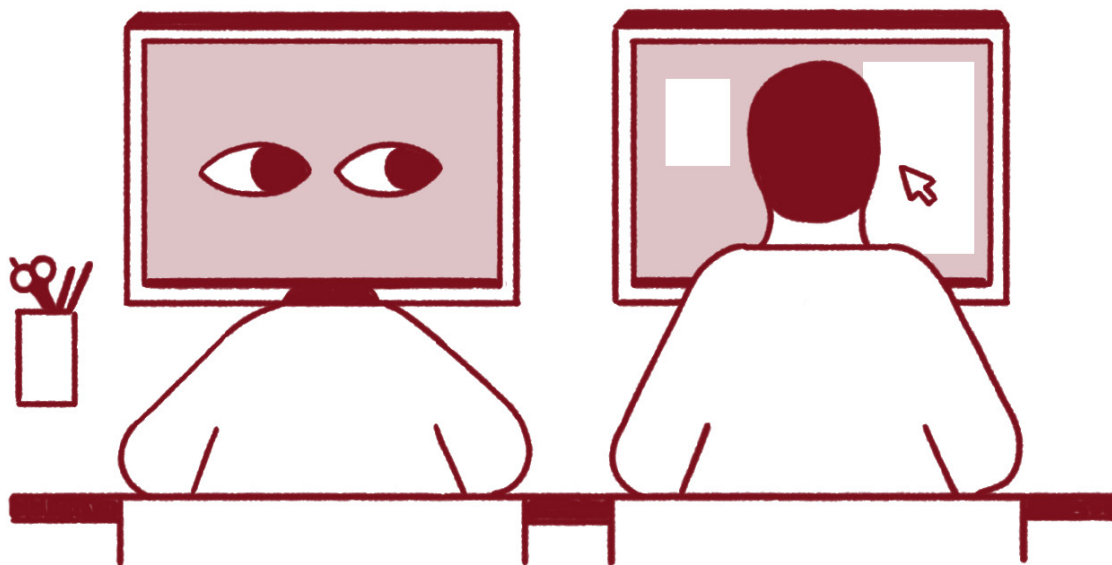# Worker Power and Voice in the AI Response

January 2024

Introduction

Across sectors and industries, the use of increasingly sophisticated tech-enabled management and production tools to track human activity has been ramping up, both in and outside of the workplace. These tools are having and will continue to have a profound impact on work. Some impacts may be positive – relieving workers of dangerous tasks or improving productivity. But many are degrading workplace conditions – displacing workers, imposing invasive surveillance, and collecting vast amounts of personal data. This means that it is essential both to our economic well-being and our efforts to preserve basic democratic practice that workers are able to collectively address the integration of managerial software, artificial intelligence, and algorithmic decision-making on the job.

At the functional level, that clearly means workers must be included in the regulation of and decisions regarding how AI is deployed within an enterprise, and its implications for how work is performed; how workers are potentially surveilled; and how compensation and jobs are impacted. But this should also be embedded in a larger pro-democracy project that recognizes the ideological underpinnings of Silicon Valley and the developers of this technology.

Of great concern is the use of algorithmic management software in lower wage workforces, which doles out rewards and punishments according to an ever-changing and opaque set of data inputs, programmed to maximize productivity. This technology replaces human managers and direct supervisors, who would otherwise be directly petitioned by workers to negotiate certain rules or workplace practices. In replacing these managers with software, the company further constrains the potential for workplace democracy in an already limited legal landscape. Further, the use of the technology acculturates workers (and therefore most poor and working-class citizens) to a regime in which technology has an enormous influence over their daily lives with little redress.

We must insist now on the need to include workers and worker organizations in every aspect of bringing AI technology into the workplace. The inclusion now of workers and worker organizations in decisions about the deployment of AI in the workplace enables us to future-proof labor law, technology policy, and institutions of democracy. There is an enormous amount of potential to improve workplaces through the use of technology, creating conditions of abundance for business owners and for workers. But workers are in the best position to ensure that we understand all the implications of the rise of AI in the workplace – not just to ensure the health, humanity, and safety of the workers themselves, but also to ensure the very basic experience of democracy in the workplace, and thereby strengthen democracy for us all.

