THE *NORRIS* DECISION, ITS IMPLICATIONS AND APPLICATION*

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* The views expressed in this article are the opinions of the authors, not of their employers, clients, or others with whom they are affiliated.

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I. Introduction

The confusion and ambiguity created by the Supreme Court's 1978 decision in *Los Angeles Department of Water & Power v. Manhart*[1] has been eliminated by the Court's recent decision, *Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans v. Norris*.[2] In *Manhart* the Court held that Title VII of the Civil Rights Act of 1964[3] prohibits an employer from requiring greater *contributions* from female employees than from comparably situated males in order to be eligible for the

1. 435 U.S. 702 (1978).
2. 103 S. Ct. 3492 (1983).
3. Civil Rights Act of 1964, Pub. L. No. 95-555, 92 Stat. 2076 (codified as amended at 42 U.S.C. § 2000e (1976 Supp. V 1981).

same monthly benefits as the males.[4] The *Norris* decision extends the *Manhart* holding by prohibiting an employer from offering female employees any retirement benefit *option* which provides smaller monthly benefits than those available to a comparably situated male.[5]

Because we believe lawyers and other individuals advising pension plan providers, employers or participants may benefit from a thorough discussion of the case, in this article we will first summarize the key elements of the *Norris* decision and then discuss the likely applications of the decision to the range of employee fringe benefits.

In the second part of the article, we will discuss (a) the current range of employee fringe benefits, (b) those benefits to which the *Norris* decision is likely to have the greatest impact, (c) the manner in which *Norris* will likely impact such fringe benefits and (d) possible methods which employers may wish to consider in complying with *Norris*.

II. The Decision

A. *Summary of Holding and Impact*

In sum, the *Norris* court ruled that as to employer[6]-sponsored[7] retirement plans, for all contributions[8] accumulated *subsequent* to August 1, 1983, the benefits relating to such contributions must be equivalent for comparably situated males and females.[9] In reaching its decision as to the *Norris* facts, the Court applied Title VII of the Civil Rights Act of 1964, which

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4. Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. at 707-18.

5. Arizona Governing Committee v. Norris, 103 S. Ct. at 3493.

6. "Employer" is defined by Title VII as:

> a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2101 of title 5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

42 U.S.C. § 2000e(b) (1976).

7. Although the Title VII definition of "employer" is clear, *see id.*, the *Norris* decision leaves unanswered the question of what employer involvement with a benefit plan is required before it becomes a "term, condition or privilege" of employment. *See infra* pp. 932-33.

8. Throughout its decision, the Court uses the terms "contributions" and "benefits". *See, e.g.*, Arizona Governing Committee v. Norris, 103 S. Ct. at 3493. In employee benefits parlance, these terms are generally related to defined contribution plans, although it is clear to the authors that the Court's decision is intended to apply to a much wider range of employment fringe benefits. For example, a fair reading of the Court's holding in terms of a defined benefit plan is that *benefits accrued* after August 1, 1983 must comply with *Norris*.

9. Arizona Governing Committee v. Norris, 103 S. Ct. at 3493-94.

provides in relevant part that it is an unlawful employment practice "to discriminate against any individual with respect to his compensation . . . because of such individual's . . . sex . . . ."[10]

By requiring prospective relief only, the Court made it clear that benefits relating to pre-*Norris* contributions need not be adjusted to a sex-neutral stature, but that only benefits derived from post-*Norris* contributions must be adjusted.[11] As a result, the decision does not mandate, for example, an alteration of current benefits where the employee is retired or terminated from employment and where no further post-*Norris* contributions will be involved.[12]

Although the majority of pension plans qualified under section 401(a) of the Internal Revenue Code[13] are of the defined contribution type,[14] approximately two-thirds of all participants in United States' employer-sponsored pension plans are covered under defined benefit plans.[15] Defined benefit plans provide for unisex benefits as long as benefits are paid under the so-called "normal form" and thus, are not affected by *Norris*.[16]

As to defined contribution plans, where such plans permit conversion of the account balance into a lifetime annuity upon retirement or other eligibility, it is equally clear that the benefits paid under that annuity must be sex neutral where the annuity is provided within the employment context.[17]

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10. 42 U.S.C. § 2000e-2(a)(1) (1976).

11. Arizona Governing Committee v. Norris, 103 S. Ct. at 3512 n.3 (O'Connor, J., concurring).

12. Indeed, it will be several years before the *Norris* decision will fully play itself out in terms of unisex benefits. Thus, an employee with 25 years of completed employment under a plan as of August 1, 1983, who works an additional five years before drawing benefits, will have only the final five years of contributions affected by *Norris*. Nonetheless, depending on the terms of the plan, the final years could have a significant impact on the ultimate benefit.

13. I.R.C. § 401(a) (CCH July, 1983).

14. CHARLES D. SPENCER & ASSOCIATES, EBPR RESEARCH REPORT No. 101.1-2A (May, 1980). A "defined contribution plan" is defined as "any plan which provides for an individual account for each participant and for benefits based solely on the amount contributed to the participant's account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account. *Id.* § 414(i).

15. U.S. DEPT. OF LABOR, PRELIMINARY ESTIMATES OF PARTICIPANTS AND FINANCIAL CHARACTERISTICS OF PRIVATE PENSION PLANS, 1977 (1977). The Internal Revenue Code defines a "defined benefit plan" as "any plan which is not a defined contribution plan." I.R.C. § 414(j) (CCH July, 1983).

