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Artificial Intelligence and Employee Monitoring:

Big Brother is an Algorithm Named Julie, and She's Hiring, Watching and Rating You

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Introduction

The workplace of 2023 would be unrecognizable to a visitor from 1990. Employees routinely working from home, with instant, unending electronic access to each other, their employer's documents, and a gargantuan encyclopedia of information a click away -- these would all bewilder our work life ancestors. They would be flummoxed by how we interact with applications and algorithms -- both intentionally and unknowingly -- as if they were our human colleagues down the hall. And they would probably be aghast at how we apply for jobs and have our qualifications judged by algorithms, and how employers can incessantly track, monitor and evaluate our every working moment.

This paper discusses two of the major issues for employees arising out of our current technology: artificial intelligence and employee monitoring.

I. Artificial intelligence

Artificial intelligence refers to systems that use data and computational techniques to make decisions or assist people in making them. AI tools use large amounts of data to detect patterns, and then use those patterns to predict outcomes in new situations. Pauline T. Kim and Matthew T. Bodie, Artificial Intelligence and the Challenges of Workplace Discrimination and Privacy, ABA Labor and Employment Law Journal, June 2021, at 290.

We use artificial intelligence (or artificial intelligence uses us) when we "talk" with an automated voice on a phone call (which pauses embarrassedly and says "I'm sorry… I didn't get

that…"), "chat" with a smiling robot on a website ("Hi! I'm Kaitlin. How can I help you today?") and, for millions of people, in their work lives.

As employers increasingly use AI to handle tasks currently done by human beings, the impact on global employment is likely to be close to apocalyptic, particularly because of the tremendous power of "generative" AI tools, such as ChatGPT. Generative AI is able to scan, analyze and use vast amounts of data (i.e. the entire Internet) to produce content that can rival writing and images created by humans. A 2023 Goldman Sachs study concluded that about two-thirds of current jobs are exposed to some degree of AI automation, and that generative AI could substitute for up to one-fourth of current work. Globally, AI could expose the equivalent of 300 million full-time jobs to automation. Goldman Sachs Economics Research, The Potentially Large Effects of Artificial Intelligence on Economic Growth, March 26, 2023. https://www.key4biz.it/wp-content/uploads/2023/03/Global-Economics-Analyst_-The-Potentially-Large-Effects-of-Artificial-Intelligence-on-Economic-Growth-Briggs_Kodnani.pdf.

A side effect of AI is that the work of annotating the vast amounts of data used in AI tools is being done by underpaid workers in developing countries, who are often cheated out of their pay. As the Washington Post explained, "While AI is often thought of as human-free machine learning, the technology actually relies on the labor-intensive efforts of a workforce spread across much of the Global South and often subject to exploitation." Washington Post, Behind the AI boom, an army of overseas workers in 'digital sweatshops', (August 28, 2023), https://wapo.st/3YQpK52

Employers have leapt at the chance to use AI to recruit, screen, interview and rate job candidates. When Mercer surveyed employers and employees in 2020-21, it concluded that 55% of U.S. Human Resources leaders said they use predictive analytics. 41% of employers used AI to identify job candidates, and 38% planned on doing that in the next year. More than a third were using AI in performance management, and were having employees use wearable technology "to track employee habits," with roughly another third planning on starting that in the next year. Half of U.S. companies were using AI to determine if there were pay inequities by race or gender; but, ironically, less than a quarter were using it to identify what employees were at risk of burn out, and that was down from a year before. Mercer Global Talent Trends 2020-21 at 34, 37, 38. https://www.mercer.com/content/dam/mercer/attachments/private/global-talent-trends/2021/gl-2021-gtt-global-eng-mercer.pdf.

Employers argue that in these contexts, AI saves time and reduces costs, is better than humans at predicting performance and evaluating job candidates, and, unlike humans, isn't subject to bias in decision making. Whatever the savings in time and cost, AI presents tremendous problems for job seekers and employees, and can erect discriminatory barriers.

A. AI in sourcing and hiring

As a first step in recruitment, employers use AI to find candidates who might be in the job market. How important is this? Ninety percent of recruiters look for candidates on LinkedIn, which has more than 50 million companies. Two-thirds of employers research potential candidates using social media, and a survey found that more than half had disqualified a candidate because the employer disagreed with something in a candidate's social media profile.

