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presents

Pay Equity and Statistics: Avoiding and Defending Claims

Minimizing Liability for Compensation Practices Through Statistical Analysis and Proactive Audits

A Live 90-Minute Teleconference/Webinar with Interactive Q&A

Today's panel features:

Jonathan L. Sulds, Shareholder, **Greenberg Traurig**, New York

Dr. Debo Sarkar, Affiliate, **Analysis Group**, New York

Tuesday, August 10, 2010

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1 pm Eastern

12 pm Central

11 am Mountain

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Pay Equity and Statistics: Avoiding and Defending Claims

Presented by

**Jonathan Sulds, Esq.
Debo Sarkar, Ph.D.**

August 10, 2010

Overview

- **In pay equity, the focus of concern is both on existing laws and pending legislation**
- **Paycheck Fairness Act changes to Equal Pay Act: Pending**
- **Lilly Ledbetter Act expands statute of limitations**
- **Title VII pay equity claims magnified by recent class action rulings**
- **Increased regulatory oversight**
- **Statistics critical to all aspects**

Equal Pay Act Currently

- **Equal pay for equal work**
- **Factors other than gender**
- **Opt-In classes**

Under Paycheck Fairness Act

- **Equal pay for equal work**
- **Pay difference consistent with business necessities**
- **Concept of same facility expanded**
- **Opt-Out not Opt-In classes**
- **Compensatory and punitive damages**

“Consistent with Business Necessity”

- **Consideration of alternatives**
- **Less impactful ways to proceed**
- **Pay in last job not likely to be sustained; market for job generally may fly**
- **Plaintiff proves less impactful alternative exists, plaintiff wins**
- **Example from the cases – Henry v. Milwaukee County, 539 F. 3d 573 (7th Cir. 2008)**

Additional Paycheck Fairness Act Developments

- **Enforcement agencies announce heightened efforts**
- **Record keeping and information gathering**

Things to Keep in Mind

- **Emphasis for employers will be on equal work components**
- **Examples from cases:**
 - **Lang v. Kohl Food Stores, 217 F.3d 919 (7th Cir. 2002)**
 - **Mulhall v. Advance Security, Inc., 19 F.3d 586 (11th Cir. 1994)**

What to Do?

- **Analyze workforce in context of pay differentials**
 - **Current employees**
 - **New hires**
- **Job content analysis**
- **Requirements congruent with duties?**
- **Market rates**

The “Privilege” Issue

- **Examples from cases:**
 - **Reitz v. City of Mt. Juliet, 680 F.Supp 2d 888 (M.D. Tenn. 2010)**
 - **EEOC v. City of Madison, 2007 U.S. Dist Lexis 70647 (W.D. Wisc. Sept 20, 2007)**
 - **Lara v. Tri-State Drilling, 504 F.Supp 2d 1323 (N.D. Ga. 2007)**
 - **Miller v. Praxair, 2007 U.S. Dist Lexis 34260 (D. Conn. May 10, 2007)**
 - **MacNamara v. City of New York, 2007 U.S. Dist Lexis 17478 (S.D. N.Y. March 14, 2007)**
 - **Davis v. Kraft Foods N.A., 2006 U.S. Dist Lexis 87140 (E.D. Pa. Dec 1, 2006)**

The “Executives” Decision

- **Mulhall v. Advance Security, Inc., 19 F.3d 919 (7th Cir. 2002)**

A Return to “Comparable Worth”?

- **Comparable worth concepts were repeatedly rejected by the courts in the 80s and 90s but theory is still out there**
 - **American Nurses Association v. Illinois, 783 F.2d 716 (7th Cir. 1986)**
 - **Dell compensation case presently pending in Texas**

Title VII Pay Discrimination Lawsuits

- **Is there improper motivation behind job assignment, evaluations, raises, promotions or other employment conditions driving pay?**
 - **As opposed to: Is there equal pay for equal work?**
- **Two kinds of discrimination**
 - **Disparate impact**
 - **Disparate treatment**

Proving a Case

- **Incidents of individual discrimination as examples**
 - **Anecdotal evidence**
- **Use of statistics if data permit**
 - **Class certification**
 - **Merits**

The Looming Questions

- **Will the class be certified?**
- **Will a Daubert type hearing be available to contest plaintiff's class certification statistical showing?**
 - **American Honda Motor Co. v. Allen, 600 F.3d 813 (7th Cir. 2010)**
 - **De Rosa v. Mass Bay Commuter Rail, 694 F.Supp 2d 87 (D. Mass. 2010)**
 - **In Re FedEx, 2010 U.S> Dist Lexis 50211 (N.D. Ind. May 19, 2010)**
 - **In Re Hydrogen Peroxide Antitrust Litigation, 552 F.3d 305 (3rd Cir. 2008)**

Ledbetter Act and Other Employment Claims

- **Many employment events with a possible effect on compensation can be disputed now**
 - **Gentry v. Jackson State University, 910 F.Supp 2d 564 (S.D. Miss, 2009: Tenure denied leading to a lower compensation)**
 - **Bush v. Orange County Correctional Department, 597 F.Supp 2d 1293 (M.D. Fla. 2009: Transfers labeled as demotions leading to a lower compensation)**
 - **Gilmore v. Macy's Retail, 2009 U.S. Dist Lexis 70691 (D. NJ, Aug 11, 2009); Aff'd 2010 U.S. App. Lexis 13383 (3rd Cir. June 23, 2010: High-end jewelry department shifts were not assigned to plaintiffs leading to lower opportunity of larger bonuses)**

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A Primer on Statistical Methodology

