



# Prohibiting Surveillance Prices and Wages

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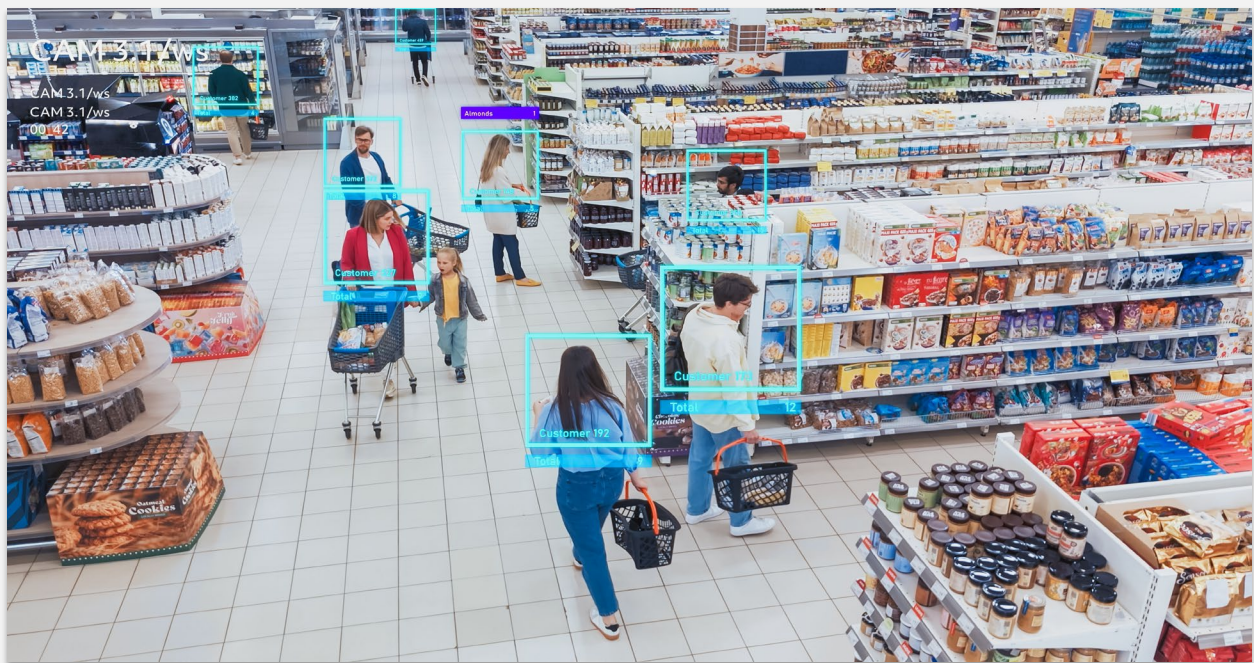
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## Introduction

Last October, an explosive news report found that Kroger, one of the largest grocery store chains in the United States,<sup>2</sup> was exploring the use of facial recognition technology in its stores. Immediately, shoppers and public officials<sup>3</sup> worried that consumers' faces might be used, along with other intimate data, to deliver different prices for different consumers. The story tapped into a deep and understandable fear. Imagine walking into a grocery store and seeing a price for milk that's higher than what the next shopper pays because an algorithm calculated that you're willing to spend more based-on data regarding your shopping habits, financial vulnerability, social media activity, or even subtle cues like your body language.

The threat is real.<sup>4</sup> The Federal Trade Commission (FTC) published a first-of its kind report on surveillance pricing last month, which details how corporations can use vast quantities of personal data to set individualized



prices for goods and services, exploiting consumers based on their unique vulnerabilities and behaviors.<sup>5</sup>

Corporations collect information about where we go, what we watch, what we like, who we know, what food we buy, what videos our cursors linger over, and what loans we take out. Giant firms can run those data points through algorithms to set individualized prices and wages, rigging the market to charge us as much as possible for goods and services and pay us as little as possible for our work.<sup>6</sup>

This report explains how surveillance prices and wages work; what harms they may cause; and what legal tools are currently available to combat them. It then calls on the states to act decisively and ban these practices outright. To do so, it introduces five core principles to guide future government action.



## I. Prevalence of Surveillance Prices and Wages

The prevalence of surveillance prices and wages is difficult to measure, but the technology to impose them is already widespread. Last month's FTC report summarized preliminary agency findings about third-party companies that market surveillance pricing tools to clients. The report suggests that surveillance pricing tools are being actively developed and marketed across a range of industries, including consumer-facing businesses like "grocery stores, apparel retailers, health and beauty retailers, home goods and furnishing stores, convenience stores, building and hardware stores, and general merchandise retailers such as department or discount stores."<sup>7</sup> Two of the companies the FTC examined specifically market to financial services companies, including credit card companies.<sup>8</sup>

The tools vary in their sophistication and application, from generalized price-setting algorithms for brick-and-mortar stores to highly personalized price-



targeting based on data such as browsing history, purchase patterns, or a customer's inferred "willingness to pay."<sup>9</sup> The full extent of adoption remains challenging to quantify, due to the opacity of the underlying systems and the proprietary nature of the algorithms used, but the FTC report indicates a growing normalization of surveillance-pricing practices in both consumer and business-to-business markets.

