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# Pay Equity Audits

**Testing Your Company's Compliance  
Before Your Employees (and Their  
Lawyers) Do**

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# Equal Pay for Equal Work – It's Not a New Issue



# Overview

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- Equal Pay Laws at the Federal Level
- New Jersey's Recent Equal Pay Law
- Conducting an Equal Pay Audit



# **Equal Pay Laws at the Federal Level**

# Federal Equal Pay Laws

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- Gender-based Pay Disparities
- Other Discriminatory Pay Disparities

# Non-Gender-Based Pay Disparities

- Title VII
  - Race/Color
  - National Origin
  - Religion
- ADEA
  - Age (40+)
- ADA
  - Disability

# Non-Gender-Based Pay Disparities

- Traditional Three-Part *McDonnell Douglas* Analysis
  - Plaintiff Must Establish *prima facie* Case
  - Employer Must Articulate Legitimate Non-Discriminatory Reason
  - Plaintiff Must Establish Pretext
- Plaintiff Bears Ultimate Burden of Persuasion

# Gender-Based Pay Disparities

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- Title VII
- Equal Pay Act



# Gender-Based Pay Disparities

- Title VII
  - Subject to *McDonnell Douglas* test
- EPA
  - Created separate two-part analysis
    - Employee establishes *prima facie* case by showing employees of opposite sexes were paid differently for performing “equal work”
    - Employer must prove affirmative defense, and employer carries the burden of persuasion

# Gender-Based Pay Disparities

- Equal Work under the EPA
  - Substantially equal skill
  - Substantially equal effort
  - Substantially equal responsibility
  - Substantially equal working conditions
- Employer's Affirmative Defenses under the EPA
  - Seniority
  - Merit
  - Quantity or quality of production
  - Any factor other than sex



# **New Jersey's Recent Equal Pay Law**

# New Jersey Equal Pay Law

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- “Diane B. Allen Equal Pay Act”
- Signed by Governor Phil Murphy on April 24, 2018
- Took effect July 1, 2018

# What Does It Do?

- Amends the New Jersey Law Against Discrimination (LAD)
- LAD already prohibited discrimination in pay on the basis of sex
- New law expands protection
- Makes it unlawful to discriminate in pay on the basis of membership in any protected class under LAD
- Employers cannot pay employees differently for “substantially similar work, when viewed as a composite of skill, effort and responsibility” based on a protected characteristic

# What Is “Substantially Similar Work”?

- Meaning unclear pending regulations and development of case law
- Compare to federal Equal Pay Act’s (EPA) “equal work” standard
- Regulations and case law interpreting EPA can provide guidance in the meantime

# What Is Still Allowed?


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- Employers may still pay differently if differential is:
  - Pursuant to a seniority system or merit system; or
  - Based entirely on bona fide factors such as training, education, experience or quantity or quality of production
    - Factors must be job-related and based on legitimate business necessity

# Consequences Of Violation

- LAD generally allows for compensatory damages, punitive damages, attorneys' fees and costs
- Six years of back pay available
- Six-year period resets each time employee receives an unequal paycheck, benefit or other form of compensation
- Unlawful to require employees to agree to a shorter limitations period
- Trebling of “any monetary damages”





# **Conducting Analyses of Equal Pay**

# Major Steps in an Equal Pay Audit

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- Define Objectives
- Solicit Executive Management Support and Partner with Stakeholders
- Develop a Budget
- Conduct the Pay Equity Analysis
- Take Action
- Establish Plan for Ongoing Monitoring

# Initial Decisions to Be Made

- Project Team
- Type of Employees to be Included in Analysis
- Type of Pay to be Analyzed (base, bonus, equity, etc.)
- Gender, Race, Other
- Deliverables
- Timetable
- Communication Strategy

# Pay Equity Audit

## Step 1: Gather Relevant Data

- Gather readily available data:
  - a. Name/employee ID
  - b. Protected Class Status (Gender, Race, etc.)
  - c. Primary work location
  - d. Work type (full-time, part-time, temporary, etc.)
  - e. Exempt/non-exempt status
  - f. Date(s) of hire
  - g. Job title
  - h. Job code/grade/band
  - i. Date in most recent job code/grade/band
  - j. Division/department/ business unit
  - k. Job function/family
  - l. Supervisor
  - m. Performance Rating
  - n. Highest level of education/field of study
  - o. Special licenses, certifications, etc.
  - p. Pay type (salary, hourly, etc.)
  - q. Annualized salary or hourly rate
  - r. Shift differential
  - s. Variable Pay eligibility
  - t. Variable Pay amounts (incentive, bonus, LTI, commissions, etc.)
  - u. Hours worked/type (regular, OT, etc.)
  - v. Other information (job-related training, individual production/sales, etc.)

