

Matthew Scherer: The Promise and the Peril of AI in the Workplace

Testimony before the Assembly Standing Committee on Labor and Assembly Standing Committee on Science and Technology

Chair Joyner, Chair Otis, and Committee members—good morning. My name is Matt Scherer, and I am Senior Policy Counsel for Workers’ Rights and Technology at the Center for Democracy & Technology. CDT is a nonprofit, nonpartisan organization that advocates for stronger civil rights protections in the digital age. CDT’s Workers’ Rights project examines, among other workplace technologies, automated employment decision tools, or AEDTs; as well as electronic surveillance and automated management systems, or “ESAM.”

History shows that while technology has the potential to make work and workplaces safer, fairer, and more accessible, not all new technologies live up to their hype, and in certain cases they have even caused great harm. The stakes are especially high with automated decision and management systems, which already impact the careers and livelihoods of untold numbers of workers. While these tools can improve productivity and efficiency, they also present risks for workers’ health, safety, privacy, dignity, and legal rights. Strong regulation providing bright-line protections, meaningful transparency, and true accountability is needed to protect workers from these risks.

I want to emphasize that the approach taken by New York City’s LL 144, which purported to regulate AEDTs, is wholly inadequate to the scale and depth of the risks posed by automated decision and management tools. That law creates no clear protections for workers, does not require companies to provide meaningful disclosures to candidates nor to ensure that their tools comply with most anti-discrimination laws—and it does not apply to automated management systems at all. I urge the Committee members to consider instead a model along the lines of S. 7623, a comprehensive bill introduced on the other side of the Capitol by Sen. Brad Hoylman-Sigal.

Automated Employment Decision Tools (AEDTs)

On the topic of automated employment decision tools, or AEDTs—as the Committees are aware, more and more employers are using AEDTs to make critical employment decisions. These technologies are frequently referred to as “automated *hiring* technologies.” But, as Professor Ifeoma Ajunwa has noted, this is something of a misnomer. AEDTs are rarely used to identify the single best candidate for a position and make a *hiring* decision. Instead, they are most often used to evaluate large numbers of candidates and decide which of them are *not* worthy of further consideration.

The fact that these tools are used to screen *out* candidates *en masse* is deeply problematic because today’s automated tools rarely, if ever, make an effort to directly measure a worker’s actual ability to perform the essential duties and tasks of a job. Some vendors claim to assess workers based on “personality” or other subjective characteristics untethered from actual

job duties. Others use correlation-driven machine-learning methods that can lead the tool to focus on irrelevant and potentially discriminatory characteristics.

Such tools pose a risk of discrimination against already-disadvantaged groups of workers, who are often underrepresented in the data used to train AEDTs and whose relevant skills and abilities may not be as obvious to an automated system. And they do so on the basis of characteristics untethered from the specific duties or essential functions of the jobs for which candidates are supposed to be evaluated under the law. That is bad for both workers *and for businesses*, since employers may miss out on unique candidates who would make great hires. That is precisely the sort of arbitrary and unfair barrier to employment opportunities that civil rights laws are designed to eliminate.

Electronic Surveillance and Automated Management (ESAM) Systems

Turning to electronic surveillance and automated management, or “ESAM” systems. Employers today are using a diverse and expanding array of surveillance technologies to track and control workers. These include remote monitoring, location tracking, keystroke and mouse-click loggers, sophisticated camera and sensor technologies, and scientifically dubious systems that purport to measure emotional states and vocal characteristics. While surveillance of worker activity has a deep and long history in the United States, the advent of new technologies makes it easier for employers to not just monitor but effectively control workers’ behavior without expending much time or effort. For that reason, many advocates have taken to referring to ESAM systems as *bossware*.

ESAM practices are increasingly prevalent in white-collar jobs, particularly as a result of the pandemic-induced work-from-home revolution, but it is low-wage and hourly workers who are most frequently subjected to monitoring. These workers are also often from marginalized populations historically facing higher levels of scrutiny and surveillance. Consequently, ESAM systems, like AEDTs, threaten to entrench existing inequities that already afflict our workplaces and labor markets.

