New Digital Infrastructures of Workplace Health and Safety

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About the Author

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Alina heads the Labor Futures initiative at Data & Society, which seeks to understand the implications of data-driven technologies for the future of work, technological development, and create new frames for understanding these disruptions through evidence-based research and collaborations with practitioners, policymakers, and the public. Previously, she was a fellow at the Berkman Klein Center for the Study of Law and Technology. She brings a practitioners perspective to Data & Society, having worked for over a decade in community and worker advocacy and organizing.

Prior to joining Data & Society, she worked to raise job standards for retail, service, and hospitality workers in Massachusetts, including on issues of health and security, and local governance at the Boston Foundation and the Boston Economic LAANDS. She has authored reports analyzing outsourced passenger vehicle drivers in Boston, the impact of Massachusetts' minimum wage on safety and jobs, and a baseline study of Orange County's (California) workforce.

About the Series

In this essay series, Watching the Watchers: The New Frontiers of Privacy and Surveillance amidst COVID-19, WILDAF-Ghana Rights, Technology and Democracy explores the policy, legal and ethical issues of forced surveillance tactics in times of crisis.

As the audit of the COVID pandemic, governments and corporations around the globe have deployed surveillance tactics to contain the virus. Across the spread of COVID, it's used innovation to infer and even unconstitutionally table illness. This essay series examines how public and private actors are using pandemic response technologies to capitalize on the unprecedented moment.

A lighthouse, it remains a shining group of experts in countries the policy, legal, and technical landscapes of surveillance and privacy. Contributors from Ghana and around the world, this series is a wide ranging report that is professional in tone, justice, and author sensitiveness, among others, this series offers a roadmap on how to navigate the emerging and treacherous rapids impacts of crisis like this and coronavirus in the years to come.

I. Introduction

By the end of March, New York City, the epicenter of the COVID-19 pandemic in the United States, was already beginning to look like a ghost town. Many businesses had closed their doors and began instituting work from home policies. Governor Andrew Cuomo declared a state of emergency and suspended all activities deemed non-essential, including all in-person work.[1] Only those who had a "essential" job could continue to travel to their place of work. Among stores and warehouses were pouring in extra hours to pack, deliver, and stock to meet a growing demand for household products. In the medical field, hospitals were stretched to their limit yet were asked to find even greater capacity to care for a growing number of COVID patients. The demand for health care, food production, and delivery navigation the pandemic gripped the city.

As unemployment number grew, the federal government passed emergency legislation to provide financial assistance to workers who were furloughed or laid off. Unemployed American Americans received an extra $600 in unemployment benefits in the initial months of the pandemic, and independent contractors were eligible for benefits for the first time ever.[2] However, millions of workers were left out of the safety net. Many of the workers who were not included from these programs, Emergency legislation like the Families First Coronavirus Response Act granted enhanced paid leave for employees who contracted the virus, but contained major loopholes for large employers like exemptions for companies with 500 or more employees, businesses, such as food delivery workers.[3] The office men that "essential workers" received an influxes of cash but still had to work in hazardous conditions.

Compounding the difficult situation in the workplace, Congress found themselves was the unwillingness of the U.S. Occupational Safety and Health Administration (OSHA), the government agency responsible for enforcing workplace safety, to take steps to ensure employers were fulfilling their legal duties to provide a "place of employment which are free from recognized hazards that are causing or likely to cause death or serious physical harm to employees."[4] In the impact of the pandemic grows, OSHA and other federal agencies with oversight over the workplace continue to issue calls to expand regulatory authority for the overcoming circumstances or enforce existing regulations.[5] Rather, federal oversight agencies are leaving responsibilities to states and employers to decide how to address this public health crisis.

As a result, in the workplace, employers have to federal requirements for instituting measures to mitigate COVID-19 transmission. These measures, which are not mandatory, range from large-scale facilities requirements to work from home policies to offering soap and wash stations. Most states have emphasized solutions like wearing masks in public, social distancing, contact tracing, and health and symptom monitoring. Many of these measures have been in place for months, and it becomes the basis for many corporate workplace health and safety policies as well.

