

17 Righting the Wrong: Putting Workers' Data Rights Firmly on the Table

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Workers across the world are increasingly becoming commodified—turned into numerous data points that can be used for statistical inferencing and, more invasively, for predictive analysis. From “gig” workers to warehouse workers, from those working from home due to COVID-19 to well-paid tech experts, numerous inferences are being drawn as workers work: the speed of their typing, the routes they take, their earnings, their ratings, what websites they visit, how their eyes move on video calls, the tone of their voice, and so much more. These systems for worker surveillance are often obscure, hidden under the hood, observing what you do, predicting what you will do, deciding what you should do, and affecting what opportunities will be available to you. Algorithms are shaping the opportunities available to workers as citizens. Is a worker investable? Will job advertisements be withheld from them by an algorithm that has deemed them unfit or unsuitable for the job? Job candidates can be screened, sourced, assessed, interviewed, and vetted by artificial intelligence (AI) systems (Raju 2020). Will they be fired or promoted?

What must be remembered is that all of these profiles and predictions about an individual do not just affect that person. Indeed, people who are similar to that person can be affected by the profiles that are built up about the person. In the data world, all workers and citizens are connected. These algorithmically calculated predictions are robbing workers of their fundamental right to form and shape their lives as best they can—essentially their right to be human.

At the same time, work itself is being chopped up into piecemeal tasks that can be assigned to workers across the world, and the rising individualization of work is going hand in hand with a growth in precarious contracts (ILO 2016). These workers are left to bear the risk of the market on their shoulders yet are stripped of most, if not all, of their social rights (Tan et al. 2020). Former colleagues are now competitors in a globally distributed labor market, fighting for piecemeal and often underpaid tasks. National

industrial relations systems are inadequate to meet the needs of this distributed workforce, whose bargaining power is not space-bound. In addition, many of these workers are invisible, in Mary L. Gray's words, "ghost workers" (Chen 2019), making it hard for traditional unions to find them, let alone organize them.

In the words of Shoshana Zuboff, we are living in the world of "surveillance capitalism"—an economic system that is distinguished by the commodification of personal data with the core purpose of profit making. Dependent on the Internet, this networked and global economy extracts and claims "private human experience as free raw material for translation into behavioral data" (Laidler 2019). This economy transcends geographies and is void of time restraints, yet it has simultaneously highly spatial and temporal characteristics. Spatially, the digital divides that split the world between those with (affordable) Internet and those without are deepening. Temporally, the current expansion of surveillance capitalism has been able to manifest itself because of inadequate national and global regulatory responses.

Indeed, we are heading down a very destructive path that must be reversed through the development of stronger rights frameworks, better institutional capacities, and global enforcement systems. In the labor market, trade unions need to urgently revamp their strategies and find ways to cooperate across borders to organize this distributed workforce and ensure that all workers, in all forms of work, have the same social and fundamental rights.

One key policy area in need of immediate attention is the lack of workers' collective data rights. For all workers up and down corporate value chains, trade unions need to negotiate what I call the "data life cycle at work." These rights will be key in reversing the commodification of workers discussed above.

While better data rights for workers are an immediate concern, ideally, and echoing the strong voice of Shoshana Zuboff, the trading of algorithmic inferences should be made illegal: "I want to say that human futures markets [predictive analytics] need to be criminalized. They need to be made illegal. They cannot stand. Human futures markets have predictably antidemocratic consequences. Those consequences are already clear. The economic imperatives of surveillance capitalism are a direct result of the financial incentives in those markets" (Access Now 2020).

By outlawing the multibillion-dollar trading of the many inferences (profiles) that are constantly extracted from us based on our actions and nonactions, we will remove one of the greatest threats to our fundamental rights. This could be actualized by revising the United Nations' Universal Declaration of Human Rights so that it specifically includes articles on the right to be human (i.e., the right to be free from data manipulations that form and shape a human's life opportunities).

While we hold the vision of forbidding markets in human futures as a top priority, in this chapter I focus on the actions that need to be taken here and now in workplaces and in defense of workers. I start by describing the data life cycle at work and the various elements unions, on behalf of all workers, should be negotiating. I then move on to why these improved rights will benefit workers and prevent the commodification of workers that is currently taking place. The chapter ends with some reflections on why and how unions could become guardians of good data stewardship and empower workers through responsible data use.