16. However, the various options available under defined benefit plans provide for sex-distinct benefits. For example, if an employee elects a so-called "joint-and-survivor" option, most plans require a reduction in the amount of monthly benefit from the "normal form" benefit, with female employees receiving a *greater* monthly benefit than similarly situated males because of the longevity differential. *See infra* text accompanying notes 165-71. It is clear that such benefit differentials are prohibited by *Norris*. *See infra* text accompanying notes 181-82.

17. *Norris* makes it clear that to the extent that an employer provides only for a lump-sum distribution, and does not further provide or arrange for lifetime annuity conversion, there is no violation of Title VII. Arizona Governing Committee v. Norris, 103 S. Ct. at 3511 (O'Connor, J., concurring). A simple method of compliance with *Norris*, then, is to eliminate

Most defined contribution plans, however, do not automatically convert accumulated assets into annuities at retirement.[18] Typically, they offer the beneficiary either some form of lifetime annuity or a lump sum cash option.[19]

In addition to the two major types of pension plans, we believe that the following benefits, when provided in a Title VII employment context,[20] are exemplary of the additional range of employee benefits which may be impacted by *Norris*: (a) group life and health conversion policies provided or arranged for on behalf of terminating or retiring employees;[21] (b) group life, medical and disability contracts; (c) individual disability income policies sold to employer groups (typically on a guaranteed renewable, non-cancellable basis); (d) group automobile insurance plans; (e) cafeteria plans, which provide generally that employees are granted a level of credits from which they may purchase a range of benefits; (f) Internal Revenue Code section 79[22] and section 162 plans,[23] which in relevant part provide for the employer to enhance employee compensation by purchasing additional life insurance coverage; (g) split-dollar life insurance programs and the underlying policies; (h) supplemental and dependent life insurance coverage; (i) survivor income insurance; (j) individual life insurance sold on a group basis under guaranteed issue; (k) payroll deduction plans generally, where the employer provides payroll deduction facilities, (for example, life insurance coverage with no special rate structure when the employer selects the insurer); (l) employers' plans for their own employees, with payroll deductions, especially when there is a reduction in rates provided; (m) Keogh plans which use annuities or life insurance as the funding vehicle; (n) employer-sponsored IRA's in which annuities are ultimately utilized; and (o) group-deposit administration contracts, especially where settlement tables are used.

Having considered briefly the nature of *Norris'* impact, we next consider compliance questions.[24] We believe that employer-sponsored fringe

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the employer-sponsored lifetime annuity option. *See infra* text accompanying notes 193-200. Indeed, this was the solution adopted by the State of Arizona when the lower courts struck down the option. Arizona Governing Committee v. Norris, 103 S. Ct. at 3506 & n.4 (Powell, J., dissenting).

18. Employee Benefit Research Institute, Employee Benefit Research Institute Issue Brief No. 19 (June, 1983).

19. *Id.*

20. *See supra* note 6.

21. Most states provide by statute for health insurance conversion privileges for terminating employees. *See, e.g.*, Iowa Code § 509.3(4) (1983).

22. Group-Term Insurance Purchased for Employees, I.R.C. § 79 (CCH July, 1983).

23. Trade or Business Expenses, *Id.* § 162.

24. Title VII employers should first survey their entire employee benefit program and identify any plan or offering in which there may be a sex-based distinction. Once a sex-based differential is identified, the underlying benefit should be brought into compliance. As the laundry list of potentially affected plans set out in the text above suggests, sex-based distinctions are not always apparent. For example, the settlement options of some group life insurance poli-

benefits with benefit structures in violation of the *Norris* decision may remedy such plans by (1) "topping-up" the lower benefit to the level of the greater benefit,[25] (2) by providing a new unisex benefit level which reflects, in part, the sex composition of the particular employee group,[26] or (3) by dropping any benefit which provides for sex-differentiated benefits.[27]

B. *The Facts*

1. *The Plan*

The *Norris* decision related to a deferred compensation plan, made available to employees of the State of Arizona.[28] In 1972, the State of Arizona provided by statute[29] for a Governing Committee to investigate and approve tax-deferred annuity and compensation plans for employees of the State of Arizona.[30]

The purpose of the deferred compensation plan[31] was to allow state employees to defer the receipt of a portion of their compensation, generally until termination of employment.[32] This arrangement permitted the employees to take advantage of certain provisions of the Internal Revenue Code[33] which defer income tax on such deferred compensation to the year it is actually received.[34]

The Arizona statute authorized a Governing Committee to enter into agreements with life insurance companies, bank trustees and investment counseling firms for tax-deferred compensation and annuity programs.[35] The arrangement was offered to all state employees (approximately 35,000) on a voluntary basis.[36] As of August 18, 1978, there were 1,675 employees partici-

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cies give the beneficiary the right to elect an annuity settlement option where the periodic benefits are sex-based. Literally hundreds of other examples exist in various plans.

25. The Court makes it clear that this solution is not required, however. Arizona Governing Committee v. Norris, 103 S. Ct. at 3512-13 n.4 (O'Connor, J., concurring). *See infra* pp. 938-39.

26. This solution is clearly contemplated by the Court. Arizona Governing Committee v. Norris, 103 S. Ct. at 3512-13 n.4 (O'Connor, J., concurring). *See infra* p. 938.

27. *See infra* p. 939.

28. Arizona Governing Committee v. Norris, 103 S. Ct. at 3493.

29. Ch. 133 § 3, 1972 Ariz. Sess. Laws ___, (codified as amended at ARIZ. REV. STAT. ANN. §§ 38-871 to -874 (1974)).

30. Arizona Governing Committee v. Norris, 103 S. Ct. at 3494.

31. Arizona has an entirely separate and independent state retirement plan. *See* ARIZ. REV. STAT. ANN. §§ 38-741 to -781 (1974 & Supp. 1982). That retirement plan is mandatory, and contributions and benefits are equal for similarly situated males and females. *Id.* § 38-745A.

