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October 5, 2022

The Honorable Gene L. Dodaro
U.S. Comptroller General
U.S. Government Accountability Office
441 G Street, NW
Washington, DC 20548

Dear Comptroller Dodaro:

The shift to remote work during the coronavirus pandemic prompted a rise in employers' digital surveillance of workers.¹ Employers are monitoring workers in increasingly novel ways, often via artificial intelligence (AI), and sometimes without workers' awareness.² Employers have turned to this surveillance technology, sometimes called "bossware," to monitor workers both in telework and office settings.³ As bossware may become a permanent fixture in the labor market, it is critical to better understand its impact on workers.

Accordingly, I write to respectfully request that the U.S. Government Accountability Office (GAO) assess employers' use of bossware to monitor workers in telework and office settings and how this impacts workers. Further, as the Department of Labor (DOL), the National Labor Relations Board (NLRB), and the Equal Employment Opportunity Commission (EEOC) all have distinct enforcement authority over employers who illegally use surveillance technology, I also request that this assessment examine the extent to which these agencies' enforcement efforts have addressed the connection between employers' use of bossware and the impact on workers' rights.

¹ Danielle Abril and Drew Harwell, *Keystroke tracking, screenshots, and facial recognition: The boss may be watching long after the pandemic ends*, The Washington Post (Sept. 24, 2021), <https://www.washingtonpost.com/technology/2021/09/24/remote-work-from-home-surveillance/>.

² *Id.*

³ Bennett Cyphers and Karen Gullo, *Inside the Invasive, Secretive "Bossware" Tracking Workers*, Electronic Frontier Foundation (June 30, 2020), <https://www.eff.org/deeplinks/2020/06/inside-invasive-secretive-bossware-tracking-workers>.

Beyond more traditional models of surveillance that track workers' use of websites and applications, surveillance technology now has the power to record keystrokes, take screenshots of workers' devices, provide live video feeds of workers' screens, use facial recognition to determine workers' attention to their screens, and track workers' locations using GPS data.⁴ Some surveillance technology even allows employers to "secretly activate webcams and microphones on worker devices."⁵ Moreover, some employers who use these surveillance tools when workers are on the clock continue to keep tabs on workers after hours.⁶ Further, some employers are using this surveillance technology to make decisions about whether to demote or fire workers; they are basing decisions on algorithmic performance assessments⁷ despite the fact that these assessments are not always accurate.⁸ Finally, while some employers advise workers that they are being monitored, many do not.⁹

Many employers acknowledge that they are unaware of how to responsibly use the data they've collected from bossware,¹⁰ and some employers already provide workers' data to third parties, without those workers' knowledge or consent.¹¹ That employers will, or already do, provide sensitive information from bossware to third parties is a risk with far-reaching implications for worker privacy. This is especially so, given that many employers collect workers' data as it pertains to, for example, computer and phone usage, location, movement, medical information,

⁴ See *id.*; Abril, *supra* note 1.

⁵ *Id.*

⁶ 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.").

⁷ Matt Scherer, *Warning: Bossware May Be Hazardous to Your Health*, Center for Democracy & Technology (July 4, 2021), <https://cdt.org/wp-content/uploads/2021/07/2021-07-29-Warning-Bossware-May-Be-Hazardous-To-Your-Health-Final.pdf> (reporting that employers have the ability to "feed the data collected by sensors and activity tracking systems into algorithmic management platforms that automate some or all of the tasks traditionally employed by human managers, including assessing workers' productivity and performance and making disciplinary decisions").

⁸ Jodi Kantor and Arya Sundaram, *The Rise of the Worker Productivity Score*, The New York Times (Aug. 14, 2022), <https://www.nytimes.com/interactive/2022/08/14/business/worker-productivity-tracking.html> ("But the most urgent complaint, spanning industries and incomes, is that the working world's new clocks are just wrong: inept at capturing offline activity, unreliable at assessing hard-to-quantify tasks and prone to undermining the work itself.").