While some employers are taking extra measures, most employers are focusing on hygiene and behavioral changes rather than more effective, economic strategies to mitigate the spread of the disease. Specifically, these measures rely on measuring, monitoring and data collection, and emphasize strong individual behavior. A new acceptance of monitoring and surveillance of disease and movement, and a willingness to share personal information with employers, including monitoring increased surveillance in the name of public health, emphasizing individual responsibility, shifting accountability to workers, and new privacy implications with the integration of new data centric technologies.

II. Pandemic Protection in a Regulatory Vacuum

In the United States, the Occupational Safety and Health Act (OSH) is the body of law governing workplace health and safety for most private sector employers and their employees. The OSH Act requires employers to comply with the Occupational Safety and Health Administration (OSHA) which is responsible for promulgating rules and enforcing regulations meant to protect employees while at work. However, since COVID-19 became a global pandemic, OSHA has resisted issuing even temporary standards to protect workers from the coronavirus. Instead, OSHA has left it to employers to provide safety with its current mandate and has only provided voluntary, unenforceable guidelines to employers on recommended steps.[6] The most comprehensive guidelines OSHA offered was a 20 page "Guidance on Preparing Workplaces for COVID-19" (7) The guidance recommends employers to implement a hierarchy of control hygiene practices outlined by the Center for Disease Control and Prevention (CDC).[8] The guidelines follow a hierarchy of controls, or measures that employers can institute in order of effectiveness to reduce the exposure of employees to hazards.

> ***Engineering controls*** are used to reduce exposure to hazards without relying on changes in behavior and are often the most effective solutions. These types of controls include engineered air filters and ventilation, as well as physical barriers. **Administrative controls** are changes to policies or practices that require action by employees or employers such as allowing employees to work from home, or staggering work shifts. Finally, the use of personal protective equipment (PPE) like masks, gloves, and gowns are a form of administrative controls that are meant to reduce the duration and frequency, or intensity of exposure. These measures can include providing tissues and hand sanitizer, encouraging sick employees to stay home, and cleaning and disinfecting. **Personal Protective Equipment (PPE)** like masks, gloves, and gowns can be useful in prevent certain exposures but do not remove the hazard in any way. However, in shifting those as recommendations instead of requiring that employers take more comprehensive measures to reduce the hazard, OSHA's guidance emphasizes the ease of use and that it has to be adopted for it to be effectiveness.[9]
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> Furthermore, guidance that is not enforceable means that employers can take no measures at all. OSHA's lack of enforcement capability has been exacerbated by its office further downgrading the importance of COVID as a threat to the agency's expected response. The memo informs staff that they should treat complaints related to COVID-19 as non-formal if they are from non-emergency or non-healthcare facilities and narrowly tailored to the types of injuries that should be reported.[10]

These recommendations changed little for workers who struggle to find personal protective equipment, or employers who struggle to adapt these guidelines. OSHA has been enforcing its rules, even in the healthcare industry, and it has come under fire for not investigating dangerous working conditions in industries, like meat packing, that have been kept open to a presidential executive order to meet food demand.[11]

The result of the regulatory vacuum has been a rapid spread of the disease in certain workplaces. As of July 2020, over 700 healthcare workers have died from the virus and according to one estimate, nearly 100,000 healthcare workers have been infected.[12] The United States Department of Agriculture (USDA) national processing line speed limits in some poultry plants to maintain high production levels, a decision that conflicts with the CDC's recommendation that businesses slow their production lines and space workers apart.[13] Meanwhile, meat processing companies have asked to work with inadequate PPE and employers have retaliated against workers for speaking out. Health care workers are recognizing the failure of the federal government to protect them, and they are appealing to state governors to establish mandatory workplace safety standards such as PPE, social distancing, and stronger whistleblower protections.[14]

Because the federal government has failed to establish any required mandates, the responsibility decision to individual states and municipalities to implement and enforce. Many states have issued comprehensive mandatory standards for employers but most have not. This leaves employers in most states free to set their own standards and policies for workplace health and safety.

III. Tracking, Measuring, and Monitoring

Governments have adopted a variety of approaches to "flatten the curve" in order to ease the strain on healthcare, hospitalizations, and ultimately, deaths. These include stay at home orders, requirements to wear masks, and social distancing. However, orders to close businesses and limit gatherings were always meant to be temporary measures. The ultimate goal of government and public disagreement over how long to keep stay-at-home orders because of the severity of the coronavirus and how answers about the future. The medical community's best estimates proposed that a vaccine wouldn't be available for over a year. Given this long-term outlook, many have begun to look for more sustainable, and often solutions. Even as measures have been lifted, many have seen simultaneous efforts to create a means of identifying and monitoring the spread of the disease.

