SEX, MONEY, AND MACHINES: HOW THE FATE OF AI PAY EQUITY SOFTWARE DEPENDS ON THE RESOLUTION OF A CIRCUIT SPLIT

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ABSTRACT

Since the Equal Pay Act (EPA) was enacted, employers faced with a pay discrimination claim have attempted to use an employee's prior compensation to justify a sex-based pay disparity. Under the Equal Pay Act, however, employers can only escape liability where the disparity can be attributed to one of four exceptions. Employers have argued that prior compensation falls under the fourth exception as a "factor other than sex." The federal courts of appeals have taken different approaches when deciding whether an employee's prior compensation is a permissible "factor other than sex" that employers may use to defend against a claim arising under the Equal Pay Act. Amid this developing landscape, state and local legislatures are rolling out pay equity legislation of their own. Many employers have turned to artificial intelligence algorithms to help them comply with multiple levels of pay transparency law in their jurisdiction. These algorithms often contain features that make salary recommendations based on compensation data from the labor market as a whole, and from within the employer's organization. Because AI models may be trained by prior compensation data, legislative or judicial resolution of the circuit split could impact an employer's ability to confidently rely on pay equity algorithms. This Note analyzes employer use of pay equity algorithms in light of the developing law on the issue and argues that the circuit split should be resolved to allow good faith employer reliance on AI pay equity software.

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INTRODUCTION

Since the Equal Pay Act was enacted in 1963, employers faced with a pay discrimination claim have attempted to use an employee's prior compensation to justify a sex-based pay disparity.[1] Under the Equal Pay Act, however, employers can only escape liability where the differential is attributable to: "(i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on *any other factor other than sex*."[2]

Employers have argued that an applicant or employee's prior compensation falls under the fourth exception as a "factor other than sex."[3] The federal courts of appeals have taken three different approaches when deciding whether an employee's prior compensation is a permissible "factor other than sex" that employers may use to defend a claim brought under the Equal Pay Act.[4] The Fourth and Seventh Circuits have stated that prior pay alone is a "factor other than sex" and can be used to justify a pay disparity;[5] the Ninth Circuit has said that prior pay can never be used to justify a pay disparity;[6] and the Sixth, Tenth, Eleventh, and Federal Circuits have held that prior pay cannot be used unless it is not based on sex or it is used in conjunction with another permissible factor (the "middle ground" approach).[7]

Amid this developing federal landscape, state and local governments are rolling out increased pay equity legislation as well.[8] Many employers have

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[1] *See, e.g.*, Boyer v. United States, 97 F.4th 834, 839-40 (Fed. Cir. 2024) (acknowledging the government sought to defend against an Equal Pay Act claim by relying on Dr. Boyle's prior pay to justify the disparity).
[2] 29 U.S.C. § 206(d)(1) (emphasis added).
[3] *See, e.g.*, Boyer, 97 F.4th at 839 (Fed. Cir. 2024) ("the government argued that the pay differential was justified by a 'factor other than sex,' namely Dr. Boyer's prior salary").
[4] *Id.* at 841.
[5] *Id.*; Spencer v. Va. State Univ., 919 F.3d 199, 207 (4th Cir. 2019), as amended (Mar. 26, 2019); Wernsing v. Dep't of Hum. Servs., 427 F.3d 466, 470–71 (7th Cir. 2005).
[6] Boyer, 97 F.4th at 841 (citing Rizo v. Yovino, 950 F.3d 1217, 1223 (9th Cir. 2020) (holding that prior pay does not justify unequal pay, because, although it "could be viewed as a proxy for job-related factors . . . and . . . a function of factors related to an employee's prior job," "prior pay itself is not a factor related to the work an employee is currently performing, nor is it probative of whether sex played any role in establishing an employee's pay")).
[7] Boyer, 97 F.4th at 841–42 (citing Balmer v. HCA, Inc., 423 F.3d 606, 612 (6th Cir. 2005), *abrogated on other grounds by*, Fox v. Vice, 563 U.S. 826, 832 (2002); Glenn v. Gen. Motors Corp., 841 F.2d 1567, 1570-71 (11th Cir. 1988); Irby v. Bittick, 44 F.3d 949, 955 (11th Cir. 1995); Price v. Lockheed Space Operations Co., 856 F.2d 1503, 1506 (11th Cir. 1988); Riser v. QEP Energy, 776 F.3d 1191, 1199 (10th Cir. 2015)).
[8] *See* Lindsay Burke et al., *New Pay Transparency Laws Effective in 2025*, COVINGTON (Jan. 8, 2025), https://www.globalpolicywatch.com/2025/01/new-pay-transparency-laws-

turned to artificial intelligence ("AI") algorithms help them comply with increased pay transparency legislation at the federal, state, and local levels.[9] Some of these algorithms contain features that make salary recommendations based in part on labor market data.[10] Because AI models may be trained by prior compensation data, legislative or judicial resolution of the circuit split could impact an employer's ability to confidently rely on pay equity algorithms.

This paper will analyze an employer's ability to rely on pay equity software in light of the developing law on the issue. Section I lays out the important background of pay equity law. Section II details the analytical framework used by courts in evaluating a claim under the Equal Pay Act and analyzes the current circuit split regarding employer reliance on prior pay to defend against an Equal Pay Act claim. Section III discusses other sources of pay equity law at the federal, state, and local levels. Section IV offers a brief overview of AI and its usefulness in the employment arena. Finally, Section V advocates for the middle ground approach utilized by the Sixth, Tenth, Eleventh, and Federal Circuits, under which employers may safely rely on AI algorithms that are informed in part by prior compensation data.

I. THE GENDER PAY GAP AND THE EQUAL PAY ACT: A BRIEF HISTORY

As millions of men were drafted to serve in World War II, the United States faced an unprecedented need for women to leave their roles as homemakers and enter the workforce.[11] As a result, between 1940 and 1945, 19 million women joined the civilian labor force.[12] After the war, women

effective-in-2025/ [https://perma.cc/C48B-BK3Q] (summarizing new pay transparency statutes taking effect in 2025).

[9] Robert Sheet, *AI in HR: Can You Trust Your Pay Equity Software Provider?*, TRUESAIC (June 29, 2023), https://trusaic.com/blog/ai-in-hr-can-you-trust-your-pay-equity-software-provider/ [https://perma.cc/5CCD-UT5A] ("working with a trusted pay equity software provider ensures compliance with . . . evolving pay equity laws in the US"); *see also* Rebecca Scully, *9 Reasons Enterprises are Switching to Pay Equity Software*, SYNDIO (Jun. 15, 2022), https://synd.io/blog/why-pay-equity-software/ [https://perma.cc/6U63-KTER] ("[P]ay equity analysis software is always being enhanced and improved with new functionality to help companies keep up with changing legal requirements and evolving priorities.").

[10] *See generally Meet Syndi: Decision Intelligence for Pay*, SYNDIO, https://synd.io/syndi/ [https://perma.cc/G3DZ-6U7A] (last visited Nov. 2, 2025) [hereinafter *Meet Syndi*] ("Syndi . . . ingest[s] internal and external market data").

[11] Elizabeth L. Maurer, *Honoring Rosie the Riveter and the Women Who Won the War*, NAT'L WOMEN'S HIST. MUSEUM (March 20, 2017), https://www.womenshistory.org/articles/honoring-rosie-riveter-and-women-who-won-war [https://perma.cc/PY9F-KWBE].

[12] *Id.*; *see also Equal Pay Act of 1963*, NAT'L PARK SERV. (Apr. 1, 2016), https://www.nps.gov/articles/equal-pay-act.htm [https://perma.cc/DL9B-9WYJ] ("During

were expected to return to domestic roles.[13] However, the number of females in the labor force had grown to 25 million by 1960.[14] Despite this growth, Congress repeatedly failed to pass a bill that would ensure women were entitled to equal compensation.[15]

In February of 1963, thanks in large part to labor activist Esther Peterson, the Kennedy administration introduced a proposed version of the Equal Pay Act.[16] After changing the original draft bill's language from "comparable work" to "equal work" and agreeing to make the Equal Pay Act an amendment to the preexisting Fair Labor Standards Act, the bill moved forward.[17] When signing the bill into law, President Kennedy acknowledged that the bill was an important "first step," but that more work needed to be done to help women achieve economic equality.[18]

President Kennedy was correct in noting that the Equal Pay Act, while undoubtedly a significant step, would prove to be ineffective at completely eradicating a gender pay disparity.[19] Over 60 years later, women are still earning an average of 84 cents[20] for every dollar earned by a man, a disparity which is even greater for many women of color.[21] Opinions of what factors are responsible for the gender pay gap vary across gender and political lines.[22] However, it is largely accepted that at least a portion of the pay

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World War II, however, labor shortages brought large numbers of women in to the workplace and by 1945, women made up 37% of the civilian workforce.").

[13] NAT'L PARK SERV., *supra* note 12.

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] Amy Dalrymple, *Issue Brief "Equal Pay in the United States: Salary History Bans"* U.S. DEP'T OF LABOR, WOMEN'S BUREAU (MAR. 2023), *reprinted by* MASS. LAWYER'S WEEKLY, https://masslawyersweekly.com/wp-content/blogs.dir/1/files/2023/05/DOL-salary-history-bans.pdf [https://perma.cc/2L5V-LWNV] ("In the United States, on average, women are paid less than men.").