There are several other known examples of surveillance pricing going back more than a decade, such as when customers discovered that Staples was charging different amounts for staplers online on the basis of their zip codes.<sup>10</sup> Princeton Review was caught charging more for test-prep services in zip codes with large Asian populations.<sup>11</sup> Rideshare companies have been suspected of charging customers more when their phone batteries are low.<sup>12</sup> Amazon has been accused of setting personalized prices based on customer location, browsing history, purchase behavior, and Amazon Prime membership status.<sup>13</sup>

There is even more evidence of the ubiquity of surveillance wages. Millions of people in this country are already subject to algorithmic wage setting. For example, Uber and Lyft set compensation based on algorithmic determinations, and there is reason to think they use intimate data to determine precisely how little an individual worker may be willing to accept to perform a job.<sup>14</sup> Several studies of wages paid



to workers in the so-called “gig economy” show that hidden algorithms lead to unpredictable pay that varies between workers performing the same work.<sup>15</sup> And as more and more companies require workers – ranging from healthcare providers and construction workers, to engineers and teachers – to shift to a gig-economy model of employment, gig-based-surveillance systems are expanding across the marketplace.<sup>16</sup> A recent report from the Roosevelt Institute shows how some nurses are paid differently based on an algorithmically-manipulated-bidding war, not the tasks they perform.<sup>17</sup>

Surveillance wages could soon extend beyond gig work to various blue- and white-collar industries, such as e-commerce, healthcare,<sup>18</sup> customer service, and transportation and logistics.<sup>19</sup> Corporations already use algorithms to influence staffing and scheduling in ways that have an indirect effect on wages,<sup>20</sup> and as employers and third parties increasingly gather personal and behavioral data, that data could be used to set personalized wages outside of the gig-economy context.



## II. How Surveillance Price and Wage Setting Works

*Surveillance price and wage setting relies on*

*(1) widespread collection of personal, demographic, consumer, workplace, and contextual (i.e., geography, supply and demand, etc.) data*

*(2) algorithmic processing of collected data*

*(3) automated inferences*

*(4) decision-making based on those inferences*

First, companies gather extensive personal and behavioral information about each of us. Employers and retailers use workplace surveillance tools, consumer apps, and third-party data brokers to amass data on individuals. For example, workplace tools monitor productivity by tracking keystrokes, time spent on tasks, or even biometric data such as eye movements or posture. Retailers use apps to track what consumers buy, their browsing habits, and their location while shopping. Third-party data brokers provide demographic and financial data, such as income levels, debt, or even how often someone shops online. Together, these data form a comprehensive picture of an individual's behavior, preferences, and financial situation.

Then, corporations use automated tools to make decisions based on predefined rules (algorithms), optimization models, or AI-generated predictions.<sup>21</sup> This means that computing systems uncover patterns and predict how individuals are likely to behave—or in wage and price terms, what their “pain point” is.

On the consumer side, companies can analyze purchasing habits, urgency of need, and geographic constraints and adjust prices accordingly. The same technologies can be employed to set wages. Companies can use wage-setting algorithms to analyze a worker's financial stress, geographic location, and employment history to determine the lowest wage the worker might accept.<sup>22</sup>

Surveillance prices and wages are already here, and we don't know how far they may extend. We could already be living in or soon encounter a world where:

- *A consumer is charged more for airline tickets because their web search history shows they were recently looking at obituaries and may need to travel to attend a funeral.*<sup>23</sup>
- *A customer searching online for diapers is charged more after searching "divorce attorney" online.*
- *A woman is charged more for sanitary products because her period tracking-app shows that she is menstruating.*
- *An online vendor offers a "deal" on cat litter to customers who bought their first known bag of cat food within the past ten days but increases the price once those customers set up recurring cat litter deliveries.*
- *A worker is paid less because data shows she took out an online payday loan.*
- *A worker is paid less because data shows he has a chronic illness and few other employment options.*
- *A worker's wages are reduced because she joined a Facebook group of reproductive rights advocates, and her employer opposes abortion rights.*
- *A mother is charged higher prices for groceries because she bought cold syrup online.*

### III. Harms Caused by Surveillance Prices and Wages

#### A. Surveillance Prices and Wages Threaten Personal Privacy, Freedom of Thought, and Freedom of Expression

Personalized wage and price setting embeds surveillance into every facet of our lives. Absent legal protections and basic data rights, individuals lack the ability to control how this information is used.



These concerns are perhaps most salient in the workplace.<sup>24</sup> Employers can use surveillance tools to track, monitor, and surveil, not just productivity measures, but emotions,<sup>25</sup> movements,<sup>26</sup> and interactions with others. Employers use this information to nudge behaviors, suppress wages,<sup>27</sup> and undermine workers' right to organize and engage in collective bargaining.<sup>28</sup> There is already evidence, for example, that in Japan, employers have used surveillance wages to suppress pay for union workers.<sup>29</sup>

Because workers fear that their politics, as revealed through associations or social media activity, can affect pay or benefits, surveillance wages can create a culture of "rational paranoia,"<sup>30</sup> where workers censor themselves to avoid retaliation.

## B. Surveillance Prices and Wages Exacerbate Systemic Discrimination

Algorithms often rely on data that reflect historical and ongoing biases, embedding these prejudices into wage- and price-setting systems and perpetuating them. For example, as studies of rideshare company platforms have shown, riders traveling to predominantly non-white neighborhoods are often charged higher prices,<sup>31</sup> a pattern that mirrors historical residential segregation. And, as explained above, college test-prep services have sometimes been priced over \$1,000 more in zip codes with large Asian populations.<sup>32</sup>

Similarly, on the wage side, immigrant workers and workers from subordinated racial groups are often subject to lower pay rates<sup>33</sup> due to the opaque operation of their employers' algorithmic systems, which exploit workers' vulnerabilities to suppress compensation. The harm extends beyond lower pay. As a result of employers' use of surveillance wages, workers from marginalized groups may have to work longer hours to make the same money as someone who is less financially desperate. That may mean more dangerous workplace conditions and less time with families or for other pursuits outside of work.



## C. Surveillance Prices and Wages Facilitate and Mask Corporate Control

Surveillance wage and price setting also strips working people of power and autonomy, transferring control to corporations that exploit data to maximize profits.

Again, the problem is most apparent in the workplace. Companies' algorithms collect



vast amounts of data to continuously monitor, evaluate, and nudge worker behavior,<sup>34</sup> including through individualized wage payments. Workers, often unaware of how their wages are calculated, are incentivized with fluctuating pay rates that encourage them to accept more tasks or work longer hours. For example, gig companies offer bonuses or surge pay for specific routes or times, but these incentives often disappear once enough workers are “nudged” into compliance. This unpredictability mirrors gambling,<sup>35</sup> where workers are lured by potential rewards without clarity on their odds. The gamblification of work threatens health, safety, and human dignity.<sup>36</sup> Constant uncertainty and competition encouraged by surveillance wages often compel workers to take on grueling schedules, push beyond safe limits, skip using the bathroom, or forego rest to maximize earnings.<sup>37</sup>

Because these systems of control are obscured, they often are used to control workers while also suggesting to them their work is independent and flexible, even when it is not. Thus, some corporations may use surveillance-wage systems to control workers they classify as independent contractors,

allowing the corporations to sidestep legal obligations that they would incur if workers were correctly classified as employees.<sup>38</sup> These corporations thus maintain a system of “control without responsibility,” where corporations tightly manage labor while avoiding the legal and financial responsibilities of formal employment relationships.