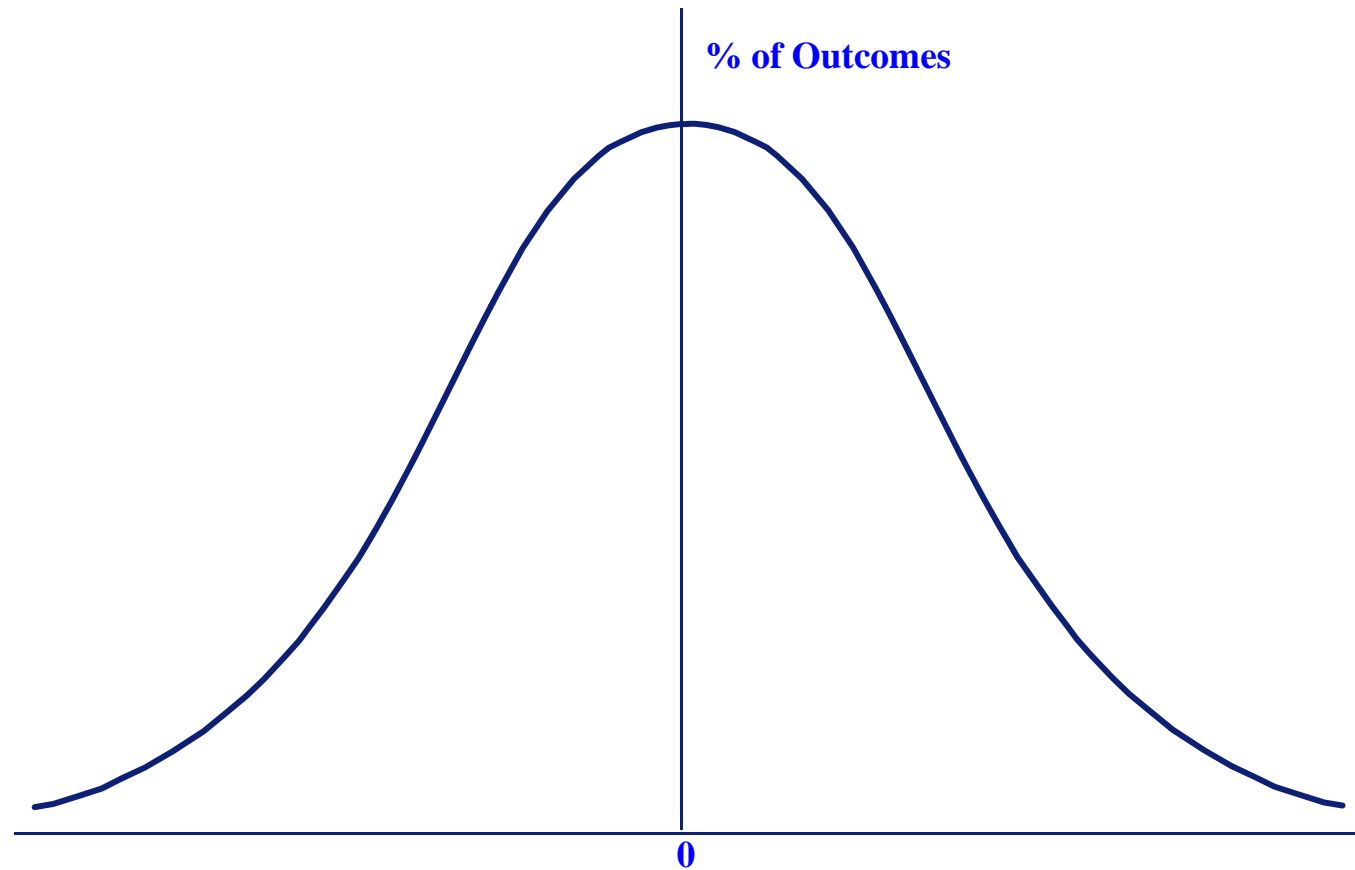
Disparate Impact on Female Compensation

- Calculate average female compensation
- Calculate average male compensation
 - If compensation is gender-neutral, the two averages should be “statistically” similar
- If female average is lower than male, check for statistical significance
- If the male-female compensation differential can be shown to happen enough number of times by chance, no inference of discrimination
- The differential is considered “statistically significant” if differential happens less number of times
- The courts have interpreted “enough number of times” as 5% or more

5% Statistical Significance and 2 STD Cut-Off Point

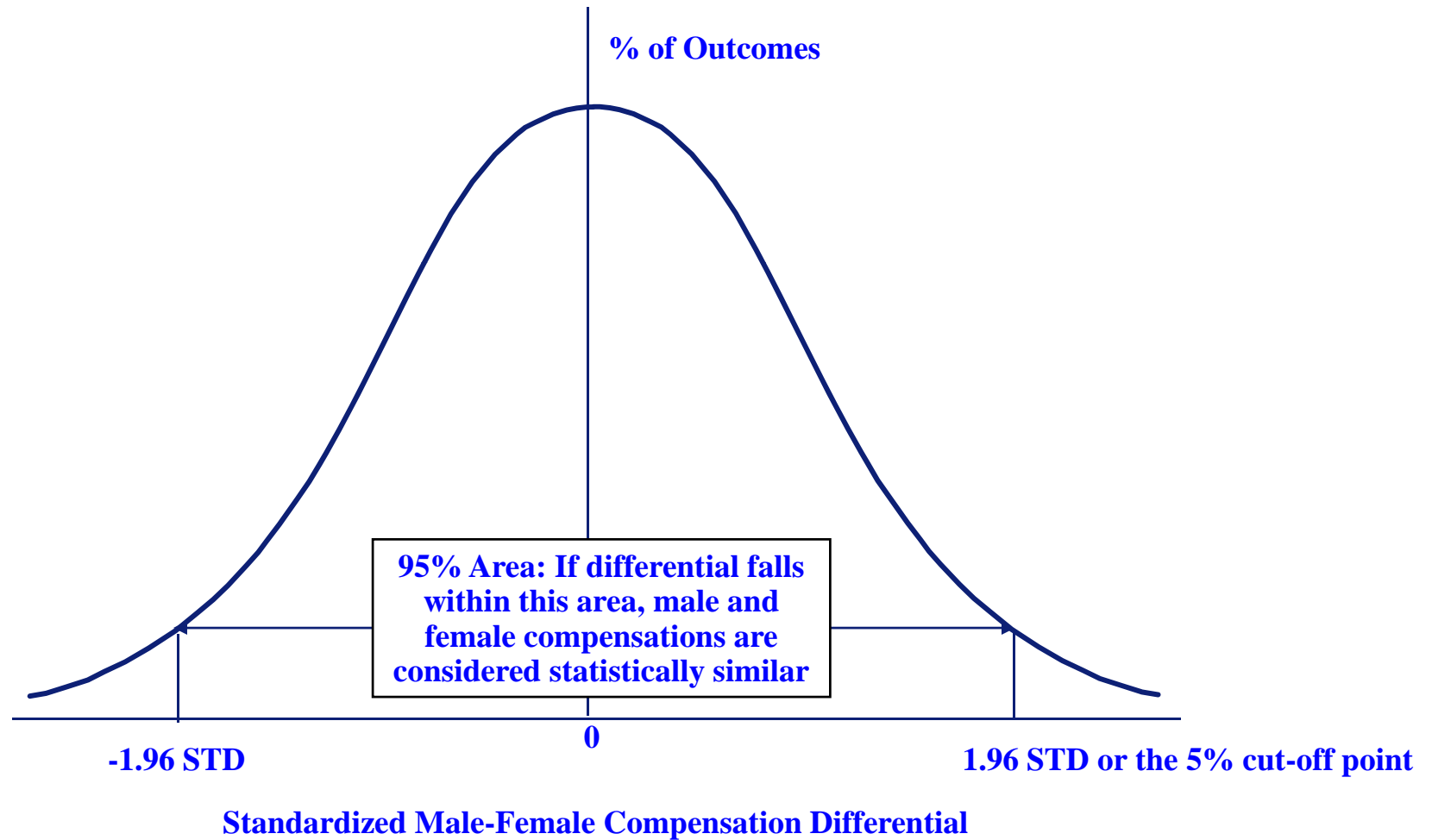
- **The 5% level of statistical significance is equivalent to “2 STD”**
 - **STD stands for “standard deviations”**
 - **Actually, it is equivalent to 1.96 STD**
- **The 5%-2 STD equivalence holds if the variable (male-female compensation differential) is “Normally” distributed**
 - **The Normal distribution is often referred to as the Bell Curve or the Bell Distribution**