Overview of Recommendations

This report outlines several concrete recommendations. At the heart of our analysis is an insistence that workers have an active role in monitoring and assessing how AI is used in the workplace. The technology is changing so rapidly that we cannot possibly legislate every conceivable use and potential abuse. So what we must do is build a pro-active model of worker participation that insists

on transparency, joint decision-making, sector-wide oversight, and – shocking but true that we have to mandate this – access to an actual human being before a status-altering decision, such as firing, becomes final.

In addition to regulating safety in the workplace, we also address the potential impact of AI on collective bargaining. It is exceedingly difficult for workers to organize around a boss that they cannot see or even understand. The information asymmetries always present in the autocratic workplace are significantly greater in a workplace managed by AI. This report outlines a series of recommendations to ensure that what workers need to organize – including access to information, safe channels of communication, and transparency in the workplace – are protected in an AI environment.

We believe these protections are important not just for the workers themselves, but that they also will serve as an important bulwark for our entire society against the onslaught of AI abuses in any number of areas we are likely to see in the coming months and years. This has vital implications for the health of our workforce, our livelihoods, and our civic square.

Role of the Clean Slate for Worker Power Program

In January 2020, Professors Sharon Block and Benjamin Sachs released Clean Slate for Worker Power: Building a Just Economy and Democracy. The report was the product of more than a year of intensive engagement with more than 200 stakeholders, including union leaders, workers, advocates, academics, economists, futurists, students, and others from the U.S. and around the world.

Our Clean Slate for Worker Power project is now serving as a clarion call to reset the agenda for labor law reform. The results of the project changed the debate over the future of labor law reform, leading to a robust national conversation about sectoral bargaining and other forms of worker representation not now contemplated by US labor law. In the three years since the Clean Slate report, the project has continued to expand. To ensure that our Clean Slate recommendations were actionable, we published a series of white papers that provided roadmaps for drafting legislation. In our Clean Slate Pandemic Response report, we offered a set of recommendations designed to empower workers so that they could be better positioned to cope with the ravages of COVID-19, keep themselves and their families safe, and build a more equitable economy than the one the pandemic shut down. We were asked to provide subject matter expertise to a number of state lawmakers and advocates who were working on legislation aligned with the recommendations in our report.

We believe the potential for AI – particularly generative AI or Large Language Model AI – to transform the workplace is great. That's why we have drafted this report – to apply what we learned in crafting our initial Clean Slate recommendations to the urgent task of mapping how to best give workers a voice in the AI-driven transformation of work.

Terminology

Searching for precise definitions of the terms used in this report is challenging. As labor lawyers and not computer scientists or technology experts, we realized we needed some assistance to provide some more texture to what we discuss, instead of referring to all of it as "AI." To prove that this report is not driven by a fear of technology or denial of its potentially beneficial uses, we offer the following glossary of how we use the different relevant terms for the purposes of this report, which was informed by several ChatGPT queries:

- *AI-Driven Workplace Surveillance*: AI-driven workplace surveillance involves the use of artificial intelligence technologies to monitor and analyze various aspects of employee behavior, performance, and activities within a work environment. This can include tracking digital activities, such as emails and online interactions, as well as physical behaviors through tools like video, biometric, or other sensors. AI is used to detect and analyze patterns, identify anomalies, and provide insights to employers as defined by human managers.

- *Algorithmic Management*: Algorithmic management is the use of algorithms and automated systems to manage, monitor, and control various aspects of work, tasks, or processes within an organization. This can include the allocation of tasks, scheduling, performance monitoring, and decision-making. Algorithmic management systems use data and algorithms to optimize efficiency, resource allocation, productivity, or other objectives defined by human management.

- *Artificial Intelligence*: Artificial intelligence is the simulation of human intelligence processes by computer systems, encompassing tasks such as learning, reasoning, problem-solving, perception, and language understanding. It has involved the development of algorithms and models based on human-based data and inputs that enable machines to perform tasks that typically require human intelligence.

- *Generative AI*: Generative AI refers to a subset of artificial intelligence that focuses on creating new and original content. Generative AI models are designed to generate content that is not directly copied from existing data, but rather synthesized based on patterns and knowledge learned from a dataset.