Corporations can also use surveillance prices to exercise increased control over consumers. In a fair marketplace, prices are determined by competition between rivals, which typically produces downward pressure on prices. Consumers are empowered by their ability to determine whether a price reflects the actual cost to provide the good or service in question. But personalized pricing untethers price from cost and manipulates individual consumers into paying the highest price possible, eroding the consumers’ ability to determine whether a price is fair.

#### D. Surveillance Prices and Wages Transfer Wealth from People to Powerful Corporations

Surveillance wage and price setting allows corporations to identify an individual’s “pain point”—the maximum price a consumer will pay or the minimum wage a worker will accept. This strategy allows corporations to extract and capture every dollar they can from each transaction. Savings that workers and consumers were once able to achieve are now systematically funneled to corporate profit margins. In gambling terms, through surveillance prices and wages, the house always wins.<sup>39</sup>

On the price side, merchants can use surveillance pricing to continually experiment with higher and higher prices for individuals who may be more financially desperate. In theory, however, especially for goods or services in markets with many sellers, the consumer will walk away as prices rise. That kind of experimentation on the wage side is even more harmful as it’s often

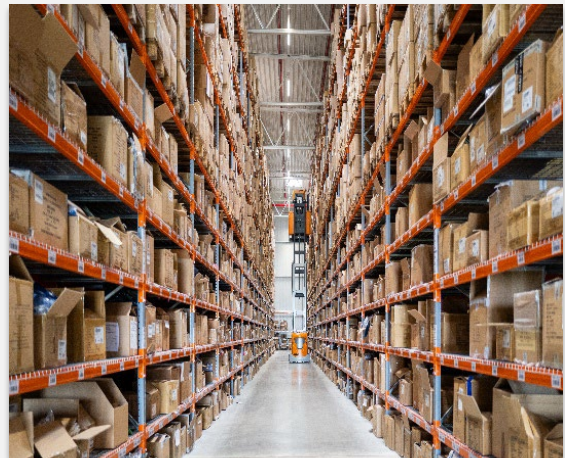
much harder for a worker to leave a job, particularly when they rely on that income for necessities, than for a consumer to stop buying a good or service. Many labor markets, especially in the gig economy, are exceptionally concentrated,<sup>40</sup> so there are few other places for a worker to go.

Finally, powerful corporations may use surveillance wages and prices to facilitate price and wage coordination. Many firms rely on the same third party-algorithm providers, creating conditions for implicit or explicit coordination on wage suppression or price inflation.<sup>41</sup> That empowers firms to collectively set terms in their favor, to the detriment of workers and consumers alike. A single firm can achieve similar effects if its surveillance systems are advanced enough to monitor competitors' pricing or predict whether workers or consumers will have viable access to rival firms.

### E. Surveillance Prices and Wages Hurt Small Businesses and Give Large Corporate Powers a Competitive Advantage

Surveillance prices and wages allow dominant corporations to increase their dominance over small businesses. Dominant firms typically have superior access to data and advanced technologies to exploit surveillance-wage-and-price-setting systems, and once dominant firms begin using surveillance wage and price setting, they can collect even more data, refining algorithms and widening their advantage. Smaller firms often lack the market power and technology to demand access to or exploit surveillance data. A recent FTC case against Amazon<sup>42</sup> offers a useful illustration of the way dominant corporations can harm smaller rivals by exploiting asymmetrical access to data. The FTC alleged that Amazon had created a secret algorithm, internally codenamed "Project Nessie," to increase prices in contexts where Amazon believed competitors were likely to follow suit. If competitors increased their prices to match Amazon's, Amazon kept its prices at the higher level. If competitors did not increase their prices,

Amazon lowered its prices again, so as to avoid losing customers. Project Nessie worked as intended, allowing Amazon to extract over a billion dollars from American households, by allowing Amazon to identify opportunities to increase prices without losing customers.





## IV. Current Legal Regimes Partially Address Surveillance Prices and Wages

Surveillance prices and wages implicate several legal frameworks and, in some instances, may already be illegal under existing laws. From competition laws and anti-discrimination statutes to privacy laws, credit-reporting regulations, and prohibitions on economic reprisals for political affiliation, multiple legal schemes provide an opportunity to reign in surveillance price and wage setting.

The stakes are high, and it is unlikely that federal enforcers will pursue action in the short term. State attorneys general and other state and local enforcers, therefore, along with private enforcers, must leverage existing legal frameworks to tackle this emerging problem.

Nonetheless, each existing legal scheme has its limitations, and enforcement will be challenging due to the opacity of these practices and the difficulty of detecting abuse. To complement these tools and meaningfully address the harms of surveillances prices and wages, then, states should ban surveillance price and wage setting wholesale, subject to narrow exceptions for legitimate and transparent practices. This approach, discussed further below, would reinforce existing legal tools and address the systemic challenges of detecting and combating surveillance prices and wages.

### A. Competition Law

The Federal Prohibition Against “Unfair Methods of Competition”: Section 5 of the Federal Trade Commission Act’s prohibition against “unfair methods of competition”<sup>43</sup> may provide the most flexible tool for addressing surveillance

prices and wages.<sup>44</sup> It can only be enforced by the FTC itself. But the FTC's guidance in interpreting and enforcing Section 5 can be a helpful framework for state enforcement.