32. *Id.* § 38-872 note 1.

33. I.R.C. § 401 (CCH July, 1983).

34. *Id. See* ARIZ. REV. STAT. ANN. § 38-872 note 1(1974).

35. ARIZ. REV. STAT. ANN. § 38-871(B)(1) (1974).

36. Arizona Governing Committee v. Norris, 103 S. Ct. at 3495.

pating in the plan, 681 of whom were women.[37]

Since the purpose of the plan was to provide deferred compensation benefits, there were no employer contributions[38] to the plan (except for related administration expenses, payroll salary deductions, and employer-sanctioned time-off to employees to attend group meetings).[39] Upon the effective date of this statute, the Governing Committee established a plan which met the requirements of the Internal Revenue Service for deferred compensation.[40]

The deferral arrangement of the plan had two phases.[41] During the "accumulation" phase, employees selected from a variety of investment vehicles which the Governing Committee had approved.[42] Employees could direct that their deferred compensation be (a) invested in shares of a mutual fund, (b) deposited in a savings account, or (c) used to purchase life insurance or annuity contracts.[43] Employees were free to change the type of investment vehicle utilized.[44] Equal amounts contributed to any one vehicle by a male and female employee earned investment income at the same rate.[45] There was no attack on the accumulation phase of the plan (as there was in *Manhart*[46]). During the second or "pay-out" phase, the employees also had choices as to how their deferred funds were to be repaid to them.[47] They

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37. *Id.* Of this number, 572 women had elected some form of future annuity option. *Id.* As of 1978, 10 women participating in the plan had retired and four of the retirees had chosen a lifetime annuity. *Id.*

38. Arizona Governing Committee v. Norris, 103 S. Ct. at 3494. Retirement plans are generally either "contributory" or "noncontributory." "Contributory" plans provide for employee contributions in addition to those of the employer, while "noncontributory" plans provide for the entire contribution to be provided by the employer.

39. ARIZ. REV. STAT. ANN. § 38-871C (1974).

> The Governing Committee shall: (1) arrange for consolidated billing and efficient administrative services in order that any such plans approved shall operate without cost of contribution from the state except for the incidental expense of administering the payroll salary deduction or reduction and remittance thereof to the trustee or custodian of the plan or plans.

Id.

40. Arizona Governing Committee v. Norris, 103 S. Ct. at 3494.

41. *See id.* at 3494.

42. *Id.* at 3494.

43. The companies offering the annuity and life insurance contracts included Lincoln National Life Insurance Company, National Investors Life Insurance Company, Valley National Bank of Arizona, Variable Life Insurance Company, the Hartford Insurance Company, ITT Life Insurance Corporation, Keystone B4 Mutual Fund, and the Arizona State Employees Credit Union, which replaced the Valley National Bank. Joint Statement of Plaintiff & Defendant at 15, Norris v. Arizona Governing Committee, 486 F. Supp. 648 (D. Ariz. 1980).

44. Arizona Governing Committee v. Norris, 103 S. Ct. at 3494.

45. *See infra* text accompanying notes 63-64.

46. Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. at 704. The Los Angeles Department of Water and Power required larger pension fund *contributions* from female employees than from male employees. *Id.*

47. Arizona Governing Committee v. Norris, 103 S. Ct. at 3494.

could choose to receive all their deferred compensation and the earnings (a) in one lump sum, (b) in fixed monthly payments for a designated period of time, or (c) in some form of life annuity.[48] The benefits relating to these options could differ depending on which pay-out method was chosen and on which pay-out vehicle was selected.[49]

Plaintiff Norris objected to the benefit relating to one of her pay-out options, namely the life annuity provided by an independent insurer.[50] Lifetime annuity payouts were subject to the annuity purchase rate tables published in the contract with the particular insurance company selected by the employee.[51] All insurers offering the lifetime annuity used separate mortality tables for men and women to predict the life expectancy and thus, the period of time over which the payments could be expected to extend.[52] Under the lifetime annuity option, female employees would always receive a lower lifetime income than a similarly situated male because of the longevity differential.[53] The plaintiff argued that the benefit differentials produced by the lifetime annuities for men and women of equal ages was an illegal act of discrimination by her employer in violation of Title VII.[54]

At the district court level, the parties stipulated that all mortality tables which were used by the plans offering lifetime annuities provided for a larger monthly lifetime benefit to males than to females of equal age, account value, and guaranteed payment period, because monthly payments to women were made, on the average, over a longer period of time than

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48. *Id.*

49. *Id.*

50. *Id.* at 3495.

51. *Id.*

52. *Id.* The various insurers used different methods to determine the male/female mortality differentials. For example, separate male/female mortality tables or a male table with a six-year set-back assumption to determine the female mortality. *Id.* at 3495 n.2.

53. *Id* at 3495. Although it is popularly suggested that the male-female longevity differential is diminishing, the underlying data strongly suggests the contrary. The life expectancy of a woman born in 1920 was 54.6 years. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1981, at 69 (102d ed. 1981). A man born the same year had a life expectancy of 53.6 years. *Id.* By contrast, the life expectancy of a woman born in 1979 was 77.8 years, compared to 69.9 years for a man born in that year. *Id.*

Indeed, the United Nation's *Demographic Yearbook* reports significantly lower mortality rates for women than for men throughout the world in a diversified range of societies and cultures. UNITED NATIONS, DEMOGRAPHIC YEARBOOK - 1978: SPECIAL ISSUE: HISTORICAL SUPPLEMENT 542-62 (1979).