[20] *Id.* The $0.84 figure was recently used by former President Biden in his proclamation on Equal Pay Day 2024. *Fact Sheet: On Equal Pay Day, the Biden-Harris Administration Announces Actions to Continue Advancing Pay Equity and Women's Economic Security*, THE AM. PRESIDENCY PROJECT (Mar. 12, 2024), https://www.presidency.ucsb.edu/node/370741 [https://perma.cc/2JF5-F7KR]. However, the United States Census Bureau cited the 2023 female-to-male earnings ratio as 0.827. Gloria Guzman & Melissa Kollar, *Income in the United States: 2023*, U.S. CENSUS BUREAU (Sep. 2024), https://www2.census.gov/library/publications/2024/demo/p60-282.pdf [https://perma.cc/X9CQ-CKPH].

[21] Dalrymple, *supra* note 19 (in 2021, Black women earned 67 cents and Hispanic women earned 57 cents per dollar earned by a white, non-Hispanic man).

[22] Richard Fry & Carolina Aragão, *Gender pay gap in U.S. has narrowed slightly over 2 decades*, PEW RSCH. CTR. (Mar. 4, 2025), https://www.pewresearch.org/short-reads/2025/03/04/gender-pay-gap-in-us-has-narrowed-slightly-over-2-decades/ [https://perma.cc/C9RP-EQQ8].

disparity can be explained by measurable differences, and it is slowly narrowing as more women are achieving in the education space and permeating traditionally male-dominated occupations.[23] Despite this, discrimination continues to play a role in the gender pay gap, and the Equal Pay Act alone is too narrow to provide an adequate remedy.[24] As the Federal Circuit Courts of Appeals battle over the interpretation of the Equal Pay Act, state and local legislatures are implementing salary history bans and other wage transparency laws to address the gender pay disparity.[25]

II. PAY DISPARITIES UNDER THE EQUAL PAY ACT: THE CIRCUIT SPLIT COMPLICATING THE PRINCIPAL PIECE OF FEDERAL LEGISLATION ADDRESSING THE GENDER PAY GAP

The Equal Pay Act ("EPA" or "the Act") prevents employers from engaging in sex discrimination by paying different wages[26] to male and female employees performing equal work "under similar working conditions," unless the differential is attributed to seniority, merit, production quality or quantity, or "any other factor other than sex."[27] The fourth category of exceptions has been the subject of disagreement among the circuits.[28] Either an employee or the Equal Employment Opportunity Commission (the "EEOC") has the power to bring a charge of discrimination under the Equal Pay Act.[29] Under the Equal Pay Act, the EEOC[30] or the

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[23] *Id.*; *but see* Boyer v. United States, 97 F.4th 834, 842 (Fed. Cir. 2024) (citing Brief for Nat'l Women's Law Ctr., et al. as Amici Curiae Supporting Plaintiff-Appellant) ("As pointed out by amici and not contradicted by the government, 'the gender wage gap has hardly narrowed over the last 15 years.'").

[24] *See* Rizo v. Yovino, 950 F.3d 1217, 1229 (9th Cir. 2020) ("even after accounting for certain observable characteristics—such as education and experience—an unexplained disparity largely persists."); *see also* Dalrymple, *supra* note 19, at 2 ("[D]iscrimination in hiring, promotions, access to assignments, and advancement opportunities, which also affect compensation, are not addressed by the EPA").

[25] *See* Dalrymple, *supra* note 19, at 5 ("salary history bans are an effective tool that states and localities are using to address wage discrimination and unequal pay").

[26] Victims of discrimination in "hiring, promotions, access to assignments, and advancement opportunities" do not have a cause of action under the Equal Pay Act and must instead peruse remedies available under other anti-discrimination statutes such as Title VII of the Civil Rights Act, the Age Discrimination in Employment Act (ADEA), the Americans with Disabilities Act (ADA), and other federal, state, and local legislation. *Id.* at 2–3. Additionally, the Equal Pay Act only protects against sex-based wage discrimination but victims of wage discrimination based on other protected characteristics may be protected by the legislation mentioned above. *Id.*

[27] 29 U.S.C. § 206(d)(1).

[28] *Boyer*, 97 F.4th at 841 (describing the various approaches adopted by the federal courts of appeals).

[29] *Filing a Lawsuit*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/filing-lawsuit [https://perma.cc/G45Y-FCZF] (last visited Sep. 21, 2025).

[30] While enforcement of the Equal Pay Act was initially handled by the Department of Labor, authority was transferred to the U.S. Equal Employment Opportunity Commission

employee bringing the action has the initial burden of establishing a prima facie case.[31] The burden of proof [32] then "shifts to the employer to show that the differential is justified under one of the Act's four exceptions."[33] Finally, the employee has the opportunity to establish that the employer's defense is "merely pretextual."[34]

A. Making a Claim of Unequal Pay for Equal Work: The Plaintiff's Initial Burden of Establishing a Prima Facie Case

To establish a prima facie case under the Equal Pay Act, the plaintiff must demonstrate that the employer pays employees of opposite sexes differently for performing "equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions."[35] In bringing a claim under the Equal Pay Act, the plaintiff does not need to establish that the employer had any discriminatory intent.[36]

Employee "skill" is measured by factors such as "experience, ability, education, and training."[37] Only skills that are "needed to meet the requirements of the job" should be considered.[38] Accordingly, an employer hiring for a job that only requires a high school diploma should not pay an

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(EEOC) who, in the five years preceding the Equal Pay Act's 60th Anniversary, recovered over $65 million for individuals (most of whom were women). Dalrymple, *supra* note 19, at 2 (citing *Data Highlight: The Continuing Impact of Pay Discrimination in the United States* U.S. EQUAL EMP. OPPORTUNITY COMM'N, OFF. OF ENTER. DATA AND ANALYTICS (Mar. 2022), https://www.eeoc.gov/sites/default/files/2022-03/Equal-Pay-Day-Data-Highlight.pdf [https://perma.cc/V2ZZ-GA97]).

[31] Corning Glass Works v. Brennan, 417 U.S. 188, 195 (1974).

[32] In a claim arising under the Equal Pay Act, the employer bears the ultimate burden of persuasion after the employee establishes a prima facie case. Stanziale v. Jargowsky, 200 F.3d 101, 107 (3d Cir. 2000). In discussion with Professor Paul Frieden, it became apparent to emphasize how this burden differs from the employer's burden of production in a Title VII claim. Unlike an employer defending a Title VII claim, in which the burden of proof remains with the plaintiff despite a shifting burden of production, an employer defending an Equal Pay Act claim bears the burden of *proof* at trial after the plaintiff establishes a prima facie case. *Id. quoting* E.E.O.C. v. Del. Dep't of Health & Soc. Servs., 865 F.2d 1408, 1414 (3d Cir. 1989) ("to prevail at the summary judgment stage, the employer must prove at least one affirmative defense 'so clearly that no rational jury could find to the contrary'").

[33] *Corning Glass Works*, 417 U.S. at 196.

[34] Boyer v. United States, 97 F.4th 834, 839 (Fed. Cir. 2024).

[35] *Corning Glass Works*, 417 U.S. at 195 (quoting 29 U.S.C. § 206(d)).

[36] Rizo v. Yovino, 950 F.3d 1217, 1223 (9th Cir. 2020) (holding the Equal Pay Act creates a "type of strict liability").

[37] *Equal Pay Act of 1963 and Lilly Ledbetter Fair Pay Act of* 2009, U.S. EQUAL EMP. OPPORTUNITY COMM'N (Apr. 29, 2014), https://www.eeoc.gov/laws/guidance/equal-pay-act-1963-and-lilly-ledbetter-fair-pay-act-2009, [https://perma.cc/YJ5V-PA7Y] [hereinafter *Equal Pay Act of 1963 and Lilly Ledbetter Fair Pay Act of 2009*].

[38] *Id.*

employee more because she has obtained a Bachelor's degree.[39] The term "effort" refers to the "amount of physical or mental exertion needed to perform a job."[40] "Responsibility" refers to the "degree of accountability" that the job requires, and can be measured by how closely the employee is supervised, whether the employee supervises others, and the impact of the employee's job on the overall business.[41] Finally, when evaluating "working conditions," employers should consider the work environment, and any hazards that may exist as employees carry out their job duties.[42]

Federal courts have construed "substantially equal work" broadly.[43] In the Ninth Circuit, the relevant inquiry in determining whether employees are engaged in substantially equal work is whether the jobs being compared share a "common core" of tasks.[44] When comparing two jobs under the Equal Pay Act, the Ninth Circuit looks to the "actual job duties" rather than "job titles or classifications."[45] Accordingly, courts may find that jobs are "substantially equal" despite differences in "title, supervisors, classifications, departments, and geographic locations."[46]

While the term "substantially equal work" has been construed quite broadly, the term "equal pay" has been interpreted to have a narrower meaning.[47] The EEOC has explained that for wages to be considered "equal" under the Equal Pay Act, they must be paid in the same form.[48] For example, employers may not attempt to equalize a pay disparity by issuing a bonus to a female employee that is earning a lower base rate than a male.[49]

The Fourth Circuit has found the amount of total compensation earned to be irrelevant where a female employee earned a lower base salary than her male counterparts.[50] In *Sempowich v. Tactile Systems*, the Fourth Circuit held

