

February 26, 2024

California Privacy Protection Agency  
2101 Arena Boulevard  
Sacramento, CA 95834

Dear Board Members,

The signed organizations and individuals write to provide feedback on the California Privacy Protection Agency's current rulemaking for the California Consumer Privacy Act (CCPA), which will detail a set of important worker rights and employer responsibilities for the use of data-driven technologies in the workplace. We commend Executive Director Soltani, Agency staff, and members of the Board for their commitment and dedication to giving guidance to California businesses, consumers, and now workers on the most important and consequential data privacy policy in the U.S.

For union and non-union workers alike, the emergence of AI and other digital technologies represents one of the most important issues that will shape the future of work in California for decades to come, potentially affecting workers' privacy, race and gender equity, wages and working conditions, job security, health and safety, right to organize, and autonomy and dignity.<sup>1</sup>

We believe that employers can use data-driven technologies in the workplace in ways that benefit both workers and their businesses; the goal is not to block innovation. In fact, our organizations can offer many examples where technology has helped make jobs safer, opened up new skills and careers, and improved the quality of products and services. But it will take robust guardrails, of the kind that the CCPA begins to establish, to ensure that workers are not harmed by a rapidly evolving set of often unproven and untested technologies, many of which employers and even engineers themselves do not fully understand.

By covering worker data in the CCPA and in the promulgation of regulations, California has a historic opportunity to lead the U.S. in establishing workers as key stakeholders in decisions about how best to govern artificial intelligence and related technological innovations.

In this letter, we highlight three substantive priorities to help inform the work of the Agency in its rulemaking going forward. Our focus is on topics covered by the draft Automated Decisionmaking Technology Regulations and the Risk Assessment Regulations. However, this letter does not comment on specific language in these drafts, including the versions most recently released; instead, our focus is on lifting up policy principles to ensure that workers are fully protected. In the below, we use the term

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<sup>1</sup> For overviews, see Ifeoma Ajunwa, *The Quantified Worker*, Cambridge University Press (2023); Annette Bernhardt, Lisa Kresge, and Reem Suleiman, "Data and Algorithms at Work: The Case for Worker Technology Rights," UC Berkeley Labor Center (2021); Matt Scherer and Lydia X. Z. Brown, "Warning: Bossware May Be Hazardous to Your Health," Center for Democracy & Technology (2021); Wilneida Negrón, "'Little Tech' Is Coming for Low-Wage Workers: A Framework for Reclaiming and Building Worker Power," Coworker (2021); Aaron Rieke, et al., "Essential Work: Analyzing the Hiring Technologies of Large Hourly Employers," Upturn (2021); Aiha Nguyen, "The Constant Boss: Work Under Digital Surveillance," Data & Society (2021); Merve Hickok and Nestor Maslej, "A Policy Primer and Roadmap on AI Worker Surveillance and Productivity Scoring Tools," AI Ethics 3, 673–687 (2023).

“workers” to include employees, independent contractors, and job applicants, following the CCPA’s scope in defining workplace-related personal information.

## **1. The scale and scope of data-driven workplace technologies necessitates broad protections for workers**

With the advent of big data and artificial intelligence, employers in a wide range of industries are increasingly capturing, buying, and analyzing worker data, electronically monitoring workers, and using algorithmic management to make important employment-related decisions. Recent studies have documented the use of data-driven technologies in sectors as diverse as trucking and warehousing, hospitals and home care, retail and grocery, hotels and restaurants, call centers, building services, and the public sector. Key functions for which employers are using these technologies range from hiring and firing, to workforce scheduling, performance monitoring and evaluation, and augmentation and automation of job tasks.