Where mortality studies have been limited to individuals who work for pay outside the home, the differential between male and female mortality is greater than for individuals who do not. *See*, Lautzenheiser, *Sex and the Single Table: Equal Monthly Retirement Income for the Sexes?*, 2 EMPLOYEE BENEFITS J. 1 (1976). Studies have also shown that even after adjusting for specific risk factors (*e.g.* occupation, smoking, alcohol use, etc.) male mortality continued to significantly exceed female mortality. Wingard, *The Sex Differential in Mortality Rates: Demographic and Behavioral Factors*, 115 AM. J. EPIDEMIOLOGY 205, 205-16 (1982).

54. Arizona Governing Committee v. Norris, 103 S. Ct. at 3495.

monthly payments to men.[55]

2. *The Plaintiff Nathalie Norris*

Nathalie Norris was employed by the State of Arizona in the Department of Economic Security.[56] On May 3, 1975, Norris made an application to the Governing Committee to participate under the deferred compensation plan, and requested that her contributions be invested in the fixed annuity contract offered by Lincoln National Life Insurance Company.[57] Two days later she filed charges with the EEOC complaining about the plan.[58] Six days after that her application was approved by the Governing Committee.[59] Norris was deferring $199.50 per month under the plan.[60] Under the arrangement, when Norris became eligible to receive benefits upon retirement, she could then make a different election as to the form in which she would like to receive her benefits, thus reversing the initial decision.[61]

Norris could elect options ranging from a lump-sum payment of her benefits, to periodic payments over a designated period (of her choice), to life annuity payments based upon the rates of any insurance company with which the Governing Committee had contracted.[62] Under the plan, if Norris did not change the amount which was being deferred by her, and if she did not change her payout election, the total value of her account at age sixty-five would be $53,890.93 and her annuity payment would be $320.11 per month for life.[63] If she were male, assuming all other factors were the same, the total value of her account at age sixty-five would still be $53,890.93, however, the life annuity payment would be $354.06 per month because of the application of sex-distinct mortality tables which estimate different life expectancies for males and females.[64]

3. *The Trial Court Decision*

After exhausting her administrative remedies, Respondent Norris brought suit in the United States District Court for Arizona.[65] In essence, Norris contended that the plan violated Title VII by administering an annuity plan that discriminated on the basis of sex.[66] On March 13, 1980, the

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55. Norris v. Arizona Governing Committee, 486 F. Supp. 645, 648 (D. Ariz. 1980).
56. Arizona Governing Committee v. Norris, 103 S. Ct. at 3495.
57. *Id.*
58. *Id.*
59. *See* Norris v. Arizona Governing Committee, 486 F. Supp. at 649.
60. Arizona Governing Committee v. Norris, 103 S. Ct. at 3495.
61. *See id.* at 3494.
62. *See id.*
63. Norris v. Arizona Governing Committee, 486 F. Supp. at 648.
64. *Id.*
65. Arizona Governing Committee v. Norris, 103 S. Ct. at 3495.
66. Norris v. Arizona Governing Committee, 486 F. Supp. at 647.

United States District Court certified a class action[67] and granted summary judgment for the plaintiff class, holding the plan in violation of Title VII.[68] The court directed the petitioners to cease using sex-based mortality tables and to pay similarly situated males and females the same monthly benefit.[69] The United States Court of Appeals for the Ninth Circuit affirmed the decision.[70] The Supreme Court then granted *certiorari*.[71]

C. *Summary of the Arguments*

1. *The Petitioners: Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans*

In sum, the petitioners argued before the Supreme Court, both in their briefs and in oral argument, as follows:[72] (a) that the court of appeals erred in holding that the petitioners violated Title VII, in that the petitioners did not, in fact, discriminate against the respondent, and (b) that the petitioners (1) were not guilty of discrimination where they had no choice but to contract with an insurer using sex-based actuarial tables (i.e., no insurer in the marketplace offered unisex annuity benefits under the conditions outlined), (2) were not guilty of discrimination where each employee had a range of options from which to choose, and several of the options did not provide for sex-differentiated benefits, and (3) were not obligated to compensate female employees where the relevant limitations (i.e., sex differentiated benefits) were created in the marketplace.[73] In addition, the petitioners argued (4) that Title VII did not cover the practices of the insurance industry (i.e., the practices were exempt under the McCarran-Ferguson Act[74]), (5) that affirmance of the court of appeals decision would revolutionize the insurance and pension industries, contrary to *Manhart's* clearly limiting language,[75] and (6) that the plan at issue fell squarely within the exception stated in *Manhart*[76] because it offered each employee the alternative available on the open

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67. The district court certified a class under Federal Rule of Civil Procedure 23(b)(2) consisting of all female employees of the State of Arizona "who have enrolled in, or in the future will choose to enroll in the State of Arizona Deferred Compensation Plan. . . ." *Id.* at 651.

68. *Id.* at 652.

69. *Id.*

70. Norris v. Arizona Governing Committee, 671 F.2d 330, 332, 336 (9th Cir. 1982).

71. Arizona Governing Committee v. Norris, 103 S. Ct. 205 (1982).

72. For a summary of oral argument, see 51 U.S.L.W. 3713-14 (1983).

73. *Id.*

74. 15 U.S.C. §§ 1011-15 (1976). In relevant part this Act provides that "[n]o Act of Congress shall be construed to invalidate, impair or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance." *Id.* § 1012(b).

75. *See* Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. at 717-18.