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[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] *Id.*
[43] Alexandra Harwin & Melinda Koster, *Critical Steps for Employers to Legally Close the Wage Gap*, BLOOMBERG LAW, (Jun. 2022), https://www.bloomberglaw.com/external/document/XO3I5G0000000/employment-professional-perspective-critical-steps-for-employers [https://perma.cc/J7HP-3Y9E] ("federal courts have thought broadly about which employees deserve equal pay.").
[44] Freyd v. Univ. of Or., 990 F.3d 1211, 1220 (9th Cir. 2021) (quoting Stanley v. Univ. of S. Cal., 178 F.3d 1069, 1073–74 (9th Cir. 1999)).
[45] *Equal Pay Act of 1963 and Lilly Ledbetter Fair Pay Act of 2009*, *supra* note 37.
[46] Harwin & Koster, *supra* note 43.
[47] *See id.* ("It's a common misconception that employers can use year-end bonuses or commissions to fix pay inequities.").
[48] *Equal Pay Act of 1963 and Lilly Ledbetter Fair Pay Act of 2009*, *supra* note 37.
[49] Harwin & Koster, *supra* note 43.
[50] *Id.* (citing Sempowich v. Tactile Sys. Tech., Inc., 19 F.4th 643, 655–56 (4th Cir. 2021)).

that a violation of the Equal Pay Act may occur even where the plaintiff earned more in total compensation than a comparable employee performing substantially equal work.[51] If an employee is able to establish a prima facie case, the burden then shifts to the employer to argue that "the differential is justified under one of the Act's four exceptions."[52]

B. The Act's Four Affirmative Defenses: Justifying a Pay Disparity Between Employees of Opposite Sex

An employer can escape liability where the disparity is attributable to: "(i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex."[53] The employer has the burden of proof when using an exemption under the Fair Labor Standards Act, as these exemptions are considered a "matter of affirmative defense."[54]

Since the adoption of the Equal Pay Act, employers have argued that the use of an employee's prior compensation falls into the fourth category of exceptions as a "factor other than sex."[55] However, the federal courts of appeals disagree on how to define the scope of that exception.[56] The federal circuits have developed three primary approaches to analyze whether prior pay is a "factor other than sex."[57]

C. Current Circuit Split: What is a "Factor Other Than Sex"?

1. The Fourth and Seventh Circuits

The Fourth and Seventh Circuits determined that prior pay does fall within the fourth category of exceptions and allow employers to justify a pay differential based on prior pay alone.[58] These circuits interpret "factor other than sex" broadly and allow employers to consider virtually any factor, other than the employee's sex, in setting the employee's wages.[59]

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[51] *Id.*
[52] Corning Glass Works v. Brennan, 417 U.S. 188, 196 (1974).
[53] 29 U.S.C. § 206(d)(1).
[54] *Corning Glass Works*, 417 U.S. at 196–97.
[55] *See* Boyer v. United States, 97 F.4th 834, 839 (Fed. Cir. 2024) (holding that prior pay alone cannot justify a pay differential despite the employer's argument "that the pay differential was justified by a 'factor other than sex,' namely Dr. Boyer's prior salary"); *see also* Rizo v. Yovino, 950 F.3d 1217, 1220–21 (9th Cir. 2020) (rejecting the employer's argument that "Rizo's pay . . . which was based solely on [her] prior pay, was a "factor other than sex" that defeated Rizo's EPA claim.").
[56] *Boyer*, 97 F.4th at 841.
[57] *Id.*
[58] *Id.*; Spencer v. Va. State Univ., 919 F.3d 199, 206–07 (4th Cir. 2019); Wernsing v. Dep't of Hum. Servs., 427 F.3d 466, 468–70 (7th Cir. 2005).
[59] *Boyer*, 97 F.4th at 841 (citing *Wernsing*, 427 F.3d at 469).

Because "markets are impersonal and have no intent," the Seventh Circuit views the use of prior pay as a non-discriminatory means of setting wages based on what the market will bear.[60] In *Wernsing v. Dep't of Hum. Servs., State of Ill.*, the Seventh Circuit referred to the use of prior pay in salary decision-making as a "common personnel-management practice."[61] The Illinois Department of Human Services hired Jenny Wernsing to a position with an allotted monthly salary range of $2,478 to $4,466.[62] Upon hire, the Department considered Jenny's prior monthly pay of $1,925 and extended her an offer for $2,478 (an almost 30% increase), which she accepted.[63] Jenny's male comparator [64] received and accepted an offer for $3,739, a 10% increase from his prior monthly salary of $3,399.[65] Jenny and her male counterpart performed substantially the same work for drastically different pay.[66] Despite this, the Seventh Circuit found no Equal Pay Act violation after concluding that employers need not ignore market wages in setting salaries for new hires, even where consideration of those wages would result in a pay disparity.[67] The Seventh Circuit has continued to follow the *Wernsing* precedent, holding in 2017 that "a difference in pay based on the difference in what employees were previously paid is a legitimate factor other than sex."[68] However, the court also noted that it could find discrimination if the employee established that the lower prior wages were a result of sex discrimination.[69]

The Fourth Circuit took a similar approach in *Spencer v. Virginia State University*.[70] In *Spencer*, a female professor alleged an Equal Pay Act violation because she was earning less than two male professors in other departments.[71] Spencer's male comparators held administrative roles prior to their current roles as professors.[72] The university used her male counterparts' prior earnings as administrators to set their current pay as professors, which led to their annual earnings being roughly $30,000 higher than Spencer's.[73]

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[60] *Id.*
[61] *Wernsing*, 427 F.3d at 467.
[62] *Id.*
[63] *Id.*
[64] For purposes of the Equal Pay Act, a comparator is an individual who "performs work 'substantially equal' to that of the plaintiff." Spencer v. Va. State Univ., 224 F. Supp. 3d 449, 456 (E.D. Va. 2016).
[65] *Wernsing*, 427 F.3d at 467.
[66] *Id.*
[67] *Id.* at 470.
[68] Lauderdale v. Ill. Dep't of Hum. Servs, 876 F.3d 904, 908 (7th Cir. 2017) (internal quotation marks omitted).
[69] *Id.* at 909.
[70] Spencer v. Va. State Univ., 919 F.3d 199, 207 (4th Cir. 2019).
[71] *Id.* at 202–03.
[72] *Id.*
[73] *Id.*

The court noted that the Equal Pay Act is a "powerful tool" because it allows employees to prevail on claims against their employers "with no evidence of intentional discrimination."[74] Following this observation, the court explained that the tool needed to be "tempered by adherence to its provisions" and held that reliance on prior pay to set employee salaries is permissible under the Equal Pay Act.[75]

2. Ninth Circuit

The Ninth Circuit, in stark disagreement with the Fourth and Seventh Circuits, held that prior pay is not a "factor other than sex" and therefore can never be used to justify a disparity in the wages of male and female employees.[76] In *Rizo v. Yovino*, the Ninth Circuit used principles of statutory construction to interpret the fourth category of exceptions to the Equal Pay Act.[77] The court looked carefully at each word of the fourth exception— "any *other* factor other than sex"—and noted that, because the preceding three exceptions are all job related, Congress intended the fourth exception to also be limited to job-related factors.[78]

The Ninth Circuit then considered whether prior pay was a job-related factor that could defeat a prima facie case and held that it was not, noting that prior pay is pay received for a *different* job.[79] The court reasoned:

> We do not presume that any particular employee's prior wages were depressed as a result of sex discrimination. But the history of pervasive wage discrimination in the American workforce prevents prior pay from satisfying the employer's burden to show that sex played no role in wage disparities between employees of the opposite sex. And allowing prior pay to serve as an affirmative defense would

[74] *Id.* at 207.
[75] *Id.*
[76] Boyer v. United States, 97 F.4th 834, 841 (Fed. Cir. 2024) *citing* Rizo v. Yovino, 950 F.3d 1217, 1229 (9th Cir. 2020). The Ninth Circuit explains that its holding in *Rizo* merely prevents employers from using prior pay to defend against an Equal Pay Act violation and does not prevent employers from considering salary history in setting pay. *Rizo*, 950 F.3d at 1231–32. However, as noted by Judge McKeown's concurring opinion, "the majority's vague disclaimer hardly dilutes the practical effects of the holding's broad sweep." *Id.* at 1236 (McKeown, J., concurring). Despite the distinction that the court purports to draw, this holding will likely deter employers from relying on prior pay in setting current wages because the employer could not use that rationale to defend the decision if a claim should arise.
[77] *Rizo*, 950 F.3d at 1224.
[78] *Id.*
[79] *Id.* at 1227.

> frustrate the EPA's purpose as well as its language and structure by perpetuating sex-based wage disparities.[80]

Addressing the concurrence, the majority disagreed that prior pay could be used in conjunction with other factors because relying on prior pay as a proxy for the other cited factors does not bolster an employer's defense.[81] Instead, employers can use only job-related factors to defeat a prima facie showing of an Equal Pay Act violation.[82]

3. Sixth, Tenth, Eleventh, and Federal Circuits

In *Boyer v. United States*, the Federal Circuit joined the Sixth, Tenth, and Eleventh circuits in adopting a "middle ground" approach when analyzing whether an employee's prior compensation is a "factor other than sex."[83] The circuits following this analysis prevent employers from relying on prior pay in setting an employee's current wages, unless the employer demonstrates that the prior pay is not based on sex or considers prior pay with another permissible factor.[84] In other words, an employer is prohibited from relying *solely* on the employee's prior pay to justify a pay disparity.[85] When employers consider prior pay in conjunction with another permissible factor, the employer is not using prior pay as a "proxy for sex," thereby reinforcing the "central lesson" that prior pay cannot be an "other factor other than sex" if the prior pay itself is the product of sex discrimination.[86]

In *Boyer*, the Federal Circuit remanded the case to the Claims Court to determine whether there was a "bona fide business reason [for the pay differential] other than prior pay" after noting that "there is evidence both ways as to whether prior pay alone was the deciding factor."[87] Evidence suggesting that the employer impermissibly relied on the plaintiff's prior pay includes statements made by the employer's representatives that the new hire's prior pay can "basically trump" other considerations, and is the "biggest factor that [they] always took into consideration" when setting pay.[88] However, some evidence suggests that other factors were considered as well, such as an email to the plaintiff stating that "salary could be 'based on education, residency, [and] published articles' in addition to salary