Recent FTC guidance emphasizes that methods are "unfair" if they are "coercive, exploitative, collusive, abusive, deceptive, predatory, or involve the use of economic power of a similar nature."<sup>45</sup> Under this framework, surveillance price and wage setting driven by algorithms, and charging people different prices or paying them different wages based on an algorithmic assessment, could be unfair. In fact, the FTC has explained that the legislative history of the FTC Act suggests that "price discrimination not justified by differences in cost or distribution" could be an instance of unfair competition.<sup>46</sup> This conduct is especially likely to be unfair when it involves exploiting sensitive personal data, when it is concealed from workers or consumers, or when it is used to coerce consumer or worker behavior. Importantly, workers are covered by protections against unfair competition whether or not they are "employees."<sup>47</sup>

**State Competition Law:** State competition laws offer a patchwork of varying tools to address surveillance prices and wages. Importantly, consistent with federal law, some states prohibit "unfair methods of competition,"<sup>48</sup> which may condemn surveillance prices and wages without further proof of market power or competitive harm. In addition, some states have enacted laws targeting specific forms of price discrimination. In California, for example, a specific prohibition against "locality discrimination"<sup>49</sup> protects purchasers from being treated differently based on their geographic location.

Furthermore, state laws often impose *per se* prohibitions on vertical restraints,<sup>50</sup> such as vertical price fixing (e.g., when a firm controls downstream prices or wages.). If a firm uses algorithmic price setting to set end-user/consumer prices or controls wages across purportedly

independent workers—meaning to engage in vertical price or wage fixing—that may be a *per se* violation of state antitrust law.

State laws against secret rebating or discounting<sup>51</sup> may also provide a mechanism for addressing surveillance prices and wages. When algorithms are employed to offer selective rebates or discounts based on user data or other non-transparent criteria, they may violate these laws.<sup>52</sup>

## B. Consumer Protection Laws

Laws Prohibiting “Unfair and Deceptive Acts or Practices”: Surveillance price and wage setting could also constitute an unfair or deceptive act or practice (UDAP)<sup>53</sup> under Section 5 of the Federal Trade Commission Act, especially when used to suppress wages or prices in ways that may be hidden and difficult for consumers or workers to avoid.

Depending on the context, state UDAP laws<sup>54</sup> may provide even stronger protection and could draw on federal legal frameworks. When used to challenge surveillance wages, state UDAP protections should not vary based on employment status, meaning that if they are available to workers classified as employees as a matter of state law, they should also be available to those classified as independent contractors.

Credit Reporting Laws: Credit reporting laws, such as the Fair Credit Reporting Act (FCRA),<sup>55</sup> provide safeguards when third-party consumer reporting agencies (CRAs) are involved in decisions that impact wages or prices.<sup>56</sup> These laws mandate accuracy in the information collected and, in some cases, require that businesses using credit reports or similar data obtain authorization and disclose their use to individuals. However, the FCRA applies only to third-party CRAs and does not govern the internal use of data within a single firm. Additionally, while the FCRA emphasizes accuracy and consent, it does not prohibit differential treatment based on collected data.

## C. Privacy and Data Protection Laws

Electronic Communications Privacy Act (ECPA): The ECPA regulates the interception and monitoring of electronic communications to protect privacy.<sup>57</sup> Algorithms that monitor workers' or consumers' communications without authorization to gather data for price or wage setting risk violating the ECPA.

State Privacy Laws: State privacy laws like the California Consumer Privacy Act (CCPA)<sup>58</sup> and the California Privacy Rights Act (CPRA)<sup>59</sup> may require businesses to disclose what personal information they collect, how they use it, and whether they share it with third parties. However, these laws have notable limitations, as opt-out rights typically apply only to data shared between firms and not to internal uses within a company, where much algorithmic decision-making occurs.

Biometric Privacy Laws: State laws like Illinois' Biometric Information Privacy Act (BIPA)<sup>60</sup> regulate the collection and use of biometric data like fingerprints and facial scans. Unauthorized use of such data for the purpose of surveillance price or wage setting could violate these laws, exposing employers to significant statutory damages.

## D. Anti-discrimination Laws

Anti-discrimination laws may play a role in addressing surveillance price and wage setting when such practices result in a disparate impact on individuals with protected characteristics such as race, gender, or age. Disparate impact claims focus not on the intent behind a policy or algorithm but on its effects, allowing challenges to facially neutral practices. However, most anti-discrimination laws, including federal anti-discrimination laws, apply only to specific substantive areas, such as employment, housing, and credit. Importantly, federal and state antidiscrimination protections in

employment will often hinge on a finding of employment status. Other federal laws may have a broader reach, but do not permit disparate impact claims and thus will be of limited utility in the context of surveillance wages and prices where the rationale for differential prices or wages is not disclosed.<sup>61</sup> And even when disparate impact claims are available, it will often be extremely difficult to establish those claims by showing a statistically significant disparity caused by the practice and demonstrating the existence of less discriminatory alternatives. In the surveillance price and wage context, this will be particularly challenging given the opacity and complexity of algorithmic systems.

## E. Other Worker Protection Laws

Employment laws provide critical protections that can be used to challenge wage-setting practices tied to surveillance and algorithmic management, such as those violating wage and hour standards, collective bargaining rights, or workplace safety obligations. However, these protections generally apply only to employees, meaning that workers classified as independent contractors—whether accurately or not—face significant barriers to accessing these safeguards.

**Wage and Hour Laws:** Wage and hour laws like the Fair Labor Standards Act (FLSA) set minimum wage, overtime, and recordkeeping standards to protect workers. Surveillance wage systems risk violating these laws by underpaying workers, failing to account for all hours worked, or denying overtime, requiring oversight to ensure compliance and protect workers' rights.

**Labor Law:** The National Labor Relations Act (NLRA) protects workers' rights to unionize and engage in collective activities. Algorithms that penalize workers for union involvement or otherwise monitor and impede workers' communications or concerted activities may violate the NLRA.<sup>62</sup>

Workplace Health and Safety Laws: Workplace health and safety laws like the Occupational Safety and Health Act (OSHA) require employers to maintain a safe work environment. Wage-setting algorithms that pressure workers to overexert or skip safety measures to boost pay or avoid penalties can violate OSHA's duty to protect against known hazards.

