation software, item scanners, wristbands, thermal cameras, security cameras and recorded footage are utilized by employers to surveil workforces for illegal purposes and stifle employee concerted activity. For example, reports have well documented Amazon’s use of heat maps and data such as team-member sentiment and a diversity index to figure out which stores have a higher probability of unionizing.\(^6\) The absence of effective surveillance standards has systematically confined unions and workers in a defensive posture, constantly confronting employee disciplinary sanctions in court or arbitration; in which employers seek to purge workers that organize or speak out in the pursuit of better working conditions.\(^7\) To ensure new and emerging data-driven technology is used in a trustworthy manner,

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1 See 29 U.S.C. § 158(a).
2 Congress in 1935 created the National Labor Relations Board (NLRB). Decisions of the Board can be appealed to the appropriate United States Court of Appeals. Under § 3(d) of the NLRA (29 U.S.C.A. § 153), the General Counsel has final authority to investigate unfair labor practice charges, issue formal complaints of unfair labor practices, and prosecute such complaints before the Board.
5 See Caesars Entertainment, 368 NLRB 143 (2019); Verizon Wireless and Commun. Workers of Am., 369 NLRB No. 108 (N.L.R.B. June 24, 2020); Employees are left with no recourse to address employer policies that disguise surveillance motives connected to rights generally reserved in management rights clause or employer handbook.
7 Building trust among workers, especially those workers without union representation, is an important prerequisite for any workplace collective action. There is a likely possibility that modern employer surveillance and the fear of retaliation by an employer will deter workers from activities that build trust and lead to collective action. See Charlotte Garden, Labor Organizing in the Age of Surveillance, 63 St. Louis U. L.J. 55 (2018), p 66. https://digitalcommons.law.seattleu.edu/faculty/814. Workers at companies like Amazon have reported that their employer has used modern workplace surveillance technology to deter workplace organizing and retaliate against
a Bill of Rights for an Automated Society should include labor protections for workers that find employer workplace rules that depend on data produced by modern technology, illegal if its’ use can be reasonably construed to prohibit or diminish the exercise of labor rights by employees.

**Robotization of the Human Workforce**

Federal Laws and regulations, as currently enforced, fail to account for employers expanding utilization of technology as a means of setting abnormally dangerous worker productivity quotas.\(^8\) The NLRA does grant employees the right to bargain over mandatory subjects such as health and safety;\(^9\) and provides protection for workers that refuse to work over abnormally dangerous safety condition.\(^10\) However the ability to bargain requires the element of “concertedness,” where two or more people are acting together, or one person is acting on the behalf of others.\(^11\) Additionally, legal precedent suggests that the source of the employees’ concern must relate to a condition over which the employer has control.\(^12\) Also, for protection for refusing to work in abnormally dangerous conditions, the harm must be objectively demonstrable.\(^13\)

Similarly, The Occupational Safety and Health Act (OSH Act) was enacted to assure safe and healthful working conditions for working men and women. To that end, the Occupational Safety and Health Administration (OSHA) has promulgated guidance in effort to protect employees from retaliation when they refuse to work in imminently dangerous situations that present “a risk of death or serious physical harm.”\(^14\) Recent efforts at the state level have also employees who engage in it. See Daniel Hanley & Sally Hubbard, Eyes Everywhere: Amazon's Surveillance Infrastructure and Revitalizing Worker Power, Open Market Institutes (2020), pp 12-13. https://static1.squarespace.com/static/5e449c8c3ef68d752f3e70dc/t/5f4cfeea23958d79eae1ab23/1598881772432/A mazon_Report_Final.pdf; Olivia Solon & April Glaser, Fired, interrogated, disciplined: Amazon warehouse organizers allege year of retaliation, NBC News (2021). https://www.nbcnews.com/business/business-news/fired-interrogated-disciplined-amazon-warehouse-organizers-allege-year-retaliation-n1262367

\(^8\) State level efforts have been made. See CA LEGIS 197 (2021).