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[80] *Id.* at 1228.
[81] *Id.* at 1231.
[82] *Id.*
[83] Boyer v. United States, 97 F.4th 834, 843–44 (Fed. Cir. 2024).
[84] *Id.* at 843.
[85] *Id.* (citing Glenn v. Gen Motors Corp., 841 F.2d 1567, 1570–71 (11th Cir. 1988)).
[86] *Boyer*, 97 F.4th at 842, 844.
[87] *Id.* at 849.
[88] *Id.*

matching."[89] If the Claims Court determines that the employer relied on prior pay alone, "[it] should be provided an opportunity to attempt to prove that the prior pay . . . was not itself based on sex."[90]

The Federal Circuit explains that the concern about employers relying on prior pay alone is that the prior pay may have been "artificially reduced by prior sex discrimination."[91] However, where the employer considered other factors unrelated to sex in conjunction with prior pay, it is likely that any differences resulting from those factors *will*[92] explain a prior pay disparity as well.[93] This analysis allows an employer to safely rely on legitimate non-sex-based differences between a male and a female employee (such as education, work experience, or recommendations) in conjunction with prior pay when determining the employees' respective wages.[94]

III. BEYOND THE EQUAL PAY ACT: OTHER SOURCES OF PAY EQUITY LEGISLATION AT THE FEDERAL, STATE, AND LOCAL LEVELS

A. Pay Equity Law at the Federal Level

Since the enactment of the Equal Pay Act, several pieces of legislation[95] have been introduced that seek to fill some of the Act's gaps.[96] Among these pieces of legislation is the Lilly Ledbetter Fair Pay Act which strengthened an employee's ability to effectively challenge unfair pay practices.[97] As the first piece of legislation enacted by the Obama administration, the Lilly Ledbetter Fair Pay Act of 2009 made it more difficult for employers to use the statute of limitations to escape liability for wage discrimination.[98] The Lilly Ledbetter Fair Pay Act was enacted following the Supreme Court's

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[89] *Id.*
[90] *Id.*
[91] *Id.* at 841.
[92] "[O]ther circuits have explained that it is not enough that the employer's proffered reasons could explain the wage disparity . . . it is necessary that the proffered reasons do in fact explain the wage disparity." *Boyer*, 97 F.4th at 844 (citing Riser v. QEP Energy, 776 F.3d 1191, 1198) (internal quotation marks omitted).
[93] *Id.*
[94] *Id.* at 842.
[95] *See, e.g.*, Civil Rights Act of 1964, 42 U.S.C.A. § 2000e-2 (West) (prohibited discrimination against applicants and employees on the basis of race, color, religion, sex and national origin); National Labor Relations Act, 29 U.S.C.A. § 157 (West) (granting employees the right to "self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection").
[96] Dalrymple, *supra* note 19, at 2, 8.
[97] Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111–2, 123 Stat 5.
[98] *Id.*; Orly Lobel, *Knowledge Pays: Reversing Information Flows and the Future of Pay Equity*, 120 COLUM. L. REV. 547, 565–566 (2020).

decision in *Ledbetter v. Goodyear Tire & Rubber Co*.[99] There, the Court held that Lilly Ledbetter's claim was untimely because the statute of limitations began running at the time the employer made the discriminatory pay decision, not at the time Ledbetter received a paycheck reflecting that decision.[100] In a striking dissent, Justice Ginsburg called upon Congress to enact legislation that would overturn the Court's decision, stating "the ball is in Congress' court."[101] Congress, and President Obama, took Justice Ginsburg up on this call to action and enacted the law which allows complainants to file within 180 days of receiving a discriminatory paycheck rather than needing to file within 180 days of when the employer made the discriminatory pay decision.[102]

The Lilly Ledbetter Fair Pay Act was not the only step that the Obama Administration took to advance equal pay.[103] President Obama continued his fight for equal pay by encouraging Congress to pass the Paycheck Fairness Act which sought to close loopholes in the Equal Pay Act.[104] The Paycheck Fairness Act had several goals, including: refining the fourth category of exceptions under the Equal Pay Act to apply to only "bona fide job-related factors"; restricting an employer's ability to retaliate against employees pursuing equal pay; and promoting pay transparency by prohibiting employers from requiring employees to sign contracts promising not to disclose information about the employee's pay.[105] Initially introduced in 1997, Congress has failed to move the Paycheck Fairness Act forward for nearly three decades.[106] The Act was recently reintroduced in March of 2025, sponsored by Representative Rosa L. DeLauro in the House of

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[99] *Fact Sheet: New Steps to Advance Equal Pay on the Seventh Anniversary of the Lilly Ledbetter Fair Pay Act*, THE WHITE HOUSE (Jan. 29, 2016), https://obamawhitehouse.archives.gov/the-press-office/2016/01/29/fact-sheet-new-steps-advance-equal-pay-seventh-anniversary-lilly [https://perma.cc/QMZ9-M4LS] [hereinafter *Fact Sheet: New Steps to Advance*].

[100] Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 632 (2007), *overturned due to legislative action* (Jan. 29, 2009).

[101] *Id.* at 661 (Ginsburg, J., dissenting).

[102] *Fact Sheet: New Steps to* Advance, *supra* note 99; *Ledbetter*, 550 U.S. at 621.

[103] Lobel, *supra* note 98.

[104] Lobel, *supra* note 98, at 566; *see also* Press Release, Rosa DeLauro, Representative, House of Representatives, DeLauro Murray Introduce the Paycheck Fairness Act (March 9, 2023), https://delauro.house.gov/media-center/press-releases/delauro-murray-introduce-paycheck-fairness-act [https://perma.cc/VK3Q-BLB2] ("The Paycheck Fairness Act would eliminate loopholes in the Equal Pay Act, breaking harmful patterns of pay discrimination and strengthening workplace protections for women.").

[105] Paycheck Fairness Act, H.R. 17, 118th Cong. (2023); Paycheck Fairness Act, S. 728, 118th Cong. (2023).

[106] Chabeli Carrazana, *The Paycheck Fairness Act to Close the Gender Wage Gap Failed in Congress. What Comes Next?*, 19TH NEWS (June 10, 2021), https://19thnews.org/2021/06/paycheck-fairness-act-fails/ [https://perma.cc/3E6Z-7CEW].

Representatives and Senator Patty Murray in the Senate, but no action has been taken on the bill since being reintroduced.[107]

President Obama also established the National Equal Pay Enforcement Task Force, bringing together the "Equal Employment Opportunity Commission ('EEOC'), the Department of Justice ('DOJ'), the Department of Labor ('DOL'), and the Office of Personnel Management ('OPM')" to identify and address five challenges associated with equal pay enforcement.[108] Additionally, President Obama attempted to address pay discrimination by issuing an Executive Order which promoted wage transparency by prohibiting retaliation against employees of government contractors who discuss their pay.[109] In the Executive Order, President Obama noted that "compensation discrimination is much more difficult to discover and remediate, and more likely to persist" when employees are prevented from discussing their pay with colleagues.[110]

President Biden built on the Obama Administration's work toward pay equity during his time in office.[111] Notably, President Biden issued Executive Order 14035 in June of 2021 to promote "diversity, equity, inclusion, and accessibility" in the Federal workforce.[112] Among other things, the Executive Order directed the Office of Personnel Management to consider prohibiting federal agencies from using an applicant or employee's salary history "during the hiring process to set pay."[113] On March 12, 2024, National Equal Pay Day,[114] the Biden-Harris Administration announced that the Office of

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[107] Actions - H.R.17 - 119th Congress (2025-2026): Paycheck Fairness Act, H.R.17, 119th Cong. (2025), https://www.congress.gov/bill/119th-congress/house-bill/17/all-actions [https://perma.cc/Q3XW-HCY7]; *H.R. 17: Paycheck Fairness Act*, GOVTRACK.US, https://www.govtrack.us/congress/bills/119/hr17 [https://perma.cc/SB83-K73A]; *S. 1115: Paycheck Fairness Act*, GOVTRACK.US, https://www.govtrack.us/congress/bills/119/s1115 [https://perma.cc/JLA2-J74M].

[108] Obama White House Archives, *National Equal Pay Task Force*, https://obamawhitehouse.archives.gov/sites/default/files/rss_viewer/equal_pay_task_force.pdf [https://perma.cc/5YQ2-8RL4].

[109] Exec. Order No.13665, 79 Fed. Reg. 20749 (Apr. 11, 2014); Lobel, *supra* note 98 (citing Melanie Garunay, *Taking Action to Advance Equal Pay*, THE WHITE HOUSE, (Jan. 29, 2016, at 9:43 ET) https://obamawhitehouse.archives.gov/blog/2016/01/29/taking-action-advance-equal-pay [https://perma.cc/K62R-NA2E]).

[110] Exec. Order No.13665, 79 Fed. Reg. 20749 (Apr. 11, 2014).

[111] *See, e.g.*, Exec. Order No.14035, 86 Fed. Reg. 34593 (June 25, 2021) ("The Director of OPM shall . . . consider whether to . . . prohibit agencies from seeking or relying on an applicant's salary history during the hiring process to set pay or when setting pay for a current employee, unless salary history is raised without prompting by the applicant or employee.").