Bell Curve and 2 STD Cut-Off point

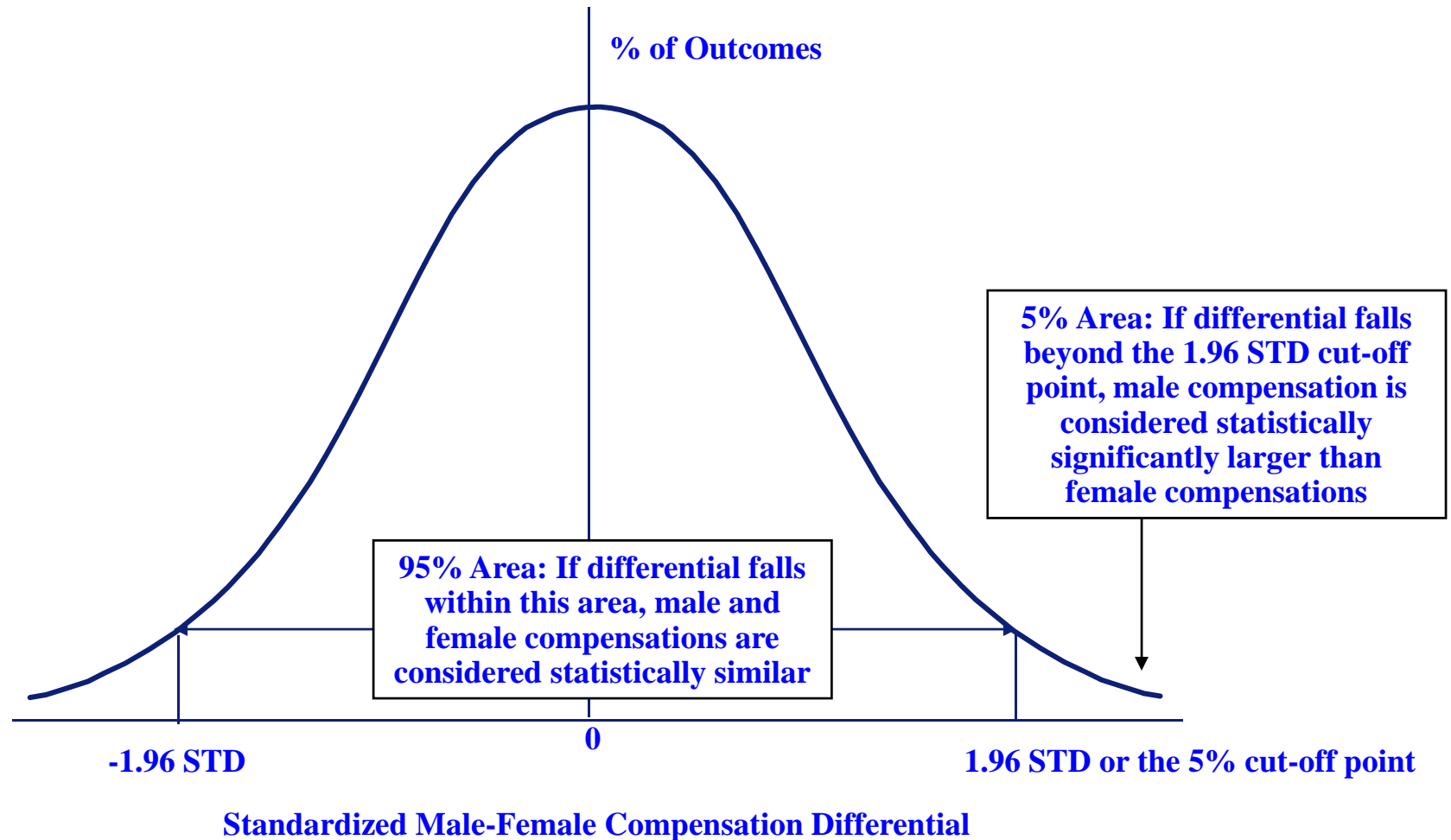


Standardized Male-Female Compensation Differential

Bell Curve and 2 STD Cut-Off point



Bell Curve and 2 STD Cut-Off point



Disparate Impact: Plaintiff's Analysis for Company XYZ

- **Company XYZ has 402 employees – 201 male and 201 female**
 - **Female average compensation is \$60,090**
 - **Male average compensation is \$91,900**
 - **The male-female compensation differential is \$31,810**
 - **The “standardized” differential has a 7.8 STD value**
 - **To the right of the 2 STD cut-off point**
 - **The differential is considered statistically significant**

Disparate Impact: Defense Response for Company XYZ

- **Compensation decisions at Company XYZ are made at the three division levels:**

| <u>Division</u> | <u>Avg. Compensation</u> | | <u>Number of Employees</u> | |
|-----------------|--------------------------|-------------|----------------------------|-------------|
| | <u>Female</u> | <u>Male</u> | <u>Female</u> | <u>Male</u> |
| A | \$143,660 | 127,741 | 27 | 107 |
| B | 61,734 | 58,430 | 67 | 67 |
| C | 37,970 | 34,895 | 107 | 27 |
| Overall | 60,090 | 91,900 | 201 | 201 |

- **The disaggregated analysis shows a completely different picture at Company XYZ**

Plaintiff's Analysis v. Defense Analysis

- **The overall picture (plaintiff's analysis) and the broken-down picture (defense analysis) are both based on the same data but with completely opposite results. Why?**
 - **The weight associated with female in Division A much smaller than the weight associated with male**
 - **The weight associated with female in Division C much larger than the weight associated with male**
- **“Inappropriate Aggregation” of dissimilar employees led to plaintiff's erroneous finding**

Inappropriate Aggregation: Class Certification v. Merits

- **For class certification purposes**
 - **Plaintiffs should satisfy Commonality and Typicality**
 - **If dissimilar employees are inappropriately aggregated, the conditions are violated**
 - **Statistical evidence arising from this analysis may be misleading for class certification**
- **Inappropriate aggregation can give rise to misleading or profoundly inaccurate statistical evidence at the merit stage**
- **The expert must pay special attention to this particular issue**

Omitted Variable Bias

- **The decision-making process should be modeled properly to capture legitimate objective factors. Factors such as division, seniority, specific skills, customer relations may be considered in the selection process.**
- **Excluding these factors in the analysis can yield misleading and, in some cases, profoundly inaccurate evidence**
- **If the excluded variable and gender are correlated, the exclusion would give rise to “Omitted Variable Bias” to the gender effect that the expert is trying to estimate**

Why Use Multiple Regression Framework?