In addition to the threat of discrimination and unprecedented invasions of workers’ privacy and autonomy, ESAM can be used in ways that seriously threaten workers’ health and safety. Many companies use bossware to enforce a dangerously fast pace of work and crack down on breaks and other forms of employee downtime. These uses of ESAM have a number of negative effects on workers’ health and safety, including by:

- Discouraging and even penalizing lawful, health-enhancing employee conduct, including taking breaks to rest when needed to avoid fatigue or to use toilet facilities;
- Enforcing a faster work pace and reducing downtime, which increases the risk of physical injuries, particularly those stemming from repetitive motion;
- Increasing the risk of psychological harm and mental health problems for workers, particularly due to the effects of job strain, which occurs when workers face high job demands but have little control over their work. Extensive research shows that job strain

can lead to anxiety, depression, cardiovascular disease, ulcers, and a number of other negative health effects associated with stress.¹

The Need for Strong Regulation

The pervasiveness of ESAM and the rising use of AEDTs is a result of cheaper and omnipresent technology, declining levels of worker power, and, critically, weak workplace regulation. This is exacerbated by companies' near-complete lack of transparency regarding their use of these tools; workers frequently do not even know when they are being evaluated, monitored, or managed by an automated system, and almost never have details on what data employers collect about them or how an employer uses that information to make decisions. While existing laws provide some (mostly indirect) protection, the legal landscape desperately needs clarification and refinement to address these concerns.

In the context of AEDTs, this means that the Assembly should pass legislation in line with the *Civil Rights Standards for 21st Century Employment Selection Procedures*, which were adopted last year by a broad coalition of civil and workers' rights groups including CDT. As the *Standards* state, effective governance of employment decision tools means:

- Requiring that all selection tools be clearly linked to essential job functions;
- Mandating pre-deployment and ongoing audits to ensure tools are non-discriminatory and assess job-related skills and traits;
- Ensuring that employers select the least discriminatory assessment method available; and
- Prohibiting certain tools that pose a particularly high risk of discrimination or lack scientific validity, such as facial analysis and personality testing.

It also means creating transparency and accountability by:

- Adopting multiple layers of disclosure requirements, ensuring that candidates and regulators alike have access to relevant information regarding decision tools;
- Ensuring candidates can communicate their concerns and seek redress; and
- Mandating clear procedures for disabled candidates to access accommodation.

More information about the *Standards* can be found at cdt.org/civilrightsstandards.

On ESAM tools, the Assembly should pass legislation that ensures employers only deploy ESAM tools if certain conditions are met, namely:

- 1) They have a legitimate and important purpose for doing so, such as:

¹ See, e.g., Schnall, Peter L., Paul A. Landsbergis, and Dean Baker. "Job strain and cardiovascular disease." *Annual review of public health* 15.1 (1994): 381-411; Madsen, Ida EH, et al. "Job strain as a risk factor for clinical depression: systematic review and meta-analysis with additional individual participant data." *Psychological medicine* 47.8 (2017): 1342-1356; Babu, Giridhara R., et al. "Republished: is hypertension associated with job strain? A meta-analysis of observational studies." *Postgraduate medical journal* 90.1065 (2014): 402-409.

- a) Enabling workers to perform the essential functions of their jobs;
 - b) Ensuring the quality of the company's goods and services; or
 - c) Complying with applicable laws.
- 2) The use of the technology is narrowly tailored toward achieving that legitimate and important purpose; and
 - 3) The benefits of using the technology outweigh the risks they pose to workers.

Legislation should also prohibit the use of ESAM systems that harm workers' health or safety, or that violate their legal rights, including the right to organize and engage in union activity.

I am particularly encouraged by the introduction of S. 7623 on the other side of the Capitol. This bill, which is sponsored by Senator Brad Hoylman-Sigal of Manhattan, includes the strong disclosure and impact assessment requirements that are needed for AEDTs and ESAM tools, as well as bright-line protections against harmful uses of these technologies. I urge the Committee members to consider introducing an Assembly counterpart to the bill.

And more generally, I urge the Committee to use its platform and authority to ensure that workers, not machines, remain at the center of the future labor market. The rights of workers, particularly vulnerable and marginalized workers, must not be trampled or glossed over for the sake of convenience or efficiency. Thank you.