

## **Matthew Scherer: Washingtonians Deserve Better Than HB 1951**

### Testimony for the Washington House of Representatives Committee on Consumer Protection & Business

January 19, 2024

Chair Walen, Ranking Member Robertson, and Committee Members—thank you for considering my testimony. I am Matt Scherer, and I lead the Workers’ Rights project at the Center for Democracy & Technology. CDT is a nonprofit, nonpartisan organization fighting to advance civil rights and civil liberties in the digital age.

I have been tracking automated decision system (ADS) bills across the country. Unfortunately, HB 1951 is one of the weakest. I will focus on two reasons, in addition to those noted by my co-panelists:

- It includes no provisions giving workers or consumers notice or explanation regarding ADS-driven decisions
- Its requirement that an ADS be "specifically developed...or specifically modified" to be a "controlling factor" in a covered decision will allow companies to easily avoid the act’s requirements

This bill would do more harm than good by entrenching the extreme information disadvantage that workers and consumers face in such decisions and by signaling to the rest of the country that even a state with a proud history of protecting civil rights is unable to pass legislation that meaningfully protects Washingtonians from AI-driven discrimination.

#### **NO NOTICE OR EXPLANATION REQUIREMENTS**

HB 1951 provides workers and consumers with absolutely no right to notice, disclosure, or explanation when companies use AI to make crucial decisions about their lives, either before or after an ADS-driven decision. This is a fatal flaw. People frequently don’t even know when they are being evaluated by AI, much less how they will be evaluated.

Without strong notice provisions, citizens will be unable to exercise their rights under existing laws.

The bill includes fig leaves that give the appearance of transparency, but those provisions prove meaningless under even modest examination. The bill would require developers to publish statements about the "types" of ADSs they sell, but no information that would help workers or consumers know whether a particular company is using that

developer's ADSs, much less whether and how a company might use an ADS to assess them.

HB 1951 also allows the Attorney General to request impact assessment results, but the bill exempts those results from disclosure under public records laws. This would do nothing except ensure that workers remain in the dark about ADS used to make decisions about them. Moreover, without notice and disclosure, how will the AG even know which companies to request impact assessments from? This shows that without transparency, even the bill's current provisions won't help workers or consumers. HB 1951's definition of "ethical AI" mentions "prioritizing transparency," but this is toothless without actual notice requirements, which the bill simply does not include.

Washingtonians need true transparency. This means, at a bare minimum, disclosure of each ADS a company uses on them, what types of decisions an ADS makes, what personal data and attributes an ADS uses, how it uses that information to make decisions, and explanations of adverse decisions. Far from providing solid notice to workers and consumers, this bill provides them with none whatsoever.

#### **"CONTROLLING FACTOR" REQUIREMENT UNACCEPTABLY NARROWS BILL'S SCOPE**

The requirement that AI be designed to be a "controlling factor" creates a loophole that will undercut existing civil rights protections and allow companies to easily avoid even those protections HB 1951 would provide. In employment, for example, a decision is unlawful if race, sex, disability, or any other protected status is a motivating factor in an adverse decision, even if other factors were also involved. Adopting legislation with a narrower "controlling factor" approach would create inconsistencies and confusion and undermine the effectiveness of existing antidiscrimination laws.

Moreover, research (which I am happy to provide) indicates that people frequently defer to ADS recommendations, even if they have no information on the system's reliability or accuracy. It thus is essential that ADS legislation covers all assessments that influence consequential decisions. Otherwise, companies could evade the law simply by casting ADS outputs as "recommendations" that human decision-makers either rubber-stamp or hesitate to contradict.

The definition thus creates a loophole that could swallow the law; a company need only show that a tool is not designed to make final decisions, even if that is precisely how the tool is used in reality. And due to the bill's lack of transparency requirements, citizens would have no way of knowing whether an AI was a "controlling factor" anyway, leaving them unable to demonstrate that an ADS is in-scope.

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It is possible to do AI regulation well. To that end, I urge the committee members to engage with civil and workers' rights groups and look to good bills pending in other states, such as New York's S7623. But this bill is not the solution. For these reasons, I urge this committee to vote no on HB 1951.