Surprising Social Media Recruiting Statistics, https://www.apollotechnical.com/social-media-recruiting-statistics/.

1. AI in recruiting ads on social media

LinkedIn and Facebook enable companies advertising job openings to target specific audiences, using both criteria the advertiser has established and the platform's algorithms which decide who sees which ads. Outside auditors seeking to determine whether a platform's algorithm is reliable, fair or discriminatory are hampered because "they investigate the platform's algorithms as a black-box, without access to the code or inputs of the algorithm, or access to the data or behavior of platform members or advertisers." Auditing for Discrimination in Algorithms Delivering Job Ads, International World Wide Web Conference Committee, 2021, https://ant.isi.edu/datasets/addelivery/Discrimination-Job-Ad-Delivery.pdf. The authors of that study identified several ways that a platform can skew an ad so that it potentially has a discriminatory impact:

1. An advertiser can select a platform's targeting options and an audience in a way that skews the results.

2. A platform can choose options in its ad delivery optimization algorithm to increase the ad's relevance, which skews results. For example, "if an image used in an ad receives better engagement from a certain demographic, the platform's algorithm may learn this association and preferentially show the ad with that image to the subset of the targeted audience belonging to that demographic."

3. Other factors such as the time of day or competition among advertisers may skew results. An ad may reach more men than women, because more men than women are on the site at a particular time. Id. at 2-3. Of course, advertisers have always worked hard to direct ads to a particular demographic. The many drug ads on CNN target a very different audience than ads for American Eagle on Instagram. But Title VII prohibits employers from categorizing job applicants using discriminatory criteria, and that includes job ads. It precludes employers from publishing ads that "indicate a preference, limitation, specification, or discrimination" based on a forbidden characteristic. 42 U.S.C. § 2000e-3(b). The ADEA has a similar prohibition of ads that indicate an age preference. 29 U.S.C. § 623(e).

In 2019, Facebook reached a settlement in a case where five civil rights groups alleged that its algorithms discriminated against women and older job seekers. Facebook agreed to no longer allow advertisers to target job seekers based on gender, age or zip code, and that it would no longer give advertisers detailed targeting options based on protected classes. https://www.aclu.org/legal-document/exhibit-describing-programmatic-relief-facebook-settlement.

In a statement announcing the settlement, Sheryl Sandberg said the company was "grateful" for the plaintiffs' "leadership." Using the well-worn language that we're used to hearing from people who've been caught doing something wrong, she wrote, "Today's changes mark an important step in our broader effort to prevent discrimination and promote fairness and inclusion on Facebook. But our work is far from over. We're committed to doing more, and we look forward to engaging in serious consultation and work with key civil rights groups, experts

and policymakers to help us find the right path forward." https://about.fb.com/news/2019/03/protecting-against-discrimination-in-ads/.

However, several studies after the settlement indicate that Facebook's algorithm still manages to discriminate. One by Northeastern University researchers found that the modified algorithm relies on proxy characteristics that correlate with age and gender. Algorithms that "Don't See Color": Measuring Biases in Lookalike and Special Ad Audiences, https://arxiv.org/pdf/1912.07579.pdf. Although the algorithm, called "Special Ad Audiences," doesn't consider audience members' age, gender, race or zip code, the researchers found that it created audiences almost as biased by age, gender and race. Id. at 2. As one example, the algorithm delivered an ad for jobs in AI mostly to young men, while one for supermarket jobs went to middle-aged women.

The researchers concluded, "Taken together, our results show that simply removing demographic features from the inputs of a large-scale, real-world algorithm will not always suffice to meaningfully change its outputs" about those features. They noted that they didn't believe that Facebook had breached the settlement; "Rather, the findings in this paper are a natural result of how complex algorithmic systems work in practice." Id. at 2.