- **The basic tenet of pay equity analysis is that two identical employees – one male and one female – should receive the same compensation**
- **If data permit, multiple regression framework is the most perfect instrument to make two employees, who are otherwise very different, “statistically similar”**

Advantages of Multiple Regression Framework

- **Multiple regression framework allows us to:**
 - **Examine variations in salary between employees – even when improperly aggregated**
 - **Account for factors that influence salary, which may include salary grade, time with company, time in position, or performance rating**
 - **Test if average salary for the protected class still falls below the benchmark salary**
 - **If falls below, test whether the standardized salary differential exceeds the 2 STD cut-off point**
 - **In proactive audit context, implement “fixes” if warranted**

Company XYZ:

Plaintiff's Analysis Using Multiple Regression Framework

- The analysis can be performed using a multiple regression framework
 - Compensation (dependent variable) is assumed to be a function of an indicator variable *Female* (explanatory variable)
 - *Female* = 1 for women, = 0 for men
 - The estimated Female coefficient = -31,810
 - Shows a compensation shortfall for women at Company XYZ
 - When standardized, this shortfall – at 7.8 STD – lies beyond the 2 STD cut-off point indicating existence of discrimination
 - The conclusion of evidence of discrimination, however, will be wrong

Company XYZ:

Defense Analysis Using Multiple Regression Framework

- In addition to *Female*, the multiple regression model also includes three indicator variables: *Div A*, *Div B* and *Div C*
 - *Div A* = 1 for employees in Division A, = 0 for others
- The *Female* coefficient now = +6,930
 - Shows a compensation advantage for women at Company XYZ

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**Plaintiff's Approach to Class Certification:
An Example from the Cases**

Plaintiff's Preliminary Findings

- The preliminary analysis separates employees into hourly and salaried groups and finds the following:

Earnings

| <u>Job Status</u> | <u>Male</u> | <u>Female</u> | <u>Difference</u> |
|-------------------|-------------|---------------|-------------------|
| Hourly | \$18,609 | 17,459 | 6% |
| Salary | 55,443 | 40,905 | 26% |
| Total | 23,403 | 18,184 | 22% |

- Women on average earned 22% less than men

Plaintiff's Initial Regression Model

- **Plaintiffs' initial regression controlled for:**
 - **Length of time working for company**
 - **Number of weeks worked in the year**
 - **Whether the employee was hired or terminated in the year**
 - **Whether the employee was full or part time**
 - **What store the employee worked in**
 - **Whether the employee was hired into a management position**
 - **Gender**
- **Result: Women received 9.3% less than similarly situated men**

A Second Regression Model with Same Facts

- **Controlled for:**
 - **All the variables in initial model**
 - **Job Position**
- **Result: Women received 4.5% less than similarly situated men**

Potential Responses

- **Variables not considered:**
 - **Hours worked**
 - **Overtime hours worked**
 - **Leaves of absence**
 - **Full/part time at hire**
 - **Recent promotion or demotion**
 - **Prior grocery experience**
 - **Night shift**
 - **Department**
 - **Facility size**
 - **Facility profitability**