76. *Id.* at 718 n.33. The so-called "open market" exception provides that "[n]othing in our holding implies that it would be unlawful for an employer to set aside equal retirement

market.[77]

2. *The Respondents: Nathalie Norris and Class*

The Respondents, citing *Manhart*, argued that the petitioner violated section 703(a) of Title VII by administering an annuity plan that discriminated on the basis of sex.[78] The Respondents based their conclusion on the following arguments: (1) that the State of Arizona was intimately involved in facilitating the plan, and was thus an "employer"[79] under Title VII, and (2) that the state could have avoided the discriminatory option by not offering it at all.[80]

D. *Analysis of Court's Decision*

1. *The Holding*

Before examining the Court's reasoning in detail, we will note briefly the direct *Norris* holding. Justice Marshall, writing the majority opinion, articulated the issue presented by the *Norris* case as: "[t]he issue we must decide is whether it is discrimination 'because of . . . sex' to pay a retired woman lower monthly benefits than a man who deferred the same amount of compensation."[81] After reiterating the key *Manhart* holdings,[82] Marshall concluded that: "[w]e have no hesitation in holding, as have all but one of the lower courts that have considered the question, that the classification of employees on the basis of sex is no more permissible at the pay-out stage of a retirement plan than at the pay-in stage."[83] In coming to their decision, the fact found most significant by the majority was that if a woman under the Arizona plan wished to ultimately receive the same monthly benefit as her male counterpart under the option at issue, she could do so only by making greater monthly contributions than he would have to make.[84] The court held that this fact placed the arrangement squarely within the *Manhart* holding.[85]

As discussed in detail below,[86] Marshall found the fact that Arizona offered only one discriminatory option to be an insufficient foundation to dis-

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contributions for each employee and let each retiree purchase the largest benefit which his or her accumulated contributions could command in the open market." *Id.* at 717-18.

77. Arizona Governing Committee v. Norris, 103 S. Ct. at 3499-501.
78. *Id.* at 3497.
79. *See supra* note 6.
80. *See* Arizona Governing Committee v. Norris, 103 S. Ct. at 3500 n.17.
81. *Id.* at 3496.
82. *See infra* text accompanying notes 95-100.
83. Arizona Governing Committee v. Norris, 103 S. Ct. at 3497 (citations omitted).
84. *Id.*
85. *Id.*
86. *See supra* text accompanying note 14.

tinguish *Norris* from *Manhart*.[87] The Court also rejected each of the following arguments[88] (all of which are discussed below): (1) that annuities with roughly equivalent present actuarial values meet the Title VII equality requirement, [89] (2) that the benefit differential can be justified by valid actuarial mortality tables,[90] (3) that the selection of the discriminatory option by Norris was voluntary,[91] (4) that pension arrangements, to remain actuarially sound, must utilize sex classification,[92] and (5) that the McCarran-Ferguson Act pre-empts the application of Title VII to pension arrangements.[93] As the discussion that follows will suggest, the ultimate relevance of the *Norris* decision may relate to its broad based rejection of this entire range of arguments.[94]

2. *The Impact of Manhart on the Norris Decision*

In analyzing the *Norris* decision, it may be valuable to review those holdings in *Manhart* that the *Norris* court found worth reiterating. They are critical because the *Norris* Court used the *Manhart* reasoning as a lock-step foundation for its *Norris* position.

A summation of those *Manhart* principles the *Norris* Court found relevant include the following: (a) that employer-sponsored retirement benefits constitute a form of Title VII compensation,[95] (b) that Title VII prohibits an employer from requiring greater retirement plan contributions from women than from comparably situated men to fund the same monthly benefit,[96] (c) that Title VII's "focus on the individual is unambiguous," and, as such, prohibits an employer from treating some employees less favorably than others because of their sex,[97] (d) that although it is true that women as a class live longer than men, the Bennett Amendment[98] to Title VII does not permit the extraction of greater contributions from women because the greater longevity characteristic of women is based on sex, since "sex is ex-

87. Arizona Governing Committee v. Norris, 103 S. Ct. at 3497.

88. *Id.* at 3496-502

89. *See infra* text accompanying notes 101-08.

90. *See infra* text accompanying notes 109-14.

91. *See infra* text accompanying notes 118-19.

92. *See infra* text accompanying notes 120-26.

93. *See infra* text accompanying notes 127-37.

94. In connection with the Norris decision, the Court collaterally granted *certiorari*, vacated the judgments below and remanded the following cases to the lower courts for judgment consistent with the *Norris* holding: *Teachers Ins. and Annuity Ass'n v. Spirt*, 103 S. Ct. 3565 (1983), *rev'g* 691 F.2d 1054 (2d Cir. 1982); *California v. Retired Public Employees' Ass'n of California*, 103 S. Ct. 3565, *rev'g* 677 F.2d 733 (9th Cir. 1982); *Peters v. Wayne State Univ.*, 103 S. Ct. 3566 (1983), *rev'g* 677 F.2d 733 (9th Cir. 1982).

95. Arizona Governing Committee v. Norris, 103 S. Ct. at 3496 (citing Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. at 712 n.23).

96. *Id.* (citing Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. at 708-18).

97. *Id.* (citing Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. at 708).

98. *See* 42 U.S.C. § 2000e-2(h) (1976).

actly what it is based on,"[99] and (e) that a plan requiring women to make greater contributions than men discriminates "because of . . . sex" for the simple reasons that it treats each woman "in a manner which but for (her) sex would [have been] different."[100] In brief, the *Norris* Court relied heavily on the *Manhart* precedent.