# Pay Equity Audit

## Step 2: Identify Comparable/Similar Jobs

- Who identifies which jobs are comparable/similar?
  - Within an organization: HR professionals
  - Outside an organization: An Industrial/Organizational (I/O) Psychologist will perform a job analysis to identify and determine, in detail, the particular job duties and requirements and the relative importance of these duties for a given job.
- Only after the jobs are grouped as being comparable or similarly situated, the labor economist will develop models to determine if there are differences in pay among demographic groups.

# Pay Equity Audit

## Step 3: Calculate Whether Protected and Unprotected Class of Workers are Paid Equally

- Within each comparable job grouping, perform analysis.
- The analyses performed vary from employer to employer, based on the size of the employer and the complexity of the pay structure.
- General Types of Analyses:
  - Cohort Analysis
  - Comparison of Averages
  - Regression Analysis

# Pay Equity Audit

## Step 3: Calculate Whether Protected and Unprotected Class of Workers are Paid Equally

For an organization with:

Small, clearly defined groupings of employees

Relatively simple pay structure

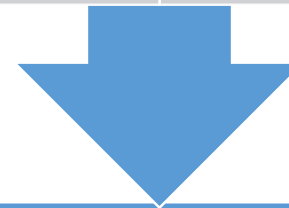


A simple analysis comparing the average wages earned by protected class and unprotected class in similar jobs may be sufficient to identify where there are disparities.

For an organization with:

More than 30 employees per grouping

Complex pay structure

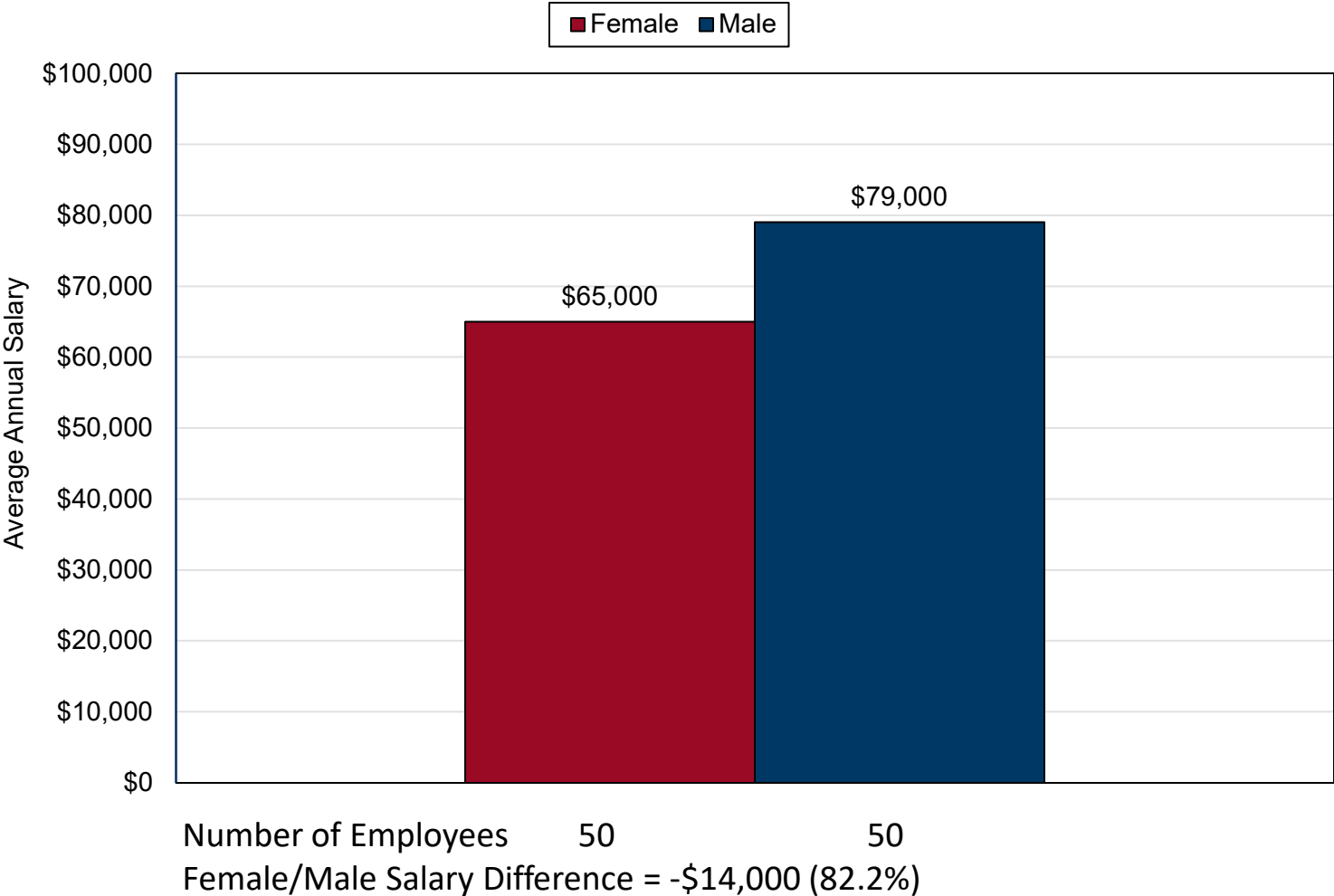


A more detailed statistical analysis (i.e., regression analysis), may be identifies differences in pay, after controlling for other factors.