Negotiating the Data Life Cycle at Work

What data rights should be covered by collective agreements and/or law? Figure 17.1 depicts the data life cycle at work. My claim is that unions should negotiate across the entire data life cycle, for both conventional workers and distributed workers in the platform economy and otherwise. Work is work, and rights are rights, irrespective of contract form.

Let's look at the phases of the data life cycle at work one at a time and unpack the potentials. While some of the demands are already fulfilled for workers who are covered by Europe's General Data Protection Regulation (GDPR), far from all are. For workers in most other jurisdictions across the world, these rights will be new, as workers are

The Data Lifecycle @ work

Bargaining for stronger data rights

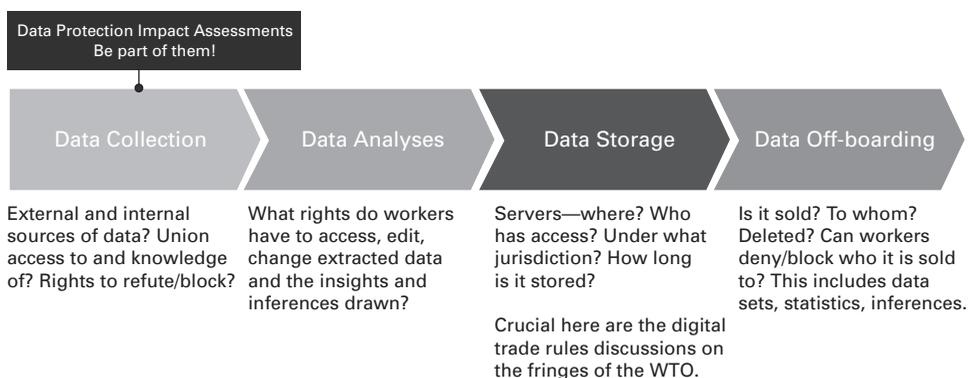


Figure 17.1

The data life cycle at work.

Source: Author.

explicitly exempt from national data protection regulations (for example, in Australia and Thailand).

The *data collection phase* refers to data that is extracted and/or generated by digital systems that are either internal or external to the company/workplace. Here shop stewards (i.e., labor union officials or union representatives) and workers must be informed about the tools, and negotiate for the right to refute or block (parts of) this data extraction and generation. Recalling that much data extraction takes place under the hood, hidden from the worker or citizen, these points are extremely important. Management should be held accountable for their responses.

Importantly, in my conversations with union officials and management, many union officials say they are unaware of the algorithmic systems in place in their companies. But just as importantly, management indicates that they too are unaware of the systems' details and, according to many, simply do not understand the risks, challenges, or potentials of using them. Interestingly, in the GDPR zone, companies are obliged to conduct data protection impact assessments (DPIAs) on the introduction of new technology that is likely to involve a high risk to people's information (European Commission 2016). They are also obliged to consult the workers (European Commission 2017). However, very few of the unions I have spoken with have been involved in, have access to, or even know about these DPIAs.

In the *data analysis phase*, until trading in human futures is banned, unions must cover the gaps identified by Wachter and Mittelstadt (2019)—namely, the lack of rights with regard to the inferences made by algorithmic systems, which can even be used to predict behavior based on emotional data derived from video or audio recordings and/or activity data. Here workers should have greater insight into, access to, and rights to rectify, block, or even delete the inferences. They should also have the right to ban the selling of datasets and inferences that include personal information and personally identifiable information (i.e., any data that can be used to identify a particular person). This could be a social security number, a driver's license number, a bank account number, a passport number, or an email address.

Because such inferences can be used to determine scheduling and wages (if linked to performance metrics), or, in human resources, to decide whom to hire, promote, or fire, unions should demand that shop stewards, on behalf of a worker or group of workers, can gain access to the data/datasets and inferences that workers are subject to. Access to the inferences is key to the empowerment of workers and indeed to our human rights. Without these access rights, there will de facto be few checks and balances on management's legitimate, or ethical, use of algorithmic systems. Nor will there be any check or balance on data-generated discrimination and bias.

The *data storage phase* has to do with jurisdiction under which the data generated and extracted at work is stored. Current digital trade rules proposals within and on the fringes of the World Trade Organization are pushing for rules specifying that it is the laws of the country in which the data is stored that should determine who has access to the data, whom it can be sold to, and what it can be used for (James 2020). The majority of data centers are currently in the United States.¹ The digital trade proposals want data to flow freely across borders, unhindered by any national laws or regulations on data flows such as the GDPR, which has strict regulations on the flow of personal data. If adopted, these new digital trade rules will allow data to be used, sold, rebundled, and sold again, unlimited by national law. Although the 2020 Court of Justice of the European Union ruling (CJEU 2020), which invalidates the EU-US Privacy Shield,² can be seen as a slap in the face of proponents of unrestricted data flows, the demand is nonetheless still on the table. To prevent data from ending up in areas of the world with as little data protection as possible, two things must happen simultaneously. First, trade unions across all jurisdictions need to negotiate the data life cycle at work to obtain much improved data rights; and second, these digital trade negotiations must be stopped.

