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December 7, 2022

The Honorable Charlotte A. Burrows
Chair
Equal Employment Opportunity Commission
131 M Street, NE
Washington, DC 20507

Dear Chair Burrows:

As you know, employers across the country are using sophisticated automated technology systems to assess and monitor both job candidates and workers.¹ Automated technology systems now have the power to monitor physical activity, use facial recognition to assess workers' attention to their screens, track workers' locations, and collect medical data.² Some technology even allows employers to surreptitiously activate webcams and microphones on workers' devices,³ and to keep tabs on workers after hours.⁴ Additionally, many automated technology

¹ See Bennett Cyphers and Karen Gullo, *Inside the Invasive, Secretive "Bossware" Tracking Workers*, Elec. Frontier Found. (June 30, 2020), <https://www.eff.org/deeplinks/2020/06/inside-invasive-secretive-bossware-tracking-workers>; see Jodi Kantor and Arya Sundaram, *The Rise of the Worker Productivity Score*, New York Times (Aug. 14, 2022), <https://www.nytimes.com/interactive/2022/08/14/business/worker-productivity-tracking.html>.

² See *id.*; see Danielle Abril and Drew Harwell, *Keystroke tracking, screenshots, and facial recognition: The boss may be watching long after the pandemic ends*, Wash. Post (Sept. 24, 2021), <https://www.washingtonpost.com/technology/2021/09/24/remote-work-from-home-surveillance/>; see also Tam Harbert, *Watching the Workers*, Soc'y for Hum. Res. Mgmt. (Mar. 16, 2019), <https://www.shrm.org/hr-today/news/all-things-work/pages/watching-the-workers.aspx>; see also Nandita Bose, *Amazon's surveillance can boost output and possibly limit unions – study*, Reuters (Sept. 15, 2020), <https://www.reuters.com/article/amazon-com-workers-surveillance/amazons-surveillance-can-boost-output-and-possibly-limit-unions-study-idUSKBN25S3F2> (reporting on research that found that "Amazon uses such tools as navigation software, item scanners, wristbands, thermal cameras, security cameras and recorded footage to surveil its workforce in warehouses and stores").

³ Cyphers, *supra* note 1.

⁴ Kaveh Waddell, *Why Bosses Can Track Their Employees 24/7*, The Atlantic (Jan. 6, 2017), <https://www.theatlantic.com/technology/archive/2017/01/employer-gps-tracking/512294/> ("But GPS tracking doesn't necessarily end when an employee's shift does. If a worker is allowed to take a company vehicle home at night or over the weekend, it might continue sending its location. And a tracking app on a mobile phone can keep broadcasting an employee's location during his or her off hours.").

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systems incorporate algorithmic management and artificial intelligence (AI) that employers use to decide whether to, for example, hire, fire, or promote workers.⁵

I appreciate the Equal Employment Opportunity Commission's (EEOC) work thus far to combat discrimination stemming from the use of automated technology tools, including the launch of the EEOC AI and Algorithmic Fairness Initiative and the release of a technical assistance document detailing how automated technology systems may violate the *Americans with Disabilities Act* (ADA).⁶ I was also pleased to see that, in September 2022, the EEOC, alongside the Department of Labor's (DOL) Office of Federal Contract Compliance Programs (OFCCP), held a roundtable to discuss the civil rights implications of using automated technology systems,⁷ and that the EEOC later held a Strategic Enforcement Plan (SEP) listening session to highlight Title VII of the *Civil Rights Act of 1964*, as amended by the *Pregnancy Discrimination Act of 1978* (Title VII)⁸ in the context of automated technology systems.⁹ Further, I commend the EEOC's ongoing work with the Biden-Harris Administration's Office of Science and Technology Policy to highlight a blueprint "Bill of Rights" for the development and use automated technology systems.¹⁰