3. *Arguments and Interpretations Rejected by the Norris Court*

In analyzing the *Norris* opinion, it may also be instructive to evaluate the Court's analysis as to several defenses urged by the petitioners, as the authors believe that the *carte blanche* rejection by the Court of the wide range of petitioner's arguments is significant. It was widely contended in pension and insurance circles that the *Norris* case presented the best opportunity for a more definitive post-*Manhart* decision. With the Court's rejection of every single significant argument for reversal, it appears to the authors that the law is now clear in the area of fringe benefits and sex-based differentials. We analyze below the relevant arguments the Court rejected.

a. *Comparable Present Actuarial Value.* The *Norris* Court rejected Arizona's argument that the challenged plan did not discriminate against women because the lifetime annuity policies from which employees could select provided the same *present actuarial value* upon retirement for both men and women.[101] The Court articulated the fallacy of the argument as:

> In asserting that the Arizona plan is nondiscriminatory because a man and a woman who have made equal contributions will obtain annuity policies of roughly equal present actuarial value, petitioner incorrectly assumes that Title VII permits an employer to classify employees on the basis of sex in predicting their longevity. . . . This underlying assumption that sex may properly be used to predict longevity is flatly inconsistent with the basic teaching of *Manhart*: that Title VII requires employers to treat their employees as *individuals*, not as simply components of . . . a . . . sexual . . . class.[102]

The "comparable present actuarial value" was an integral component of the petitioner's argument. Sex-based benefit differentials have been mathematically justified in the face of Title VII.[103] Thus, the "present actuarial value" of a lifetime annuity is determined by multiplying the promised monthly benefit times the life expectancy of the annuitant as determined by a selected mortality table.[104] This total is then discounted by a relevant interest

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99. Arizona Governing Committee v. Norris, 103 S. Ct. at 3496 (citing Los Angeles Dept. of Water & Power v. Manhart, 553 F.2d 581, 588 (9th Cir. 1976)).

100. *Id.* (quoting Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. at 708-10).

101. *Id.* at 3497-98.

102. *Id.* (citing Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. at 708).

103. *See id.* at 3498 (quoting Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. at 709).

104. *Id.* at 3497 n.11. For another definition of "present actuarial value," see D. McGILL,

factor to a "present actuarial value."[105] Two annuities with roughly equivalent present actuarial values are said to be of a comparable dollar value.[106]

It is worthwhile to note that the Court did not reject the validity of the underlying mathematical foundation of the argument.[107] The Court did, however, reject the mathematical reasoning as an acceptable justification for sex-based benefits.[108]

b. *Validity of Actuarial Tables.* Although the Court accepted the validity of the longevity differential between men and women,[109] the Court rejected the use of sex-based actuarial tables to calculate retirement benefits.[110] "The use of sex-segregated actuarial tables to calculate retirement benefits violates Title VII whether or not the tables reflect an accurate prediction of the longevity of women as a class, for under the statute '[e]ven a true generalization about [a] class' cannot justify class-based treatment."[111]

There has never been a serious challenge to the overall validity of actuarial studies generally, which clearly demonstrate a male-female longevity differential,[112] although there have been occasional challenges to the degree of the difference.[113] In any case, it is worth observing that the related actuarial mortality tables were not rejected by the Court as invalid, but were rejected as a basis to justify sex-based benefit differentials.[114]

c. *Choice of Plans.* Arizona argued that because some of the options offered to women under the Arizona plan did not provide sex-based benefit differentials, the plan should not be prohibited.[115] Of the three options available upon retirement, lump sum, fixed-sum-for-a-fixed-period, and lifetime annuity, only the lifetime annuity option contained the discriminatory benefit differential feature.[116] Nonetheless, the Court was unpersuaded:

FUNDAMENTALS OF PRIVATE PENSIONS 331 (4th ed. 1979).

105. *See* Arizona Governing Committee v. Norris, 103 S. Ct. at 3497 n.11.

106. *See id.*

107. *See id.* at 3497-98.

108. *Id.*

109. *Id.* at 3498 (citing Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. at 709).

110. *Id.*

111. *Id.* at 3498 (quoting Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. at 708).

112. *See supra* note 53.

113. *See, e.g.*, Bergmann & Gray, *Equality in Retirement Benefits: The Need for Pension Reform*, 8 CIV. RTS. DIG. 25, 25-27 (1975).

114. Arizona Governing Committee v. Norris, 103 S. Ct. at 3497-98.

115. *Id.* at 3497 n.10. See also *Parham v. Hughes*, 441 U. S. 347, 355-58 (1979), where the Supreme Court held that a Georgia statute under which the mother of an illegitimate child, but not the father, could sue for the wrongful death of that child, did not constitute prohibited gender-based discrimination under the Equal Protection Clause of the Fourteenth Amendment. The Court noted that by voluntarily legitimatizing the child, the father could change his status to the father of a legitimate child. *Id.* at 356.

116. Arizona Governing Committee v. Norris, 103 S. Ct. at 3494, 3497 n.10.

"[a]n employer that offers one fringe benefit on a discriminatory basis cannot escape liability because he also offers other benefits on a nondiscriminatory basis."[117]

d. *Voluntary Participation.* Arizona had emphasized in both its briefs and oral argument before the Court that Nathalie Norris made a voluntary decision to participate in the plan in two ways: first, when she elected to participate in the Arizona deferred compensation plan in the first instance, and second, when she selected the only option with the sex-differentiated benefit.[118] Again, it was widely contended in both insurance and pension circles that the voluntary participation feature of the Arizona plan should, free-standing, preclude application of the *Manhart* decision to the arrangement. In a footnote, the *Norris* Court stated that "[i]t is irrelevant that female employees in *Manhart* were required to participate in the pension plan, whereas participation in the Arizona deferred compensation plan is voluntary."[119]

e. *Pension Contributions and Benefits Require Group-Based Assumptions.* Another argument advanced by both Arizona and several *amicii* was that because pension (as well as insurance) arrangements must, by actuarial definition,[120] reference group characteristics for contribution (premium) and benefit purposes, basing benefits on referenced group characteristics (i.e., sex) is permissible under Title VII.[121] The *amicus* brief of The American Academy of Actuaries probably best articulates the contention:

> The risk that the insurance company accepts when it undertakes to write life annuities arises because it is impossible to predict in advance how long any single individual will live. But if this risk is assumed with respect to a group of persons, the rate and frequency of deaths within that group can be reliably predicted based on the past mortality experience of similar groups. This permits the insurer to set the amount of monthly annuity as members of the group retire at a level that will not exhaust the total fund available for the payment of annuities until the last person in the pool has died.[122]

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117. *Id.* at 3497 n.10.

