



Legislative Affairs  
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## 2023-2024 Legislative Memorandum

**Subject:    Bossware and Oppressive Technology Act – A.9315-A  
              (Alvarez) / S.7623-B (Hoylman-Sigal)**

**Position:   SUPPORT**

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Worker surveillance and the use of artificial intelligence in hiring have been allowed to run rampant for far too long. Biased, ineffective, or unfair hiring tools are deciding who gets employed, and invasive electronic monitoring systems are used to track workers' every move and interaction, enforce unrealistic and inhumane quotas, or penalize workers for taking breaks.

These surveillance technologies are deployed in areas of acute power imbalance, and almost universally, they operate without transparency or even the most basic legal protections. Job candidates and workers affected by these systems have little to no power to get the information they deserve, learn how these systems impact them, or challenge their use. They often replicate and amplify bias, discrimination, and harm towards populations who have been and continue to be disproportionately impacted by bias and discrimination: women, Black, Indigenous, and all people of color, religious and ethnic minorities, LGBTQIA people, people living in poverty, people with disabilities, formerly incarcerated people, and other marginalized communities.

**The Bossware and Oppressive Technology Act (BOT Act), A.9315-A (Alvarez) / S.7623-B (Hoylman-Sigal), would empower workers against exploitative surveillance, prohibit the use of discriminatory algorithms in hiring, and make New York a leader in setting labor protections for the digital age. The NYCLU strongly supports this legislation and calls for its immediate passage.**

The myriad of worker surveillance, tracking, and analytics tools – collectively called *bossware*<sup>1</sup> – which include, for example, in-person and remote monitoring, location

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<sup>1</sup> See e.g.: Aiha Nguyen, DATA & SOCIETY, *The Constant Boss: Work Under Digital Surveillance*, (2021), [https://datasociety.net/wp-content/uploads/2021/05/The\\_Constant\\_Boss.pdf](https://datasociety.net/wp-content/uploads/2021/05/The_Constant_Boss.pdf) and Bennett Cyphers and Karen Gullo, *Inside the Invasive, Secretive “Bossware” Tracking Workers*, ELECTRONIC FRONTIER FOUNDATION (2020), <https://www.eff.org/deeplinks/2020/06/inside-invasive-secretive-bossware-tracking-workers>.

tracking, keystroke or mouse loggers, and various forms of biometric recognition such as facial, voice, emotion, and behavior recognition, are highly invasive and facilitate surveillance and control far beyond workplace needs. The underlying goals are diverse: enforcing extreme productivity goals that disincentivize or even penalize taking breaks; replacing of human supervisors; protecting against injury, theft, data breaches, or lawsuits; and many other dubious marketing claims.

The negative impacts on workers are severe, both psychologically and physically,<sup>2</sup> and workers don't have any meaningful say in their use due to the power imbalance between employers and workers, lack of rights, and lack of even the most basic information about these systems. Bossware allows employers to collect troves of workers' personal information, including health data, religious practices, family structure, pregnancy, race, gender, sexuality, nationality, and immigration status – mostly without any informed or meaningful consent. Workers who already face marginalization are most likely to bear the brunt of workplace surveillance that is used to impose standardized behavior or to flag “atypical” behavior. To protect against these harms, the BOT Act would enact notice and data minimization requirements and create urgently needed privacy safeguards. Employers would only be permitted to collect data on employees for specific use cases and only to the extent necessary to achieve these. It carefully balances the need for certain electronic monitoring for legitimate purposes with much needed protections against excessive, exploitative, or oppressive worker surveillance.