\(^12\) See National Transportation Service, 240 NLRB 565 (1979), whether an employer has control over the conditions of employment of its employees in sufficient manner so as to enable it to bargain effectively with a union. Under Section 502 . . . immaterial as to whether it is within the employer’s control.

\(^13\) See Tns, Inc., 309 NLRB 1348 (N.L.R.B. 1992). Under Section 7 employees’ do not need for the belief to be objectively reasonable.

\(^14\) See OSH Act of 1970, Pub. L. 91-596, § 2, 84 Stat. 1590, 1590. Employee may refuse an assignment that involves “a risk of death or serious physical harm” if all of the following conditions apply: (1) the employee “asked the employer to eliminate the danger, and the employer failed to do so”; (2) the employee “refused to work in ‘good faith’” (a genuine belief that “an imminent danger exists”); (3) “a reasonable person would agree that there is real
sought to fill the regulatory void. A new California law, AB 701, attempts to regulate productivity quotas for warehouse distribution centers. AB 701\textsuperscript{15} requires employers to provide a written description of productivity quotas to employees subject to potential adverse employment action that could result from failure to meet the quota; prohibits employers from requiring that workers meet a quota that prevents them from taking meal or rest breaks or complying with other health and safety laws; and prohibits adverse action against an employee for failure to meet a quota that has not been disclosed or does not allow a worker to comply with meal and rest break or occupational health and safety laws.\textsuperscript{16}

For Unionized workers, productivity quotas are often established in contract negotiations between management and labor unions. Bargaining obligations under the NLRA often lead the two parties to negotiate a reasonable level of production for employees in various roles and with different levels of experience. Unionizing can be a remedy for workers in the face of unfair discipline because of a dangerous productivity quotas enforced by automated surveillance technology, and ensure employees have a say in the degree to which employers can use automated surveillance technology to make disciplinary decisions.\textsuperscript{17} Nevertheless, the reality for most nonunionized workers is much different. Most are forced to work under quotas that are unilaterally set by management and are subject to unimpeded termination for failing to make quotas.\textsuperscript{18} With automated workplace surveillance becoming the new normal,\textsuperscript{19} and without any say in how employers use surveillance technology, workers have already seen these technologies used as the sole means for dispensing workplace discipline and termination.\textsuperscript{20}

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\textsuperscript{15} See CA LEGIS 197 (2021), 2021 Cal. Legis. Serv. Ch. 197 (A.B. 701). Applies to employers of 100 or more employees at a single warehouse distribution center or 1,000 or more employees at one or more warehouse distribution centers in the state.
\textsuperscript{16} See id. Allows a current or former to request one written description of each quota to which the employee is subject and a copy of personal work speed data. An employer must abide by this request and there shall be a rebuttable presumption of unlawful retaliation if an employer in any manner discriminates, retaliates, or takes any adverse action against any employee requesting quota information or making a complaint related to a quota; Authorizes an action for injunctive relief to obtain compliance.
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Employers operating in the gig economy, franchise model, or those who misclassify employees as independent contractors, utilize these employment models to unilaterally control working conditions including productivity quota rates. The problem is particularly grim for employees that work under structures like the Amazon – Delivery Service Provider (DSP) model. Under the DSP model, Amazon uses a system of independent delivery contractors instead of directly employing drivers. Amazon uses their agreements with the delivery contractors to reserve the right to control driver working conditions, closely monitoring their performance, and dispense termination when it deems necessary. Thus, the legal requirement that the source of the employees’ concern must relate to a condition over which the employer has control, in order for the concerted activity to be protected, makes it very difficult for employees to take remedial action against a delivery contractor who retains little control by means of contract obligations to a larger economic firm such as Amazon. Protection under the NLRA for workers that refuse to work in abnormally dangerous conditions are also ill-equipped to alleviate employees from these harms. Because of the high bar required for establishing the employees’ perception of possible harm, must be objectively demonstrable, it is arguably understandable why poorly researched and documented harm resulting from dangerously high worker productivity quotas are not provided broader protection in the courts.