[112] *Id.*

[113] *Id.*

[114] National Equal Pay Day commemorates the additional days into 2024 that women had to work to earn the same amount as men earned in 2023. *Equal Pay Day: March 12, 2024*,

Personnel Management ultimately issued a final rule prohibiting dozens of federal agencies from taking employee and applicant non-federal salary history into consideration in pay-setting decisions.[115]

The momentum behind *federal* equal pay legislation seems to be slowing under the new Trump Administration.[116] During the first days of his second term, President Trump issued an Executive Order rescinding Executive Order 14035.[117] However, this does not mean that the push toward pay equality will cease altogether.[118] Instead, it will be largely up to state and local governments to continue the fight against pay inequity.[119]

B. State and Local Wage Transparency Statutes are Strengthening Employees' Power to Bring Equal Pay Claims

The localized fight against pay inequity is well underway as state and local legislatures pass wage transparency laws to address pay inequity.[120] Given the country's history of gendered pay inequity, relying on employees' prior pay to set their current pay poses a significant risk of perpetuating wage discrimination.[121] Nonetheless, employers routinely inquire about pay history during the hiring process.[122] In fact, half of United States workers

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U.S. CENSUS BUREAU (Mar. 12, 2024), https://www.census.gov/newsroom/stories/equal-pay-day.html [https://perma.cc/W344-CST8].

[115] THE AM. PRESIDENCY PROJECT, *supra* note 20.

[116] *See* Lobel, *supra* note 98, at 566 (citing Martha Burk, *With No Hope Under Trump, Gender Pay Gap Action Goes Local*, HUFFINGTON POST (Dec. 19, 2016), https://www.huffpost.com/entry/with-no-hope-under-trump_b_13730364 [https://perma.cc/8F29-LRVB]) ("With the federal government's most likely action on gender pay disparities in the [Trump] administration being 'none,' women must look to local and state jurisdictions to move the needle on equal pay.")); *see also* Burke et al., *supra* note 8 (summarizing new pay transparency statutes taking effect in 2025).

[117] *Initial Rescissions of Harmful Exec. Orders and Actions*, THE WHITE HOUSE (Jan. 20, 2025) https://www.whitehouse.gov/presidential-actions/2025/01/initial-rescissions-of-harmful-executive-orders-and-actions/ [https://perma.cc/VTM3-8ZR4].

[118] Lobel, *supra* note 98 (citing Martha Burk, *With No Hope Under Trump, Gender Pay Gap Action Goes Local*, HUFFINGTON POST (Dec. 19, 2016), http://www.huffingtonpost.com/martha-burk/with-no-hope-under-trump_b_13730364.html [https://perma.cc/9VNQ-H8HX]).

[119] *See id.* ("With the new Trump Administration dissipating the focus on pay equity, states are taking the lead in attacking the problem.").

[120] *See, e.g.*, 820 ILL. COMP. STAT. 112/10 (b-25) ("It is unlawful for an employer with 15 or more employees to fail to include the pay scale and benefits for a position in any specific job posting."); N.J. STAT. ANN. § 34:6B-23 (West) ("An employer shall disclose in each posting for new jobs and transfer opportunities . . . the hourly wage or salary, or a range of the hourly wage or salary, and a general description of benefits").

[121] Dalrymple, *supra* note 19, at 4.

[122] *Id.* at 1.

surveyed reported that their employer knew details of their pay history before extending an offer for the job they currently hold.[123]

In recent years, a growing number of state and local jurisdictions have passed salary history bans or other wage transparency statutes to further the fight against pay inequity.[124] California and Massachusetts were among the first states to prohibit employers from asking about applicants' salaries before extending a job offer.[125] Several other states have followed their example or are considering doing so.[126] A number of states, from Washington to Rhode Island, have adopted wage transparency statutes; and New York City and Cincinnati are just two of the many cities that have implemented similar laws on a local level.[127] However, a few states have taken the opposite approach and attempted to prohibit local legislatures from implementing salary history bans.[128]

These wage transparency laws generally have at least one of two main components:[129] (1) provisions prohibiting employers from asking applicants to disclose their prior pay;[130] and (2) provisions requiring employers to

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[123] *Id.* (citing Robert Hall & Alan Krueger, *Evidence on the Incidence of Wage Posting, Wage Bargaining, and On-the-Job Search*, AM. ECON. J.: MACROECONOMICS, 4 (4): 56-67 (2012)).

[124] *See*, e.g., N.Y. Lab. Law § 194-a (McKinney) ("No employer shall . . . orally or in writing seek, request, or require the wage or salary history from an applicant or current employee."); D.C. Code Ann. § 32-1452 (West) ("An employer shall not . . . Seek the wage history of a prospective employee from a person who previously employed the individual.").

[125] Lobel, *supra* note 98, at 567 (citing Stacy Cowley, *Massachusetts Bans Employers from Asking Applicants About Previous Pay*, N.Y. TIMES (Aug. 2, 2016), https://www.mass.gov/doc/ma-bans-employers-from-asking-applicants-about-pay/download [https://perma.cc/A6ZS-LAZ3]); Yuki Noguchi, *Proposals Aim to Combat Discrimination Based on Salary History*, NPR (May 30, 2017, 11:09 ET) https://www.npr.org/2017/05/30/528794176/proposals-aim-to-combat-discrimination-based-on-salary-history [https://perma.cc/FER5-DH3X].

[126] Lobel, *supra* note 98, at 567.

[127] Jeanne Sahadi, *More states now have pay transparency laws. Here's the effect they're having*, CNN BUS., (Nov. 13, 2024), https://www.cnn.com/2024/11/13/business/pay-transparency-laws-by-states/index.html, [https://perma.cc/G4GK-MMBK].

[128] Lobel, *supra* note 98, at 570 (citing Jeffrey Fritz, *Banning The Bans: Michigan and Wisconsin Buck the Salary History Ban Trend*, FISHER PHILLIPS (Apr. 4, 2018), https://www.fisherphillips.com/en/news-insights/pay-equity-matters-mind-the-gap/banning-the-bans-michigan-and-wisconsin-buck-the-salary-history-ban-trend.html [https://perma.cc/AA42-9NK2]).

[129] Colleen Murphy, *Pay Equity Disputes May Be the 'Sleeping Giant' of Wage Transparency Laws, Employment Lawyers Predict*, N.J.L.J. (Apr. 18, 2024, 11:27 ET), https://www.law.com/2024/04/18/pay-equity-disputes-may-be-the-sleeping-giant-of-wage-transparency-laws-employment-lawyers-predict/ [https://perma.cc/2JSN-PFWY].

[130] *See, e.g.*, Md. Code Ann., Lab. & Empl. § 3-304.2(d)(1) ("An employer may not . . . seek the wage history for an applicant for employment orally, in writing, or through an employee or an agent or from a current or former employer.").

disclose a salary range and/or benefits associated with the position.[131] Including a predetermined salary range in a public job advertisement helps employers avoid some unconscious biases in setting pay because the advertisements are generally posted before knowing the identifying characteristics that applicants possess.[132] Pay transparency statutes benefit the employee population,[133] and reduce the gender pay gap by 20% to 40% in some instances.[134] In addition to benefitting employees, salary history bans may also benefit employers and the broader economy as investors are increasingly drawn to companies "that are creating fair, empowered culture [and] reap the performance benefits that diversity affords."[135]

The full effect that these statutes will have on employers, however, is not entirely clear.[136] Practitioners in the area believe that employers are not likely to see many stand-alone wage transparency claims, and that instead, wage transparency violations may be used to bolster an employee's unequal pay claim.[137] AI pay equity software is one tool that may prove useful for employers seeking to locate pay discrepancies in their organizations and remedy them before a lawsuit arises under federal, state, or local pay equity laws.[138]

IV. AI PAY EQUITY SOFTWARE IS OFFERING SOLUTIONS TO EMPLOYERS SEEKING TO COMPLY WITH INCREASED PAY EQUITY LEGISLATION

A. What Exactly is Artificial Intelligence?

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[131] *See, e.g.*, Md. Code Ann., Lab. & Empl. § 3-304.2(a)(2) ("An employer shall . . . disclose in each public or internal posting for each position the wage range and a general description of benefits and any other compensation offered for the position").
[132] Keith A. Markel, Jessica L. Lipson, & Alana M. Smolow, *AI and pay equity: Positives and pitfalls for employers to consider*, REUTERS (Dec. 21, 2023, 11:00 ET) https://www.reuters.com/legal/legalindustry/ai-pay-equity-positives-pitfalls-employers-consider-2023-12-21 [https://perma.cc/EZ6Q-HMYQ].
[133] Murphy, *supra* note 129 (examining public sector disclosure laws on university salaries according to the National Bureau of Economic Research in Cambridge, Massachusetts).
[134] Michael Baker et al., *Pay Transparency And The Gender Gap*, NAT'L BUREAU OF ECON. RSCH. (2019) (finding that, on average, wage transparency laws in Canada "led to a statistically significant 1.2-2 percentage point reduction in the gender gap").
[135] Dalrymple, *supra* note 19, at 4 (citing Natasha Lamb and Will Klein, *A Proactive Approach to Wage Equality is Good for Business*, 42 EMP. RELATIONS TODAY 21, 25 (2015)); Lamb & Klein, *supra*.
[136] Murphy, *supra* note 129 (quoting Melinda Koster, "I think there is a real question as to how these laws are going to culminate in legal actions.").
[137] *Id.*
[138] Daniela Porat, *How AI Could Change W&H Compliance*, LAW360 (June 1, 2023, 16:22 ET) https://www.law360.com/employment-authority/articles/1683088 [https://perma.cc/Y5AC-PMGS] ("[AI] can be deployed in the workforce to devise protocols or do company-wide pay evaluations.").