Lastly, the *data off-boarding phase* is also one where unions must be vigilant. Off-boarding refers both to the deletion of personal data or personally identifiable data extracted at the workplace and to the selling or passing on of these data/inferences/profiles/datasets to third parties. Unions should negotiate for much better rights regarding (1) knowing what data/inferences/profiles/datasets are off-boarded and to whom (e.g., an intelligence agency or data broker) and (2) objecting to and even blocking off-boarding to third parties. I cannot stress enough the importance of negotiating these rights, especially in light of the push in digital trade negotiations for an unrestricted global free flow of data that includes data generated on and extracted from workers.

Benefiting Workers

While the above negotiations across the data life cycle at work will require a coordinated and dedicated effort from unions across the world, promising first steps are already being taken. The Financial Services Union in Ireland has, in one of their agreements (Financial Services Union 2020), negotiated two key articles—namely, (1) an anticommodification clause stipulating that Ulster Bank/RBS commits that it will not turn employee data into a commodity for sale or trade (this relates directly to the data off-boarding phase above) and (2) a commitment to the Universal Declaration of Human Rights and the International Labour Organization's (ILO's) code of practice on the protection of workers' data (ILO 1997). In professional sports, "the NFL

Players' Association signed a deal with WHOOP [a fitness wearable company] to make it the Officially Licensed Recovery Wearable of the NFLPA and allow players to commoditize their own data. In their new [collective bargaining agreement], the NBA and NBA Players' Association agreed to terms protecting the right of individual players to decline the use of wearables at any time" (Chung 2017). UNI Global Union (2019), a global trade union federation for the skills and services sectors, has signed a global framework agreement with the global bank Crédit Agricole that includes reference to UNI Global Union's "Top 10 Principles for Workers' Data Privacy and Protection" (UNI Global Union 2017). This global framework agreement covers all of the bank's 140,000 employees across the world and gives the workers a string of rights in relation to the worker-related data collected by the company. For example, the workers and their union representatives have the right to access, influence, edit, and delete data that is collected on them and via their work processes (this relates to the data collection and data analysis phases in the data life cycle at work). Although these examples are promising, much more must be done.

Beyond successfully negotiating the data life cycle at work, what additional actions need to be taken and which new regulations are needed? First, we must move toward collective rights in a datafied world with a planetary labor market rather than the individual rights stipulated in current national/regional data protection laws. If workers have these rights over their data, they will also have the right to decide what to do with them—share them, pool them, for example, into workers' data collectives (Colclough 2020). The ILO could beneficially develop their nonbinding 1997 code of practice "Protection of Workers' Personal Data" (ILO 1997) into a new convention to establish these collective rights across the world.

Second, although companies covered by the GDPR must conduct DPIAs prior to, and periodically after, using algorithmic systems, many other data protection regulations, such as the California Consumer Privacy Act (CCPA), do not include this obligation. Unions and/or the ILO should be the ones demanding that the processing of workers' data cannot take place before a DPIA has been made *together* with the workers.

Third, workers and/or their union representatives must have a seat at the table regarding the periodic governance of data usage and algorithmic systems. This should be enshrined in a new global convention by the ILO.

Fourth, many data protection regulations across the world, even those aimed exclusively at consumers, are relatively weak and offer far fewer protections than, for example, the GDPR. To prevent the race to the bottom predicted if the digital trade rules proposed by the tech giants and supportive governments are adopted, workers and citizens up and down value and supply chains need sound data rights and protection.

Workers must fight for a digital ethos that is responsible and puts their rights above profit. In the world of work, unions must be the guardians of this alternative ethos.

Finally, power asymmetries between management and workers will only continue to expand if workers and their unions do not build capacity in the fields of data, algorithmic systems, and the governance of these. This implies digital awareness campaigns designed around workers' interests. But also a resource-demanding transformation in union strategies, policies, and operations. Funding is urgently needed to ensure that all unions across the world have the possibility to engage in these change processes.