## F. Laws Protecting Free Speech and Political Associations

Some forms of surveillance prices and wages may fall under the scope of state laws prohibiting economic reprisals based on political associations, providing a powerful—though limited—avenue for redress. Minnesota law, *lxiii* for example, prohibits economic reprisals or threats of employment loss due to an individual's political contributions or activities. An algorithm using data regarding political affiliations, speech, or group memberships to determine wages or prices would violate those laws.

While this approach can't address all forms of surveillance prices and wages, it offers a targeted tool for combating politically motivated bias. The challenge lies in detecting such algorithmic determinations, as algorithms rarely disclose their inputs, and political data may be derived indirectly or inferred from seemingly neutral factors.

## V. A Framework for Prohibiting Surveillance

### Prices and Wages

State lawmakers should ban surveillance prices and wages before they further expand across our economy. These practices are unfair; they hurt consumers and workers; and they undermine an open, thriving market. We accordingly propose grounding legislative reform in five core principles.

First, legislation must provide broad coverage and be easy to enforce. Reforms should ban surveillance prices and wages entirely—without additional elements such as proof of harm to competition, market power, or whether it has a disparate impact on a protected class. Because corporations typically conceal surveillance price and wage setting, it will often be extremely difficult to make these showings. Nonetheless, corporations should not be permitted to engage in this conduct merely because they keep their practices opaque.

Second, the ban should focus on *individualized* prices and wages based on surveillance data.<sup>63</sup> In other words, the ban on surveillance prices and wages should not affect companies' ability to offer transparent discounts or wage premiums in a manner that is clearly disclosed to consumers or workers, like senior discounts or cost of living adjustments. It should also not prohibit companies from adjusting prices or wages to reflect changes in market conditions or the cost of providing a good or service. Finally, the ban should not prohibit firms from making automated decisions unrelated to wage or price setting.

Third, the ban should eliminate loopholes that corporations could exploit. Prices should include all related costs, fees, and material terms that have a

direct bearing on the amount paid by the consumer. Wages should include compensation for all work performed and for other terms and conditions of employment (like scheduling) which can have a direct impact on wages. The protections of the ban should extend to all workers, not just those classified as “employees.”

Fourth, if states do craft narrow exceptions to address legitimate justifications for first-degree price and wage discrimination based on surveillance data, it is essential that the business engaging in such conduct have the burden of clearly and transparently establishing that the exception applies.<sup>64</sup> Such a burden-shifting framework is essential to effective enforcement in this context. The firm engaging in the conduct holds all relevant information, and it would be impossible for a consumer or worker to make out a case that the exception does not apply without having access to data and algorithms within the company’s sole possession.

Fifth, reforms should include broad enforcement, including both public and private enforcement as well as robust statutory damages. State attorneys general are well positioned to enforce state-level bans on surveillance prices and wages, but funding and capacity constraints mean that they cannot do it alone. Private enforcement ought to include a private right of action and statutory damages sufficient to deter future abuses and make consumers and workers whole.

Guided by these core principles, reformers can prevent the most insidious new ways of amassing and exercising market power and make it easier for regular people to make ends meet.



## Endnotes

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<sup>1</sup> This practice may also be called “algorithmic price and wage discrimination,” “personalized pricing,” “personalized price gouging,” “personalized wage skimming,” or other various other terms used to describe the setting of individualized prices and wages powered by digital surveillance.

<sup>2</sup> Suzanne Smalley, *Kroger’s Facial Recognition Plans Draw Increasing Concern from Lawmakers*, *The Record* (Oct. 17, 2024), <https://therecord.media/kroger-facial-recognition-lawmakers-concerns>.

<sup>3</sup> Luis Prada, *Kroger Asked About Surge Pricing and Facial Recognition at Grocery Stores*, *Vice* (Oct. 16, 2024), <https://www.vice.com/en/article/surge-pricing-facial-recognition-surveillance-grocery-stores/>.

<sup>4</sup> Rite Aid recently was disciplined by the Federal Trade Commission (FTC) for using facial-recognition technology to identify potential shoplifters, relying on artificial intelligence trained on tens of thousands of images. See Fed. Trade Comm’n, Legal Library, *FTC v. Rite Aid Corp.*, <https://www.ftc.gov/legal-library/browse/cases-proceedings/2023190-rite-aid-corporation-ftc-v>. That same technology could be used to profile consumers who are likely to spend heavily, or consumers who need rebates to afford their purchases. In response to a 2022 advanced notice of proposed rulemaking issued by the FTC, several groups submitted extensive comments regarding the threat of surveillance pricing. See, e.g., Electronic Privacy Information Center, Comment Letter on Advance Notice of Proposed Rulemaking, Trade Regulation Rule on Commercial Surveillance and Data Security (Nov. 2022), <https://www.regulations.gov/comment/FTC-2022-0053-1195>; Upturn, Inc., Comment Letter on Advance Notice of Proposed Rulemaking, Trade Regulation Rule on Commercial Surveillance and Data Security (Nov. 21, 2022), <https://www.regulations.gov/comment/FTC-2022-0053-0986>; Data Science Initiative, Brown University, Comment Letter on Advance Notice of Proposed Rulemaking, Trade Regulation Rule on Commercial Surveillance and Data Security (Nov. 21, 2022), <https://www.regulations.gov/comment/FTC-2022-0053-1152>; NAACP Legal Defense and Educational Fund, Inc. (LDF), Comment Letter on Advance Notice of Proposed Rulemaking, Trade Regulation Rule on Commercial Surveillance and Data Security (Nov. 21, 2022), <https://www.regulations.gov/comment/FTC-2022-0053-1135>.

<sup>5</sup> Fed. Trade Comm’n, *FTC Surveillance Pricing 6(b) Study: Research Summaries – A Staff Perspective* (2025), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/p246202\\_surveillancepricing6bstudy\\_researchsummaries\\_redacted.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/p246202_surveillancepricing6bstudy_researchsummaries_redacted.pdf) [Hereinafter FTC Report].