118. *See id.*

119. *Id.*

120. *See* D. McGILL, *supra* note 104, at 325-28.

121. *See, e.g.*, Brief for American Academy of Actuaries as *Amicus Curiae* at 10, Arizona Governing Committee v. Norris, 103 S. Ct. 3492 (1983).

122. Brief of American Academy of Actuaries as *Amicus Curiae* at 9, Arizona Governing Committee v. Norris, 103 S. Ct. 3492 (1983). Justice Powell also reiterates the point in his opinion. Arizona Governing Committee v. Norris, 103 S. Ct. at 3509 (Powell, J., concurring in part & dissenting in part). Other *amicii* who filed briefs on behalf of Arizona included Equal Employment Advisory Counsel, State of Florida, National Association of Insurance Commissioners, New York State Teacher Retirement System, and Teachers' Insurance and Annuity Association and College Retirement Equities Fund. Those who filed on behalf of Norris included American Association of University Professors, American Civil Liberties Union, AFL-CIO, American Nurses' Association, eight individual actuaries, Lawyers' Committee for Civil

The *Norris* Court disposed of this argument in a footnote.[123] Although the Court agreed that " 'insurance is concerned with events that are individually unpredictable' [and that] it cannot be determined in advance when a particular employee will die,"[124] the Court observed that this fact "has never been deemed a justification for 'resort to the classification proscribed by Title VII.' "[125]

The Court also noted that unisex annuities are currently available in the marketplace.[126]

f. *The McCarran-Ferguson Act Preempts Title VII.* The McCarran-Ferguson Act,[127] signed into law in 1945 following the Supreme Court's decision in the *Southeastern Underwriters* case,[128] made it clear that the federal government fully intended to delegate insurance regulatory authority to the various states: "No Act of Congress shall be construed to invalidate, impair or supersede any law enacted by a State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance."[129] The line of cases which followed have fairly articulately defined the parameters of the key phrase "business of insurance."[130] The language of *SEC v. Variable Annuity Life Insurance Company*[131] is typical of these cases. In that case, the Court held generally that for purposes of the McCarran-Ferguson Act "the concept of 'insurance' involves some investment risk-taking on the part of the company."[132]

Rights Under Law and National Insurance Consumer Organization.

123. Arizona Governing Committee v. Norris, 103 S. Ct. at 3499 n.15.

124. *Id.* (quoting Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. at 710).

125. *Id.*

126. *Id.* (citing 25 THE CHRONICLE OF HIGHER EDUCATION 25-26 (Oct. 13, 1982)).

127. Ch. 20, §§ 1-5, 59 Stat. 33 (1945) (codified as amended at 15 U.S.C. §§ 1011-15 (1976)).

128. United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533 (1944). In that case, the Court held that the insurance business, when engaged in across state lines, constitutes "Commerce among the several States," and may be regulated by the Congress under the Commerce Clause. *Id.* at 539.

129. 15 U.S.C. § 1012(b) (1976).

130. An example of the tension *Norris* created between Title VII and state insurance department regulation relates to group health conversion policies and rates. *Norris* raises the issue of whether such conversion policies must utilize unisex rates. *See, e.g.*, State of New York Insurance Department, Circular Letter No. 14, July 25, 1983.

131. 359 U.S. 65 (1959). *See also* Union Labor Life Ins. Co. v. Pireno, 102 S. Ct. 3002, 3007-11 (1982).

132. SEC v. Variable Annuity Life Ins. Co., 359 U.S. at 71. There are

> three criteria relevant in determining whether a particular practice is part of the "business of insurance" . . . *first*, whether the practice has the effect of transferring or spreading a policyholder's risk; *second*, whether the practice is an integral part of the policy relationship between the insurer and the insured; and *third*, whether the practice is limited to entities within the insurance industry. None of these criteria is necessarily determinative in itself. . . .

Union Labor Life Ins. Co. v. Pireno, 102 S. Ct. at 3009.

Arizona had argued that Norris' real complaint related to the practices of third-party insurance companies,[133] and that Title VII was not intended to reach the practices of those insurers.[134] Arizona argued further that Title VII, according to the *Manhart* definition, was not intended to "revolutionize the insurance and pension industries."[135] This argument was significant because in a related case a federal district court had held that the McCarran-Ferguson Act precluded the application of Title VII to an insurance-type entity which issued annuities with sex-differentiated benefits.[136]

The Court disposed of the McCarran-Ferguson argument in an indirect fashion:

> Although petitioners contended in the Court of Appeals that their conduct was exempted from the reach of Title VII by the McCarran-Ferguson Act . . . we think it is appropriate to lay the matter to rest . . . . All that is at issue in this case is *an employment practice*: the practice of offering a male employee the opportunity to obtain greater monthly annuity benefits than could be obtained by a similarly situated female employee. It is this conduct of the employer that is prohibited by Title VII. By its own terms, the McCarran-Ferguson Act applies only to the business of insurance and has no application to employment practices. Arizona plainly is not itself involved in the business of insurance, since it has not underwritten any risks.[137]