Congress has defined AI as "a machine-based system that can, for a given set of human-defined objectives, make predictions, recommendations, or decisions influencing real or virtual environments."[139] Generative AI and machine learning AI are two types of AI that "have been making headlines."[140] Generative AI uses algorithms "that can create original content such as text, images, video, audio or software code in response to a user's prompt or request." [141] Machine learning AI uses "data and algorithms to imitate the way that humans learn, gradually improving its accuracy."[142]

AI systems can be categorized as "open" or "closed."[143] Open AI systems do not limit what the AI tool does with a user's prompts.[144] This may result in the AI system sharing a user's inputted information with an unintended party, or storing the information in the AI's "neural network."[145] Closed AI systems may restrict the AI tool from sharing user prompts and data with third parties, making the tool saf*er* for use with sensitive personnel or business information.[146] Nonetheless, employers should be cognizant of what they share with AI platforms to mitigate the risk of employee or applicant information being shared publicly.[147]

B. How Employers are Using AI

In recent years, employers have increased their reliance on various types of "algorithmic decision-making tool[s]," including those that do, and those

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[139] *Select Issues: Assessing Adverse Impact in Software, Algorithms, and Artificial Intelligence Used in Employment Selection Procedures Under Title VII of the Civil Rights Act of 1964*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (May 18, 2023), *reprinted by* ACLU MASS., https://data.aclum.org/storage/2025/01/EOCC_www_eeoc_gov_laws_guidance_select-issues-assessing-adverse-impact-software-algorithms-and-artificial.pdf [https://perma.cc/B992-WZT5] [hereinafter *Select Issues*] (citing Nat'l A.I. Initiative Act of 2020 § 5002(3)).

[140] Porat, *supra* note 128.

[141] Cole Stryker & Mark Scapicchio, *What is generative AI?*, IBM, https://www.ibm.com/think/topics/generative-ai [https://perma.cc/EDM8-D9NP] (last visited Nov. 3, 2025).

[142] *What is machine learning?*, ELASTIC, https://www.elastic.co/what-is/machine-learning [https://perma.cc/9HBL-JNKG] (last visited Sep. 19, 2025, 17:08 ET).

[143] Keith A. Markel, Alana R. Mildner, and Jessica L. Lipson, *AI and employee privacy: important considerations for employers*, REUTERS (Sep. 29, 2023) https://www.reuters.com/legal/legalindustry/ai-employee-privacy-important-considerations-employers-2023-09-29/ [https://perma.cc/66EW-LTD6].

[144] *Id.*

[145] *Id.*

[146] *Id.*

[147] *Id.* ("employers should not share any information with these "open" AI systems that they would not otherwise want published to a third party, as once that information is inputted into the system, the employer cannot control how it will be used and disseminated in the future").

that do not, involve AI.[148] At each stage of the employment process, employers have a number of AI tools at their disposal, including: resume scanners; "employee monitoring software"; "chatbots" that screen applicants by asking preliminary questions; video interview software; and software that scores applicants based on personality, cognitive ability, or perceived cultural fit within a company.[149] As with all AI, AI in the employment space is accompanied by both risks and benefits, especially AI software used to set employee wages.[150]

C. How Does Artificial Intelligence Pay Equity Software Work?

Software is broadly defined as the "information technology programs or procedures that provide instructions to a computer on how to perform a given task or function."[151] Software will often utilize algorithms to aid employers in processing data and making decisions.[152] An algorithm is defined by the EEOC as a "set of instructions that can be followed by a computer to accomplish some end."[153] In other words, algorithms function as instructions that the software gives to a computer so the computer is able to perform a specific task.[154] AI algorithms are "trained" by developers[155] who essentially feed the AI data.[156] The AI then uses that data to complete tasks when prompted.[157]

Employers can use AI pay equity software to both make salary recommendations and conduct pay audits.[158] Pay audits allow employers to identify pay disparities within their organizations, so they can be addressed

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[148] *Select Issues*, *supra* note 139.
[149] *Id.*
[150] *See* Markel, Lipson, & Smolow, *supra* note 132 (noting that, although AI appears to be a "better solution than trusting compensation decisions to humans who might possess unconscious biases," AI tools can "unknowingly perpetuate historical salary discrimination").
[151] *Select Issues*, *supra* note 139.
[152] *Id.*
[153] *Id.*
[154] *Id.*
[155] Not all AI algorithms are "trained" entirely by developers. Some forms of AI can be taught to learn from data that it takes in on its own. AI algorithms that do not need a programmer to input the training data could pose additional risks in the employment context where the AI ingests biased historical data and perpetuates discrimination through decision-making. *See Artificial intel. (AI) algorithms: a complete overview*, TABLEAU https://www.tableau.com/data-insights/ai/algorithms#algorithm-uses [https://perma.cc/97UT-PLLY] (last visited Jan. 23, 2025) ("Some types of AI algorithms can be taught to learn on their own and take in new data to change and refine their process.").
[156] *Id.*
[157] *Id.*
[158] Markel, Lipson, & Smolow, *supra* note 132.

before a claim arises.[159] Completing a manual pay equity audit can take several months and be quite expensive.[160] AI models can help employers efficiently analyze the job descriptions of all employees, and identify any disparities in employee pay.[161] This function of the software is especially valuable for employers that have recently undergone a change in business structure such as a merger.[162]

There are several models of pay equity software available on the market.[163] PayEQ,[164] the pay equity software trusted by recognizable companies such as Microsoft, General Mills, American Airlines, and Salesforce, uses AI to identify, address, and monitor for pay inequity within an organization.[165] The software allows employers to import data directly from their Human Resources Information System (HRIS) into a single platform so they can efficiently analyze their organization's pay structure and continuously monitor for disparities.[166] In addition to providing insights, PayEQ also provides "expert-backed guidance" to employers regarding any disparities that the program identifies.[167]

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[159] *Id.*; *see also* Porat, *supra* note 138 ("Algorithms offer an opportunity to combat pay discrimination by allowing large employers to compare people across similar roles and find outliers.").

[160] Scully, *supra* note 9 ("It takes an average of two to five months to complete a manual pay equity audit."). For more information regarding the time and resources associated with conducting a pay equity audit, see Karen L. Corman, *Conducting a Pay Equity Audit*, THOMSON REUTERS (2019), https://www.skadden.com/-/media/files/publications/2019/09/conducting_a_pay_equity_audit.pdf [https://perma.cc/DJL8-FNPL] ("Conducting a proactive, self-driven pay equity audit can be a time-consuming and resource-intensive process.").

[161] Markel, Lipson, & Smolow, *supra* note 132.

[162] *Id.* (noting that an AI algorithm can quickly "identify potential areas of overlap between positions and assess potential compensation disparities" in recently merged departments).

[163] Colin Gordon, *Top 10 Pay Equity Software in 2025*, RECRUITERS LINEUP (May 26, 2025), https://www.recruiterslineup.com/top-pay-equity-software/ [https://perma.cc/UW92-CD9C].

[164] Syndio, the parent company of PayEQ and PayFinder, is just one of several companies that has made pay equity software available for use by employers. *Id.* This paper uses PayEQ and PayFinder as examples of the software models available on the market because of the many large companies that trust the Syndio software.

[165] *PayEQ Product Sheet*, SYNDIO, https://synd.io/payeq-product-sheet-pdf/ [https://perma.cc/AAH8-SAST] (last visited Sep. 15, 2025) [hereinafter *PayEQ Product Sheet*]; Talia Goldberg, Byron Deeter & Sakib Dadi, *Syndio is solving pay equity gaps in the workplace*, BESSEMER VENTURE PARTNERS (Jan. 7, 2021) https://www.bvp.com/news/syndio-is-solving-pay-equity-gaps-in-the-workplace, [https://perma.cc/9GXT-TDMQ].

[166] *PayEQ: The #1 Pay Audit Solution*, SYNDIO, https://synd.io/products/payeq/#whyPayEQ [https://perma.cc/PK29-4C26] (last visited Jan. 23, 2025); Goldberg, Deeter & Dadi, *supra* note 165.

[167] *PayEQ Product Sheet*, *supra* note 165.

PayEQ pairs with Pay Finder, another program owned by their shared parent company, Syndio.[168] Managers and recruiters can use Pay Finder to "make and explain" decisions regarding applicant or employee pay.[169] Pay Finder takes the individual's "geo zone," education, managerial status, performance score, years in the role, and years of experience into account to make pay decisions that are "explainable," and help employers "mitigate legal risk."[170] The program does not tell employers what to pay an individual; instead it provides them with insights and recommendations so they are able to determine wages that are externally competitive and internally equitable.[171]

D. Artificial Intelligence Algorithms Have the Potential to Both Cure and Contribute to Pay Discrimination

AI algorithms are providing a unique service to employers. By compiling the pay data of all employees within an organization, AI algorithms allow employers to evaluate pay data quickly, locate discrepancies, and address any issues before an unequal pay claim arises thereby aiding employers in legal compliance and employee fairness.[172] Despite the benefits of AI pay equity software, AI algorithms may also cause trouble for an employer where, for example, the software takes a candidate's prior pay into account despite the applicant being in a jurisdiction where considering salary history is prohibited by a state or local wage transparency statute.[173] Of perhaps even greater concern to employers is the less obvious scenario in which they utilize an algorithmic decision-making tool that has a discriminatory input "baked into it."[174] An employer may be subject to liability under the Equal