Another study showed that Facebook's ad delivery algorithm can discriminate based solely on the ad's content. Discrimination through optimization: How Facebook's ad delivery can lead to skewed outcomes, https://arxiv.org/pdf/1904.02095.pdf. The researchers found that the headline, text and images in an ad which targets the same users ends up being automatically delivered to vastly different audiences broken down by race or gender. So, ads featuring body-

building can deliver mostly to men, ads for cosmetics mostly to women, ads for country music mostly to whites and ads for hip-hop mostly to Blacks. Facebook's algorithm selectively delivered ads to stereotypical audiences based solely on the ad's images, *even if the content wasn't related to the stereotypical group.* The authors concluded that it is the algorithm that classifies an ad image as relevant to a user and skews delivery to audiences - not users' interaction with the ad. Id. at 2.

Employers can prevent this, by applying draconian standards to where they advertise and the methods and criteria for ad delivery. It means going past what a platform's public relations and marketing materials claim, interrogating platforms about their algorithms, and seeking proof that their practices are fair and not affected by bias.

2. AI in evaluating, hiring and rejecting job applicants

Employers also use AI to evaluate, accept and reject job candidates based on their social media behavior. For example, the AI recruitment tools available through SignalHire search 350 million social media profiles using terms picked by recruiters. A company video explains that its algorithms analyze a candidate's social behavior to determine if the candidate would be likely to move to another job, and displays candidates' social media postings. SignalHire Pricing, Alternatives & More 2022 - Capterra, https://www.capterra.com/p/152955/SignalHire/.

Employers can go deeper, by using AI to scan candidates' social media activity for possibly troublesome signs. As one consulting firm explains, an algorithm can quickly scan social media, score a candidate on their tendencies toward certain behaviors, and analyze "the tendency for the post to promote violence, racism, sexism, and bullying, just to name a few."

Icon Consultants, Social Media Screening - The Next Stage in Recruitment, https://www.iconconsultants.com/blog/social-media-screening-the-next-stage-in-recruitment/. One AI developer, Humantic, says its AI tool creates a candidate's personality profile without requiring them to take a test. The tool ranks a candidate on "five big personality traits: Openness, Neuroticism, Agreeableness, Extroversion and Conscientiousness," as well as dominance, influence, and steadiness, and potential work behaviors like teamwork. It also gives personalized advice about how to deal with a particular candidate, such as "Be respectful but crisp. Come to the point quickly," but "avoid being a story teller. Don't talk too much about process and rules." https://humantic.ai/talent.

Of course, a critical question for employers and applicants is whether these tools measure what they claim to. Are candidates' social media postings an accurate indicator of a long list of highly specific personality traits? And are those even relevant to the requirements of a particular job? And even if an employer's use of an algorithm isn't intentionally discriminatory, it may be liable in a disparate impact case, in which an apparently neutral criterion has a discriminatory impact on members of a protected class. 42 U.S.C. § 2000e-2(k) (setting out burden of proof in disparate impact cases under Title VII).

In evaluating candidates, an AI tool can create bias when the data it uses reflects gender or race disparities. For several years an Amazon hiring initiative used a tool that rated the resumes of applicants for tech jobs on a scale that was skewed to favor men. This was because the criteria for the ratings were based on the resumes submitted by applicants in the previous ten years, and most of those applicants were male. The tool gave lower ratings to resumes

containing the word "women's" (so "women's chess club" hurt the applicant's chances) or contained the names of women's colleges. Amazon says it scrapped the project in 2017. Amazon Scraps Secret AI Recruiting Tool That Showed Bias Against Women, https://www.reuters.com/article/us-amazon-com-jobs-automation-insight-idUSKCN1MK08G.

Companies that sell AI evaluation tools say that their algorithms can fairly and reliably evaluate applicants. For example, Cappfinity says that its tools test eight strengths that "align with success in a job role," "assess business-critical soft skills," "measure the personality traits that deliver performance at work," and "discover meaningful work experience beyond a resume." https://www.cappfinity.com/tempo/. Pymetrics says that its platform "calculates [employees'] fit for all custom job profiles across your company," which "improves efficiency, diversity and employee success." https://www.pymetrics.ai/solutions#talent-acquisition. Pymetrics uses twelve games to "fairly and accurately measure cognitive and emotional attributes in only 25 minutes." It produces scores on attention, effort, fairness, decision making, emotion, focus, generosity, learning and risk tolerance. Pymetrics says that it only releases tools that don't create a disparate impact, https://www.pymetrics.ai/science, and a study seems to confirm that. pymetrics_audit_FAccT.pdf (evijit.io)

Job seekers who make it past an AI screening can find that their job interview will be conducted by an algorithm. Applicants respond to questions which appear in text on the screen, or are posed by a digital voice. Beyond the impersonality and discomfort of having a one-sided conversation with an algorithm that can't have a true conversation, there are grave questions about whether some AI interviews tell an employer anything accurate about a candidate.