<sup>6</sup> Surveillance pricing is different from “dynamic pricing,” where prices shift and adjust in real time. But many of the tools of dynamic pricing, like digital price tags, coupled with the rapid expansion of commercial surveillance systems and data brokerages provide corporations with everything they need to dramatically expand surveillance price and wage setting over the next decade. The expansion of dynamic pricing has been the subject of widespread public concern and negative consumer attitudes. Allison Morrow, *Why Dynamic Pricing Feels Like Such a Scam*, *CNN* (Apr. 3, 2024), <https://www.cnn.com/2024/04/03/business/dynamic-surge-pricing-nightcap/index.html>.

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Surveillance pricing involves even more potential for exploitation through the use of personal and sometimes intimate data to adjust prices from person to person. The same goes for surveillance wages.

<sup>7</sup> FTC Report at 7.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 6 & n.39.

<sup>10</sup> Jennifer Valentino-DeVries, Jeremy Singer-Vine & Ashkan Soltani, *Websites Vary Prices, Deals Based on Users' Information*, Wall St. J. (Dec. 24, 2012), <https://www.wsj.com/articles/SB1000142412788732377204578189391813881534>.

<sup>11</sup> Julia Angwin, Surya Mattu & Jeff Larson, *The Tiger Mom Tax: Asians Are Nearly Twice as Likely to Get a Higher Price from Princeton Review*, ProPublica (Sept. 1, 2015), <https://www.propublica.org/article/asians-nearly-twice-as-likely-to-get-higher-price-from-princeton-review>.

<sup>12</sup> *Uber Accused of Charging People More If Their Phone Battery Is Low*, Vice (Apr. 11, 2023), <https://www.vice.com/en/article/uber-surge-pricing-phone-battery/>.

<sup>13</sup> Lesley Hensell, *7 Secrets to a Successful Amazon Pricing Strategy*, Riverbend Consulting (Jul. 23, 2024), <https://riverbendconsulting.com/blog/amazon-pricing-strategy/>.

<sup>14</sup> Veena Dubal, *On Algorithmic Wage Discrimination*, 123 Colum. L. Rev. 1929 (2023).

<sup>15</sup> An audit by Shipt gig workers found that an opaque pay algorithm led to unpredictable and often reduced earnings that varied from person to person. Dana Calacci, *Shipt's Algorithm Squeezed Gig Workers. They Fought Back*, IEEE Spectrum (Jul. 1, 2024), <https://spectrum.ieee.org/shipt>. Their findings were consistent with reporting by the Markup, which found that Uber's "Upfront Fares" system used a pay algorithm that resulted in wage offers varying from driver to driver, based on unknown and undisclosed considerations. Dara Kerr, *Secretive Algorithm Will Now Determine Uber Driver Pay in Many Cities*, The Markup (Mar. 1, 2022), <https://themarkup.org/working-for-an-algorithm/2022/03/01/secretive-algorithm-will-now-determine-uber-driver-pay-in-many-cities>; see also More Perfect Union, *We Put 7 Uber Drivers in One Room. What We Found Will Shock You.*, YouTube (Sept. 9, 2024), <https://www.youtube.com/watch?v=OEXJmNj6SPk>.

<sup>16</sup> Thomas Claburn, *Algorithmic Wage Discrimination: Not Just for Gig Workers*, The Register (Jul. 6, 2024), [https://www.theregister.com/2024/07/06/algorithmic\\_wage\\_discrimination/](https://www.theregister.com/2024/07/06/algorithmic_wage_discrimination/).

<sup>17</sup> Katie J. Wells & Funda Ustek Spilda, *Uber for Nursing: How an AI-Powered Gig Model Is Threatening Health Care*, Roosevelt Inst. (2024), [https://rooseveltinstitute.org/wp-content/uploads/2024/12/RI\\_Uber-for-Nursing\\_Brief\\_202412.pdf](https://rooseveltinstitute.org/wp-content/uploads/2024/12/RI_Uber-for-Nursing_Brief_202412.pdf).

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<sup>18</sup> In recent years, we have seen how algorithms can impact workers' wages in the home healthcare context. Last year, the nation's largest assisted-living chain, Brookdale Senior Living, was accused of using a staffing algorithm that underestimated the labor required to adequately care for residents. Douglas MacMillan & Christopher Rowland, *Assisted Living Managers Say an Algorithm Prevented Hiring Enough Staff*, Wash. Post (Apr. 1, 2024), <https://www.washingtonpost.com/business/2024/04/01/assisted-living-algorithm-staffing-lawsuits-brookdale/>.

<sup>19</sup> For example, in the trucking and logistics industry, digital monitors track metrics such as driving time, purported safety compliance, delivery times, fuel efficiency, customer feedback, route optimization, and idle time management through algorithms and data systems and shape truck drivers' wages. Milan Andrejić, *Different Approaches for Performance Appraisal and Bonus Calculation: The Case of Truck Drivers*, 1 J. of Intelligent Mgmt. Decision 97 (2022).

<sup>20</sup> The home healthcare group Amedisys uses a predictive turnover model to identify employees who are at risk of leaving. Amedisys, *Environmental, Social & Governance Report* (2022), [https://s2.q4cdn.com/960461372/files/doc\\_downloads/2023/amedisys-2022-esg-report.pdf](https://s2.q4cdn.com/960461372/files/doc_downloads/2023/amedisys-2022-esg-report.pdf).

<sup>21</sup> Daniel Nunan and MariaLaura Di Domenico, *Value Creation in an Algorithmic World: Towards an Ethics of Dynamic Pricing*, 150 J. of Bus. Rsch. 451 (2022).