The suggested ILO conventions will be crucial for the globalization of workers' digital rights and the extension of them to all workers in all forms of work. However, the ILO's supervisory system/mechanism (ILO n.d.) needs to be expanded to true enforcement rights so that breaches of, or failure to comply with, the conventions can be effectively addressed.

Realizing the above will be no simple task, resistance in relation to agreeing on and later ratifying the proposed ILO conventions is to be expected. Yet ILOs relevance in the digital age might well depend on the organization's very ability to unify around these rights-based demands. Already today, COVID-19 has led to a massive rise in the demand for, and supply of, worker surveillance technologies (Graziosi 2020; Jones 2020; Rees 2020). Little indicates that this will change unless global regulations are put in place.

Commitments within and between unions on a national, regional, and global scale are also called for to ensure that no workers are left behind. Unions' baseline understanding of digital technologies and their impact on workers' rights could be supplemented by a more advanced toolkit of model clauses, standard questions to ask management on the use of digital technologies, and model language and articles to be addressed in the ongoing assessment of these technologies. Given the complexity of the issues at hand, unions could consider training specialized "digital shop stewards." The union movement has the structures to do this and, if any of the above rings true, also the reasons to.

Unions must also unite to find ways to juxtapose the hegemonic narratives around digital technologies. This can be done by finding responsible ways to gather data about working conditions, and using these data in union campaigns, organizing efforts, and storytelling. It is to this we now turn.

Responsible Tech for Unions

One responsible and privacy-preserving way for unions to utilize tech for good and get information about their members' working conditions is by using the new open-source app WeClock (figure 17.2). WeClock functions as a self-tracking tool where the data

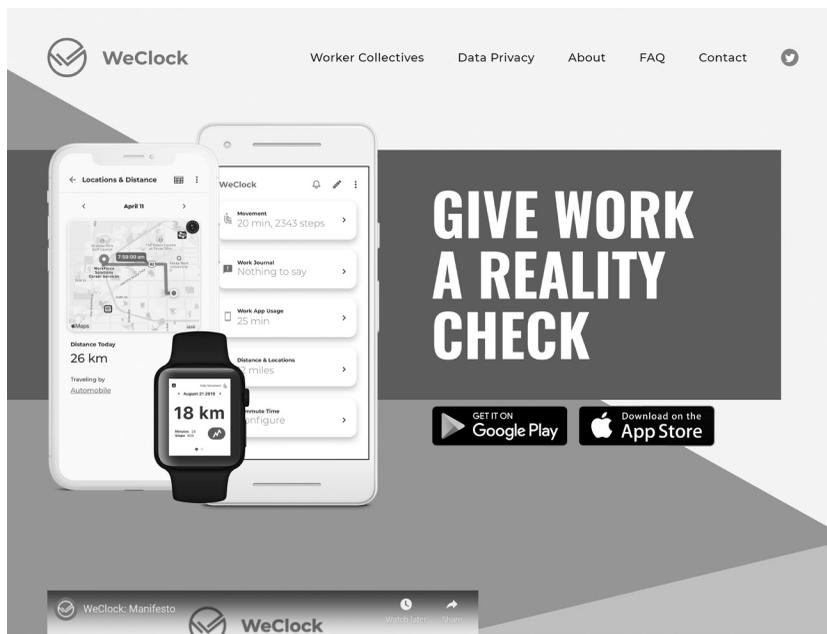


Figure 17.2

WeClock, the app for workers by workers.

Source: <https://weclock.it>.

generated is held exclusively by the worker until they decide to share it. Unions could use WeClock to support campaigns and prove to the world the realities facing workers. For example, via location, data workers can track their working time and time between shifts. Warehouse workers can log the exact distance they cover during a working day and whether they get any breaks. Home care workers can measure distance traveled and compare that to fixed-mileage fuel coverage. Gig workers can track their routes and idle time, and compare them to their earnings.

Another example of empowering workers through data is Driver's Seat (figure 17.3), a delivery and ride-share driver cooperative that, via an app, pools the data from drivers, analyzes it, and shares helpful insights with the drivers or sells the data to city and transportation agencies. For example, Driver's Seat can tell the drivers where the customers are and in what part of town the highest earnings can be made, and help calculate the odds of earning bonuses depending on the ride-sharing company (e.g., Uber, Lyft, or other local options). Proceeds from data selling to transport or city agencies are shared as dividends.