In one study, the MIT Technology Review tested AI interview platforms from two companies, MyInterview and Curious Thing, and found gross inaccuracies in the responses they reported to employers, their predictions and job matching.

In two interviews on Curious Thing, an applicant (playing the role for the study) answered identical automated questions. In the first, she answered in English, and the algorithm rated her English competency as 8.5 points out of 9. In the second, she answered the questions by reading out a Wikipedia entry in German. The tool also thought her English was fine, giving her a 6 -- and scored her identically again on another try where she again responded in Wikipedia German. When the candidate repeated the experiment on MyInterview, again answering questions in German, the algorithm rated her as a 73% match for the job, and assessed her on a broad range of personality traits. MyInterview gives employers an interview transcript; the transcript interpreted the applicant's German as if were English, so it was entirely gibberish:

> So humidity is desk a beat-up. Sociology, does it iron? Mined material nematode adapt. Secure location, mesons the first half gamma their Fortunes in for IMD and fact long on for pass along to Eurasia and Z this particular location mesons.

https://www.technologyreview.com/2021/07/07/1027916/we-tested-ai-interview-tools/#:~:text=AI%2Dpowered%20interview%20software%20claims,about%20their%20accuracy%20and%20reliability.

Another company that markets an AI tool to conduct and evaluate interviews -- millions of them -- is HireVue. It uses its database to create a list of competencies for a particular position and automated questions for the interview; employers can add their own. The questions come in the form of text on a screen. For example, a question testing for adaptability reads:

> Please give an example of when you had to change direction on a project or work assignment midway through implementation. What happened as a result of the change? Please describe the situation, your actions, and the outcome.

HireVue's algorithm then evaluates how the applicant did in the interview and scores them on the job competencies. It also rates candidates on "soft" competencies like communication skills, conscientiousness, problem-solving skills, team orientation, and initiative. https://www.hirevue.com/blog/candidates/how-to-prepare-for-your-hirevue-assessment.

The algorithm tells an employer how an applicant scores on a particular job competency using this scale:

> Unlikely to be successful in situations that require this competency.
>
> Is likely to demonstrate the competency or ability in simple or a limited number of situations.
>
> Consistently demonstrates competency or ability, but may require assistance in more difficult situations.
>
> Is likely to be effective in moderate to complex situations that require this competency or ability.
>
> Is likely to be very effective and excel in complex situations that require this competency or ability.

See the company's White Paper at Science-Backed Hiring: Enhance Quality & Fairness with Structured Interviews Whitepaper, https://www.hirevue.com/resources/whitepaper/guide-science-backed-hiring-enhance-quality-and-fairness-with-structured-interviews.

In 2019, the Electronic Privacy Information Center filed a complaint at the Federal Trade Commission, alleging that HireVue's processes constitute an unfair or deceptive trade practice.

The complaint said that HireVue uses facial recognition technology to evaluate candidates concerning social intelligence, personality traits, communications skills and job aptitude, and that the technology does not properly evaluate interviews based on race, improperly interpreting the expressions of Black faces. https://epic.org/wp-content/uploads/privacy/ftc/hirevue/EPIC_FTC_HireVue_Complaint.pdf. One 2021 study concluded that AI tools could not properly read people's facial expressions in photographs, because the meaning of those expressions tremendously varies based on an individual's background and culture. https://www.nature.com/articles/s41467-021-25352-6#Sec2.

HireVue claims that an independent audit affirmed the reliability and validity of the interview process. Download IO Psychology Audit Description by Landers Workforce Science LLC. https://webapi.hirevue.com/wp-content/uploads/2021/04/hirevue-industry-organizational-psychology-audit-report-2021.pdf?_ga=2.158371386.1827309848.1693334614-850478031.1693334614. In January 2021, it announced it would no longer use facial analysis to evaluate job candidates. https://epic.org/hirevue-facing-ftc-complaint-from-epic-halts-use-of-facial-recognition/

3. Legislative and regulatory responses to the use of AI in employment decisions

Other than what AI vendors tell the public about the validity of their tools, what legislation can a job seeker rely on to ensure that an AI tool measures what it's supposed to measure? .