- *Machine Learning*: Machine Learning is a subset of artificial intelligence that involves the development of algorithms and models that enable computers to learn from and make predictions or decisions based on data. Instead of being explicitly programmed to perform a specific task, machine learning systems use patterns and statistical techniques to improve their performance.

- *Workplace Automation*: Workplace automation refers to the use of technology, particularly automation software and machinery, to perform tasks previously carried out by human workers. It involved the design and deployment of systems that can execute tasks without constant human intervention. Automation can range from simple repetitive tasks to more complex activities that require decision-making and problem-solving

Background on AI in the Workplace

Much has been written about the ways that AI and algorithmic management is being used in the workplace. Many of these headlines focused on the question of whether ChatGPT is going to displace workers. While that is an important question, we believe it also is important to look at how AI and algorithmic management is changing the experience of work.

It is beyond the purview of this report to provide a comprehensive overview of all the ways that AI and algorithmic management is influencing the experience of work. An overview that purports to be comprehensive will quickly not be so – the technology is advancing and the landscape is shifting very quickly.

There are a number of uses that at least as of this point in time seem to be most common:

1. **Task Monitoring:** AI tracks employee activities and tasks, providing real-time updates to managers.

2. **Time Tracking:** AI monitors time spent on tasks, ensuring adherence to schedules and deadlines.

3. **Productivity Analysis:** AI measures productivity metrics and identifies areas for improvement.

4. **Employee Surveillance:** AI-powered tools monitor employee communications and activities for compliance.

5. **Performance Metrics:** AI generates performance scores based on data analysis, aiding in evaluation.

6. **Automated Feedback:** AI provides immediate feedback to employees based on their performance data.

7. **Resource Allocation:** AI optimizes resource allocation by analyzing workloads and skill sets.

8. **Workforce Planning:** AI predicts staffing needs and suggests workforce adjustments.

9. **Workplace Behavior Analysis:** AI identifies patterns in employee behavior to assess engagement and morale.

10. **Risk Assessment:** AI identifies potential risks associated with employee actions or decisions.

All of these uses have the potential to greatly affect the experience of work for impacted workers. More disturbingly, most of them also have the potential to introduce new or more intensive invasions of worker privacy, surveillance of union or other collective activity, intensification of work

requirements beyond what is safe, or forms of discrimination based on stereotypical behavior or likelihood to engage in union activity.

In 2018, Professor Charlotte Garden cataloged some of the most personally intrusive of these practices:

> For example, a profile of the Silicon Valley firm Humanyze recounts that both the company's own employees and its clients' employees are outfitted with "a microphone that picks up whether they are talking to one another; Bluetooth and infrared sensors to monitor where they are; and an accelerometer to record when they move." That technology is capable of yielding "metrics such as time spent with people of the same sex, activity levels and the ratio of time spent speaking versus listening." Another company sells a "happiness meter," which can "infer mood levels from physical movement."' And a third takes email monitoring to a new level by scanning employees' email to understand how their "sentiment changes over time."[1]

Reports on the experience of work at Amazon, particularly in Amazon fulfillment centers, can demonstrate many of the ways that AI and algorithmic management is being used to change the experience of work:

- Amazon uses wearable devices to track workers' productivity using a sophisticated algorithm and then sends automated dismissal notices – by the hundreds to workers who fail to meet the algorithmically defined productivity metrics.[2] The Amazon algorithm is called Associate Development and Performance Tracker (ADAPT) that monitors each worker's productivity and automatically fires workers.[3]

- Amazon warehouses with the highest level of automation – use of robotics – have the highest rates of injuries for human workers.[4]

- Amazon warehouse workers who are tracked as spending too much "time off task" are sent warnings in real time warning them to return to work or risk dismissal. Workers report not being able to use the bathroom without risking a TOT warning.[5]

- ADAPT's metrics are based on consumer demand and warehouse location. It does not take into account any individual characteristics of the workers being monitored.[6]

- Amazon-owned Whole Foods used AI-driven data analysis to create a "unionization heat map" to predict which Whole Foods stores were most likely to have union organizing campaigns.[7]

- In Amazon warehouses, workers are required to wear wristbands that constantly track their location and proximity to other workers. These wristbands are purportedly used to direct workers to their next task, but collects location data that could be used for other purposes, such as analyzing relationships between workers.