While digital technologies can benefit both workers and employers, the current challenge is the lack of robust guardrails to ensure responsible use. Many legal scholars have documented the inadequacies of existing laws in the U.S. to protect workers in the data-driven workplace. As a result of these deficiencies, direct harms to workers are beginning to emerge, with disproportionate impacts on people of color, women, and immigrants.<sup>2</sup> The following examples illustrate the range in applications, impacts, and industries being documented by researchers and reported by workers:

- In warehouses, the unfettered use of productivity management systems can push the pace of work to dangerous limits and cause repetitive stress injuries for workers.<sup>3</sup>
- Bias based on race, gender, disability, and other characteristics in recruitment and hiring algorithms can mean that qualified workers are screened out from applicant pools.<sup>4</sup>
- Many gig economy employers track workers and use those metrics to determine workers’ access to job opportunities and to set the pay rate (which can fall below the minimum wage once expenses are factored in).<sup>5</sup>
- Homecare workers are increasingly required to use tablets or their phones to verify the services they’ve provided. But the technology—known as Electronic Visit Verification—has also been used to micromanage already very difficult care work, as well as incorporate excessive GPS monitoring.<sup>6</sup>
- Many low-wage employers use “just in time” scheduling software that often doesn’t factor in workers’ schedule constraints or prevent back-to-back or erratic assignments, wreaking havoc on workers, especially working mothers and workers of color.<sup>7</sup>

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<sup>2</sup> For example, see Ifeoma Ajunwa, Kate Crawford, and Jason Schultz, “Limitless worker surveillance,” *California Law Review*, 105(3) (2017); Brishen Rogers, *Data and Democracy at Work*, MIT Press (2023); Solon Barocas and Andrew D. Selbst, “Big Data’s Disparate Impact,” 104 *California Law Review* 671 (September 30, 2016); and Pauline Kim, “Data-Driven Discrimination at Work,” *William & Mary Law Review* 58 (3): 857–936 (2017).

<sup>3</sup> Martha Ockenfels-Martinez and Sukhdip Purewal Boparai, “The Public Health Crisis Hidden in Amazon Warehouses,” *Human Impact Partners and Warehouse Workers Resource Center* (2021).

<sup>4</sup> Miranda Bogen and Aaron Rieke, “Help Wanted: An Examination of Hiring Algorithms, Equity, and Bias,” *Upturn* (2018).

<sup>5</sup> Michael Reich, “Pay, Passengers, and Profits: Effects of Employee Status for California TNC Drivers,” *UC Berkeley Institute for Research on Labor and Employment*, Working Paper No. 107-20 (2020).

<sup>6</sup> Alexandra Mateescu, “Electronic Visit Verification: The Weight of Surveillance and the Fracturing of Care,” *Data & Society* (2021).

<sup>7</sup> Daniel Schneider and Kristen Harknett, “It’s About Time: How Work Schedule Instability Matters for Workers, Families, and Racial Inequality,” *The Shift Project*, Harvard University (2019); Ethan Bernstein, Saravanan Kesavan, and Bradley R. Staats, “How to Manage Scheduling Software Fairly,” *Harvard Business Review* (December 2014).

This data-driven transformation of the U.S. workplace is unprecedented in its speed and scope, and requires broad worker protections that respond to the range of technologies, uses, and harms. In particular, several definitions in the draft CCPA regulations will be important to ensuring the scope of protections that the 21st Century workplace requires and that the law itself intends.

First, the full range of employment-related decisions should be included as significant decisions that trigger the rights and requirements in the draft regulations. This would embody the protective intent of the CCPA for consumers, which now includes workers. This would also align California with leading policy models in the EU and the U.S., where employment is considered a high-risk category, in and of itself, in the use of AI and other algorithmic systems, similar to other categories such as healthcare and education.<sup>8</sup>

It is important to understand that while automated hiring systems have captured the most attention in public debate, they are only the tip of the iceberg. Employers' use of data-driven technologies happens throughout the entire employment lifecycle – and negative effects on privacy, race and gender equity, and other important aspects of employment can result throughout. Important employment-related decisions include hiring and recruitment; setting of wages, benefits, hours, and work schedules; performance evaluation, promotion, discipline, and termination; job assignments, productivity requirements, and workplace health and safety; decisions that result in job augmentation, automation, and access to upskilling opportunities; and other terms or conditions of employment.