Yet, more must be done to ensure that the use of such technology does not violate workers' rights, especially those of historically underrepresented workers, in violation of Title VII. An employer, for example, may be in violation of Title VII if the AI technology they use contains bias against people of color or women, or if an employer surveils a worker to determine her pregnancy status to that worker's detriment. Accordingly, I write to request that the EEOC take additional steps to highlight these important issues. As the EEOC develops a SEP for fiscal years 2022-2026, I encourage the agency to further highlight how it will enforce Title VII related to employers' use of automated technology systems as part of the EEOC's long-term priorities. I also encourage the EEOC to publish an additional AI Initiative technical assistance document

⁵ See Alexandra Mateescu and Aiha Nguyen, *EXPLAINER: Algorithmic Management in the Workplace*, Data&Society (Feb. 2019), https://datasociety.net/wp-content/uploads/2019/02/DS_Algorithmic_Management_Explainer.pdf ("Algorithmic management is a diverse set of technological tools and techniques to remotely manage workforces, relying on data collection and surveillance of workers to enable automated or semi-automated decision-making.").

⁶ *Artificial Intelligence and Algorithmic Fairness Initiative*, U.S. Equal Emp. Opportunity Comm'n (Oct. 2021), <https://www.eeoc.gov/ai>; *The Americans with Disabilities Act and the Use of Software, Algorithms, and Artificial Intelligence to Assess Job Applicants and Employees*, U.S. Equal Emp. Opportunity Comm'n (May 2022), <https://www.eeoc.gov/laws/guidance/americans-disabilities-act-and-use-software-algorithms-and-artificial-intelligence#Q13>.

⁷ Press Release, *READOUT: EEOC and US DOL's OFCCP hosted A.I. and Algorithmic Fairness and HIRE Initiatives roundtable*, U.S. Equal Emp. Opportunity Comm'n (Sept. 19, 2022), <https://www.eeoc.gov/newsroom/readout-eeoc-and-us-dols-ofccp-hosted-ai-and-algorithmic-fairness-and-hire-initiatives>.

⁸ See 42 U.S.C. §§ 2000e et seq.

⁹ Meetings of the Commission, *Meeting of September 22, 2022 - Shaping the EEOC's Strategic Enforcement Priorities*, U.S. Equal Emp. Opportunity Comm'n (Sept. 22, 2022), <https://www.eeoc.gov/meetings/meeting-september-22-2022-shaping-eeocs-strategic-enforcement-priorities>.

¹⁰ Press Release, *FACT SHEET: Biden-Harris Administration Announces Key Actions to Advance Tech Accountability and Protect the Rights of the American Public*, The White House (Oct. 4, 2022), <https://www.whitehouse.gov/ostp/news-updates/2022/10/04/fact-sheet-biden-harris-administration-announces-key-actions-to-advance-tech-accountability-and-protect-the-rights-of-the-american-public/>.

that sets forth how the use of automated technology systems can, if unchecked, lead to Title VII violations.¹¹

The risk of Title VII violations when an employer uses sophisticated surveillance technology systems is significant. When an employer has far-reaching access to worker information because of surveillance technology—including “sensitive or protected information, from health data to personal details such as religion, family structure, or sexuality”—the risk that this information will lead to discrimination becomes increasingly serious.¹² Indeed, some employers have tracked workers’ menstrual cycles and pregnancy statuses, an alarming fact to health and privacy experts who are cognizant of the possibility that this data could be used, in violation of Title VII, against those who experience pregnancy, childbirth, or related medical conditions.¹³

Additionally, many employers use surveillance that contains algorithmic tools. While employers may adopt these tools to “reduce the time and cost of human resources processes, increase workers’ efficiency and output, or even attempt to mitigate human bias in internal decisionmaking... whether by design or not, new technologies can give rise to discrimination” against both job applicants and workers.¹⁴ When employers increasingly depend on algorithms to assess job candidates and workers,¹⁵ the risk that employers will violate Title VII must be considered, as algorithms often adopt and mirror the stereotypes and biases of the algorithms’ creators,¹⁶ replicating “institutional and historical biases, [and] amplifying disadvantages” for certain groups, such as racial or ethnic minorities and/or women.¹⁷

¹¹ These additional steps will also help to ensure that the EEOC, per the goals laid out in its November 4, 2022, draft Strategic Plan (SP), provides the information and guidance necessary to advance equal employment opportunity and prevent workplace discrimination. See Press Release, *EEOC Seeks Public Input on FY 2022-2026 Strategic Plan*, U.S. Equal Emp. Opportunity Comm’n (Nov. 4, 2022), <https://www.eeoc.gov/newsroom/eeoc-seeks-public-input-fy-2022-2026-strategic-plan>.