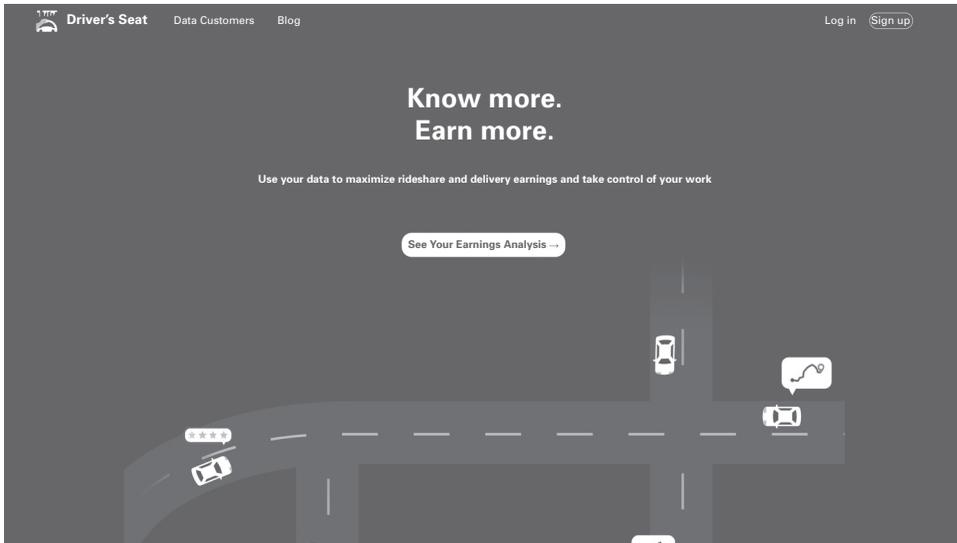


Figure 17.3

Screenshot from the website of the driver cooperative Driver's Seat.

Source: <https://www.driversseat.co>.

Lastly, unions must themselves become stewards of good data governance. In the Young Workers' Lab I was running, in which we produced WeClock, we developed an online, privacy-preserving guide to help unions with their own data governance. The tool is called Lighthouse (figure 17.4). Lighthouse takes the form of a guide or quiz where you work through a series of questions to rate your workplace's methods and practices along a range of topics—namely, writing a plan, building a community, handling data, assigning responsibility, writing rules, and managing risk.

These three examples of digital tools exemplify how unions, if they adopt an organization-wide strategy, can begin to battle back and address the commodification of workers taking place through the currently unfettered digitalization of work.

Concluding Reflections

We are at a critical moment in history, spurred by the COVID-19 pandemic and its dire economic, social, and humanitarian affects. Digital technologies are boundary-less, which is why a worker-led response needs to be globally coordinated and locally embedded. The damaging digital inferences that can affect not only individuals' life and work opportunities but also groups of citizens and workers that are statistically

Lighthouse: a guide to good data stewardship for trade unions

Welcome to Lighthouse, a purpose-made digital governance maturity test for trade unions.

This is a tool to help your union become more responsible stewards of data. You'll find a mix of guidance and quiz questions to help you better protect, manage, and harness data.

You can use Lighthouse to help evaluate a data or technology project that your union is currently running. (Although we've written Lighthouse to focus on projects, you could also use it to review your union's overall data practices.)

Take the quiz!

Lighthouse is a collaboration of Prospect, Digital Public, Duke Center on Law and Technology, and small scale.


prospect

**Digital
Public**

Figure 17.4

Landing page of Lighthouse website.

Source: <http://lighthouse.prospect.org.uk/>.

similar to one another must be banned. In the meantime, workers, their unions, and the ILO should take immediate action to bridge regulatory gaps and ensure that workers benefit from much stronger collective data rights. No worker should be left without these rights. For the many workers in areas of the world that have no Internet access as yet, a globally established and enforceable set of rights will make sure that they too will be protected. Capacity building is required for all of this to happen. In 1919, as part of the Treaty of Versailles, the international community recognized that “labour is not a commodity”

(ILO 1920, art. 427). It is time to recommit to that treaty and stop the commodification of workers that we are currently witnessing through the datafication of work.

Notes

1. See <https://www.datacenters.com/>.
2. The EU-US Privacy Shield was a framework for regulating transatlantic exchanges of personal data for commercial purposes between the European Union and the United States. One of its purposes was to enable US companies to receive personal data more easily from EU entities under EU privacy laws meant to protect European Union citizens. The European Court of Justice declared the EU-US Privacy Shield invalid on July 16, 2020.

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