Second, there is significant variation in the extent to which employers rely on automated decision-making tools. Employers may use these tools to assist them, to different degrees, in making critical employment-related decisions. Alternatively, employers may rely on these tools to fully automate such decisions. In our view, both scenarios are important to cover in the rights and protections being detailed in the draft CCPA regulations. Harms such as discrimination, invasions of privacy, overwork injuries, and suppression of the right to organize can equally result from assistive and automated management technologies. Moreover, as a recent study documents, attempting to create fine-grained distinctions between different levels of employers' reliance on these technologies is unwieldy in practice, and in the worst case scenario, can create ways to escape regulatory oversight.<sup>9</sup> The full range of use scenarios should be covered.

## **2. Full transparency and disclosure are critical rights given the black-box nature of automated decision-making systems in the workplace**

One of the hallmarks of the CCPA is that it recognizes the importance of transparency and disclosure in order for consumers and workers to make informed decisions about their data privacy. But currently, the biggest obstacle to ensuring responsible use of data-driven technologies in the workplace is that they are largely hidden from both policymakers and workers. Without transparency and disclosure, job applicants won't know why a hiring algorithm rejected their resume; truck drivers won't know when and where

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<sup>8</sup> See the European Union's Artificial Intelligence Act (2024); the federal Algorithmic Accountability Act (HR 5628, 2023); California's Workforce Technology Accountability Act (AB 1651, 2022); and NYS Senate Bill S7623A (2023).

<sup>9</sup> Lukas Wright, et al., "Null Compliance: NYC Local Law 144 and the Challenges of Algorithm Accountability," <https://doi.org/10.17605/OSF.IO/UPFDK> (2024).

they are being tracked by GPS; and workers won't realize their health plan data is being sold. In an especially pernicious example, some employers are using surveillance to identify workers who are trying to organize a union, as well as predictive algorithms that data-mine social media to identify workers who might be *likely* to try to organize one.<sup>10</sup>

Given this “black box” nature of much of digital workplace technology, the notice, access rights, and risk assessments provisions in the draft CCPA regulations will be critical for workers.

First, the framework of pre-use notice and access rights is as important in the employment context as it is in the consumer context. Workers need to know what types of automated decision-making systems are being used to make critical decisions about them. Equally important, once such a system has been used to make an employment-related decision, workers should have the right to know what model was used, what the inputs were, and crucially, what the outputs were and how the employer used them. Such disclosures are the first step in workers' ability to identify and challenge errors and unfair treatment. To illustrate, consumer-facing industries are increasingly incorporating customer ratings in their worker assessment systems. But we know that customer ratings are highly unreliable and carry significant risk of bias and discrimination on the basis of race, gender, accent, and other characteristics.<sup>11</sup> Without disclosure that these ratings have been used to evaluate them, and how, workers are left in the dark about the actual determinants of their performance evaluations.

Importantly, we do not believe that these notice requirements will be onerous on employers. For hiring algorithms, pre-use notice can be given at the time of application. For incumbent workers, notices can be automated and given to workers as part of the onboarding process and annually thereafter to remind workers of the systems in use. Similarly, notice of actual use of such systems, and workers' right to access more information about that use, can be routinized and automated, and is in line with general notice requirements already established by the CCPA.

Second, the draft CCPA regulations detail an important set of procedures for providing notice of risk assessments of data collection and automated decision-making systems. Such assessments are widely considered a critical tool for identifying and mitigating harmful impacts of digital technologies.<sup>12</sup> In the workplace context, conducting risk assessments prior to use will be absolutely critical; it is not fair to workers to wait until invasions of privacy and other harms have already occurred to begin regulatory oversight. Moreover, conducting risk assessments prior to use also helps to identify potential design flaws and harms early on, when they are easier and less costly for developers and employers to address.<sup>13</sup> Here too we do not believe these requirements to be onerous for employers, because the draft CCPA regulations include an exemption for routine administrative data processing.