As conversations about reopening began, OSHA and the CDC issued more recommendations for mandatory safety guidelines. [15] OSHA in particular outlines the following principles that employers should consider as they reopen: 1) Physical Assessment, 2) Hygiene, 3) Social Distancing, 4) Identification and Management of Ill Workers, 5) Control of Non-Ill Workplace Exposure, 6) Controls - Engineering Controls, Administrative Controls, Safe Work Practices, and PPE, 7) Work Flexibilities, 8) Training, and 9) Anti-Retaliation.

Although the principles are directive, they overlap and rely on employers instituting engineering controls, administrative controls, and PPE. For example, administrative controls are meant to influence behavior, thereby achieving social distancing goals, but maintaining a 6 feet distance could also be achieved by installing physical barriers between workstations. Similarly, PPE measures are not equally effective. But without a clear mandate, employers can choose to implement the protocol that suits their interests rather than the one that is most effective at protecting worker health and safety.

This also means policies vary dramatically from industry to industry, occupation to occupation, and even among employers in the same industry and occupation. Some employers have adopted wearable monitors in the form of a tracking device that uses bluetooth technology to enhance workplace safety. Some companies have allowed their workers to work from home situation, installed barriers and staggered schedules for higher- wage, "white collar" occupations while low-wage workers in these same companies are subjected to regular temperature checks and electronic means to encourage employees to maintain a 6 feet distance.

With OSHA only offering voluntary guidance, many companies have surveyed their policies meant to track and monitor the spread of the disease. The most common policies include health and safety changes track with state public health recommendations, such as social distancing, wearing masks, testing, and monitoring for symptoms and illness. Employers are using a variety of technologies to alerts, identify, and monitor workers and their behavior in an effort to create a sense of safety and expedite a return to normal business activity.

i. Worker health screening

Many businesses including grocery stores, restaurants, and manufacturing facilities are requiring their employees to use rating workers' temperatures at the start of their shifts, using a range of instruments from basic thermometers to more sophisticated heat sensors. In nursing homes, regular testing of patients and staff who could potentially introduce the virus into facilities is becoming a requirement for states to protect patients and other health professionals. Among Nursing Home Facilities, Medicare and Medicaid Services is curing home workers.[17] In addition, some employers are asking workers to complete questionnaires about their activities as part of daily employment screenings.

The National Basketball Association's attempt to restart the season provide an interesting example of the centrality of testing and hygiene in a post-pandemic work environment. In preparation for July games at the Disney World Complex in Florida, the NBA released a 113-page handbook for players and staff. The NBA's protocol includes "rigorous guarantine spaces and hygiene, the sports facility and daily testing for the virus. The league is also offering players a wearable monitor in the form of a ring that can be used to track temperature, heart rate, and respiration, among other biomarkers, and can display an "iPhone probability score."[18]

ii. Distancing tools

In logistics, Amazon has developed a Distance Assistant, a software that applies machine learning to cameras positioned in warehouses to identify high-traffic areas and encourage social distancing. As people walk by the cameras, the software recognizes when individuals remaining 6 feet apart (dots are highlighted with green circles, [sic] those who are closer together (which are highlighted with red circles.[19] Amazon has made the software open source for others to use and create their own Distance Assistance.

Similarly, Ford Motor Company has developed a watch that "buzzes" when workers are too close together or too close to a foot distance from one another. The app is part of a suite of new safety measures the company will institute, including thermal scanners to track fevers, and masks and face shields. The new safety measures were developed in partnership with the United Auto Workers, the union representing Ford factory workers.[20]

iii. Digital contact tracing

Contact tracing is also gaining popularity as a solution because it is potentially cheap, scalable, undetectable and non- invasive, and can be developed considerably faster than a vaccine. Public health agencies already use contact tracing to slow the spread of other infectious diseases.[21] Contact tracing is a process in which the communicable disease that public health agencies explore using digital tools to expand their reach and increase the demand for staffing.[22]

Generally, contact tracing can be broken down into following steps: case investigation, contact tracing, contact support, and self-quarantine. Digital tools can help with contact tracing and support. For example, if a person says he tested positive for a certain virus and **contact tracing**- notifying exposed people. However, support for those who have been at risk in this method include through digital means and thus far, there are no places to use digital tools to enforce self-quarantine. In fact, although such measures have been implemented in other countries.