A New York City law regulating AI in hiring went into effect in January, 2023. It requires that employers notify applicants *and employees* who "reside in" New York City that an

"Automated Employment Decision Tool" (AEDT) will be used in the employer's decision and what job qualifications and characteristics the tool will use to assess the employee or candidate, who can request an alternative means of doing the evaluation. It provides that "in the city" it is unlawful for an employer or employment agency to use an AEDT tool to screen a candidate or employee for an employment decision (hiring or promotion) unless "1. Such tool has been the subject of a bias audit conducted no more than one year prior to the use of such tool…" The results of the audit have to be publicly available on the employer's website. While the law doesn't include a private right of action, it provides for civil penalties for each day an employer violates it. Local Law 144, https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=4344524&GUID=B051915D-A9AC-451E-81F8-6596032FA3F9. [1]

Before the bill passed, a large number of advocacy groups, including the National Employment Law Project, the New York Civil Liberties Union and the NAACP Legal Defense and Educational Fund, wrote the City Council criticizing it as vague and ineffective. https://static1.squarespace.com/static/5c1bfc7eee175995a4ceb638/t/5faeb73303633f0646ae5533/1605285684675/Intro.+1894+Sign-On+Letter+%281%29.pdf.

The City Department of Consumer Affairs issued final rules to implement Local Law 144 on April 5, 2023, after proposing initial rules in September and December, 2022. Enforcement of the law began on July 5, 2023. The rules have detailed definitions of terms, detail what employers must do to conduct a bias audit, and describe the notice employers have to provide

[1] Former Mayor Bill de Blasio neither signed nor vetoed the bill, so it became law.

employees and job candidates. Rules of the City of New York, Title 6, Chapter 7, Subchapter T, https://rules.cityofnewyork.us/wp-content/uploads/2023/04/DCWP-NOA-for-Use-of-Automated-Employment-Decisionmaking-Tools-2.pdf.

Before the rules were finalized, the Department of Consumer Affairs issued an FAQ, which clarifies the law's provision that it applies to employers and employment agencies that use an AEDT "in the city." This means: that either the job location is an office in NYC, at least part time, or the job is fully remote but the location associated with it is an office in NYC. For employment agencies, it means that the location of the employment agency using the AEDT is in NYC or, if the location of the employment agency is outside NYC, one of the two previous criteria are met. https://www.nyc.gov/assets/dca/downloads/pdf/about/DCWP-AEDT-FAQ.pdf. The FAQ notes that the law doesn't apply just to hiring or promotion decisions, but also when employers or employment agencies use an AEDT to substantially help them assess or screen candidates at any point in the hiring or promotion process. However, it doesn't apply when employers scan a resume bank, conduct outreach to potential candidates, or invite applications.

Pending in the New York State Senate is a bill which also aims to restrict employers' use of AI in employment decision making and employee monitoring. It was introduced on August 4, 2023, and referred to the Senate Rules Committee. It is broader than the New York City provision. https://legiscan.com/NY/bill/S07623/2023.

On employment decision making, like the City provision, it would bar employers from using an AEDT unless it had been subject to a bias audit no earlier than a year before the use. But it defines "employment decision" more broadly, to include "any decision made by the

employer that affects wages, benefits, other compensation, hours, work schedule, performance evaluation, hiring, discipline, promotion, termination, job content, assignment of work, access to work opportunities, productivity requirements, workplace health and safety, and other terms or conditions of employment." It covers employees employed by, and independent contractors "providing service to, or through, a business operating in the state and residing in the state."

Employers and employment agencies must notify employees and candidates "who reside in New York" at least ten days before an AEDT is used in an evaluation. The notice must include a description of the job qualifications and characteristics to be evaluated. The employee or candidate has the right to ask that the employer use a different selection process. The notice must allow the candidate to request an alternative selection process. Employers may not require employees or candidates to consent to the use of AEDTs, or discipline or retaliate against them for requesting an alternative method. The proposed bill includes penalties for violators, but no private right of action.