A lack of regulatory tools has prevented OSHA from addressing worker injuries for years. OSHA has been under funded, understaffed, congressionally stifled on ergonomics and ill equipped to deter employers’ behaviors or stop the underreporting of occupational injuries and illnesses. OSHA conducted an average of 38,092 inspections per year under the Obama Administration and an average of 32,610 worksite inspections per year during the first three years of the Trump Administration, a noticeable drop. Furthermore, a 2020 report revealed that as of January 2020, OSHA had “the lowest number of on-board inspectors in the last 45 years, it was estimated that it would take the agency approximately 165 years to inspect each workplace under its jurisdiction just once.” Additionally, the financial penalties OSHA has issued for violations

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22 See 29 U.S.C. § 152(3); Allied Chemical and Alkali Workers of America, Local Union No. 1 v. Pittsburgh Plate Glass Co., Chemical Division, 404 U.S. 157, 92 S. Ct. 383, 30 L. Ed. 2d 341, 1 Employee Benefits Cas. (BNA) 1019, 78 L.R.R.M. (BNA) 2974, 66 Lab. Cas. (CCH) ¶ 12254 (1971). The NLRA expressly excludes “independent contractors” from the definition of “employee.”
24 See infra footnote 9. The harm must also be good faith belief.
27 See id.
have historically been insignificant.\(^{28}\) The maximum penalty for a serious OSHA violation\(^{29}\) is $13,653, while the maximum for a willful and repeat violation is $136,532.\(^{30}\) Nevertheless, when OSHA does find a serious violation, it rarely imposes the maximum penalty. In 2019 the average penalty for a serious violation was only $3,717.147.\(^{31}\) For example, OSHA inspectors issued a mere 67 citations at Amazon warehouses between 2015 and 2019, resulting in fines of $262,132, which represents roughly 0.0087% of Amazon’s profits in 2018 alone.\(^{32}\)

California’s Assembly Bill 701 (AB 701),\(^{33}\) seeks to address the relationship between productivity quotas and high risks of injury or illness by increasing transparency about the use of productivity quotas and placing some restrictions on what behavior can be considered time off task. However, AB 701 fails to mandate a standard\(^{34}\) that considers, “the relationship between quotas and risk factors for musculoskeletal injuries and disorders...”\(^{35}\) Therefore, while AB 701 may succeed in increasing transparency around the use of productivity quotas, it does little to address the dangerous conditions workers face as emerging technology generates increasingly demanding data-driven productivity quotas for employers.\(^{36}\)

The NLRA, OSHA, and state level efforts have not adequately dealt with employers’ use of modern-day technology, nor have there been successful efforts to properly balance the right of employers to operate their business efficiently with the right of employees to work in an environment absent of intimidation, coercion, and dangerous conditions. The current dichotomy


\(^{29}\) A violation is “serious” when “it poses a substantial probability of death or serious physical harm to workers.”


\(^{31}\) See id.

\(^{32}\) See also Athena Coal., Packaging Pain: Workplace Injuries In Amazon’s Empire 6–7 (2019), https://s27147.pcdn.co/wpcontent/uploads/NELP-Report-Amazon-Packaging-Pain.pdf [https://perma.cc/Y836-53TC] (“Amazon sets the standard for delivery and fulfillment in the eCommerce industry and it also undeniably sets the standards for employment practices and working conditions in the industry.”).


\(^{34}\) For example, standards could include limit on how many boxes workers are required to fill per hour, or more general safety protocols, like a requirement that workers be given stretch and water breaks every hour.

