

Biden Admin Must Take Action On Worker Surveillance

By **Matt Scherer and Reed Shaw** (July 11, 2023)

Companies across the economy are increasingly using electronic surveillance to track and monitor their workforce — with serious impacts on worker power and health.

Amazon.com Inc.'s crushing production quotas and speeds, enforced by worker surveillance, have resulted in workplace injuries at twice the rate of other warehouse workers.[1]

Tesla Inc. is using technology to surveil employees and quash worker organizing efforts, a potential violation of federal labor law.[2] And McDonald's is using worker surveillance to control its franchisees' cashier employees, but claims it is not liable to those workers under employment or labor law.[3]

Unfortunately, the use of technology and algorithms to surveil and monitor workers is only growing. According to a recent investigation, eight of the 10 largest private U.S. employers use worker surveillance to track their workers' productivity — many in real time.[4]

Workforce surveillance is emerging as a new front in the labor movement, but our gridlocked Congress is unlikely to pass meaningful legislation to regulate its use. Thankfully, Congress might not have to. The Biden administration can take action now, using existing laws, to protect American workers. Here's how.

First, we need to better understand the impact that workplace surveillance is having on workers. The National Institute for Occupational Safety and Health can help. NIOSH was created alongside the Occupational Safety and Health Administration in 1970 to conduct independent research into known and emerging workplace safety hazards.

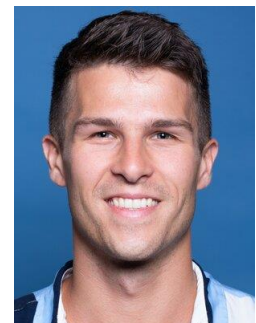
Since then, NIOSH has conducted critical research on topics like machine safety, asbestos exposure and COVID-19. But while NIOSH has previously looked into electronic monitoring, these studies were limited in scale and are out of date.

Current law gives NIOSH the authority to fund new, cross-sector research into the impacts of workplace surveillance — and the Biden administration should use it. Specifically, NIOSH should fund research that examines the impact these technologies and practices have on job strain, workers' mental health and the risk of workplace accidents from increased pace of work.

This research is an important first step to ensure any policy response is rooted in scientific knowledge and understanding. NIOSH research is also an important step for future regulatory and enforcement action.



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OSHA regularly uses NIOSH research to inform its development of workplace safety standards and insulate them from legal challenge. The agency can also use insights gleaned from the research to inform its workplace investigations — for example, by making it clear that worker surveillance can contribute to companies' high injury rates, as Washington state did in its recent citation of Amazon.[5]

In addition to initiating NIOSH research, the Biden administration should take immediate steps to protect workers by addressing workplace surveillance in subregulatory guidance for industries in which workers have the highest risk of injury.

OSHA has long-issued sector-by-sector guidance to reduce the risk of workplace musculoskeletal injuries — including for nursing homes, retail grocery stores and poultry processing plants. But current guidance documents do not discuss the ways in which workplace surveillance can heighten the risk of injuries, nor do they comprehensively address the warehousing industry, where many of the most egregious workplace surveillance-induced musculoskeletal hazards exist.

Agencies have the discretion to create and amend guidance documents without going through the typical rulemaking process, which often delays agency action for months or years. OSHA should use this power — as it has repeatedly in the past — to incorporate workplace surveillance into relevant sector-by-sector injury prevention guidance.

While this guidance will be helpful in preventing workplace injuries in the short term, OSHA should also begin the longer-term work of promulgating a formal workplace safety standard on worker surveillance. OSHA has issued more than 450 workplace safety and health standards since the practice was first authorized by Congress in 1970.

Through these standards, OSHA protects over 130 million workers from hazards, by requiring employers to adopt policies or practices "reasonably necessary or appropriate to provide safe or healthful employment." [6] These standards have been credited with preventing thousands of work-related deaths, injuries and illnesses. [7]

Importantly, an OSHA workplace surveillance standard would weather judicial scrutiny. While Congress used the Congressional Review Act to invalidate OSHA's ergonomics standard in 2001, a worker surveillance standard would regulate different hazards and require different remedial measures — and would therefore not be barred by the CRA's prohibition on issuing a rule that is "substantially the same" to the one invalidated.

A surveillance standard is also highly likely to survive a challenge under the U.S. Supreme Court's recently announced "major questions doctrine." In *West Virginia v. U.S. Environmental Protection Agency*, the court defined a "major question" as an agency action that is "unheralded" and "transformative." If an agency action is major, then there must be "clear congressional authorization."

A surveillance standard does not pose a major question, because it is in line with previous OSHA standards regulating technology — including standards on manlifts, circuits and vehicle-mounted work platforms. It is also within OSHA's traditional sphere of expertise, and would only regulate previously regulated entities — employers.

In addition to regulating workplace surveillance using workplace safety and health laws, the Biden administration should explore its authorities under existing privacy and labor statutes to address workplace surveillance.

The Federal Trade Commission, for example, has power to regulate surveillance activity under its rulemaking authority. And the National Labor Relations Board has long prohibited employers from secretly surveilling their employees — a precedent that can and should be more strictly enforced.

As worker surveillance continues to expand, we will see a proportional drop in workers' mental health, physical well-being and organizing power. The Biden administration has well-established authority to protect American workers from these harms. They should use it.

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[1] <https://www.cnbc.com/2022/04/12/study-amazon-workers-suffer-serious-injuries-at-twice-rate-of-rivals.html>.

[2] <https://www.cnbc.com/2022/06/02/tesla-paid-pr-firm-to-surveil-employees-on-facebook-in-2017-union-push.html>.

[3] <https://datasociety.net/wp-content/uploads/2021/01/DataSociety-PuppetEntrepreneurship-Final.pdf>.

[4] <https://www.nytimes.com/interactive/2022/08/14/business/worker-productivity-tracking.html>.

[5] <https://news.bloomberglaw.com/safety/amazon-loses-warehouse-worker-safety-suit-in-washington-court-7>.

[6] <https://www.gao.gov/assets/gao-12-330.pdf>.

[7] <https://www.gao.gov/assets/gao-12-330.pdf>.