- To enforce social distancing requirements during the pandemic, Amazon installed new software called the "Distance Assistant" in warehouses. It used cameras and sensors to track the location of every worker. There are no reports that Amazon disabled the system of cameras and sensors post-pandemic.[8] Even before the pandemic, Amazon used a web of AI-monitored cameras throughout its warehouses allegedly to track and deter theft.[9]

- The National Labor Relations Board in 2021 ordered a rerun union representation election at Amazon's Bessemer warehouse because a mailbox where workers returned ballots was located within the view of the warehouse's surveillance system.[10]

- Amazon truck drivers are continuously monitored while driving by a set of four cameras installed in the cabs of their trucks.[11]

- Amazon is reported to be developing a hiring algorithm – Automated Applicant Evaluation algorithm -- that would flag applicants for recruitment based on a comparison of the applicant's resume with attributes of Amazon employees considered to be successful.[12]

Clean Slate Recommendations for the AI Response

AI Impact Monitors

The use of AI to collect private information about workers and algorithmic management to monitor performance and make critical decisions is spreading quickly. The impact of this spread can profoundly affect working conditions. The imposition of AI and algorithmic management in the workplace can have impacts on workers' economic, physical, and mental health. Traditionally, labor unions have played a role in collecting information about dangerous or inequitable conditions at work and then interceded to speak up for workers subject to those threats. But with union density at a record low in the U.S. – just around six percent in the private sector – too many workers do not have a union and have no hope of bringing one into their workplaces in the near future.

Further complicating the picture for workers trying to figure out how AI is impacting their experience of work, many may not even have access to their coworkers. They may work alone in a car or from home or in a warehouse where their every movement is tracked, discouraging any workplace discussions. These conditions make it almost impossible for a collective action or a workplace leader to emerge to speak up as a representative of impacted workers.

Therefore, in any workplace where an employer deploys AI for any of these purposes, the workers should be entitled to an AI impact monitor who can be an initial point of contact in providing information about such deployment and raising concerns with the employer. **We recommend including a provision regarding AI impact monitors in any new regulatory or statutory scheme related to the use of AI in the workplace.**

> **Mandate elected AI monitors in every workplace where AI is used to collect private information, monitor performance, and make status-altering decisions**

The basic idea of the AI impact monitor is to make sure that workers in every workplace in the country have access to a knowledgeable person who can give accurate information about substantive AI impact issues and legal rights; help with worker reporting/whistleblowing on these issues; and become an information hub for workers, regulators, and the public. The AI impact monitor would be elected by workers and could but need not be a coworker. (In workplaces where workers are represented by a union, the steward should be elected according to procedures adopted by the union.) Workers might, for example, elect a monitor who has computer science expertise or is affiliated with a union or worker center.

The monitor would be entitled to receive paid time for training by qualified computer science experts, government agencies, labor unions, or worker centers. Employers could recoup the costs of paid time through a tax credit. Stewards would also be entitled to have access to workers, to train coworkers and employers on the most recent AI developments, to educate workers about

their rights, and to promote compliance with any relevant AI standards – including those standards developed by the sectoral commissions (described below). The monitor's role would be to provide support and advice to workers who have concerns about their interaction with algorithms and other forms of AI surveillance; to liaise with workers, worker committees, and government regulators; and to aggregate and report anonymized data about both worker concerns and responses.

Media reports are replete with stories of workers who are "deactivated" or dismissed via algorithm without any human contact. The result can be confusion and a lack of information about the basis for such terminations. **Any time a worker's status is altered based on a decision made by an algorithm, workers should be entitled to access to a human being in management and the right to be represented by a human being in seeking information about such a status-altering decision before it becomes final.** The AI impact monitors would play an important role in assuring that this access to humans is a reality.

For example, any worker who received what they perceive to be an unfair disciplinary action or dismissal issued by an algorithm should be able to ask the AI impact monitor to intercede and demand information about such action from a human member of the company's management team. Or, an employee who believed that their AI-generated work assignment posed a threat to their safety or health could ask the AI impact monitor to review the assignment and get information from a human member of the company's management team.