In 2019, Illinois enacted the Artificial Intelligence Video Interview Act. It applies to employers that ask applicants for Illinois-based jobs to submit to a recorded video interview, which will use an AI analysis for the interview. The employer must inform the applicant that AI may be used to analyze the interview and evaluate the applicant; tell the applicant how the AI works and what general types of characteristics it uses to evaluate applicants; and obtain the applicant's consent in advance. If the applicant requests that the video be deleted, the employer has to do that within thirty days. https://www.ilga.gov/legislation/publicacts/101/PDF/101-0260.pdf. The Act was amended in 2020 to require that employers who use only an AI

interview to determine if a candidate will be interviewed in person must collect and disclose to the State Department of Commerce and Economic Opportunity data on the race and ethnicity of candidates who are and aren't given a second interview, and concerning the candidates who are hired. https://custom.statenet.com/public/resources.cgi?id=ID:bill:IL2021000H53&ciq=ncsl&client_md=cf812e17e7ae023eba694938c9628eea&mode=current_text

In 2020, Maryland also enacted a law requiring consent by a job applicant. It prohibits the use of a "facial recognition service" (a technology that analyzes facial features) for the purpose of creating a "facial template" (a "machine-interpretable pattern of facial features extracted by facial recognition") in an employment interview, unless the applicant gives written consent. https://mgaleg.maryland.gov/2020RS/Chapters_noln/CH_446_hb1202t.pdf.

In 2020, California enacted the California Privacy Rights Act. Cal. Civil Code § 1798.100. https://iapp.org/resources/article/the-california-privacy-rights-act-of-2020/. It establishes the California Privacy Protection Agency, and directs it to issue regulations "governing access and opt-out rights with respect to businesses' use of automated decision-making technology, including profiling." Those regulations must require "businesses' response to access requests to include meaningful information about the logic involved in those decision-making processes, as well as a description of the likely outcome of the process with respect to the consumer." Cal. Civ. Code § 1798.185(a)(16). The law applies to employers as of January 1, 2023, and includes detailed requirements for handling employees' data. https://www.littler.com/publication-press/publication/california-privacy-rights-act-employers-rights-know-delete-and-

correct#:~:text=When%20the%20CPRA%20goes%20into,third%2Dparty%20recipients%20of%20personal.

The National Conference of State Legislatures tracks AI-related legislative efforts, whether or not they're successful. Approaches to Regulating Artificial Intelligence: A Primer (ncsl.org) (August 10, 2023). This year, 25 states, Puerto Rico and the District of Columbia introduced artificial intelligence bills, and 14 states and Puerto Rico passed resolutions or enacted AI-related legislation.

In October, 2021 the EEOC announced an initiative "to ensure that…[AI] and other emerging tools used in hiring and other employment decisions comply with federal civil rights laws that the agency enforces." The EEOC's plan was to meet with stakeholders, compile "information about the adoption, design, and impact of hiring and other employment-related technologies," "identify promising practices," and provide technical assistance on AI issues in employment decisions. https://www.eeoc.gov/newsroom/eeoc-launches-initiative-artificial-intelligence-and-algorithmic-fairness.

Since then, the EEOC has issued technical assistance guidances on AI in employment decision making concerning both Title VII and the ADA. Select Issues: Assessing Adverse Impact in Software, Algorithms, and Artificial Intelligence Used in Employment Selection Procedures Under Title VII of the Civil Rights Act of 1964 | U.S. Equal Employment Opportunity Commission (eeoc.gov); The Americans with Disabilities Act and the Use of Software, Algorithms, and Artificial Intelligence to Assess Job Applicants and Employees | U.S. Equal Employment Opportunity Commission (eeoc.gov).

In 2019, Congressional Democrats introduced the Algorithmic Accountability Act of 2019. It required certain large entities regulated by the Federal Trade Commission, and which use AI in making decisions affecting "consumers" (defined as any individual), to audit their systems for "inaccurate, unfair, biased, or discriminatory decisions impacting consumers." It never made it out of the House committee that considered it. https://www.congress.gov/bill/116th-congress/house-bill/2231/text.

Not governing U.S. employers, but certainly aspirational, are two sets of standards developed by the Organisation for Economic Co-operation and Development (OECD) and the Leadership Council for Civil Rights.