In the United States, the tech giants are collaborating on an application programming interfaces (API) that would run on both Android and iOS operating systems makes widespread use of digital contact tracing a possibility by allowing iOS and Android to communicate with one another. The two operating systems effectively share control of smartphones in the world. Using GPS on phones, contact tracing can collect these points of sensitive data about individuals. Many countries, including the US, have not implemented laws that limit how this data can be used. Privacy experts fear this can be used with other data bodily purposes, combined with other identifying information, or stored for extended periods of time.[23] The Apple and Google venture attempts to address these privacy concerns by decentralizing the system. Instead of a centralized Privacy experts fear this can be used with bodily purposes, combined with other identifying information, or stored for extended periods of time.[24] The Apple and Google venture attempts to address these privacy concerns by decentralizing the system. Instead of a centralized

Consulting giant PricewaterhouseCoopers (PwC) created a tool called Check In for clients' eager to bring employees back to work. Check In is a mobile application for a company's quarter of a million employees across the world. According to Tom Puthenpurackal, a digital leader working on the project for PwC, employees can normalize the use of contact tracing tools.[25]

Contact tracing digital tools are also available through wearable devices like electronic wristbands.[26] Companies like Hala, Estimote, and COVIDsafe sometimes even refer to their wearable devices as "employee monitoring devices" and statistics on effectiveness of distancing in the workplace and real-time reporting of status by users of these devices (https://www.proximityhealth.com/, https://estimote.com/covid-safety). Existing wearable technology companies like Kinetic, Proximity, and CrowdSafe sell a wearable device that integrates contact tracing location, pulse rate, and other biometrics. Companies like Amazon are

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Originally marketed to computers and family members of worker claims "Hopkins" is a tracking app that uses GPS (19) or a contact tracing tool. According to the Times, the monitoring app requires a "Bluetooth connection after an individual was in contact with and for how long [29]

IV. The Implications

Without hearkening from the federal level about how to handle the pandemic, states and municipalities are creating their own rules for the workplace. Some are requiring employers to provide personal protective equipment and/or shield allowing a return to some semblance of normalcy. This proclamation is disputed by health professionals in many industries. Bar nursing homes, where a prudent testing strategy is critical to preventing contagion, and in the meat processing industry, where the pandemic has disproportionately affected the population (18) that even in an office environment, many employers are concerned that unless office spaces are safe, workers will not return. A 2020 survey found that nearly 19(0) will be a significant threat and when these precautions will be "in place" employers are "very concerned" (17) Contact Gemmare may remain a workplace issue for much longer than anticipated, even after a vaccine is found. As Shoshana Zuboff (2019) states, personal data collection and extraction are becoming an entrenched part of every economic sector(21)

Prior to 2020, companies were hare to decrease trust with employees as they introduced new productivity monitoring technology into workplaces. According to an American Survey Research (2019) 60% of employers track, or plan to track the internet browsing habits of employees that "can be power to improve everything from innovation to ability to cybersecurity to employee performance and engagement" This would ensure that companies remain competitive, productive, and "safe" (20) Prior to the pandemic, many employees—losing employee trust could result in a drop in future revenue growth.[22] Since COVID, the emphasis on trust and voluntary participation is seemingly less important.

However,
participation was
never a real
choice for low-
income workers.
COVID 19 has
made their myth
of willing participation evident for all workers. Employers can require that workers participate in contact tracing or other monitoring as a condition of employment, as Pricewaterhouse Cooper's Participatory recognized, "Employees who refuse to participate may be vulnerable to employer expectations of participation in monitoring. While employees sometimes welcome new technology if it makes their job easier, refusing to participate can carry heavy consequences" (23) Employers can also mandate testing, and if employees refuse, they can be chastically terminated. Participation is being built in the name of public health or "for good." To participate in this form of monitoring is even deemed a "sign of national solidarity, as a contribution to keeping your fellow citizens safe "(24)

Neither OSHA standards nor the OSH Act prohibit employers from screening for COVID-19, as long as it is applied in a "transparent manner applicable to all employees" (25) Employers are also responsible in the way of accountability mechanisms for use of digital tools. This is a problem because questions about what data is collected, where it goes, who it is used for, and how long it's stored are all decisions that are made through the design of technology(26)

Particularly for lower income and minority workers, these decisions are made without participation from the same layer of workplace rules historically over-surveilled populations, further deepening systemic inequalities. New tools that seek to track, test, and prevent the spread of COVID-19 are being introduced with no real ability for employees to object and little consideration from employers or governments about privacy due to the severity of the pandemic.