<sup>22</sup> A forthcoming study has identified artificial-intelligence vendors used by retail chains such as Kroger and major technology companies such as Snowflake that sell corporate employers technologies that purportedly analyze worker performance and are integrated into corporate H.R. systems to set individualized wages. Veena Dubal and Wilneida Negrón, *Algorithmic Wage Discrimination and AI Issue Brief*, Equitable Growth (forthcoming). In one potential scenario, Snowflake's use of an AI vendor called SupportLogic to analyze support agents' performance metrics like ticket resolution time and customer sentiment, can suggest dynamic pay adjustments, such as increased overtime rates during high-ticket volume periods to address workload surges. Press Release, SupportLogic, SupportLogic Acquires xFind and its Precision Answer Engine to Set a New Standard for Support Experience (Aug. 1, 2024), <https://www.supportlogic.com/news/supportlogic-acquires-xfind-precision-answer-engine/>. In another instance, Kroger's use of the platform, Betterworks, to track retail employees' productivity, linking bonuses or reduced hours to performance metrics like sales quotas, restocking times, and customer satisfaction scores, could be used for dynamic goal setting during peak periods, such as holiday seasons, which could result in higher pay for exceeding targets or targeted training for underperformers to improve efficiency. Betterworks, *The Kroger Company Aligns Manufacturing Facilities Using Betterworks* (2021), <https://www.betterworks.com/wp-content/uploads/2021/02/Kroger-Case-Study.pdf>.

<sup>23</sup> Anna-Louise Jackson, *Lina Khan Says the FTC is Investigating Surveillance Pricing. Here's How That Could Affect You*, Fast Co. (Sept. 23, 2024), <https://www.fastcompany.com/91195551/lina-khan-ftc-federal-trade-commission-chair-surveillance-pricing-explained-what-is-it>.

<sup>24</sup> Wilneida Negrón, Coworker.org, *Little Tech Is Coming for Workers: A Framework for Reclaiming and Building Worker Power* (2021), <https://home.coworker.org/wp-content/uploads/2021/11/Little-Tech-Is-Coming-for-Workers.pdf>.

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<sup>25</sup> Josh Dzieza, *How Hard Will the Robots Make Us Work?*, The Verge, (Feb. 27, 2020), <https://www.theverge.com/2020/2/27/21155254/automation-robots-unemployment-jobs-vs-human-google-amazon>.

<sup>26</sup> 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).

<sup>27</sup> Dubal, *supra* note 14.

<sup>28</sup> Susanna Vogel, *How Companies Use Predictive Analytics to Get Ahead of Union Drives*, HR Brew, (Nov. 3, 2021), <https://www.hr-brew.com/stories/2021/11/03/how-companies-use-predictive-analytics-to-get-ahead-of-union-drives>.

<sup>29</sup> In Japan in 2019, IBM began using an algorithmic “compensation advisor” to analyze worker behavior. The workers’ union raised concerns about the lack of transparency and fairness in wage-setting processes and ultimately discovered that union members received systematically lower performance scores for the purpose of assigning bonuses. For instance, union members were assessed at an average performance rate of 63.6% compared to 100% for other employees. Some union members even received a 0% assessment. This case illustrates how algorithmic wage-setting systems can serve as tools of control, not only shaping compensation but exerting indirect pressure on workers’ behaviors and associations, such as union participation. *See* Dubal, *supra* note 14.

<sup>30</sup> Zephyr Teachout, *Algorithmic Personalized Wages*, 51 Polit. Soc. 436 (2023); Kate Morgan & Delaney Nolan, *How Worker Surveillance Is Backfiring on Employers*, BBC (Jan. 30, 2023), <https://www.bbc.com/worklife/article/20230127-how-worker-surveillance-is-backfiring-on-employers>.

<sup>31</sup> Alexandra Chaidez, *Uber, Lyft Charges More For Riders Going To Chicago’s Non-White Neighborhoods, Study Shows*, Block Club Chicago (June 26, 2020), <https://blockclubchicago.org/2020/06/26/uber-lyft-charges-more-for-riders-going-to-chicagos-non-white-neighborhoods-study-shows/>.

<sup>32</sup> Cole Edick, *Opt-Out Privacy Policy Worsens Algorithmic Price Discrimination: The Case of the American Privacy Rights Act*, Ineq. Inquiry (June 1, 2024), <https://lawandinequality.org/2024/06/01/opt-out-privacy-policy-worsens-algorithmic-price-discrimination-the-case-of-the-american-privacy-rights-act/>.

<sup>33</sup> Dubal, *supra* note 14.

<sup>34</sup> *Id.*

<sup>35</sup> Veena Dubal, *The House Always Wins: The Algorithmic Gambification of Work*, Law & Pol. Econ. Blog (Jan. 23, 2023), <https://lpeproject.org/blog/the-house-always-wins-the-algorithmic-gambification-of-work/>.

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<sup>36</sup> Alvaro M. Bedoya, Comm’r, Fed. Trade Comm’n, *Life in Hawtch-Hawtch: Unfairness in Workplace Surveillance and Automated Management*, Remarks at New York University Wager Labor Initiative (Nov. 17, 2024), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/bedoya-remarks-unfairness-in-workplace-surveillance-and-automated-management.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/bedoya-remarks-unfairness-in-workplace-surveillance-and-automated-management.pdf).

<sup>37</sup> Irene Tung, Nicole Marquez, & Paul Sonn, Nat’l Emp. L. Project, *Amazon’s Outsized Role: The Injury Crisis in U.S. Warehouses and a Policy Roadmap to Protect Workers*, (2024), <https://www.nelp.org/app/uploads/2024/04/Amazons-Outsized-Role-5-1-24.pdf>.

<sup>38</sup> *End Independent Contractor Misclassification*, Nat’l Emp. L. Project, <https://www.nelp.org/explore-the-issues/contracted-workers/misclassified-workers/> (last visited Feb. 9, 2025).

<sup>39</sup> Dubal, *supra* note 35.

<sup>40</sup> Michal Kaczmarek, *Uber vs. Lyft: Who’s Tops in the Battle of U.S. Rideshare Companies*, Bloomberg Second Measure, (Apr. 15, 2024), <https://secondmeasure.com/datapoints/rideshare-industry-overview/>.

<sup>41</sup> Hannah Garden-Monheit & Ken Merber, *Price-Fixing by Algorithm is Still Price-Fixing*, Fed. Trade Comm’n: Business Information Blog (Mar. 1, 2024), <https://www.ftc.gov/business-guidance/blog/2024/03/price-fixing-algorithm-still-price-fixing>.