# Average Annual Salaries by Gender

## Employees in Substantially Similar Accounting Jobs A, B, C & D

### XYZ Corporation

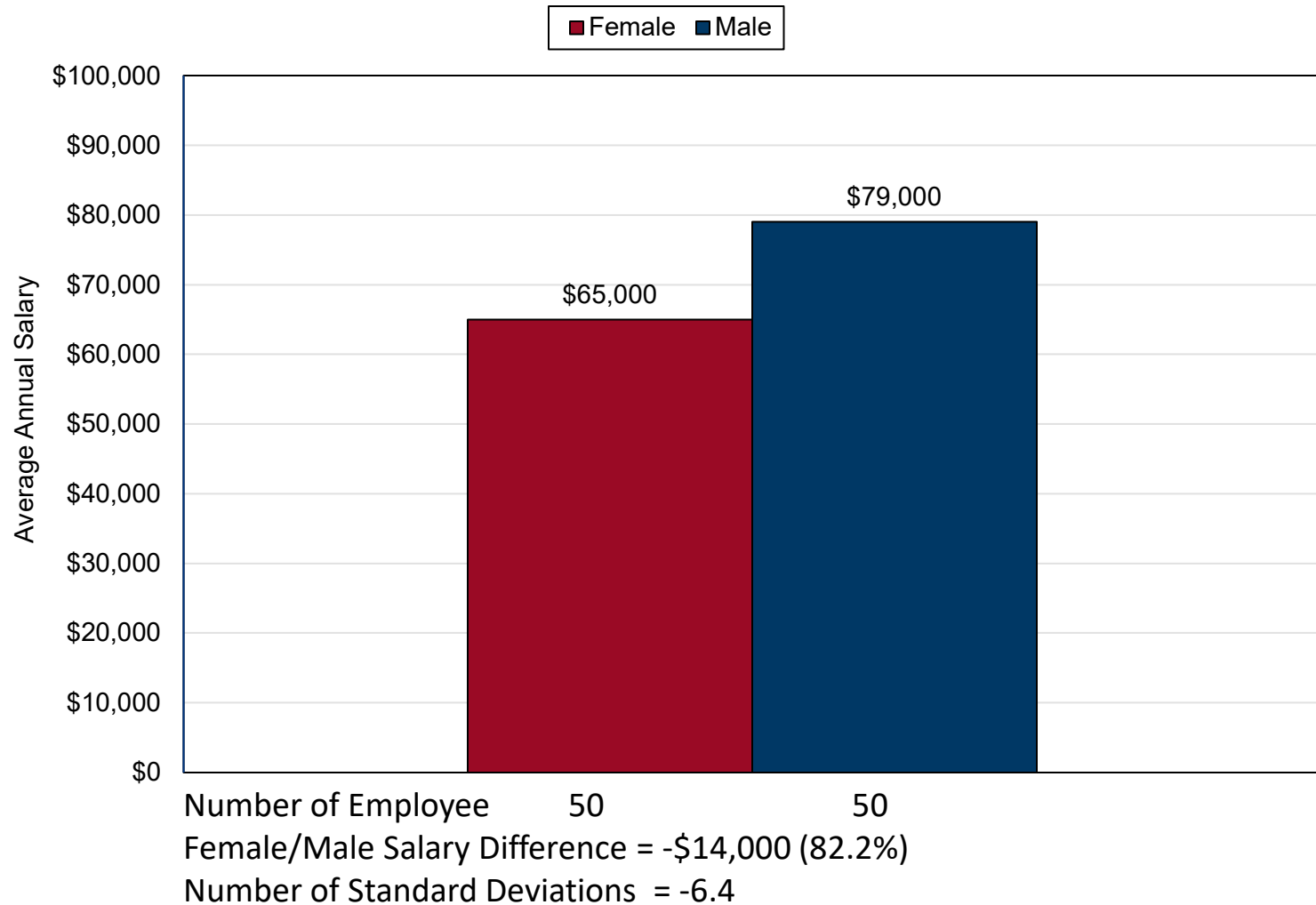




# Statistically Significant Pay Disparities

- Generally, pay disparities that are greater than or equal to approximately two standard deviations are considered statistically significant.
  - Not likely to have occurred by chance in a neutral pay-setting process.

# Average Annual Salaries by Gender Employees in Substantially Similar Accounting Jobs A, B, C & D XYZ Corporation



# Interpretation of Statistically Significant Pay Differences

Gender is a factor that influences pay  
(i.e., discrimination)

OR

The disparity is attributable to differences in factors that legitimately impact pay and for which the analysis has not accounted.

**Are the men and women similar  
in terms of these factors?**

# Affirmative Defenses for Pay Disparities

- Seniority
- Merit System
- Training, education, or experience
- Earnings measured by quantity & quality of production
  - Factors included are job-related and based on legitimate business necessity

# Multiple Regression Analysis

- A statistical tool that allows the analyst to:
  - Measure the disparity between the average salaries of demographic groups (e.g., men and women) after filtering out differences that are attributable to factors that impact pay.
  - Determine whether any remaining disparity is statistically significant.

## Readily Available Data Elements Substantially Similar Accounting Jobs A, B, C & D XYZ Corporation

- Years of XYZ experience
- Highest level of education (e.g., High School, Bachelor's, Graduate)
- Certified Public Accountant (CPA) status
- Geographic Location

# Results of a More Complete Regression Analysis

- When the analysis controls for years of XYZ service, highest level of education, and CPA status:
  - The female/male pay gap is  $-\$2,500$
  - At  $-1.6$  standard deviations, this disparity is *not* statistically significant
- Is this salary difference in compliance with relevant pay equity laws?
  - Equal Pay Act
  - Title VII
  - State Equal Pay laws

# What Does a Pay Difference Mean Under The New Jersey Equal Pay Law?

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“The Entire Difference Must Be Explained”

A statistically insignificant pay gap?

OR

A zero dollar difference in pay?



# Pay Equity Audit

## Step 4: Review of Outliers

- Review in detail results of regression analysis for employees whose actual compensation is:

Significantly *above* or *below* average compensation

and/or

Significantly *greater than* or *less than* their predicted compensation.

# Pay Equity Audit

## Step 4: Review of Outliers

- Reviewing outliers may identify:
  - Data Issues – missing or incorrect data. Clean the data and re-run the analysis.
  - Factors that were excluded from the model that explain pay differences. Inappropriate job groupings.
  - Employees who have a unique characteristic and/or are not comparable to others in the model.
  - Employees for whom a pay adjustment is warranted.

Pay Equity analysis may be iterative and require revisiting issues, collecting more data, and/or gathering anecdotal information.