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[168] *Id*.
[169] *Pay Finder Product Sheet*, SYNDIO, https://synd.io/pay-finder-product-sheet-pdf/ [https://perma.cc/45B3-AD4Q] (last visited Sep. 19, 2025).
[170] *Id.*
[171] Rebecca Scully, *Introducing Pay Finder: Correcting and Preventing Pay Inequities through Data-Driven Pay Decisions*, SYNDIO, (Nov. 15, 2021), https://synd.io/blog/introducing-pay-finder/ [https://perma.cc/4AM4-KLTC].
[172] Porat, *supra* note 138.
[173] *Id.*
[174] *Id.* An AI tool that has been "fed resumes of people who have previously been hired by the company" may inherit any subconscious biases harbored by the recruiting department that made the initial hiring decisions. Gary D Friedman & Thomas McCarthy, *Employment Law Red Flags in the Use of Artificial Intelligence in Hiring*, A.B.A. (Oct. 1, 2020) https://www.americanbar.org/groups/business_law/resources/business-law-today/2020-october/employment-law-red-flags/ [https://perma.cc/FQE6-HUDP]. Algorithmic discrimination may also occur in less direct ways, such as disadvantaging applicants from poorer areas because it has been trained to "prefer employees within a certain commuting distance." *Id.*

Pay Act where an algorithm perpetuates pay discrimination because it is informed by biased data.[175]

The fact that employers are using algorithmic decision-making tools that were created by a third party does not shield them from liability under Title VII of the Civil Rights Act or the Equal Pay Act.[176] One study out of the University of Cambridge argued that algorithmic recruitment tools may be perpetuating hiring discrimination by reproducing "cultural biases of the 'ideal candidate,' which has historically been white or European males."[177] Similar bias may be present in AI pay equity tools, which could perpetuate historical salary discrimination.[178]AI tools should theoretically transcend unconscious human biases and be more reliable at making neutral and impartial decisions.[179] However, AI is only as reliable and impartial as the data that informs the algorithm.[180] For example, where AI algorithms are informed by salary data that reflects years of historical pay inequity, the AI may make salary recommendations that reinforce a pattern of unequitable pay structures.[181]

There is also concern that AI systems may inherit the bias of its creators who chose the data that the algorithm uses and decide how the results of the algorithms are to be applied.[182] Algorithmic bias may occur if a developer unfairly weights factors in the algorithm based on the developer's own conscious or unconscious biases.[183] The training data that informs the AI may also be biased by over or under-representing certain groups.[184] For example, training facial recognition AI with data that overrepresents white people may reduce its accuracy in identifying people of color.[185] Similarly, in an

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[175] *See* Porat, *supra* note 138 (noting that employers are not insulated from liability merely because they are using AI to make decisions—the employer has the burden to prove the pay differential falls within the Equal Pay Act's exceptions after the plaintiff establishes a prima facie case).
[176] *Id.*; *Select Issues*, *supra* note 139.
[177] Madeline Halpert, *AI-Powered Job Recruitment Tools May Not Improve Hiring Diversity*, *Experts Argue*, FORBES (Oct. 9, 2022), https://www.forbes.com/sites/madelinehalpert/2022/10/09/ai-powered-job-recruitment-tools-may-not-improve-hiring-diversity-experts-argue/ [https://perma.cc/2QJL-T9AK].
[178] Markel, Lipson, & Smolow, *supra* note 132.
[179] *Id.*
[180] Friedman & McCarthy *supra* note 174.
[181] Markel, Lipson, & Smolow, *supra* note 132.
[182] Bernard Marr, *The Problem With Biased AIs (and How To Make AI Better)*, FORBES, (Sep. 30, 2022, 13:40 ET), https://www.forbes.com/sites/bernardmarr/2022/09/30/the-problem-with-biased-ais-and-how-to-make-ai-better/ [https://perma.cc/5AS5-S8NF].
[183] *Shedding light on AI bias with real world examples*, IBM (Oct. 16, 2023), https://www.ibm.com/think/topics/shedding-light-on-ai-bias-with-real-world-examples [https://perma.cc/SX3R-M39T].
[184] *Id.*
[185] *Id.*

employment context, training data bias could theoretically result in algorithms suggesting a different salary range for male candidates than it would for female candidates in male-dominated industries such as tech.[186]

An employment-related example of algorithmic bias arose in 2015 when Amazon discovered an experimental recruiting tool was rating candidates in a gender-biased way.[187] This tool was designed to complete hiring tasks, such as processing a hundred resumes and recommending the top five candidates, who would then be offered positions.[188] The AI was trained to assess applicants based on the patterns it observed in resumes submitted over a ten-year period.[189] Because the tech industry is largely male dominated, "the system taught itself that male candidates were preferable" and reduced the scores of female candidates.[190] Amazon ultimately shut down the project.[191]

While the bias implicit in Amazon's hiring tool appears to be inadvertent, the EEOC has accused one company of intentionally programming AI recruitment software to automatically reject female applicants over the age of 55 and male applicants over the age of 60.[192] In May 2022, the EEOC brought charges under the Age Discrimination in Employment Act (ADEA) against three integrated companies under the name "iTutorGroup" after an applicant suspected they had been discriminated against.[193] The agency was able to reach a settlement with iTutorGroup Inc., requiring the company to pay $365,000 into a claims fund

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[186] *See* Jeffrey Dastin, *Insight – Amazon scraps secret AI recruiting tool that showed bias against women*, REUTERS (Oct. 11, 2018), https://www.reuters.com/article/world/insight-amazon-scraps-secret-ai-recruiting-tool-that-showed-bias-against-women-idUSKCN1MK0AG/ [https://perma.cc/SBT5-E4JP]. Dastin's article notes that "Amazon's system taught itself that male candidates were preferable." *Id.* If the system were designed to make salary recommendations rather than screen resumes, this bias could likely lead to a higher proposed salary range for male applicants.

[187] *Id.*

[188] *Id.*

[189] *Id.*

[190] Amazon's recruiting tool was seen to penalize graduates from two all-women's colleges and candidates that included the word "women's," as in "women's chess club captain," on their resumes. The technology was also partial to resumes that included words such as "executed" and "captured" which most commonly belonged to male engineers. *Id.*

[191] *Id.*

[192] Annelise Gilbert, *EEOC Settles First-of-Its-Kind AI Bias in Hiring Lawsuit (1)*, BLOOMBERG LAW, (Aug. 10, 2023), https://www.bloomberglaw.com/bloomberglawnews/daily-labor-report/X4ER6U4000000?bna_news_filter=daily-labor-report#jcite [https://perma.cc/VV2T-D47E]; Equal Emp. Opportunity Comm'n v. iTutorGroup Inc., No. 1:22-cv-02565 (E.D.N.Y. May 05, 2022).

[193] Gilbert, *supra* note 192. The applicant was initially rejected but offered an interview following their submission of an identical resume with a more recent birth date. *Id.*

that will be distributed to applicants rejected because of their age.[194] In an effort to prevent additional instances of employer-sponsored AI discrimination, government agencies have provided regulatory guidance to employers that seek to employ AI in their hiring practices.[195]

E. Regulatory Guidance and Legislation Regarding the Use of AI in the Employment Space

In 2021, the EEOC launched an agency-wide "Artificial Intelligence and Algorithmic Fairness" initiative.[196] The EEOC used the initiative to focus on examining the ways technology is changing how employers make decisions.[197] These "algorithmic decision-making tools" were also the focus of the EEOC's guidance issued in May 2023.[198] While the May 2023 guidance focused on Title VII violations rather than Equal Pay Act violations, it made clear that employers should be cautious of AI bias when using it to make any employment decisions, including setting employee pay.[199]

The EEOC has also issued regulatory guidance regarding the use of AI and potential violations of the Americans with Disabilities Act (ADA).[200] The guidance warns that employers may violate the ADA by using a tool that, for example, screens out individuals with disabilities that would be able to perform the requirements of the job with a "reasonable accommodation," or using algorithms that factor in disability-related inquiries and medical

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[194] Consent Decree at 15, Equal Emp. Opportunity Comm'n v. iTutorGroup Inc., No. 1:22-cv-2565-PKC-PK (E.D.N.Y. Aug. 9, 2023).

[195] *See, e.g.*, *Select Issues*, *supra* note 139 ("This publication is part of the EEOC's ongoing effort to help ensure that the use of new technologies complies with federal EEO law by educating employers, employees, and other stakeholders about the application of these laws to the use of software and automated systems in employment decisions").

[196] *Artificial Intelligence and Algorithmic Fairness Initiative*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, *reprinted by* ACLU MASS., https://data.aclum.org/storage/2025/01/EOCC_www_eeoc_gov_ai.pdf [https://perma.cc/JH99-NG7D] (last visited Sep. 2, 2025).

[197] *Id.* ("The initiative's goal is to guide employers, employees, job applicants, and vendors to ensure that these technologies are used fairly and consistently with federal equal employment opportunity laws.").

[198] *Select Issues*, *supra* note 139.

[199] *See id.* (explaining the risk of using AI selection tools that disproportionately screen out applicants based on a protected characteristic where the selection tool cannot be shown to be job-related and consistent with business necessity).