<sup>42</sup> Second Amended Complaint, *FTC v. Amazon.com, Inc.*, No. 2:23-cv-01495 (W.D. Wash. Oct. 31, 2024), available at <https://www.ftc.gov/legal-library/browse/cases-proceedings/1910129-1910130-amazoncom-inc-amazon-ecommerce>.

<sup>43</sup> 15 U.S.C. § 45.

<sup>44</sup> The Sherman Act and Clayton Act similarly aim to ensure fairness and competition in the marketplace. In most cases, however, they will provide limited utility. Under the “rule of reason,” plaintiffs would have to demonstrate that such practices harm competition in a way that outweighs potential efficiencies. This may require proving that the offending firm had sufficient market power and that its algorithmic practices have anticompetitive effects, such as collusion or exclusion of rivals. These standards may be difficult to meet in cases of surveillance prices or wages, where companies can drive prices up or wages down without obtaining market dominance, and where the direct harm to individuals or groups may not easily translate into traditional metrics of market harm.

<sup>45</sup> Fed. Trade Comm’n, File No. P221202, *Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act* (2022), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/P221202Section5PolicyStatement.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf).

<sup>46</sup> *See id.* at 4 n.16.

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<sup>47</sup> Attacking surveillance wages and prices under an “unfair competition” framework could also draw on competition law’s historic concern with price discrimination. Price discrimination has long been a focus of competition law, including in the first federal antitrust law, the Interstate Commerce Act, and Progressive and New Deal era statutes like the Robinson–Patman Act and the Packers and Stockyards Act. These statutes were designed to prevent sellers from favoring certain buyers over others and to prevent “power buyers” from squeezing suppliers for favorable wholesale prices to disadvantage smaller rivals. However, because technology at the time didn’t enable the kind of first-degree discrimination that it can today, these frameworks focus primarily on sellers and wholesale markets, leaving gaps when it comes to protecting end consumers or workers from discrimination enabled by surveillance and algorithms.

<sup>48</sup> See Doug Whelan, *Laboratories of Antimonopoly: A Blueprint for Unfair Methods of Competition Rulemaking in the States*, 52 *Fordham Urb. L.J.* 427 (2024).

<sup>49</sup> Cal. Bus. & Prof. Code § 17031 (West 2025).

<sup>50</sup> See Complaint, *Gill v. Uber Techs., Inc.*, No. CGC-22–600284 (Cal. Super. Ct., June 21, 2022), available at <https://towardsjustice.org/wp-content/uploads/2022/06/Uber-Lyft-Complaint.6.20.2022-3.pdf>.

<sup>51</sup> Cal. Bus. & Prof. Code § 17045 (West 2025).

<sup>52</sup> For instance, if a platform uses algorithms to offer hidden rebates to preferred contractors or discounts to select consumers while excluding others, this could constitute a breach of state laws that prohibit undisclosed pricing arrangements. Similarly, in the employment context, algorithms that dynamically set wages or benefits for gig workers based on undisclosed criteria might fall afoul of these statutes if the criteria result in unequal and undisclosed compensation structures.

<sup>53</sup> Bedoya, *supra* note 36.

<sup>54</sup> Carolyn Carter, Nat’l Consumer L. Ctr., *Consumer Protection in the States: A 50-State Evaluation of Unfair and Deceptive Practices Laws* (2018), [https://www.nclc.org/wp-content/uploads/2022/09/UDAP\\_rpt.pdf](https://www.nclc.org/wp-content/uploads/2022/09/UDAP_rpt.pdf).

<sup>55</sup> 15 U.S.C. §§ 1681–1681x.

<sup>56</sup> Press Release, Consumer Fin. Prot. Bureau, *CFPB Takes Action to Curb Unchecked Worker Surveillance* (Oct. 24, 2024), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-action-to-curb-unchecked-worker-surveillance/>.

<sup>57</sup> Pub. L. No. 99–508, 100 Stat. 1848 (1986) (codified as amended in scattered sections of 18 U.S.C.)

<sup>58</sup> Cal. Civ. Code §§ 1798.100–.199 (West 2025)

<sup>59</sup> Cal. Civ. Code § 1798.140 *et seq.*

<sup>60</sup> 740 Ill. Comp. Stat. 14/1–99 (2008).

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<sup>61</sup> Importantly, a small number of state public accommodations laws allow disparate impact claims, N.J. Stat. Ann. § 10:5-12(f)(1) (West 2021) (prohibiting “direct[] or indirect[]” discrimination in public accommodations).

<sup>62</sup> Memorandum GC 23-02 from Jennifer A. Abruzzo, Gen. Couns., Nat’l Lab. Relations Bd., to All Reg’l Directors, Officers-in-Charge, and Resident Officers (Oct. 31, 2022), <https://apps.nlrb.gov/link/document.aspx/09031d45838de7e0> (Noting “the potential for omnipresent surveillance and other algorithmic-management tools to interfere with the exercise of Section 7 rights by significantly impairing or negating employees’ ability to engage in protected activity and keep that activity confidential from their employer, if they so choose.”).

<sup>63</sup> Surveillance price and wage bans should primarily target what is often referred to as “first-degree” price and wage discrimination, which involves adjusting prices or wages to an individual’s unique characteristics. This is distinct from “third-degree” discrimination, which is based on group characteristics, such as offering discounts to seniors or students, and “second-degree” discrimination, which is based on the behaviors of a consumer or worker in interactions with the company, like providing bulk discounts or rewards for repeated purchases. First-degree discrimination, as seen in surveillance-based systems, leverages detailed data about individuals to maximize profit by charging the highest price a consumer will pay or the lowest wage a worker will accept. By contrast, second- and third-degree practices generally involve transparent, broadly applied strategies that do not rely on extensive individualized surveillance or the same level of manipulation.

<sup>64</sup> For example, exceptions could allow businesses to use data from a consumer report covered by the FCRA to inform decisions about whether to extend credit or otherwise do business with an individual or determine wages for individuals based on clearly disclosed criteria that are directly related to job performance or cost of living. But again, the burden should fall on firms to demonstrate that their conduct falls within an exception like these.