The BOT Act would also regulate automated employment decision tools (“AEDT”) – algorithms and software that assist or replace human decision making on employment decisions. AEDT are widely used; yet their operation is shrouded in secrecy, and they risk undermining existing labor and civil rights protections.<sup>3</sup> Examples abound with racist, sexist, ableist, or other biased AEDT, with resume scanners that prioritize male candidates,<sup>4</sup> systems that are inaccessible to applicants with disabilities,<sup>5</sup> and racially biased video interview platforms.<sup>6</sup> To stop these practices from occurring, the BOT Act would require employers to conduct impartial impact assessments that assess validity

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<sup>2</sup> Matt Scherer & Lydia X. Z. Brown, *Report – Warning: Bossware May Be Hazardous to Your Health*, CENTER FOR DEMOCRACY AND TECHNOLOGY (Jul. 24, 2021), <https://cdt.org/insights/report-warning-bossware-may-be-hazardous-to-your-health/>.

<sup>3</sup> Olga Akselrod & Cody Venzke, *How Artificial Intelligence Might Prevent You From Getting Hired*, AMERICAN CIVIL LIBERTIES UNION (Aug. 23, 2023), <https://www.aclu.org/news/racial-justice/how-artificial-intelligence-might-prevent-you-from-getting-hired>.

<sup>4</sup> Jeffrey Dastin, Amazon scraps secret AI recruiting tool that showed bias against women, REUTERS, October 10, 2018, <https://www.reuters.com/article/us-amazon-com-jobs-automation-insight-idUSKCN1MK08G>.

<sup>5</sup> Lydia X. Z. Brown, Ridhi Shetty & Michelle Richardson, *Report – Algorithm-Driven Hiring Tools: Innovative Recruitment or Expedited Disability Discrimination?*, CENTER FOR DEMOCRACY AND TECHNOLOGY (Dec. 3, 2020), <https://cdt.org/insights/report-algorithm-driven-hiring-tools-innovative-recruitment-or-expedited-disability-discrimination/>.

<sup>6</sup> Ifeoma Ajunwa, *Automated Video Interviewing as the New Phrenology*, (2021), <https://papers.ssrn.com/abstract=3889454>.

of these tools, their potential for disparate impact on any protected class and potential remedies to address those impacts, and their impact on accessibility for people with disabilities. Employers would be required to publish the results of these assessments in a public registry. The bill would also mandate meaningful notification regarding the use of AEDT, alternative selection procedures, requests for human review, appeals processes, and clear prohibitions of tools that violate laws, threaten welfare, or have discriminatory impact.

The BOT Act incorporates lessons learned from prior efforts to address discriminatory algorithms in the workplace. New York City attempted to tackle bias in AEDT by enacting Local Law 144 of 2021 (“LL144”). Unfortunately, this ordinance fell far short of providing comprehensive protections for job candidates and workers.<sup>7</sup> LL144 requires employers to conduct severely limited bias audits of only a narrow scope of tools they use and only share certain results publicly. It also fails to provide workers with the information they need, does not ensure there are alternative selection procedures, does not prohibit technologies with discriminatory impact, and lacks sufficient enforcement mechanisms. A year after LL144 came into effect, it has become abundantly clear that it is far too weak to protect against bias and to hold employers and vendors accountable.<sup>8</sup> In contrast to A.9315-A/S.7623-B, it also does not include any protections against workplace surveillance. All these gaps and loopholes – to say nothing of the lack of even these minimal protections outside of New York City – underscore why the BOT Act is urgently needed.

New York’s workers deserve justice and equity in the workplace, and the BOT Act would set up the framework to protect against invasive and biased technologies and ensure our fundamental civil rights are upheld in the digital age.

**The New York Civil Liberties Union strongly supports A.9315-A/S.7623-B and urges lawmakers to pass it promptly.**

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<sup>7</sup> Daniel Schwarz, *Testimony Regarding Tackling Bias in Automated Employment Decision Tools*, NYCLU (2022), <https://www.nyclu.org/resources/policy/testimonies/testimony-regarding-proposed-rules-implement-local-law-144-2021-tackling-bias-automated>.

<sup>8</sup> Daniel Schwarz & Simon McCormack, *Biased Algorithms Are Deciding Who Gets Hired. We’re Not Doing Enough to Stop Them*, NYCLU (2023), <https://www.nyclu.org/commentary/biased-algorithms-are-deciding-who-gets-hired-were-not-doing-enough-stop-them>.