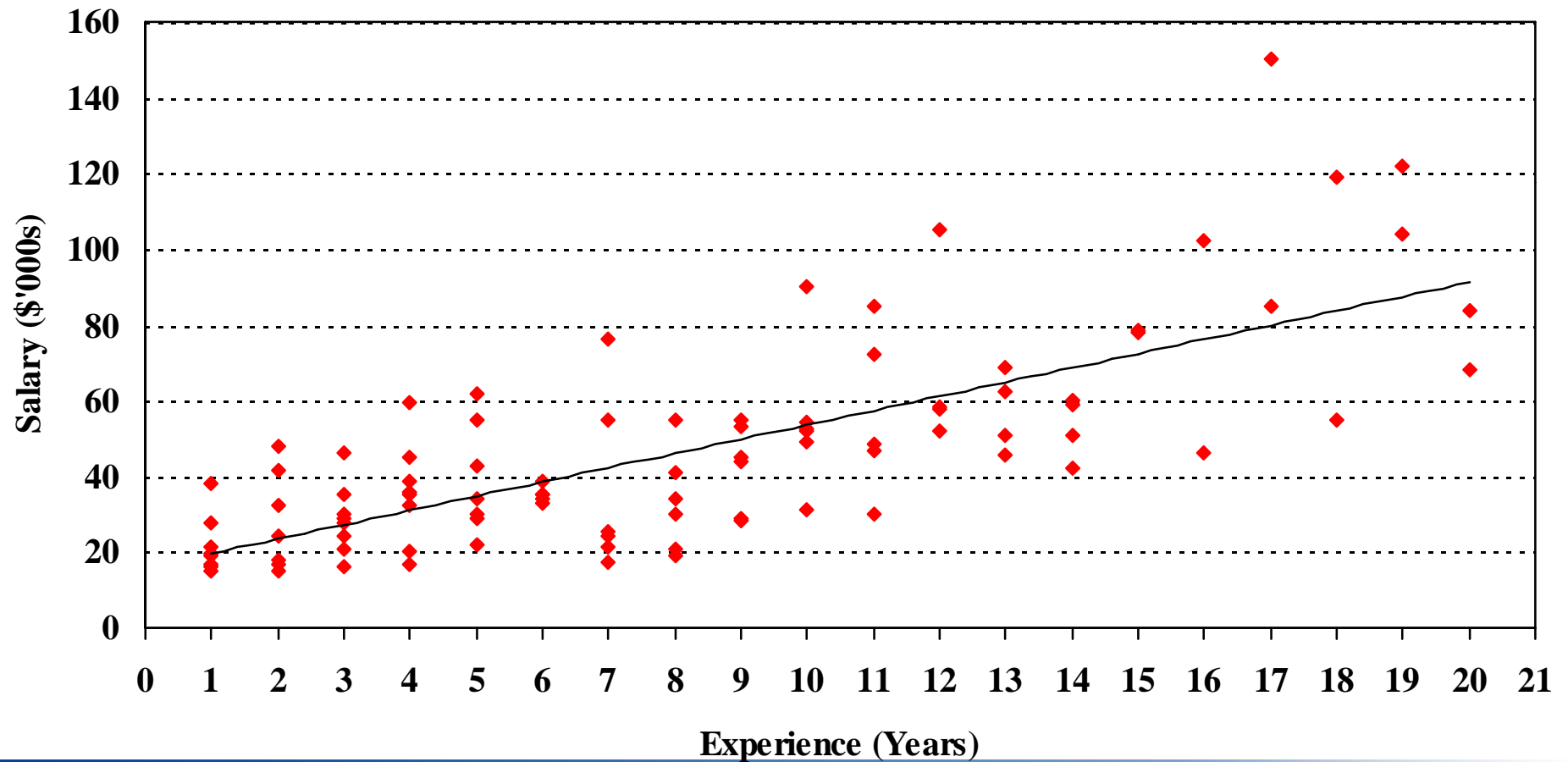
Additional Questions

- **Analysis conducted at the region level**
- **Model gives one gender pay differential per region**
- **Facility-to-facility variation common?**
 - **Are compensation decisions subjective?**
 - **Starting pay, raises vary?**
- **Proper model should allow facility-to-facility variation of the gender gap**

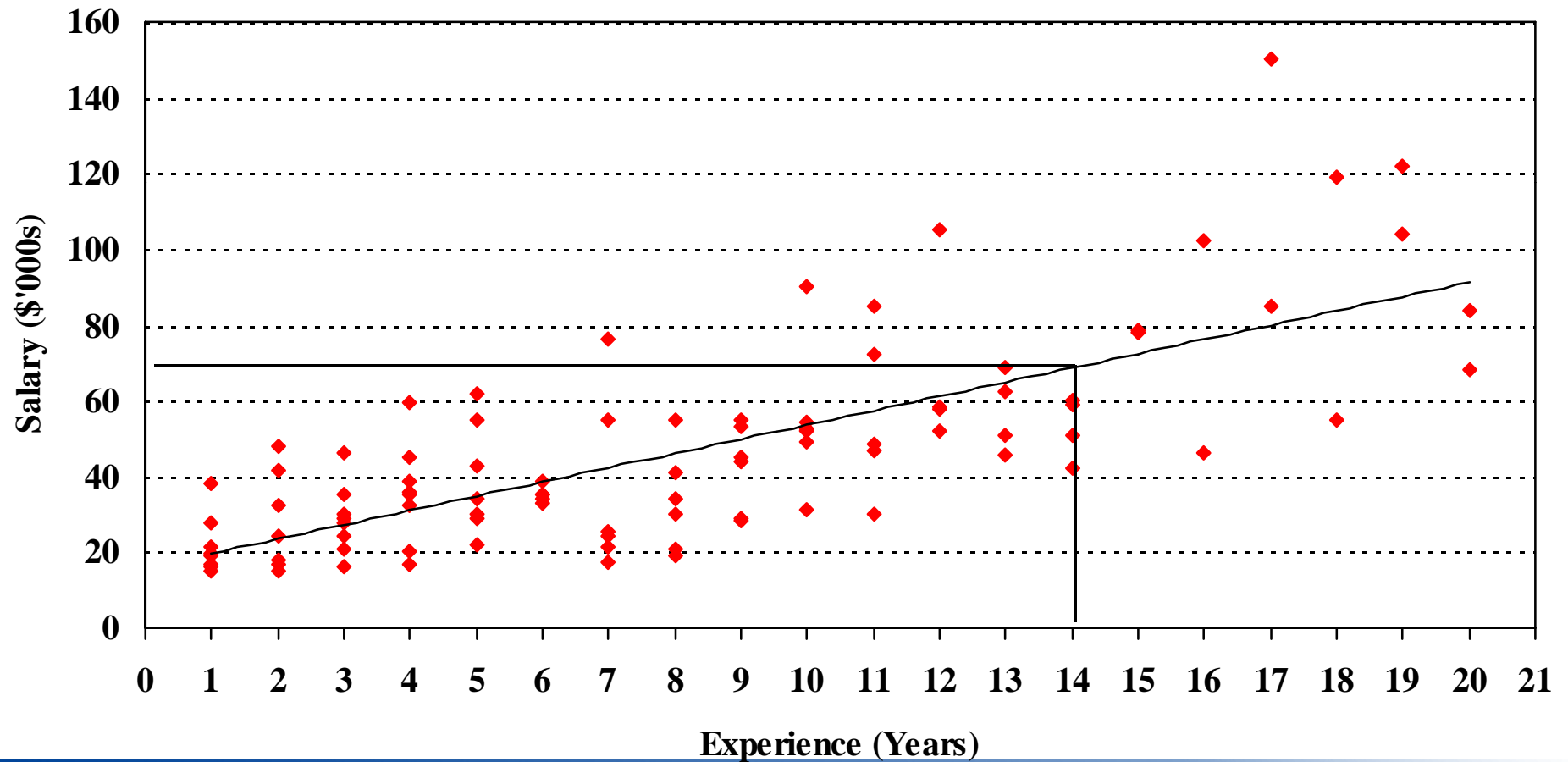
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Pay Equity Analysis