1. Shifting liability and costs

An added consequence of COVID-19 on workplaces safety is a shift in who is liable and who assumes the costs. Guidance from the CDC, OSHA and the White House suggest that employers should, if possible, "modify workplaces to allow for a safe return to work. However, these guidelines are voluntary. A failure to implement adequate safety measures carries no consequences for employers. Since March, OSHA has received over 5,600 reports of COVID-19 workplace safety complaints, but "not one citation has been issued resulting in just one case. In some instances, greater safety measures were only put in place after public displays of worker unrest. The dearth of liability for employers and enforcement by oversight authorities has placed the responsibility of compliance onto individual workers.

Recently, Smithfield, a major meat packing employer, deflected claims that inadequate safety measures were the cause of outbreaks in its plants. Given the disproportionate meatpacker rhetoric of minority population, the employer accused workers of bringing the virus into facilities. In Wisconsin, elected officials made comments that meatpacking workers are not "regular folks", and Minnesota's governor stated that meatpacking Asian American workers's overcrowding living quarters, multigenerational households, and use of public transit were the causes of infections because such lifestyles differed from those of "traditional American families."[(28)]

This type of blaming and shaming has historical roots in the US. To take just one example, in the early 1900s Chinese immigrants were "blamed—at the time, a matter of medical fact—for the spread of bubonic plague in the moral and physical health of the population. The Chinatown community was more heavily marked as different and derived because of housing conditions and domestic arrangements. This belief in public health campaigns to rid the community of disease through the use of force, quarantine, and fire. Such a mentality persists. The underlying accusation was that workers live in communities that are atypical, overcrowded, and lack good hygiene practices. Health and safety is the responsibility of employers, but hygiene is personal.

The challenges of clearly identifying points of infection have had business interests in such protection from lawsuits. In the meat processing industry, for example, workers already toiling under tough conditions were employees in sign workers releasing them from future lawsuits if they contract coronavirus. However, according to some sources, out of over 2,500 related cases filed in the US, less than one percent were employee claims.[29] Regardless, some states have passed liability shield legislation specific to the pandemic, protecting employers from lawsuits if they promised to reinstate liability protection if a businesses, identifying it as a measure crucial to restarting the economy.[30] Meatpacking legislators and worker rights organizations are concerned this could protect employers who fail to provide personal protective equipment and who restrict workers' rights to seek medical care (31) Some regulatory agencies' reluctance to either mandate or investigate, preventing employees from appealing to the courts essentially deprives workers of almost all means of holding employers accountable.

Fears about lawsuits are coupled with fears of increased costs of operations post COVID. In the running home industry there is an ongoing battle between employers, the CDC, and representatives of workers over the feasibility of the cost of testing patients and workers. New York determined that employee testing was medically necessary and should be covered, but without a clearly identified responsible party, insurance providers and centers testing these measures are the responsibility of employers while employers claim they cannot shoulder the burden of the costs. Testing is a critical tool to protect workers, some of the oldest and poorest workers in the healthcare industry must pay the costs out of pocket and in some cases turn out for tests without pay(32)

2. Screening as a disciplinary tool

Empowering employers to essentially set their own health and safety rules means that guidelines for preventing the spread of COVID-19 will vary

widely. Some states, on the other hand, is explicit that breaking protocols can result in a "warning, fine, suspension or even dismissal from the campus." In addition, the league is relying on self-policing through an "anonymous tip line" to report violations of safety protocols. This harkens to a striking shift in the responsibility of employers to comply with OSHA guidelines, but now workplaces health and safety protocols have employer responsibility into a disciplinary tool for workers. Workers are now "on the hook" for the health and safety of a team. Peer pressure is a powerfully earned their workers and collect data about their work habits—data that is used to discipline and engineer worker behaviour.[33]

3. Privacy implications

The growth in productivity and biometric technologies in the workplace have already brought up new privacy questions. Courts have found that employers have wide discretion in matters regarding when the equipment or technology is employer-owned, the employer has a legitimate business interest, and the use is limited to normal working hours. The Machine Vision Group (2020) specific requirement and tracking measures will be unlikely applied to workplaces only sides to these privacy concerns.