¹² Kathryn Zickuhr, *Workplace surveillance is becoming the new normal for U.S. workers*, Wash. Ctr. for Equitable Growth (Aug. 18, 2021), <https://equitablegrowth.org/research-paper/workplace-surveillance-is-becoming-the-new-normal-for-u-s-workers/>.

¹³ Drew Harwell, *Is your pregnancy app sharing your intimate data with your boss?*, Wash. Post (Apr. 10, 2019), <https://www.washingtonpost.com/technology/2019/04/10/tracking-your-pregnancy-an-app-may-be-more-public-than-you-think/> (“‘The fact that women’s pregnancies are being tracked that closely by employers is very disturbing,’ said Deborah C. Peel, a psychiatrist and founder of the Texas nonprofit Patient Privacy Rights. ‘There’s so much discrimination against mothers and families in the workplace, and they can’t trust their employer to have their best interests at heart.’”).

¹⁴ U.S. Congress, House Committee on Education and Labor, *THE FUTURE OF WORK: HOW CONGRESS CAN SUPPORT WORKERS IN THE MODERN ECONOMY*, p. 49 (Dec. 2020), [https://edlabor.house.gov/imo/media/doc/Future%20of%20Work%20Report%20\(FINAL\).pdf](https://edlabor.house.gov/imo/media/doc/Future%20of%20Work%20Report%20(FINAL).pdf).

¹⁵ See Alex Engler, *Auditing employment algorithms for discrimination*, Brookings (Mar. 12, 2021) (“The role of artificial intelligence (AI) in the job market and in hiring has been expanding rapidly—an industry survey found that [in 2020] 55% of human resources leaders in the United States use predictive algorithms in hiring.”).

¹⁶ See Dawn Zapata, *New study finds AI-enabled anti-Black bias in recruiting*, Thomson Reuters (June 18, 2021), <https://www.thomsonreuters.com/en-us/posts/legal/ai-enabled-anti-black-bias/> (“For the most part, Silicon Valley is still prominently populated by white people, with men comprising the majority of leadership positions. It begs the question of how the technology industry can create fair and balanced AI for the masses if there are still diversity challenges within the very teams designing and implementing the algorithms upon which that AI relies.”).

¹⁷ Miranda Bogen, *All the Ways Hiring Algorithms Can Introduce Bias*, Harvard Bus. Review (May 6, 2019), [All the Ways Hiring Algorithms Can Introduce Bias \(hbr.org\)](https://hbr.org/2019/05/all-the-ways-hiring-algorithms-can-introduce-bias); see Gideon Mann and Cathy O’Neil, *Hiring Algorithms Are Not Neutral*, Harvard Bus. Review (Dec. 9, 2016), [Hiring Algorithms Are Not Neutral \(hbr.org\)](https://hbr.org/2016/12/hiring-algorithms-are-not-neutral) (“For example, in a famous experiment, recruiters reviewed identical resumes and selected more applicants with white-sounding names

For example, studies have shown that algorithmic management systems that are trained to monitor and flag certain types of speech as purportedly “offensive” can ultimately amplify racial bias, as “speech recognition models have demonstrated clear biases against African Americans and potential problems across dialectical and regional variations of speech.”¹⁸ If an employer uses an algorithm that, because of the algorithm creators’ racial bias, flags a job applicant’s speech as offensive, resulting in the employer’s decision to screen-out the applicant from a job, or flags a worker’s speech as offensive, resulting in the employer’s decision to terminate the worker, this may amount to race-based discrimination.¹⁹