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<sup>10</sup> Susan Berfield, “How Walmart Keeps an Eye on Its Massive Workforce: The Retail Giant Is Always Watching,” Bloomberg BusinessWeek (November 24, 2015).

<sup>11</sup> Alex Rosenblat, Solon Barocas, Karen Levy, and Tim Hwang, “Discriminating Tastes: Customer Ratings as Vehicles for Bias,” *Data & Society* (2016).

<sup>12</sup> Emanuel Moss, et al., “Assembling Accountability: Algorithmic Impact Assessment for the Public Interest,” *Data & Society* (2021); Daniel J. Solove, “Data Is What Data Does: Regulating Use, Harm, and Risk Instead of Sensitive Data,” *Northwestern University Law Review* 118 (2024).

<sup>13</sup> Henriette Cramer, et al., “Assessing and Addressing Algorithmic Bias in Practice,” *Interactions* 25, no. 6 (October 25, 2018); Andrew Selbst, “An Institutional View of Algorithmic Impact Assessments,” *Harvard Journal of Law & Technology* 35, no. 1 (2021).

### 3. Workers deserve the same agency over their data as consumers under the CCPA

Another hallmark of the CCPA is that it establishes a baseline level of agency for consumers and workers, such as the right to correct their data or to opt-out of the sale or sharing of their data. The current draft CCPA regulations detail several additional touchpoints for personal agency that will be especially important to workers.

First, workers are important stakeholders that should be involved when their employers conduct risk assessments, whether of data collection systems or of automated decision-making systems. That is both a matter of principle, but also a matter of good practice. Workers have a significant amount of firm-specific knowledge and experience to bring to the table; their input can be vital for assessing and implementing new technologies.<sup>14</sup> The draft CCPA regulations should include workers as a key internal stakeholder to be involved in the risk assessment process.

A good example of the importance of worker involvement comes from new technologies in the hotel industry that automate housekeeper tasks and can result in inefficient orderings of rooms that don't take into account cart proximity or input from workers. As a result, workers may have to push heavy cleaning carts across significantly greater distances and may be penalized for not meeting their room quota.<sup>15</sup> But an innovative collaboration between engineers at Carnegie Mellon University and hotel workers and their union resulted in a system redesign that would increase worker discretion, foster collaboration and communication, and reduce workloads.<sup>16</sup>

Second, workers should have the right to opt-out of harmful, consequential, or especially intrusive automated decision-making systems, just as consumers do. There are important policy precedents for this approach.

For example, a range of public policies and collective bargaining agreements in the U.S. and other countries recognize the importance of allowing workers to refuse to work in conditions that are harmful to their physical or mental health.<sup>17</sup> In leading privacy policy models, highly consequential decisions require human review and can not be automated; an example in the workplace context is that workers should be able to opt-out of or challenge the use of automated hiring and firing systems, given their significant economic impact.<sup>18</sup> Similarly, workers should have the right to preserve their privacy against highly intrusive monitoring systems by opting out of them. For example, the ubiquity of electronic monitoring and data collection systems have increased the ability of employers to monitor workers

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<sup>14</sup> Adam Seth Litwin, "Technological Change at Work: The Impact of Employee Involvement on the Effectiveness of Health Information Technology," *ILR Review* 64, no. 5 (October 2011).

<sup>15</sup> Juliana Feliciano Reyes, "Hotel Housekeeping on Demand: Marriott Cleaners Say this App Makes their Job Harder," *The Philadelphia Inquirer* (July 2, 2018).

<sup>16</sup> Franchesca Spektor, et al., "Designing for Wellbeing: Worker-Generated Ideas on Adapting Algorithmic Management in the Hospitality Industry," *Proceedings of the 2023 ACM Designing Interactive Systems Conference*, 623–37 (2023).