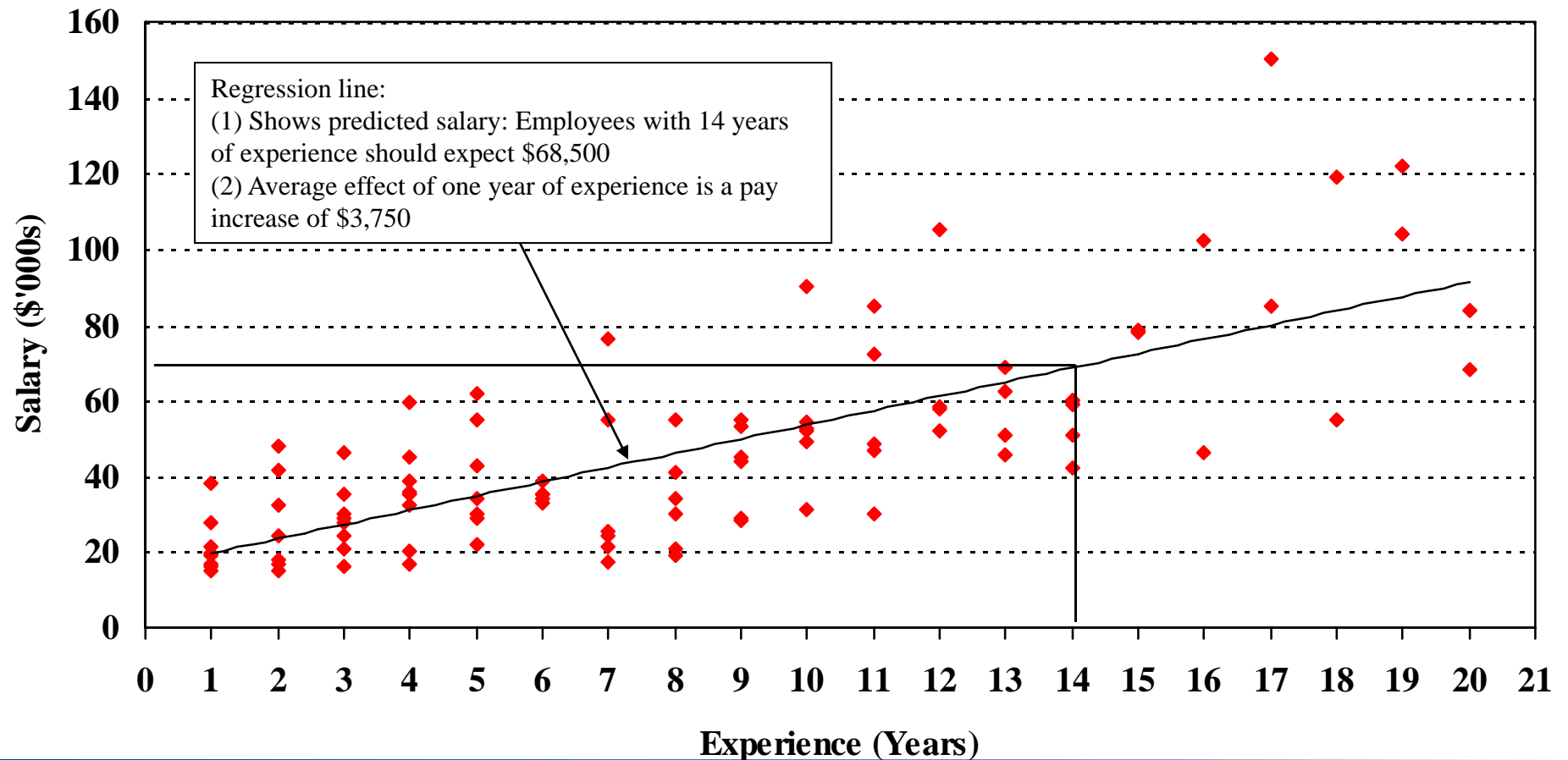
The Regression Line or Predicted Salary Is the Benchmark Salary for Comparable Employees



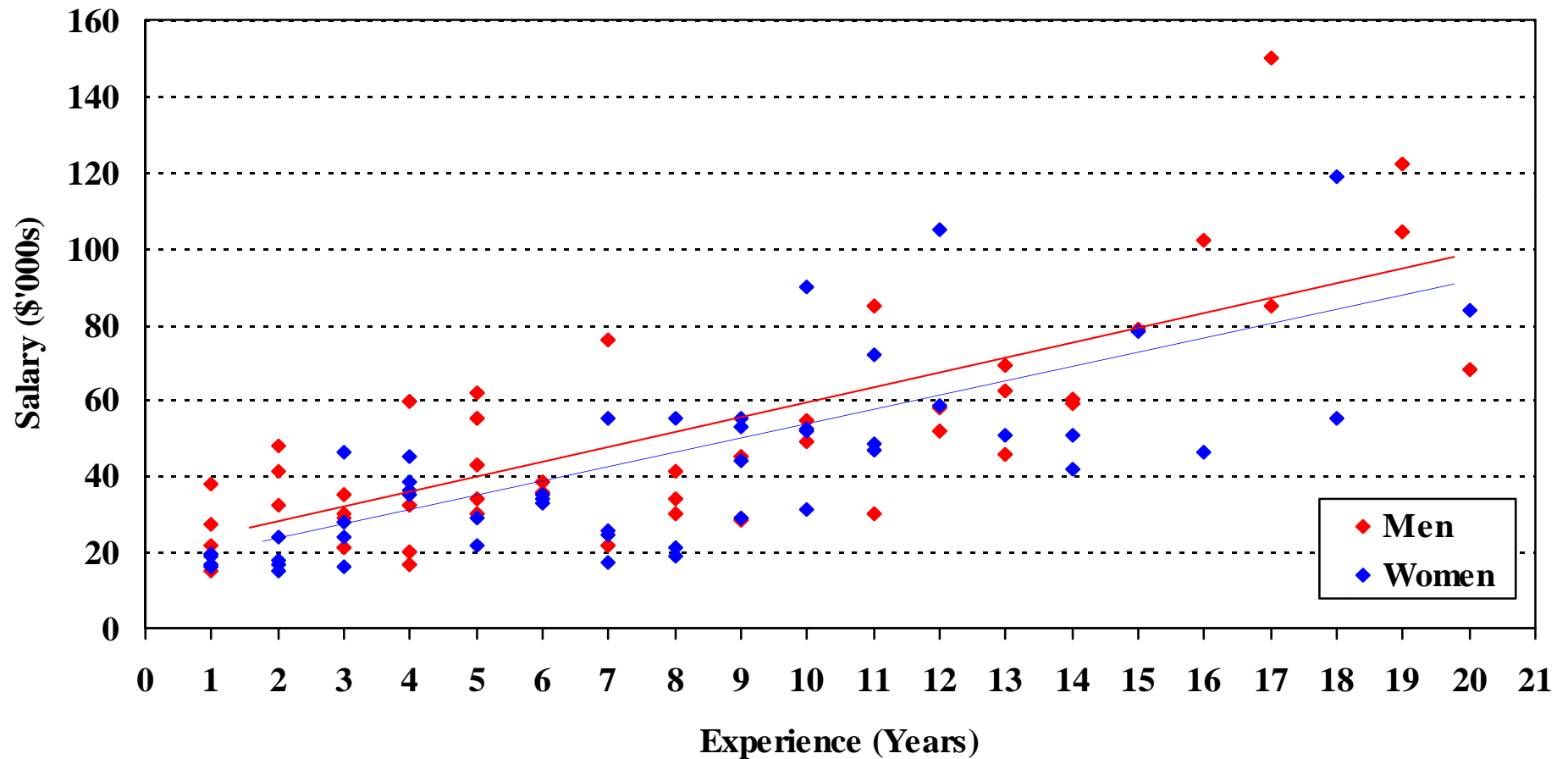
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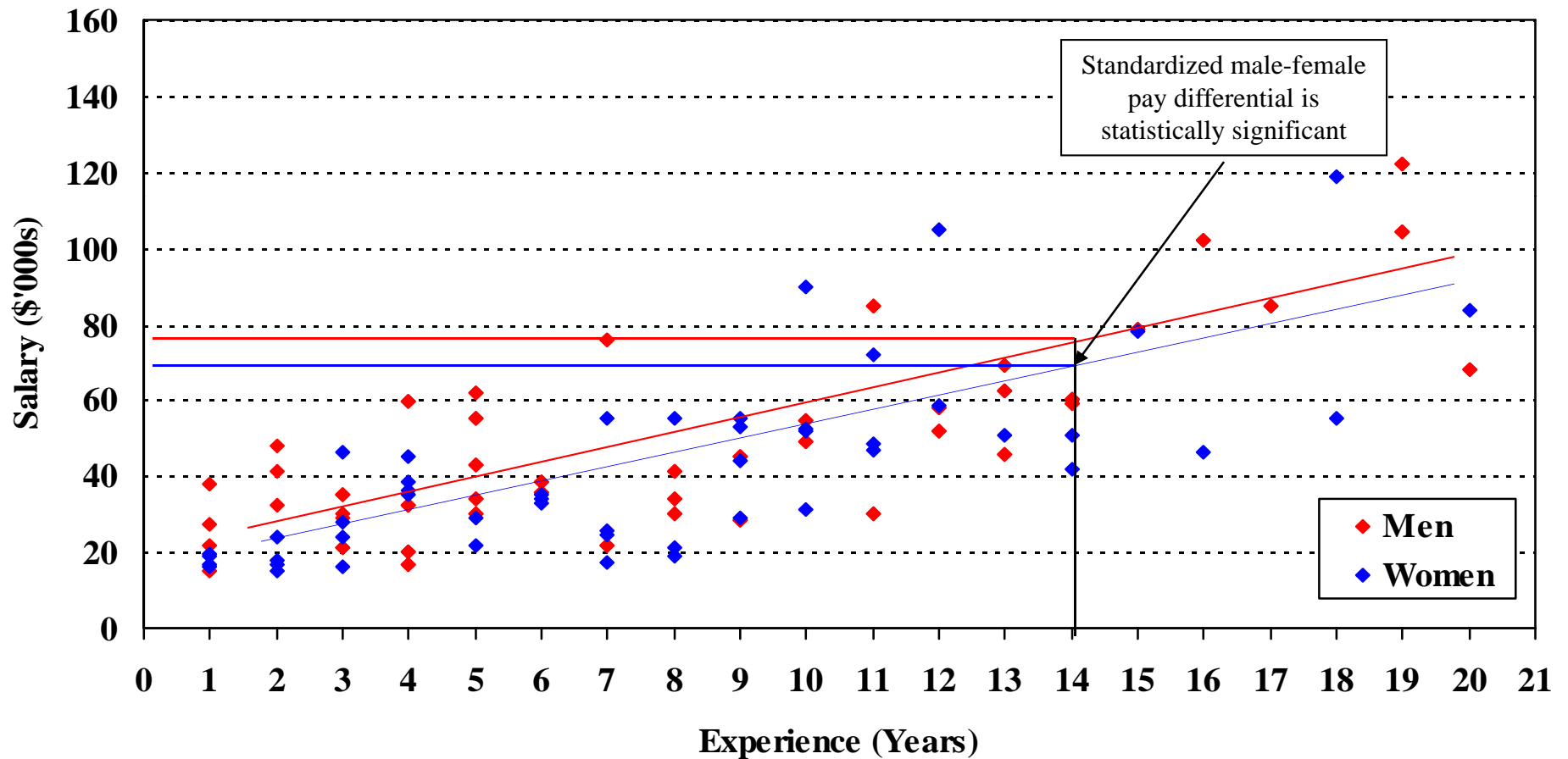
The Regression Line or Predicted Salary Is the Benchmark Salary for Comparable Employees