# Pay Equity Audit

## Step 5: Review of Influential Observations

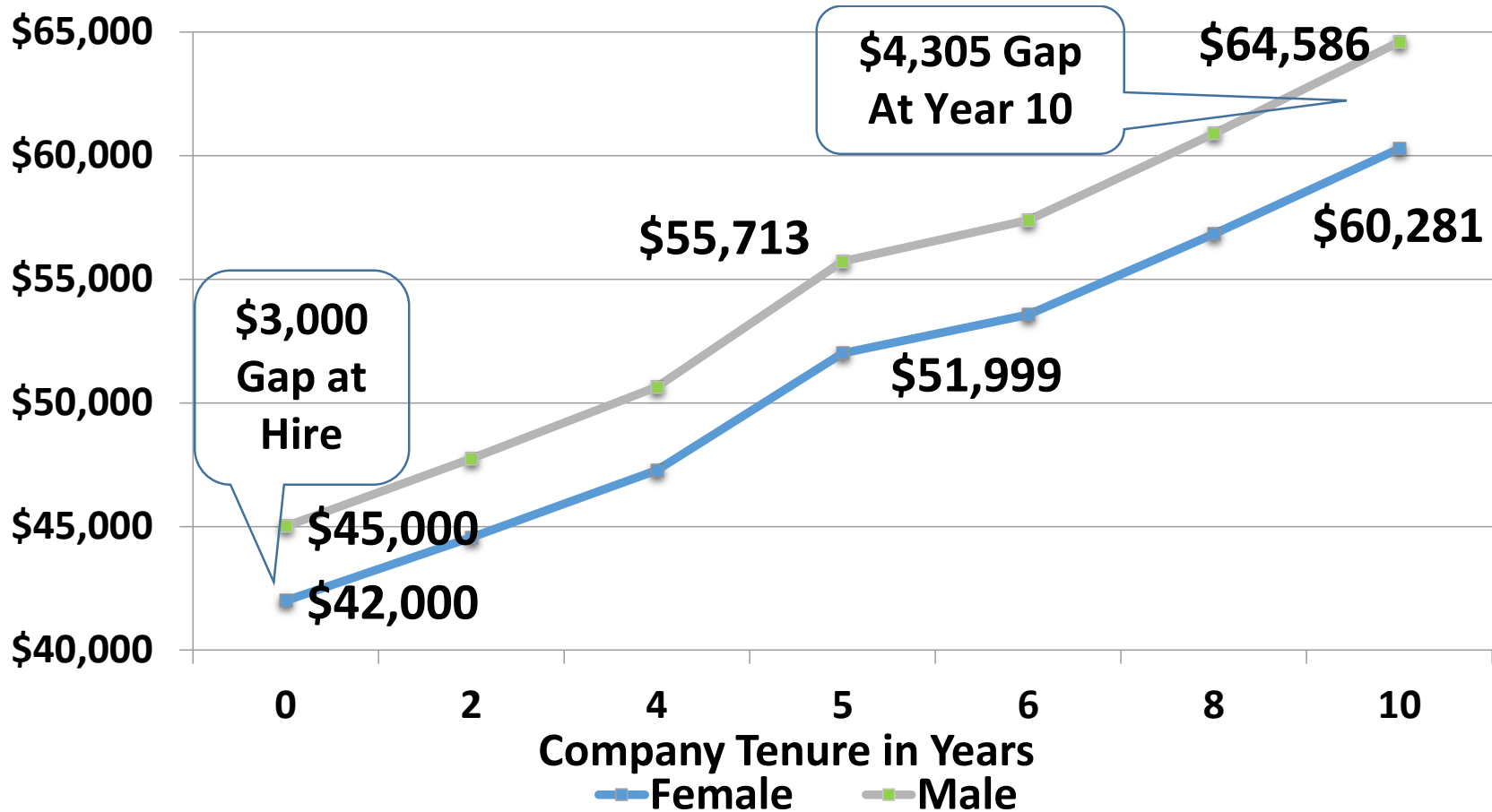
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- Identify employees who have the greatest positive or negative impact on the demographic group effect.
- Outliers and influential observations may not be the same employees.

# Practices that May Create Pay Disparities

- Percentage based compensation systems
- Demotion with little or no decrease in pay
- Negotiation
  - At hire
  - At promotion
  - Matching another employer's offer of higher pay

# Illustration of Impact of Differences in Starting Pay



# Pay Equity Analysis

## Step 6: Take Action

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- Remediate Pay Disparities
- Adjust Pay Practices
- Train Managers
- Update Existing Policies and Handbooks

# Questions?



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