> **Empower AI monitors to provide information, assist in enforcement, and support workers' collective action related to AI deployment and use**

In addition, the AI impact monitor should maintain information about workers' AI-related complaints, including complaints about a firm's failure to comply with sectoral standards (described below), how workers responded, and if/how the complaints were ultimately resolved. They should be able to submit that information in an aggregated/anonymized format to regulators on a regular basis. In turn, regulators should be required to make this information available to the public. Regulators could then use this information to plan their own work, including inspections/ audits, rulemaking, and legislation; and the public could choose not to patronize businesses where there is a pattern of introducing AI into the workplace in a way that results in a disregard for workers' rights and safety.

> **Create sector-wide network of AI impact monitors**

In addition to the AI impact monitors, which will operate at the level of the workplace, we also recommend the creation of sectoral commissions, consisting of representatives of labor and management, that would negotiate baseline AI safety standards for all firms in the sector. These

baseline standards would be minimum standards for all firms in the sector and would be enforced through the operation of the impact monitors.

These sector-wide networks are essential even in jurisdictions that adopt new AI workplace standards. AI – especially generative AI – is so fast moving, it would be impossible for a legislature or even a regulator to respond and adapt standards to every advance in the technology. The sector-wide networks would be more agile and provide labor and management a forum to share information about new developments and respond as they agree is appropriate. It would provide a collaborative space to solve AI adoption issues so that not every unexpected consequence of an AI development has to become a point of contention or adversarial resolution.

Collective Bargaining Rights

Giving workers a voice at work has always been a core aspiration of labor law. This component of a labor law regime advances the goal of bringing democratic values into the workplace and counteracting what otherwise is a sphere defined by autocratic managerial rule. The more we pay attention, moreover, the more we learn about the costs of autocratic workplace governance. Without the protections that come from a robust labor law and a strong collective organization of their peers, working people are simply too vulnerable to abusive employer authority. This vulnerability manifests in unsafe and unhealthy working conditions, wage theft, discrimination, and harassment. When workers fear that protesting such abuses will result in job loss, they are understandably hesitant to protest them—a lesson that has become painfully evident in recent years. With the backing of strong legal protections, workers are better positioned to resist these intolerable conditions.

These core ideas that have animated the modern labor movement are even more urgently needed in the face of AI-driven workplace management. The potential for abuse in the workplace, as outlined above, is enormous. **We must provide guard rails to protect the right to collective bargaining even in the face of AI**.

As strong supporters of collective bargaining, we believe that a robust labor law, such as that described in the full slate of our Clean Slate recommendations, is the best policy response to the rise of AI in the workplace. It is our belief that our current labor law makes it too hard for workers to exercise a meaningful right to collective bargaining, including those facing the introduction of AI in their workplaces. In this report, however, we focus on two reforms of the collective bargaining law that we believe would be particularly meaningful for any workers who have chosen collective bargaining or are in the midst of an organizing campaign.

> **Ban employers from embedding messages about workers' exercise of their collective bargaining or concerted activity rights in any AI-driven interface that workers are required to use to accomplish work tasks**

During the campaign at the JFK8 warehouse, Amazon embedded anti-union messages in the Amazon AtoZ app, which employees are required to use to access most human resources services, such as submitting requests for time off and receiving work schedules. These kinds of electronic interventions are the digital equivalent of captive audience speeches – that is, they compel employees to listen to employers' anti-union message. Because workers, like the Amazon workers at Amazon JFK8, must interact with AI systems that govern their work, the compulsion is present in the same way as when an employer gives a direct order to attend an anti-union meeting. The NLRB General Counsel has taken the position that captive audience speeches violate the National Labor Relations Act. That principle should be extended to compelled interaction with AI-driven human resource or performance interfaces.

Expand the range of collective bargaining subjects to include any subjects related to the deployment of AI in the workplace

Under current law, workers generally have no right to bargain over so-called "managerial decisions," even when those decisions have profound consequences on workers' terms and conditions of employment. In *Fibreboard Paper Products v. NLRB*, Justice Stewart laid the groundwork for this massive incursion into the bargaining obligation by writing, in his concurrence, that it was "hardly conceivable" that decisions that lie at "the core of entrepreneurial control" should fall within the scope of the collective bargaining obligation. He concluded that the bargaining obligation reached only a "limited area" and that "those management decisions [that] are fundamental to the basic direction of a corporate enterprise . . . should be excluded from that area." The Court adopted the thrust of Stewart's concurrence in *First National Maintenance Corp.*, where it held that employer decisions based on matters of profitability and the scope and direction of the business are not typically mandatory subjects of bargaining, even if they have a direct impact on the terms and conditions of employment; only the effects of such decisions were mandatory subjects of bargaining.