<sup>17</sup> For examples of policies and collective bargaining provisions establishing workers' right to refuse unsafe work, see "Collective Bargaining Language - Health and Safety Rights," *Labor Occupational Health Program*, University of California, Berkeley (2024). For an overview of the negative mental health impacts of electronic monitoring, see Lisa Kresge and MT Snyder, "35 Years Under Electronic Monitoring and Still Waiting for Worker Rights," *UC Berkeley Labor Center* (2023).

<sup>18</sup> Many AI principles frameworks, including the White House's *Blueprint for an AI Bill of Rights*, include some version of the right to opt-out of automatic decision-making systems that pose significant risks or harms, especially in sensitive domains including employment. For example, Article 22 of the GDPR establishes an individual's right not to be subject to a consequential decision based solely on automated data processing.

off-duty, including social media eavesdropping.<sup>19</sup> And in the retail industry, vendors have developed software that mines data from workers' social media accounts to predict whether a job candidate will become a whistleblower.<sup>20</sup>

Clearly, common sense and feasibility will need to be important considerations in detailing any opt-out regime. The important point, however, is that implementing an opt-out right in the workplace context is no more challenging than in other application domains identified in the draft CCPA regulations, such as social media, housing, education, health care, or criminal justice.

Finally, the ability of workers to exercise their rights under the CCPA will depend crucially on their ability to designate representatives to act on their behalf, including unions and other worker organizations, since research has shown that accessing data rights can be challenging to navigate, especially for individuals who may lack the resources or expertise.<sup>21</sup>

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The U.S. workplace is rapidly becoming a major site for the deployment of AI and other digital technologies. In particular, workforce management technologies constitute an area of rapid innovation and adoption that will only escalate going forward.<sup>22</sup> Coverage by the CCPA is a critical first step to ensure that California workers have the tools necessary to advocate for their rights in the 21st century data-driven workplace.

Thank you for the opportunity to provide feedback during this important rulemaking process,

Sincerely,  
The signed organizations and individuals

*Organizations:*

ACLU of Northern California  
Athena Coalition  
California Conference Board of the Amalgamated Transit Union  
California Conference of Machinists  
California Employment Lawyers Association  
California Labor Federation  
California Nurses Association  
California School Employee Association (CSEA)  
California Teamsters Public Affairs Council  
Center for Democracy and Technology  
Center on Race and Digital Justice

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<sup>19</sup> Richard Bales and Katherine Stone, "The Invisible Web at Work: Artificial Intelligence and Electronic Surveillance in the Workplace," *Berkeley Journal of Employment & Labor Law* 41 (1) (2020).

<sup>20</sup> See for example, <https://fama.io/retail-hospitality/>.

<sup>21</sup> Jef Ausloos and Pierre Dewitte, "Shattering One-Way Mirrors – Data Subject Access Rights in Practice." *International Data Privacy Law* 8, no. 1 (February 1, 2018).

<sup>22</sup> See Nina Mast and Lisa Kresge, "How Common is Employers' Use of Workplace Management Technologies? A Review of Prevalence Studies," *UC Berkeley Labor Center* (2022).

Consumer Reports  
Data & Society Research Institute  
Electronic Frontier Foundation  
Engineers and Scientists of California IFPTE Local 20  
Labor Occupational Health Program, UC Berkeley  
National Black Worker Center  
National Employment Law Project  
National Union of Healthcare Workers  
PowerSwitch Action  
Santa Clara County Wage Theft Coalition  
SEIU California  
Silicon Valley Rising Action  
TechEquity Collaborative  
Turkopticon  
UAW Region 6  
UC Berkeley Labor Center  
UC San Diego Labor Center  
UCLA Labor Occupational Safety and Health Program  
United Food and Commercial Workers (UFCW) Western States Council  
Upturn  
Warehouse Worker Resource Center  
Working Partnerships USA  
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