⁹ Cyphers, *supra* note 3.

¹⁰ Eric Rosenbaum, *Companies are collecting more data on employees, and not at all confident they are doing it responsibly*, CNBC (Jan. 23, 2019), <https://www.cnbc.com/2019/01/23/the-next-big-negotiation-with-a-boss-access-to-your-personal-data.html> ("More than two-thirds (70%) of business leaders globally said they are 'not very confident' that they are using new sources of workplace data in a 'highly responsible' way.").

¹¹ See Reed Albergotti and Gerrit De Vynck, *Tech workers are upset their companies are sharing payroll data with Equifax. Here's what's going on*, The Washington Post (Mar. 23, 2022), <https://www.washingtonpost.com/technology/2022/03/23/google-apple-equifax-worknumber/> (reporting that many companies send employee information to third party services "to offload the hassle of work verification requests, often without them [workers] actively knowing about it"); Chris Chmura, *A Data Broker Has Millions of Workers' Paystubs; See If They Have Yours*, NBC Bay Area (Feb. 15, 2022), <https://www.nbcbayarea.com/investigations/consumer/data-brokers-have-millions-of-workers-paystubs-see-if-they-have-yours/2806271/>.

biometrics, and genetic information.¹² As bossware technology evolves, employers' ability to collect sensitive data—and potentially share this data with third parties—is likely to become increasingly commonplace.¹³

Along with the need to address privacy concerns, it is also critical that employers do not use surveillance tools for discriminatory purposes. When an employer has wide-ranging access to worker information because of bossware 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 must be considered.¹⁴ As such, the Committee on Education and Labor (Committee) needs further information about how the use of bossware may violate antidiscrimination protections. For example, employers who use surveillance tools with AI to determine worker productivity risk discriminating against workers when AI fails to account for a disabled worker's reasonable accommodation.¹⁵ Surveillance that monitors and flags certain types of speech also runs the risk of discrimination. Studies have shown that AI can end up amplifying, for example, racial bias, as “speech recognition models have demonstrated clear biases against African Americans and potential problems across dialectical and regional variations of speech.”¹⁶ If an employer uses AI that flags speech because of programmatic bias, this may negatively impact certain workers and potentially create new modes of discrimination against protected individuals in the workplace.¹⁷

The rise of bossware also has serious implications with respect to workers' unionization efforts. As Dr. Kate Bronfenbrenner recently testified at a hearing before the Committee on September 14, 2022, entitled *In Solidarity: Removing Barriers to Organizing*, employers' anti-union campaigns have become increasingly sophisticated and emboldened as employers have “gained access to new tools to monitor and surveil their workers.”¹⁸ Dr. Bronfenbrenner further noted

¹² Tam Harbert, *Watching the Workers*, Society for Human Resource Management (Mar. 16, 2019), <https://www.shrm.org/hr-today/news/all-things-work/pages/watching-the-workers.aspx>.

¹³ See *id.* (“Advancements in technologies—including sensors, mobile devices, wireless communications, data analytics and biometrics—are rapidly expanding monitoring capabilities and reducing the cost of surveillance, and that's prompting more employers to use these tools.”).

¹⁴ Kathryn Zickuhr, *Workplace surveillance is becoming the new normal for U.S. workers*, Washington Center for Equitable Growth (Aug. 2021), <https://equitablegrowth.org/research-paper/workplace-surveillance-is-becoming-the-new-normal-for-u-s-workers/>.

¹⁵ Tom Spiggle, *Emerging Technology: How It Could Lead To More Employment Discrimination*, Forbes (May 24, 2022), <https://www.forbes.com/sites/tomspiggle/2022/05/24/emerging-technology-how-it-could-lead-to-more-employment-discrimination/?sh=74cd399314f2>.

¹⁶ 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>.