The law should reject the premise of the *Fibreboard/First National Maintenance* approach that narrows the range of issues over which workers have a right to bargain. Instead, the law should make clear that decisions that are fundamental to the basic direction of a firm are squarely within the duty to bargain. A decision to introduce AI – particularly generative AI – into the workplace should qualify as a decision that is fundamental to the basic direction of the firm. The bargaining table would provide a forum to ensure that a broad range of perspectives are considered before such a disruptive force as AI impacts employees' experience of work. Moreover, the bargaining table allows for flexible solutions to new concerns and objectives – it is much more flexible than a statutory or regulatory approach.

Meaningful Transparency

One of the greatest challenges for workers subject to algorithmic management, AI-driven surveillance, and other AI-powered technology is the opacity of such practices. Companies tend to aggressively guard any information about the essential functionality and operation of these programs as trade secrets. The secrecy extends not only to competitors but to companies' own workforce. Even the fact of these programs may be hidden from workers' view – even when they are subjected to them.

But the rights outlined in this report will be weakened or even meaningless if workers do not have access to information about this technology. For example, AI Impact Monitors cannot do their jobs without being informed about which workers are being monitored and how.
Obviously, workers cannot bargain over whether and how AI and algorithmic management is introduced into the workplace if they do not know that it is there or how it works.

It is not enough to require that workers and their representatives have access to information about this technology. It is essential that that access be meaningful. In the context of this kind of highly sophisticated technology, meaningful access means access in a format that is understandable for workers and their representatives – not just technical specifications that may be incomprehensible to anyone except the coders who created it.

> **Provide AI Impact Monitors and, where present, collective bargaining representatives with meaningful access to information about technology being used to manage or surveil workers**

We recommend that AI Impact Monitors be provided with information about any uses of AI or algorithmic management technology that is used to manage or surveil workers before its introduction. As discussed above, if our recommendation to treat the use of AI or algorithmic management in the workplace as a mandatory subject of bargaining is adopted, it would then follow that workers and their collective bargaining representatives would have a right to request information about these systems. We recommend, in addition, that the law make clear that the information be provided in a format that is understandable by AI Impact Monitors and union representatives or that the employer provide access to independent experts who can explain the technology and answer the monitors' or union's questions.

> **Require employers and consultants to report the use of surveillance technology on their persuader reports**

Under the Labor-Management Reporting and Disclosure Act, employers and their consultants are required to report to the U.S. Department of Labor on their "persuader" activity – that is, employers' use of external "consultants" to try to convince their employees not to support

unionization efforts. As the use of AI-driven surveillance increases, the risk increases that this technology will be used to monitor workers' organizing activity and collect data to develop union-busting strategies. One of the purposes of this reporting regime is ostensibly to give workers notice that their employers are trying to influence their union representation choice and who is involved. If the "who" – previously human consultants -- becomes a "what" – an AI-driven surveillance program and strategy -- it makes sense to require the same level of disclosure.

Surveillance

Section 7 of the National Labor Relations Act not only affords affirmative protection for workers' organizing and collective activity, but it also gives workers the right to be free from employer surveillance and interrogation regarding concerted activities – regardless of whether they are in a union or not. Employees need protection from surveillance of their organizing or collective activities because of the coercive impact of employees being "watched" by the employer. As the sophistication of AI-driven monitoring develops, the threat of surveillance expands exponentially. As discussed above, the media is replete with stories about workers being monitored without their knowledge. It is not uncommon for workers' locations within a physical workplace to be tracked by extensive cameras whose data is reviewed by algorithm and which can report on who is talking to who – including who is talking to pro-union workers. Workers whose jobs require them to work on-line can have their emails "read" by algorithms for mention of key terms such as "union," "complaint," or other terms indicating a likelihood to engage in collective action.