\(^{35}\) See Assemb. B. 701 § 6726(a); Fifty-one Democrats and 1 Republican voted in favor of the bill, while 1 Democrat and 18 Republicans voted against; Vote on AB 701 – AB 701 Lorena Gonzalez Assembly Third Reading, OPENSTATES, https://openstates.org/vote/7a543fecc-6e00-4e5d-b1d8-bd90500cafa6/ [https://perma.cc/UH6U-X5H2] (last visited June 6, 2021); see also AB-701 Warehouse Distribution Centers, CAL. LEGIS. INFO., https://leginfo.legislature.ca.gov/faces/billVotesClient.xhtml?bill_id=20212022AB701 [https://perma.cc/6JH9-KFXK] (last visited June 6, 2021).

\(^{36}\) See Lecher, C. (2019, April 25). How Amazon automatically tracks and fires warehouse workers for ‘productivity’. The Verge. Retrieved December 30, 2021, from https://www.theverge.com/2019/4/25/18516004/amazon-warehouse-fulfillment-centers-productivity-firing-terminations (“Amazon’s system tracks the rates of each individual associate’s productivity,” “and automatically generates any warnings or terminations regarding quality or productivity without input from supervisors.” (Amazon says supervisors are able to override the process.).)
many workers face is that of being terminated for failure to keep up with a quota or risk serious injury.\(^{37}\) For an example, widely reported are the alarming number of injuries suffered by workers in Amazon warehouses, due to workers fear of falling behind targets and being dismissed for poor productivity.\(^{38}\) Furthermore, Amazon has fired hundreds of employees at a single facility for failing to meet productivity quotas. A spokesperson for the company acknowledged the company once terminated roughly 300 full-time associates for “inefficiency” over a 13-month period.\(^{39}\) Research has shown that disciplining workers may result in a short-term productivity boost, just as larger employee bonuses accumulated over time result in a higher productivity increase.\(^{40}\) Therefore, regulating the unabated use of workplace surveillance in cases of worker discipline may be necessary to limit the scaling of automated worker discipline by employers. Left unchecked, employers could use expansive automated disciplinary practices to chase quick productivity increases, which would come at the expense of long-term productivity increases due to employee bonuses and other rewards, in addition to increasing the risk for on-the-job injuries.

The unilateral control over the implementation and utilization of worker productivity quotas, algorithms, and other worker systems driven by artificially intelligent or computer-generated programs must be addressed. Thus, a Bill of Rights for an Automated Society presents a unique and necessary opportunity that should include provision that make the implementation and utilization of worker productivity quotas, algorithms, and systems driven by such technology an indisputable matter of health and safety under Section 7 of the NLRA. Furthermore, the bill should consider a private right of action under OSHA in order to enable workers to file suit when an employer violates an OSHA standard, and the agency was unable to inspect or issue a citation.\(^{41}\) Additionally, a Bill should expand reporting and disclosure requirements to relevant federal agencies concerning the use of this technology and employee injury data. The correlation between the two should be properly researched, analyzed, and understood.\(^{42}\) Such data would enable agencies at the federal and state level to understand what kind of intervention or enforcement is and will be required to reduce worker injuries and other harm in the future.\(^{43}\)


\(^{42}\) In theory, such efforts would contribute significantly to the promulgation of adequate rules and increased enforcement under section 502 of NLRA and other Federal or State regulations that may utilized this information.

\(^{43}\) See id.
Reduction in Blue Collar Industry Workers

Federal nor state regulations are equipped to address the alarming decline of blue-collar workers in America because of the job loss to artificially intelligent robots. Furthermore, modern technology has created a new reality for white-collar workers as well.\(^4\) While several federal and state laws govern employment matters, the ubiquity of at-will employment makes this problem a difficult matter to resolve.\(^5\) Presently, the most useful tool is perhaps the NLRA, which guarantees employees the right to be engaged in protected concerted activities, including the right to bargain over mandatory subjects such as employee layoffs. Nevertheless, it is far from being a solution, and there are currently no other laws or regulations that directly address the matter. Though the current dichotomy workers face of being terminated for failure to meet a quota or risking serious injury has certainly contributed to the loss of workers and increased use of robots, there is clearly something gloomier in the works. Whether it be McDonald’s introducing self-serve kiosks and firing hourly workers to cut costs, or top-tier investment banks relying on software instead of traders, millions of American workers are facing the potential for job loss.\(^6\) Researchers at MIT and Boston University have projected robots could replace approximately 2 million more workers in the manufacturing industry alone by 2025.\(^7\)