The use of facial recognition systems is another example of how employers may be using technology in violation of Title VII. The use of these systems on workers can be extremely problematic as “some facial recognition systems have been shown in research to perform worse with people of color because the algorithms are less accurate at identifying people with darker skin tones.”²⁰ Employers may use facial recognition to ensure workers are continuously at their desk, or to ensure that only a designated employee has access to certain sensitive computer programs, yet biased facial recognition systems that have difficulty recognizing people of color fail to accomplish these goals.²¹ Rather, these biased systems can fail to recognize the worker in front of the camera, leaving workers who must use continuous facial recognition while working locked out of their computers’ sensitive programs and “fearful that they could be penalized because of the color of their skin.”²² A facial recognition system that at once incorrectly rejects workers of color from its system, but also penalizes those workers for time spent logged out the system, is just one example of how employers may be using technology that disadvantages workers due to race and/or national origin.

Along with racial and national origin bias, algorithms can replicate sexism when, for example, an algorithm is modeled after a company’s previous applicant history, “which historically, has been favorable to cisgender, white men.”²³ In another example of employers’ use of algorithms that is disadvantageous to women, some employers have used an online tech-hiring platform’s AI system that ranked candidates for programming jobs not only by reviewing those candidates’ resumes, but also by reviewing candidates’ presence in the digital realm, sometimes known as

than with black-sounding ones. If the algorithm learns what a ‘good’ hire looks like based on that kind of biased data, it will make biased hiring decisions.”).

¹⁸ Shirin Ghaffary, *The algorithms that detect hate speech online are biased against black people*, Vox (Aug. 15, 2019), <https://www.vox.com/recode/2019/8/15/20806384/social-media-hate-speech-bias-black-african-american-facebook-twitter>.

¹⁹ See Engler, *supra* note 15.

²⁰ Abril, *supra* note 2.

²¹ See *id.*

²² *Id.*

²³ Zoe Rohrich, *Why these companies are rethinking the use of AI in hiring*, PBS (Nov. 26, 2019), <https://www.pbs.org/newshour/world/agents-for-change/why-these-companies-are-rethinking-the-use-of-ai-in-hiring> (reporting that in 2018, “Amazon got rid of its AI job recruiting tool after discovering that it was biased against women. Amazon had trained its algorithms to rate resumes based on patterns in past applicant history — but because women were so rare in that data set, the algorithm believed men were preferable, and poorly rated women’s applications”).

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“social data.”²⁴ “But factors such as the societal expectations around unpaid care, which women tend to bear, translate to women having less time to chat online. Women therefore produce less of this social data.”²⁵ Thus, employers’ use of AI systems—when those systems are embedded with data that is biased against women—can end up replicating sexist biases, instead of eliminating bias. Therefore, employers’ use of such systems may violate Title VII’s prohibition against sex-based discrimination.

The use of automated technology systems, if left unchecked, threatens job candidates’ and workers’ rights under Title VII and warrants further attention. In light of this, I request that the EEOC publish an additional technical assistance document to highlight best practices so that employers avoid Title VII violations when using such systems, both in the hiring process and on-the-job, and so that job applicants and workers are aware of their rights. I also request that the EEOC highlight, in its forthcoming SEP, its long-term goals of enforcing Title VII as it relates to employers’ use of automated technology systems.

I appreciate your continued work to ensure that employers’ use of automated technology systems complies with the federal civil rights laws that the EEOC enforces, and I hope you will take these additional steps to both protect workers and provide guidance to employers.

If you have any questions or wish to discuss this request further, please contact Michele Simensky, Labor/Health Oversight Counsel for the Committee, at Michele.Simensky@mail.house.gov. Please direct all official correspondence to the Committee’s Chief Clerk, Rasheedah Hasan, at Rasheedah.Hasan@mail.house.gov.

Sincerely,



ROBERT C. “BOBBY” SCOTT
Chairman

²⁴ Genevieve Smith & Ishita Rustagi, *When Good Algorithms Go Sexist: Why and How to Advance AI Gender Equity*, Stanford Soc. Innovation Review (Mar. 31, 2021), https://ssir.org/articles/entry/when_good_algorithms_go_sexist_why_and_how_to_advance_ai_gender_equity.

²⁵ *Id.*