Pay Inequity May Exist when Average Pay for Women Is Lower than that for Men



Pay Inequity May Exist when Average Pay for Women Is Lower than that for Men



Controlling for Factors that May Affect Compensation

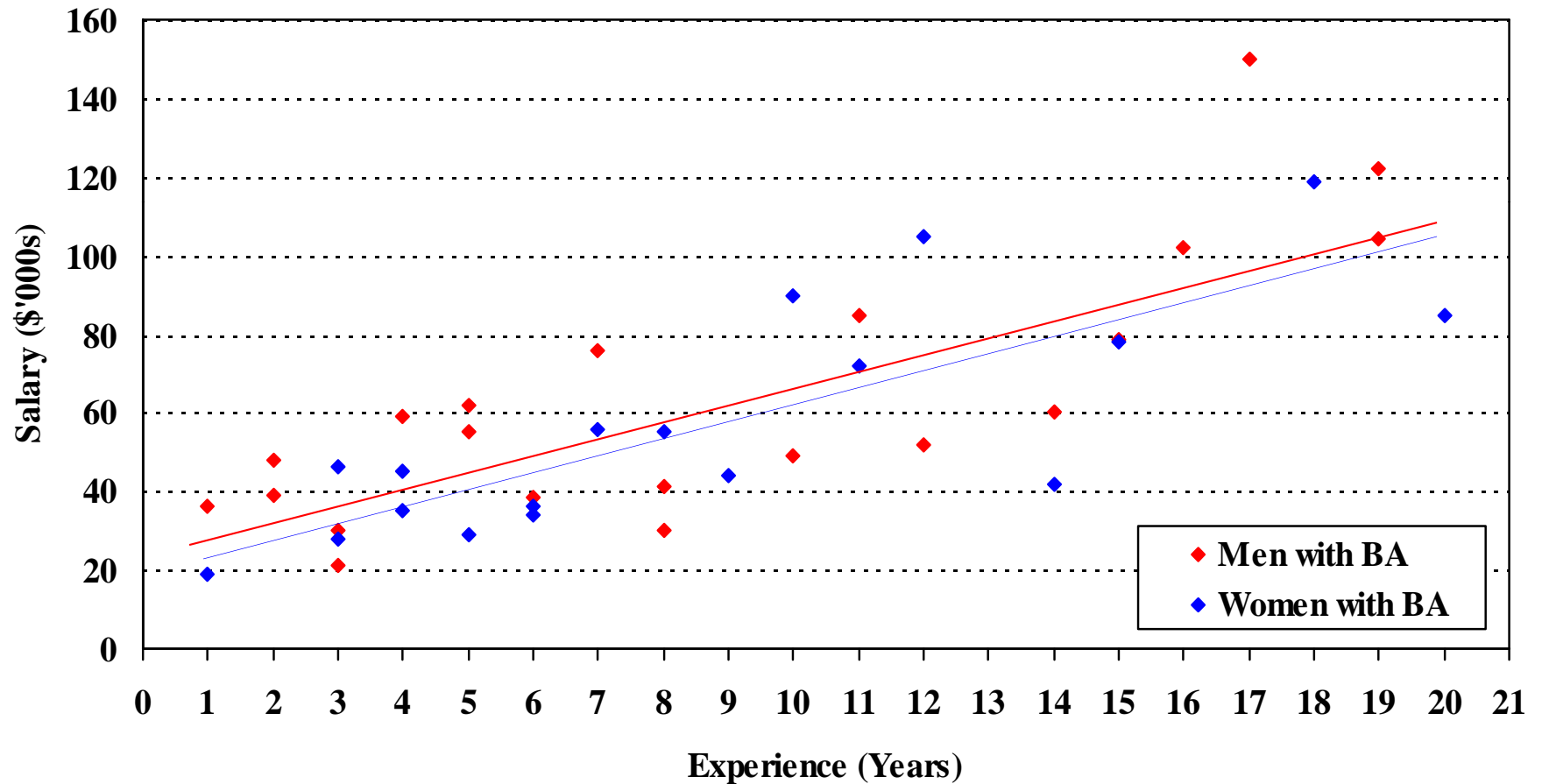
- **“As long as the analyses include enough relevant non-discriminatory independent variables (e.g., education, experience, performance, etc.), the results will indicate whether any salary disparities are attributable to gender (thereby raising an inference of discrimination) or whether the disparities are attributable to other factors (and thereby refuting such an inference).”**