The OECD has 38 member countries, including the U.S., Canada, many countries in Europe, Japan, South Korea, Chile, Colombia, and Costa Rica. https://www.oecd.org/about/members-and-partners/. The OECD's Recommendation of the Council on Artificial Intelligence, adopted in 2019, includes a statement that entities that use AI should provide information that 1. enables people "affected by an AI system to understand the outcome," and 2. enables people "adversely affected by an AI system to challenge its outcome based on plain and easy-to-understand information on the factors, and the logic that served as the basis for the prediction, recommendation or decision." https://www.oecd.org/science/forty-two-countries-adopt-new-oecd-principles-on-artificial-intelligence.htm (includes link to download the full text).

In July, 2020, the Lawyers Committee for Civil Rights issued its Civil Rights Principles for Hiring Assessment Technologies. They provide that:

> Entities that use AI should ensure that they don't perpetuate discriminatory hiring patterns. Simply removing demographic data from AI model building won't accomplish this.
>
> Entities should ensure that their AI tools measure traits and skills that are important to job performance.
>
> Applicants should be given notice of the use of AI, and an explanation of the findings. AI tools should be thoroughly and regularly audited.

http://civilrightsdocs.info/pdf/policy/letters/2020/Hiring_Principles_FINAL_7.29.20.pdf.

II. Employee monitoring

A. What employers are watching

Artificial intelligence has given employers extraordinary power to track employees' work, performance, speed, movements and keystrokes. Employers certainly have a legitimate interest in making sure that employees' electronic communications at work are job-related, that employees don't improperly use or disclose confidential, proprietary or trade secret information, and that employees' business communications are lawful, proper and appropriate. But much of the surveillance is demeaning to employees. It can leave them feeling that they're under constant suspicion, and that they're racing as fast as they can to keep up with their new demanding manager, an algorithm.

One company selling keystroke monitoring software is Teramind. Teramind captures every keystroke an employee enters, whether in documents, emails, browsers, instant messages, applications and programs. Employers can track all apps used and websites visited, and classify

them as either productive or unproductive. https://www.teramind.co/features/keystroke-recorder-logger.

Teramind claims that "Keylogging is an invaluable way for employers to gain insight in to their employees' daily activity, attitude, professionalism and productivity." Id. It can track individual employees' time worked, idle time, and the costs and time for each activity, and then rank employees by productivity. It can note which activities (including website visits and social media interactions) are productive or unproductive, and monitor for potential rule violations. https://democompany.teramind.co/#/tma/behavior_alerts.

Another company, Hubstaff, uses AI to capture screenshots of an employee's work and Internet use, and the employee's "activity rates," "idle time" and location. (It doesn't track individual keystrokes.) It calculates an employee's activity rate this way:

> Hubstaff detects input from your keyboard and mouse to measure your activity over ten-minute periods (600 seconds). For example, if you typed on your keyboard and moved your mouse for 300 total seconds while the timer was running, that would equal an activity rate of 50%.

Under Hubstaff's system, an employee who doesn't type or use their mouse because they are reading job related material, thinking, or having a work discussion would have a lower activity rate. Hubstaff's FAQs caution employers not to rush to conclude that an employee who's not touching their keyboard or mouse is a shirker. It notes that the situation of

> a writer working on an extensive article. A low activity rate doesn't immediately imply that they're inefficient. Heavy research and web browsing typically precede writing, so be sure to review the websites they visited before making a conclusion.

https://hubstaff.com/how-tracking-works.

Perhaps no company has perfected surveillance to monitor every aspect of employees' work days more than Amazon, which uses handheld scanners, workstations, cameras and software at its fulfillment centers to track every second of an employee's activities and measure their productivity. Amazon's algorithm monitors how many orders a worker packs, measures "time off task" (even to go to the bathroom), and compares the worker's productivity with Amazon's quotas.

Workers report tremendous pressure to keep up. The stress also comes from the robots that scurry through the warehouse delivering products to workers for packing. Creating more pressure, Amazon uses video games to push individual workers, teams or floors to compete with each other to handle the most products in the shortest time.