PwC's contact tracing app currently relies on employees using a company phone or agreeing to download the app onto their personal devices(34) However, it's unclear whether all employees will ask for their employer's permission to download the app onto their personal organization. United Air Respond, however, has previously asked workers to download an app onto their personal devices that collects immunity and status on alleated fevers. Managers tell workers that the app will make their lives easier and that "it's fun" (35) Use of this service is not automatically tied to workers clock out. Similarly, contact tracing apps are being marketed as beneficial for workers, as workers have little sense that they can object to using them.

Legal scholar Ifeoma Ajunwa's research into wearables shows these tools can help improve worker health and safety. Much like analytics designed employees capable of helping the source avoid danger or SmartCape used in Amazon warehouses to prevent repetitive motion illnesses Amazon's research to improve safety techniques potentially dangerous environments.[36] However, such tools can have negative impacts. A contact tracing app can inform managers of all interactions between coworkers and can be used to discipline workers who socialize too closely with others, share, lose bag, and if engaged with romantic or casual sex, the subject of discussion.

Recently, Kroger's grocery division, Harris Teeter, started using Proximity Sensing Badges from the company Kaptiva Kaptiva, the cut of one of the first non-mandatory protocol was inconsistent and lacked clear controls to protect employee privacy. The specifics of when, and where temperatures were taken were inconsistently recorded, the data was not encrypted, there was no consent, and several employees reported that managers wouldn't disclose their temperature reading. The company's refusal to provide workers with their own information raised red flags about how the company was using the information. Kaptiva's response to the privacy(37) day effort to require temperature taping, PPE, and testing is minimum risk to the virus in workplaces is welcome. However, Kroger's technological solution to shift behavior without guardrails to protect worker privacy is problematic.

Workers should be concerned about how data collection on worker health and safety will stretch beyond the pandemic, and be used to make decisions related to health benefits, insurance costs, and hiring and firing practices. Some of CDC are careful to remind employers to abide by the Americans with Disabilities Act (ADA), Health Insurance Portability and Accountability Act (HIPAA) and Equal Employment Opportunity Commission (EEOC) rules but there is little oversight to ensure that employers are indeed accurate for COVID-19. This leaves open questions about how temperature checks and test results are retained and protected, and whether that information is part of the workplace health and safety record of employers.

V. Conclusion

The COVID-19 pandemic is a landmark event that is
reshaping workplaces
and safety. COVID-19 is a
workplace health and safety
issue, as well as a public health
issue more broadly. But the
ability of workers to protect themselves and their
families and socially distant and hygiene enable to safeguard themselves from risk. Low-wage and "essential workers" employment is not, and were disproportionately exposed to infection.

Current public health orders emphasize individual responsibility, but workplaces health and safety is the responsibility of employers. The failure to mandate strong workplace safety has shifted the responsibility from employers onto individual workers, and has created a situation where workers have no responsibility and cannot, and in many cases, are not, a non-punitive position. Moreover, workers are finding themselves in the uncomfortable and sometimes dangerous position of policing customers in restaurants, grocery stores and on public transit. Workers are being surveilled and disciplined in the name of public health, and workplaces will have minimum risk, particularly as parts of the country begin to reopen and are beset with high rates of infection.

While hard fought battles by labor and the public for hazard pay, paid sick leave, and PPE are commendable, health and safety should be a fundamental right in the workplace that should be protected without a struggle. In fact, companies like Amazon and Kroger will soon render these benefits even though the dangers are over. The pandemic has exposed how precarious health and safety has been underscored a critical moment, which is other when these infrastructures are tested. Technical solutions cannot solve this large issue and threaten to further undermine workers' ability to maintain autonomy at work and have some control over their working conditions. Workers are disproportionately representative health and safety as a fundamental workplace right and be used to advocate for full funding and staffing of OSHA so that it is championing the right of employees to return to work in hazardous conditions, a right to sue employers for endangerment, and strengthen whistleblower protections.

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