See Hemmings, 285 F.3d at 1183-84 & n.9; see also EEOC v. Gen. Tel. Co. of Nw., Inc., 885 F.2d 575, 577 n.3 (9th Cir. 1989)

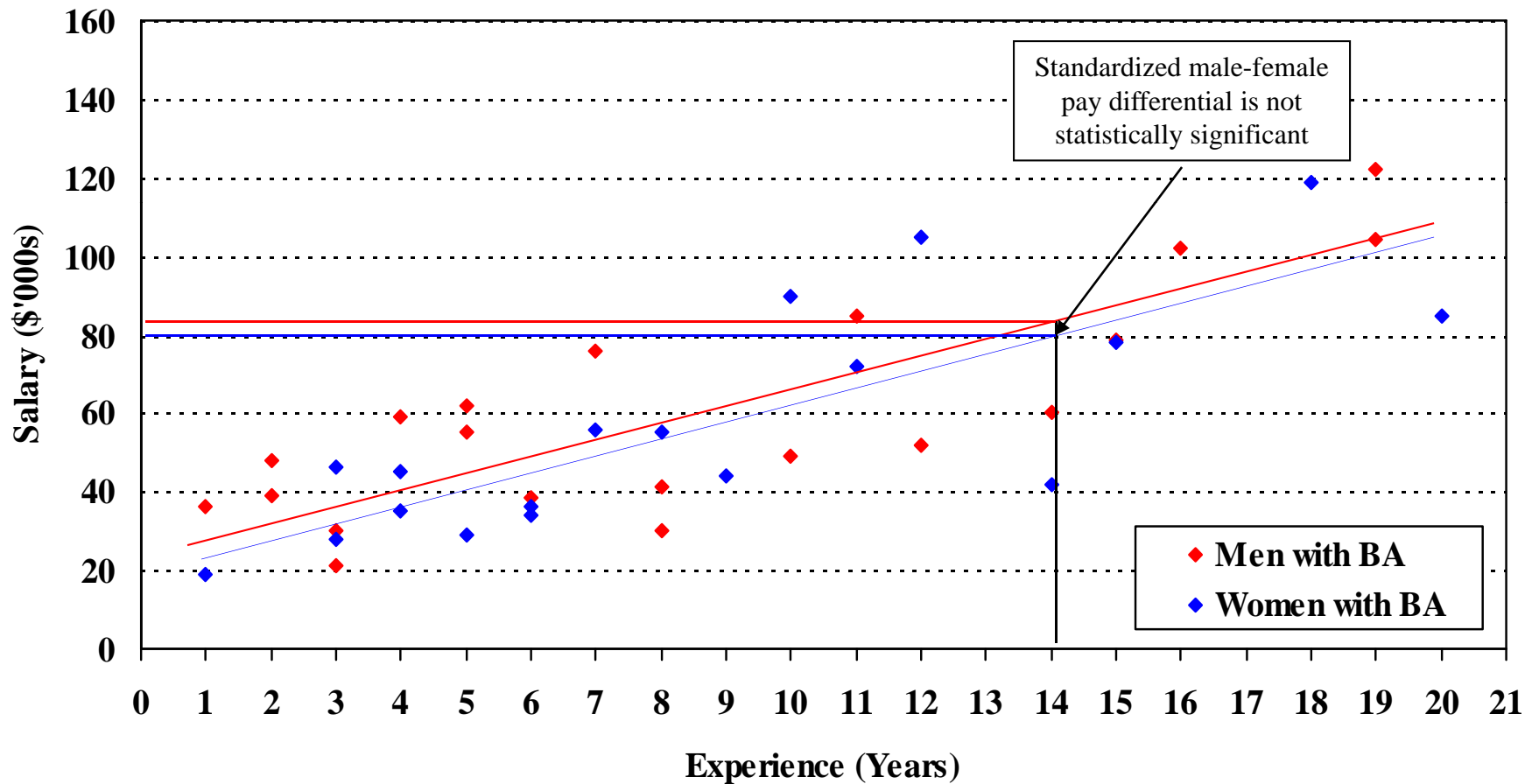
Factors that May Influence Compensation

- **Salary grade**
- **Job function**
- **Time with the company**
- **Time in grade**
- **Performance rating**
- **Prior experience**
- **Demotion**
- **Education: HS, BA, MA, PhD**
- **Department or division**
- **Geography**

Gender Differences May Be Explained by Other Factors



Gender Differences May Be Explained by Other Factors



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Proactive Audits

Why Undertake Auditing?

- **Every employment event is potentially subject to discrimination litigation risk**
 - **Recruitment, Hiring**
 - **FLSA Classification (exempt vs. non-exempt)**
 - **Compensation, Retirement Plans, Fringe Benefits**
 - **Performance Evaluation**
 - **Transfer**
 - **Training**
 - **Promotion**
 - **Discipline**
 - **Termination**
- **The statistical tests in the litigation context can be easily performed in an audit process of an employment event**
- **Employers may want to consider an audit process for each event to test for discrimination to minimize post-event litigation risk**

In Addition to Proactive Audits:

- **Community awareness – “Good Employer”**
- **Manager training; holding manager responsible**
- **Internal complaint procedures**

When to Call Counsel

- **EEO charges alleging pay equity claims**
- **Requests for personnel files in unusual numbers**
- **Increase in internal complaints**
- **Particular manager, division, facility focus of complaints**

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