

Elizabeth Denham CBE
Information Commissioner
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

9th December 2020

Dear Elizabeth

Employment Practices Guidance

The issue of how employers are increasingly using surveillance software to monitor workers, especially during lockdown, has become a significant issue over the last year.

In the few weeks, we have seen scrutiny of Microsoft's Productivity Score a feature of its Office 365 package which enables employers to track users activity at an individual and aggregate level. Even though Microsoft now claim to have adjusted the feature to mask individual-level data, it still raises issues about how these kinds of products are introduced in the work environment, its capabilities and the functions of other similar tools. In many ways this latest example is the mainstreaming of online monitoring tools which raises significant issues including privacy and the process for consultation with workers before such products are introduced.

The CDEI latest review into bias in algorithmic decision-making was also published last week and makes clear that ICO guidance is rarely being applied when it comes to screening candidates in automated algorithmic hiring processes. This increases the risk that structural discrimination inequalities and other harm to individuals will not be discerned and may be amplified, as the Institute for the Future of Work's recent report Mind the Gap describes.

These issues raised serious concerns about transparency, accountability, the nature of the work relationship and potential risks to individuals arising from data processing. This nature of privacy is even more acute during lockdown with such software bringing surveillance into our own homes.

This kind of surveillance is an intrusion on workers' privacy, with significant implications for productivity, with workers feeling they are being watched, and others able to game the system. With many people working from home, at least some of the time, this is putting monitoring into our homes, blurring the line between our work and private lives.

A recent YouGov survey commissioned by Skillcast found that one in five employers are already using, or plan to introduce, software to monitor employees who are working from home. These tools can monitor things like how many emails have been sent, how many meetings workers schedule, whether they are engaging with each other in messaging, how long it takes them to reply, as well as taking camera or image shots. Employers can view this in aggregate to see the trends in their IT usage, and how they compare against other firms. But they can also enable an option to view every worker's own individual data. This allows employers to secretly gather data on how you are working, which they can use to judge your performance.

The scale of these concerns has outpaced current guidance available from your office on the nature of employment practices. In addition, we would contend that any such use of personal data through surveillance should be subject to a Data Protection Impact Assessment before it is introduced as the process presents a high-risk of material or non-material harm to workers. The contractual nature of the work relationship makes both the idea of consent and practice of consultation different to other spheres of activity.

There is now a strong case for the ICO to update its Code on Employment Practices, as well as to review guidance provided on how a DPIA should be conducted, in particular on the need for employers to involve affected workers and unions in assessing and reviewing the impacts and how this obligation can best be fulfilled. This echoes the recommendation in the CDEI report on bias in algorithmic decision making which calls for further action on the code.

Covid has highlighted how just how quickly technology is adapting and, with the widespread move into remote working, there is an urgent need for clear, updated guidance stating employers' responsibilities, workers' right in relation to privacy, and standards on consultation.

We would urge you to prioritise updating the Code on Employment Practices in 2021. We would welcome an opportunity to provide input on the development of the Code and for discussion this important topic.

We look forward to hearing from you

Yours sincerely,

Andrew Pakes, Research Director, Prospect

Chi Onwurah MP, Shadow Digital Minister

Kirsten Oswald MP, SNP Spokesperson on Work and Inclusion

Zarah Sultana MP, Science and Technology Committee

Anna Thomas, Director, Institute for the Future of Work

Professor Lina Dencik, Cardiff University

Dr Allison Gardner, Keele University

Ivana Bartoletti, Women Leading in AI