¹⁷ See Alex Engler, *Auditing employment algorithms for discrimination*, Brookings (Mar. 12, 2021), <https://www.brookings.edu/research/auditing-employment-algorithms-for-discrimination/>; see also 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) (“[W]hen complex digital tools play a strong role in decision-making processes, workers and job applicants are at a severe disadvantage when it comes to understanding whether they have been unlawfully discriminated against, much less gathering the evidence necessary to substantiate a discrimination claim.”).

¹⁸ *In Solidarity: Removing Barriers to Organizing, Hearing Before the H. Comm. on Educ. and Lab.*, 117th Cong. (2022) (Statement of Dr. Kate Bronfenbrenner, Director of Labor Education Research and Senior Lecturer,

that some employers who mount these campaigns have been found to use cameras to spy on their employees, and some employers use “a combination of electronic surveillance techniques such as employee key cards, ID badges, phone and computer apps, GPS location devices, and tracking of movements, speed, and exit and entry” to keep tabs on workers.¹⁹ Considering this, the Committee seeks further information about the effects of bossware in the context of union organizing efforts and workers’ rights.

It is also important that the Committee better understand the effects of worker surveillance on worker productivity, morale, and health. Employers may believe that surveillance enhances productivity. But, “[r]endering worker activities into competitive, game-like dynamics driven solely by select optimization metrics can focus employees and supervisors alike on a narrow range of behaviors,”²⁰ and may ultimately decrease meaningful productivity, erode trust between employers and workers, and have consequences for workers’ physical and mental health.²¹ In a recent study that surveyed 2,000 remote or hybrid workers, 59 percent said they experienced stress or anxiety as a result of employer monitoring, and workers reported that the sense of “constantly being watched” left them feeling “dehumanized.”²²

Given the breadth and complexity of these issues, I ask that GAO undertake an investigation to address the following, and, if applicable, make recommendations:

- 1) What is known about the use of bossware in both the telework and office setting?
Specifically:
 - a) How has the use of bossware increased, if at all, since the pandemic?
 - b) What types of employers use bossware?
 - c) What types of bossware do employers use?
 - d) Which workers do employers use bossware to monitor?
 - e) How does bossware affect worker productivity?
 - f) How does bossware affect workers’ health and well-being?
 - g) How does bossware affect worker morale and the work environment?
 - h) How does bossware affect workers’ unionization efforts?
- 2) What is known about the impact, if any, of employers’ use of bossware on negative employment actions, such as discipline and/or termination?

Cornell University School of Industrial and Labor Relations, at 1).

¹⁹ *Id.* at 11-12.

²⁰ Aiha Nguyen, *On the Clock and at Home: Post-COVID-19 Employee Monitoring in the Workplace*, Society for Human Resource Management (Summer 2020), <https://www.shrm.org/executive/resources/people-strategy-journal/summer2020/pages/feature-nguyen.aspx>.

²¹ Scherer, *supra* note 7; see Kantor, *supra* note 8 (“In interviews and written submissions to The Times, workers across a variety of jobs — pharmaceutical assistants, insurance underwriters, employees of e-commerce companies — also said productivity pressure had led to problems with bathroom breaks.”).

²² Leandra Bernstein, *78% of employers admit to using digital surveillance tools on remote workers*, ABC News 4 (June 22, 2021), <https://abcnews4.com/78-of-employers-admit-to-using-digital-surveillance-tools-on-remote-workers>.

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- 3) What is known about the impact, if any, of bossware on employment discrimination in the workplace?
- 4) Are certain workers who are protected under federal employment antidiscrimination laws potentially disproportionately affected by employers' use of bossware?
- 5) What efforts have DOL, NLRB, and EEOC made to protect workers in the era of digital surveillance inside and outside of the workplace?
- 6) How are employers using the bossware data they collect? Specifically:
 - a) What is known about the use of bossware and workers' privacy?
 - b) What are the legal implications of employers' use of bossware?

Thank you for your attention to this matter. If you have any questions or wish to discuss this request further, please contact Michele Simensky, Labor/Health Oversight Counsel, U.S. House of Representatives Committee on Education and Labor, 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