[200] *The Americans with Disabilities Act and the Use of Software, Algorithms, and Artificial Intelligence to Assess Job Applicants and Employees*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (May 12, 2022), *reprinted by* ACLU MASS., https://data.aclum.org/storage/2025/01/EOCC_www_eeoc_gov_laws_guidance_americans-disabilities-act-and-use-software-algorithms-and-artificial-intelligence.pdf [https://perma.cc/K6EV-YEW7].

examinations, inquiries which are restricted by the ADA.[201] The guidance highlights concerns pertaining to pay equity algorithms that consider salary history or other factors prohibited by federal, state, or local legislation. Although the EEOC's guidance on artificial intelligence has since been removed from the agency's website, these foundational ideas remain relevant as businesses consider safe ways to incorporate AI into their employment practices. In addition to looking to the rescinded guidance, employers are also looking to state and local legislatures as AI becomes more prevalent in day-to-day business operations.[202]

The New York City Department of Consumer and Worker Protection introduced a law that prohibits employers in the city from using automated employment decision tools (AEDT) without ensuring that a full bias audit was completed.[203] The law applies to the use of an AEDT in hiring or promotion, but the requirements do not extend to preliminary employment steps such as scanning a resume bank, reaching out to potential candidates, or inviting applications.[204] If bias is detected through the bias audit, the law does not require the employer to take any specific action, but rather it reminds employers that they remain subject to federal, state, and local anti-discrimination laws.[205]

V. THE UNENTHUSIASTIC CASE FOR THE MIDDLE GROUND APPROACH: EMPLOYERS NEED THE ABILITY TO SAFELY RELY ON PAY EQUITY SOFTWARE

As discussed above, most of the federal circuit courts that have considered the issue have held that prior compensation *alone* cannot be used to justify a pay disparity.[206] This consensus raises a question regarding the

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[201] *Id.*

[202] *See, e.g.*, N.Y.C. Local Law No. 2021/144 (prohibit[ing] employers and employment agencies from using an automated employment decision tool unless the tool has been subject to a bias audit within one year of the use of the tool, information about the bias audit is publicly available, and certain notices have been provided to employees or job candidates.).

[203] *Automated Employment Decision Tools: Frequently Asked Questions*, N.Y. CITY DEP'T OF CONSUMER AND WORKER PROT. (June 29, 2023), https://www.nyc.gov/assets/dca/downloads/pdf/about/DCWP-AEDT-FAQ.pdf [https://perma.cc/XXH5-FEX7].

[204] *Id.*

[205] *Id.* ("Federal, state, and New York City laws prohibit discrimination. Employers and employment agencies must comply with all relevant Anti-Discrimination laws and rules to determine any necessary actions based on the results of a bias audit.").

[206] *See, e.g.*, Boyer v. United States, 97 F.4th 834, 841 (Fed. Cir. 2024) (distinguishing the Fourth and Seventh Circuits and noting that "the remaining circuits that have considered the question… [have held] that consideration of prior pay standing alone cannot be a factor other than sex.").

use of AI algorithms that are trained by historical pay data.[207] While the Ninth Circuit was persuasive in its decision that prior compensation could never be used to justify a pay disparity, this position may have harsh consequences for employers using algorithms to help with legislative compliance. Therefore, judicial or legislative resolution of this circuit split should align with the "middle ground" approach, adopted by the Sixth, Tenth, Eleventh, and Federal Circuits. This approach states that employers may not rely on prior pay unless "(1) the prior pay itself is not based on sex, or (2) an additional permissible factor 'other than sex' is present to assure a factfinder that the 'other factor' of prior pay is indeed 'other than sex' (i.e., not a proxy for sex)."[208]

The Ninth Circuit's analysis of the Equal Pay Act's purpose and statutory language discusses several convincing reasons for holding that prior pay can never be used as a permissible "factor other than sex" to justify a pay disparity.[209] Employees' prior pay could have been affected by factors that have no bearing on their qualifications for the employment in question. Regardless of what factors determined a candidate's prior pay, it is difficult to see why it should ever affect an employee's *new* wages in a *new* position.[210] However, the Ninth Circuit's holding may have the effect of preventing employers from taking advantage of pay equity algorithms because of the risk that historical salary data is one of many factors that the algorithm considers in evaluating the organization's pay structure or providing a proposed salary range for a given employee.[211]

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[207] Although the opinions cited in this Note primarily address the use of an individual employee's prior pay to determine *that particular* employee's pay in a new position, the practical effects of this caselaw have broader implications. The holding that prior compensation alone cannot be used to justify a pay disparity is rooted in the idea that historical sex-based wage discrimination has continued to cause pay inequity today. *See* Rizo v. Yovino, 950 F.3d 1217, 1229 (9th Cir. 2020) ("To the extent the present-day pay gap is the product of historical wage discrimination based on sex…the gap is a continuation of the very discrimination Congress sought to end."). This can have significant consequences for AI algorithms that are trained by historical compensation data.

[208] *Boyer*, 97 F.4th at 843.

[209] *See Rizo*, 950 F.3d at 1224–32 (holding that an employer cannot rely on an employee's prior pay to defend against an Equal Pay Act violation).

[210] *Boyer*, 97 F.4th at 843. State wage transparency statutes that require employers to disclose the salary range for a position help mitigate some of the concern that employers will pay employees less because they made less in their prior role. These statutes force companies to hire and set pay for positions based on what the company can afford and how much they value that position within the company.

[211] *See Rizo*, 950 F.3d at 1236–37 (McKeown, J., concurring) (discussing the "practical effects" of the holding's "broad sweep" which may chill employers from any consideration of prior pay in setting employee wages).

Conversely, the Fourth and Seventh Circuit approach [212] ignores the important fact that this prior compensation data may reflect a long and dark history of pay inequality in the United States.[213] The middle ground approach, however, allows consideration of prior pay where other permissible factors are present (or where prior pay has been shown not be tainted by considerations of sex).[214] Because these algorithms are not solely informed by prior compensation data, [215] but rather take multiple factors into account, employers could safely rely on them under the middle ground approach. The middle ground approach of the Sixth, Tenth, Eleventh, and Federal Circuits balances the Equal Pay Act's goals of addressing wage discrimination and accommodating legitimate business interests.[216]

Legislative or judicial action that could potentially discourage the use of pay equity software, like that of the Ninth Circuit, does not serve the broad goal of the Equal Pay Act.[217] As businesses grow, so does their need for employees—and technology—that can help them effectively run their organization. The need to set employee pay is common to all employers, and AI pay equity software can help employers do so in an equitable way.[218] Along with the ethical duty to determine employee wages in an equitable manner, increased legislation places a heightened legal duty on employers as well. Recognizing that employers have a legitimate need for flexibility in setting employee wages, Congress chose to include the exceptions to the

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[212] Spencer v. Va. State Univ., 919 F.3d 199, 206–07 (4th Cir. 2019); Wernsing v. Dep't of Hum. Servs., 427 F.3d 466, 468–70 (7th Cir. 2005).

[213] *See Rizo*, 950 F.3d at 1235 (McKeown, J., concurring) ("Because we know that historical sex discrimination persists, it cannot be that prior salary always reflects a factor other than sex.").

[214] *Boyer*, 97 F.4th at 843.

[215] *See generally Meet Syndi*, *supra* note 10 ("Syndi integrates with your systems of record, ingesting internal and external market data, proprietary PayEQ® data, and your company's own pay policies and rules.").

[216] *Boyer*, 97 F.4th at 841–43. In Boyer, the Federal Circuit explains that reliance on prior compensation alone as an affirmative defense to an EPA violation "risks thwarting the Act's most fundamental goal—equal pay for equal work." *Id.* However, the opinion goes on to recognize that the fourth category of exceptions was included to accommodate legitimate business interests which is another important goal of the Act. *Id.* The middle ground approach balances these two interests by giving employers the flexibility to consider prior pay when they have a legitimate business reason to do so, but requires that it be considered in conjunction with other factors to prevent the perpetuation of gender pay discrimination. *Id.*

[217] *See Rizo*, 950 F.3d at 1236 (McKeown, J., concurring) (acknowledging that the majority's holding may prohibit employers from considering prior pay, even in situations where it could benefit female applicants such as "when an employee chooses to provide this information as a bargaining chip for higher wages."). Much like the majority's holding has the potential to prevent women from using their own prior pay in negotiations, it also has the potential to deter employers from using pay equity software in good faith to set equitable wages because of a risk that the software relies in part on prior compensation data.

[218] *PayEQ Product Sheet*, *supra* note 165.

Equal Pay Act.[219] The middle ground approach grants employers this flexibility and allows them to safely rely on pay equity software that may be informed in part by prior compensation data, while also protecting employees from sex-based wage discrimination.[220]

Despite its permissibility under the middle ground approach, employers must be aware of the risk that AI pay equity algorithms may be biased by years of pay inequality in the United States. To address the risk of bias, local jurisdictions should consider following New York City's approach and implement laws that require employers to ensure a full bias audit is complete prior to using an AI tool.[221] Employers should also be treating AI recommendations as *recommendations* and continue using human judgement to set employee wages and evaluate pay disparities within their organizations.[222]

CONCLUSION

The middle ground analysis of the Sixth, Tenth, Eleventh, and Federal Circuits addresses the concerns of both employers and employees by allowing prior pay to be considered along with another permissible factor. This approach allows employers to safely rely on AI algorithms that may be informed in part by prior compensation data without ignoring the possibility that the data may very well be affected by the country's history of pay discrimination.

Taking a harsher approach, like that adopted by the Ninth Circuit, and forbidding employers from considering prior pay in any capacity could create unnecessary obstacles for employers seeking to use AI algorithms to help them to both comply with several levels of pay equity legislation and be fair to their employees. Therefore, the use of AI algorithms which may incorporate prior pay data, should not be precluded. The Sixth, Tenth, Eleventh, and Federal Circuits' middle ground approach takes full account of that important practical consideration.

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[219] *Boyer*, 97 F.4th at 843–44 (citing Washington Cnty. v. Gunther, 452 U.S. 161,171 n.11 (1981)); 29 U.S.C. § 206(d)(1).
[220] *See Boyer*, 97 F.4th at 843–44 (noting that the middle ground approach "acknowledges that there may be legitimate reasons to consider prior salary").
[221] *See* N.Y. CITY DEP'T OF CONSUMER AND WORKER PROT., *supra* note 203.
[222] Markel, Lipson, & Smolow, *supra* note 132.