In October 2022, the NLRB General Counsel Jennifer Abruzzo issued a memo announcing her intent to use her authority under the NLRA to protect workers from "intrusive or abusive electronic monitoring and automated management practices" that interfere with their rights to engage in union or concerted activity. The memo described practices such as "recording[ing] workers' conversations and track[ing] their movements using wearable devices, cameras, RFI badges, and GPS tracking devices."

Create meaningful disincentives for AI-driven surveillance

The National Labor Relations Board (NLRB) must be required to ensure that such tools are not being used to engage in unlawful surveillance and interrogation about protected concerted activities. The penalties for surveillance or other violations of the NLRA have traditionally been thin; an employer found to have violated the NLRA is required to post a notice in the workplace promising not to do it again. This fails to deter almost all employer violations because employers will reason that there is more to be gained by knowing who is organizing than the possibility of posting a notice. The law should require the NLRB to be much more creative in enforcing these rules under their current authority, such as by requiring remedial notices by email or on company websites. Penalties for employer surveillance should also be greatly enhanced.

Regulation of digital surveillance of workers at the state level may be able to accomplish the goal

of preventing anti-union surveillance without running afoul of NLRA preemption by focusing on state authority to protect worker privacy in the workplace.

Digital Communication

As discussed above in the section on AI impact monitors, many of the workers who are first experiencing the imposition of AI-driven management in the workplace are workers who are least likely to have easy access to their coworkers. Accordingly, our Clean Slate recommendation requiring companies to provide the tools to enable workers to organize online is critical for workers subject to AI in the workplace.

> **Right to a safe digital communications channel**

Specifically, we recommend ensuring that whatever technology the employer uses to communicate with workers be made available to workers for their own organizing activities. In addition, we recommend that the law require employers to establish digital meeting spaces (i.e., private forums for online communications). Employers should also be required to share information about any rights related to the imposition of AI in the workplace with workers digitally and not just physically if workers lack a common physical workplace.

Safety and Health

The Occupational Safety and Health Act purports to require employers to provide all workers with a safe and healthful workplace. In the case involving OSHA's Emergency Temporary Standard mandating vaccine or COVID-testing protections in the workplace, however, the Supreme Court potentially narrowed the scope of OSHA's authority to define what constitutes a hazard that threatens safety and health in the workplace. In the wake of that decision, it is unclear whether the Court upholds OSHA's authority to protect workers from AI-related hazards.

And, as discussed above, the hazards are real. The research is growing on the psychosocial harms caused by excessive AI-driven surveillance, AI-driven intensification of work tasks, and exposure to violent and disturbing images as part of the digital content moderation process.

> **Define the right to a "safe and healthful workplace" under the OSH Act to include the right to be free from harms caused by AI in the workplace**

Twenty-seven states have plans approved by OSHA that allows them to regulate safety and health within their own boundaries. They are required to impose protections that are at least as effective as those promulgated by the federal OSHA. They also are permitted to go beyond those standards

to be more protective. We recommend that in those 27 states, they clarify that for the purposes of their state plans, that the right to a safe and healthful workplace includes the right to be free from harm caused by AI in the workplace and that they promulgate specific standards to address those harms.

Inclusion

As with the previous Clean Slate reports, the recommendations here are designed so that they apply to all workers regardless of whether the law classifies them as employees, independent contractors, or otherwise outside of traditional labor law's protection. The recommendations aim to build structures that include everyone who works, intentionally seeking to reverse the insidious, decades-long exclusions of women and workers of color. The animating theory of these recommendations is simple: when law empowers all workers to demand equitable treatment – including safe and healthy working conditions – workers can build the kind of nation we all deserve.

The need for inclusion is particularly acute in the response to the introduction of AI in the experience of work. Workers classified – rightly or wrongly – as independent contractors or otherwise outside the protection of the NLRA, such as platform workers, are among those most frequently subjected to the datafication of their working conditions. Imagine the experience of work for rideshare drivers, who are routinely misclassified as independent contractors. From the minute they log into a company app to get their first ride, their experience is controlled, not by a human manager, but by an algorithm. In fact, many rideshare drivers complain that it is almost impossible for them to get access to a human, even to correct pay issues or to dispute deplatforming decisions.