Amazon workers' breathless race to meet productivity requirements correlates with an unusually high rate of serious employee injuries. The Washington Department of Labor found that Amazon's surveillance tools were directly linked to an increase. https://www.washingtonpost.com/technology/2021/12/02/amazon-workplace-monitoring-unions/; https://www.theverge.com/2019/4/25/18516004/amazon-warehouse-fulfillment-centers-productivity-firing-terminations. A Washington Post analysis of OSHA statistics in 2022 concluded that Amazon warehouse workers suffered serious injuries at almost twice the rate of warehouse workers in other companies. https://www.washingtonpost.com/technology/2021/06/01/amazon-osha-injury-rate/?itid=lk_inline_manual_62. [2]

[2] In Alec MacGillis' 2021 book *Fulfillment - Winning and Losing in One-Click America*, he details what it's like for Amazon employees to labor under these conditions. https://us.macmillan.com/books/9780374159276/fulfillment.

B. Legislation limiting how employers can monitor

The federal Electronic Communications Privacy Act of 1986, enacted years before most of this technology was available, has some mild protections for employees, and gives a lot of latitude to employers. Although it bars employers from intercepting employees' oral, electronic and wire communications, it contains a broad exception for monitoring done for legitimate business reasons, and for monitoring done with consent. A detailed explanation of the ECPA and the other federal statutes it affects is in Eric Bosset and Hannah Lepow's Key Issues in Electronic Communications Privacy Act (ECPA) Litigation, Practical Law (2020). https://www.cov.com/-/media/files/corporate/publications/2020/06/key-issues-in-electronic-communications-privacy-act-ecpa-litigation.pdf.

In November, 2021 New York enacted new protections for employees whose employers want to monitor their electronic activity. The statute -- which covers every private sector employer with a place of business in New York -- requires prior written notice to employees when they're hired. But since it also requires employers to prominently post the notice in the workplace so all employees subject to monitoring can view it, as a practical matter, it also protects current employees. New York Civil Rights Law 52-c. https://www.nysenate.gov/legislation/laws/CVR/52-C*2. As of this writing, there are no reported cases construing the statute. (There is an entirely unrelated duplicate Sec. 52-c in the Civil Rights Law). Enforcement is by the Attorney General, with violators subject to civil penalties.

In August, 2023 additional legislation was introduced in the New York State Senate to restrict employers' use of electronic surveillance of employees. The provisions are part of the proposed bill to further limit the use of AI in employment decisions, discussed in Section I. S07623, https://legiscan.com/NY/bill/S07623/2023.

The bill would prohibit employers and employment agencies from using an electronic monitoring tool ("EMT") to surveil employees residing in New York, unless the tool is primarily intended to be used for certain permitted purposes. The EMT has to be "strictly necessary" and "the least invasive means to the employee that could reasonably be used" for the purpose. The monitoring must be limited to the smallest number of employees and collect the least amount of data necessary. Employers must provide clear and conspicuous notice of their intention to use EMTs. They can't transfer or disclose the data, and they have to destroy it when the purpose has been fulfilled or when the employee's employment ends.

Connecticut requires employee consent for monitoring. Conn. Gen. Stat. 31-48-d https://law.justia.com/codes/connecticut/2012/title-31/chapter-557/section-31-48d/;

Delaware also requires consent, in a similar statute. Del. Lab. Code 19-7-705 https://codes.findlaw.com/de/title-19-labor/de-code-sect-19-705.html.

Hawaii: Hawaii generally prohibits employers from requiring employees to download location tracking apps on their personal devices, unless the employee consents, and prohibits retaliation for related protected activity. https://www.capitol.hawaii.gov/session2021/bills/HB1253_CD1_.pdf.

Where do we go from here?

AI and employee surveillance give employers an even greater hold on the balance of power in the workplace than they've always had. As these tools proliferate, legislatures and courts need to decide some critical questions: While employers need to recruit, evaluate and hire employees, how quickly and efficiently do they truly need to do that? Do AI-led interviews and applicant ratings eliminate human bias, or substitute the bias in an AI tool? If AI cannot truly measure job competencies and personality traits, shouldn't employers stop using it? Do employers need to micro-monitor every step, keystroke and minute of their employees' work day? Are efficiency, confidentiality and profits worth the tension, resentment, emotional stress and workplace injuries that employees get from constant surveillance and a rush to meet AI-created performance goals? What kinds of workplace cultures do we want to encourage?