Negotiating a Digital Agreement to Protect Workers

By Orit Frenkel and Debra Marks

Introduction

The fast-paced growth of new technologies such as artificial intelligence (AI), cloud services, and data analytics have the promise to strengthen the middle class through wage growth and create both economic and security benefits for the United States.[1] However, these technologies have also raised important concerns regarding privacy, safety, economic disruption, and especially new challenges confronting workers. Debates on these issues are currently playing out within the digital agreement being negotiated as part of the Indo-Pacific Economic Framework (IPEF).

While addressing these concerns as well as gaps in U.S. domestic regulations complicate our ability to promote a global agenda, remaining on the sidelines is not an option if we want to advance rules that will protect workers and shared democratic values. If America doesn't move quickly, it leaves the door open to China's growing predatory technology leadership and autocratic internet standards, which threaten workers. China is currently pursuing these standards through its RCEP agreement with many of the same countries that are part of IPEF[2].

In fact, negotiating such an agreement is an opportunity for the U.S. to advance digital agreements that create worker rights for the 21st century data-driven workplace[3].

Preserving Governments' Ability to Regulate

One argument against negotiating such an agreement is that the U.S. must first focus on strengthening its domestic digital regulatory agenda, including adopting regulations governing privacy, AI, and other areas that could increase worker protections.

It is important and doable to ensure that our global agreements do not pre-empt our ability to pursue domestic regulation. Agreements should continue to preserve room for domestic regulation to address legitimate public policy goals, including at home and abroad – and this right to regulate can be made clearer in agreements, without creating backdoors for foreign measures that harm U.S. interests.

> **Negotiating a digital agreement is an opportunity for the U.S. to advance digital standards that protect workers in the 21st century data-driven workplace.**

While existing digital agreement language, like that in the U.S. Mexico Canada Agreement (USMCA), grants governments some leeway to derogate from trade rules based on "legitimate public policy exceptions," such exceptions can be hard to define and implement in practice. Given the complexity of worker, medical and national security data in the digital sphere, an updated digital trade agreement should provide countries adequate exceptions to regulate in these areas, if it isn't done in a discriminatory nature. Regulators must have the requisite leeway to regulate these game-changing technologies so that workers are not disadvantaged or harmed.

These exceptions, however, must not be used as an excuse for regulations that are discriminatory or protectionist. Agreements must stipulate that digital rules are evenly applied among global competitors, or U.S. companies and workers will be harmed. Agreements must also guard against foreign efforts to expropriate U.S. data and technology. These foreign efforts could lead to U.S. job losses and risk facilitating Chinese efforts to gain access to U.S. technology and data.

Striking the right balance between non-discrimination, protecting American technology, and governments' ability to regulate is critical for both for individual workers, as well as for democratic approaches to technology and regulation.

Privacy

A key area of worker concern is online privacy, which has become a more urgent issue as employers increasingly use artificial intelligence (AI), facial recognition, and other technologies to monitor employee activity and automate employee supervision. More than 60% of large employers now use tools to track their workers, often without an employee's consent or knowledge, and up to 80% of employers track remote workers online.[4]

Advanced systems allow an employer to monitor the number and length of breaks an employee takes, track keystrokes, and monitor worker communications to detect communication about union organization.

Currently, there are no legal regulations covering the privacy of workers and their data, and it is urgent for the U.S. to enact federal privacy legislation to govern worker privacy.

Negotiating international agreements with language protecting worker privacy will not preempt domestic legislation. The U.S. must work at home and globally to rebalance the employee privacy deficit by regulating and bringing more transparency to opaque practices of employee monitoring and data collection and use. As part of these efforts, the language in USMCA should be upgraded to give workers and users greater assurance that their privacy will be protected irrespective of where data is stored.

Algorithms

Algorithms are increasingly used for hiring, promotion and other employment decisions, many of which have built-in biases producing discriminatory outcomes that negatively impact workers, often without the knowledge of workers, and with little recourse for the impacted individuals. These built-in biases often discriminate against minority communities. The U.S. must address the need for more transparency and accountability around algorithms and how they are used in domestic regulation, as well as in any new digital trade agreement.

Language encouraging ethical use of AI and algorithms in earlier digital agreements should be built upon and strengthened, including language facilitating cooperation between governments to understand and address the risks of AI and algorithms to workers and in the workplace, and ensuring that countries are complying with existing labor laws. The U.S. should work with its partners to develop a set of tools to regulate and provide guardrails for the use of algorithms and AI, provide transparency, and ensure equitable and unbiased application of these tools.

Artificial Intelligence

The use of AI is growing quickly, and there are strong calls from government officials to ensure that these technologies are subject to meaningful regulatory oversight. Upcoming digital agreements should actively promote the responsible growth, governance, and deployment of AI while advancing the interests of American workers.

The White House recently took an important step forward on AI governance by securing strong commitments to manage the risks posed by AI and to ensure that AI advances public safety, security, and trust.[5] In agreements like IPEF and the G7 Hiroshima process, the U.S. should advance a version of these White House principles, while also reflecting other important U.S. AI governance frameworks, such as the NIST AI Risk Management Framework. Through these agreements, the U.S. can work with democratic allies to develop a common framework for harnessing AI to protect workers, and mitigate economic, security, and safety risks from AI, while driving new forms of economic opportunity.

Conclusion

Digital technologies and their uses are rapidly evolving, and we are just beginning to understand the ways that these technologies impact workers, offering opportunities but also opening the door to abuse. The U.S. must move quickly to enact privacy legislation, regulations to ensure the fair and ethical use of algorithms, govern AI and other emerging technologies, and promote a broader digital regulatory agenda.

Yet, with China spreading its authoritarian digital standards globally, the need for the U.S. to negotiate digital agreements cannot wait for the U.S. to act domestically. A new digital agreement, which would not preempt any domestic regulation, would position the U.S. as a global leader in crafting a digital agreement that addresses the needs of workers in the 21st century global digital economy. The U.S. cannot risk losing this opportunity.

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End Notes

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3. "Data and Algorithms at Work: The Case for Worker Technology Rights", by Annette Bernhardt, Reem Suleiman, Lisa Kresge, UC Berkeley Labor Center, November 3, 2021.
4. "Employee surveillance is on the rise – and that could backfire on employers", by Goh Chiew Tong, cnbc.com, April 23, 2023, .
5. "FACT SHEET: Biden-Harris Administration Secures Voluntary Commitments from Leading Artificial Intelligence Companies to Manage the Risks Posed by AI", The White House, July 21, 2023.