Misclassification – that is, the unlawful practice of treating employees as independent contractors and thereby depriving them of the protection of labor and employment laws – deprives workers of even the most basic protections that may give them some leverage in navigating the algorithmic boss. For example, if rideshare drivers were considered employees, the companies for whom they work would have to keep records of their hours and wages in a manner that was accessible for the Department of Labor's representatives. By misclassifying rideshare drivers as independent contractors, the rideshare companies are able to use complicated algorithms to track drivers' time and compensation without making them understandable for anyone other than computer scientists. These algorithms are not records like other employers are required to keep. Instead, they constitute a format that is quite opaque for any driver or government official that wants to check for accuracy.

> **Adopt the far more protective ABC test for defining independent contractor status**

A new labor law that can be relevant in the AI era should not include an explicit exclusion for independent contractors. Ensuring coverage for workers who are treated as independent

contractors, however, will take more than just not excluding them. As long as coverage of the Act is still defined by the term "employee," employers will be able to argue that workers who meet the definition of an independent contractor are excluded and thereby denied the right to collective bargaining. We recommend two solutions to this problem. First, we recommend that federal or state laws adopt a broad definition of "employee" to minimize the number of workers who are misclassified as independent contractors. Specifically, we recommend that laws be amended to include the ABC test: that is, establish a presumption that all workers are employees unless the employer can rebut that presumption by proving each of the following three factors: (1) that it does not exert control over the workers; (2) that the work performed is outside the usual scope of the employer's business; and (3) that the worker is engaged in an independent trade, occupation, or business.

While there is paralysis in the effort to reform federal labor and employment laws, it is essential that any states that move forward with AI-specific reforms to labor standards are mindful of the danger of relying on old-fashioned definitions of "employee" and ensure that any new rights for workers related to the introduction of AI in the workplace adopt a broad definition of employee to extend those rights to those workers who need protections the most.

Extend coverage to independent contractors

We also recommend that the new labor standards to protect workers from the impact of intrusive AI in the workplace should expressly protect any independent contractors who: (1) do not employ any employees; (2) who make little capital investment – roughly defined as investment that is limited to the needs of the independent contractor personally (e.g., one car, one set of tools, one computer, etc.) – in their "businesses"; and (3) who share the same economic relationship with a single company. In addition, antitrust law should be amended to exclude any workers who meet this definition to ensure that they do not incur liability under that law when they act collectively in a manner that might otherwise meet the definition of an anticompetitive practice.

This kind of coverage of independent contractors should stymy the efforts of platform companies to litigate their way out of coverage by trying to manipulate their business model to evade the definition of "employee."

APPENDIX: SUMMARY OF RECOMMENDATIONS

This section will summarize the 9 recommendations contained in this report.

1. Mandate an **AI Impact Monitor** elected in every workplace where AI is being used to monitor, track, surveil, or assess workers. The goal of this would be to ensure that workers in every workplace have access to a knowledgeable person who can give accurate information about substantive AI safety issues and legal rights; help with worker reporting/whistleblowing on these issues; and become an information hub for workers, regulators, and the public.

2. **Create sectoral commissions, consisting of representatives of labor and management**, that would negotiate baseline AI safety standards for all firms in the sector. These baseline standards would be minimum standards across the sector and would be enforced through the operation of the impact monitors.

3. Mandate **access to a human being** when an algorithm makes a status-altering decision such as firing.

4. **Ban employers** from using AI to advocate against collective bargaining rights including a ban on employers from embedding messages about workers' exercise of their collective bargaining or concerted activity rights in any AI-driven interface that workers are required to use to accomplish work tasks.

5. **Require meaningful transparency** and access to information about the technologies being used to monitor, manage, and surveil workers.

6. Require the NLRB to develop meaningful penalties that will **deter employers from abusing surveillance technologies.**

7. **Require companies to provide a safe, digital communications channel.** Specifically, we recommend ensuring that whatever technology the employer uses to communicate with workers be made available to workers for their own organizing activities. In addition, we recommend that the law require employers to establish digital meeting spaces (i.e., private forums for online communications).

8. **Update OSHA definition of "safe and healthy workplace"** to include the right to be free from the harm caused by AI.

9. **Appropriately classify workers** so that gig workers can access their rights to redress grievances, organize as needed, and seek protection under current labor law and any AI-specific protections.

Acknowledgements

Endnotes

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