This trend has the potential to adversely impact all classes of workers and it’s beyond time to seriously think about how AI should be managed. Over 5 years ago the White House warned between 2.2 and 3.1 million car, bus, and truck driving jobs in the US would be eliminated by the advent of self-driving vehicles, and forecasted an 83 percent chance workers earning less than $20 per hour would lose their jobs to robots, 31 percent of those who make up to $40 an hour would face a chance of being replaced, and those paid more than $40 an hour faced an approximate 4 percent of losing their jobs to automation.\(^8\) In theory, automation and artificial intelligence should be used to assist workers by eliminating or reducing dangerous or complex tasks so they can take on more assignments, making companies more productive and raising wages. Historically, the answer to technological change has been a reinvestment in education and retraining for


\(^5\) Jeanne Mejeur, M. L.-K. (n.d.). \textit{At-will employment - overview}. Retrieved December 30, 2021, from https://www.ncsl.org/research/labor-and-employment/at-will-employment-overview.aspx. Employment relationships are presumed to be “at-will” in all U.S. states except Montana. The U.S. is one of a handful of countries where employment is predominantly at-will. At-will means that an employer can terminate an employee at any time for any reason, except an illegal one, or for no reason without incurring legal liability. Likewise, an employee is free to leave a job at any time for any or no reason with no adverse legal consequences. At-will also means that an employer can change the terms of the employment relationship with no notice and no consequences.


\(^7\) See id.

employees. Many companies deploying automation and AI say the technology allows them to create new jobs for which employees can be retrained, but the number of new jobs is often minuscule compared with the number of jobs lost.

A Bill of Rights for an Automated Society should include provisions for the establishment and supervision of programs for the instruction and training of employers and employees concerning the harms around the use of artificial intelligence in the workplace. Furthermore, consideration should be given to what limited roles, responsibilities, and task should be assigned to artificially intelligent robots. The primary goal of these objectives would be to preserve the human workforce, minimize the risk of injury to workers, and prevent a decline in the quality of life for working class citizens long enough for the country to learn and adjust to modern day technology. The country has a vital interest in making sure workers have the required skill set necessary to find work in today’s tech driven world, and furthermore ensure technology controlling or working with sensitive information, hazardous material, or armaments are not devoid of reasonable control. The results of such guidelines would promote stability and safety amongst the labor workforce and society at large.

Conclusion

For the foregoing reasons, A Bill of Rights for an Automated Society should focus on resolving the harmful impact modern day technology is having on marginalized workers, individuals, families, and communities. Thus, the IBT supports The White House Office of Science and Technology efforts in furtherance of said goals.

Respectfully submitted,

/s/  
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49 See Yahoo! (n.d.). Millions of Americans have lost jobs in the pandemic-and robots and ai are replacing them faster than ever. Yahoo! News. Retrieved December 30, 2021, from https://news.yahoo.com/millions-americans-lost-jobs-pandemic-102250355.html?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuYmluZy5jbi92c2Npb25yZWN0LmNvbS8&guce_referrer_sig=AQAAA BdcHsZNezSxSj__jH7CdHWiCp7_UWxb94pZuDyPqomXyXk_G27b4YRNxG8nCkzNGObYZx6gQ6hBy6VP MKmjTXSB95qSL58Mq1Fu_nMsT0ilFbCdkDLH1tYg06y1jdeIX7DsGjCV91lp9YdS_ZL83FYIspOLU9aMSu7T vHmf.

50 See generally id.

51 See generally for example training and employee education, 29 U.S.C. § 670.