4. *Relief*

a. *The Ruling.* The Court's decision is somewhat unique in that Justice O'Conner joined Justice Powell to form a majority as to the applicable remedy.[138] In his opinion as to the appropriate remedy, Justice Powell observed that the "finding of a statutory violation provides no basis for approving the retroactive relief awarded by the District Court. To approve this award would be both unprecedented and manifestly unjust."[139] Justice Powell found the following guidance in *Manhart* on the question of retroactive relief relevant: (1) that the employer may well have assumed that its pension plan was lawful,[140] (2) that a retroactive remedy would have a potentially disruptive impact on the pension plan,[141] and (3) that a "drastic change in

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133. Indeed, various state insurance statutes specifically recognize (or endorse) the practice of sex-based benefit differentials. *See, e.g.,* IOWA CODE § 508.36 (3) (1983).

134. *See* Arizona Governing Committee v. Norris, 103 S. Ct. at 3499-500.

135. Los Angeles Dept. of Water & Power, 433 U.S. at 717.

136. Spirt v. Teachers Ins. & Annuity Ass'n, 475 F. Supp. 1298, 1304 (S.D.N.Y. 1979). Note, however, that this position was reversed by the Court of Appeals for the Second Circuit. Spirt v. Teachers Ins. & Annuity Ass'n, 691 F.2d 1054, 1065-66 (2d Cir. 1982).

137. Arizona Governing Committee v. Norris, 103 S. Ct. at 3500 n.17.

138. *Id.* at 3493.

139. *Id.* at 3509 (Powell, J., concurring in part & dissenting in part).

140. *Id.* at 3510 (citing Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. at 720).

141. *Id.* (citing Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. at 721).

the legal rules governing pension and insurance funds" could jeopardize the insurer's insolvency and the insured's benefits.[142] Justice Powell concluded by noting that *Norris* "presents no different considerations" than *Manhart* did and by observing further that under the *Manhart* "open market" exception an employer could reasonably assume the legality of a *Norris* benefit option.[143]

Justice Powell was not unmindful of the potential implications of the *Norris* decision, as was demonstrated by his statement that: "holding employers liable retroactively would have devastating results,"[144] particularly since the holding applies to all employer-sponsored pension plans.[145] "Imposing such unanticipated financial burdens would come at a time when many States and local governments are struggling to meet substantial fiscal deficits . . . . Accordingly, liability should be prospective only."[146]

Justice O'Connor's concurring opinion on relief provides additional guidance on how *Norris* should be applied prospectively: "I would require . . . benefits derived from contributions collected after [August 1, 1983] to be calculated [on a unisex basis]."[147] Justice O'Connor determined that for pre-*Norris* contributions, no adjustment will be required.[148]

b. *The Relevance.* The prospective relief ruling of the *Norris* case is significant for the United States' pension and insurance community. There can be no question that a retroactive requirement would have had devastating financial consequences. Justice Powell determined that the cost of compliance "would range from $817 to $1260 million *annually* for the next 15 to 30 years."[149] Although compliance with the *Norris* decision has and will continue to result in serious administrative and financial concerns for pension plan providers, the Court's prospective relief should permit a smoother compliance transition.

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142. *Id.*

143. *Id.* at 3510. Note that Justice O'Connor agreed that *Manhart* and *Norris* were not distinguishable, but she reached her conclusion "[d]espite Justice Powell's argument." *Id.* at 3511 (O'Connor, J., concurring).

144. *Id.* Powell's remedy ruling is consistent with the Court's guidance as to Title VII remedies in *Teamsters v. United States*, 431 U.S. 324 (1977). In that case, the Court recognized that in shaping Title VII remedies, the courts "must 'look to the practical realities and necessities inescapably involved in reconciling competing interests,' in order to determine the 'special blend of what is necessary, what is fair and what is workable.' " *Id.* at 375 (citing Lemon v. Kurtzman, 411 U.S. 192, 200-01 (1973)).

145. *See* Arizona Governing Committee v. Norris, 103 S. Ct. at 3501-02. From a liability standpoint, the authors believe that employers with plans not in compliance with *Norris* after August 1, 1983 will potentially be subject to damages. Depending on the circumstances, potential damages could be so significant that audit disclosure could be necessary.

146. *Id.* at 3510 (Powell, J., concurring in part & dissenting in part).

147. *Id.* at 3512 (O'Connor, J., concurring). *See also id.* at 3510 n.12 (Powell, J., concurring in part & dissenting in part).

148. *Id.* at 3512 (O'Connor, J., concurring).

149. *Id.* at 3510 (Powell, J., concurring in part & dissenting in part) (emphasis added).

E. *Limitations of the Norris Decision*

We believe that three additional areas of the Court's decision merit further scrutiny: (1) contracts offered outside the employment relationship, (2) employers that fall outside the Title VII definition,[150] and (3) the type of employer participation required to bring a benefit plan within the "term, condition or privilege" of employment.

It is critical to note that *Norris'* reach is limited by the scope of Title VII's applicability. In relevant part, application is limited to employers with fifteen or more employees or "any agent" of such employer.[151]

1. *Non-Employment Contracts*

It may be worthwhile to emphasize that any insurance or pension arrangement entered into between a provider and a third party outside of the employment context will not be affected by *Norris*.[152] As a result, (for example), life insurance premiums and benefits related to such third-party contracts will probably continue to be sex based. In addition, third-party annuities probably will likewise provide for sex-differentiated benefits. The authors believe that the latter point merits reflection. We believe that the availability of superior annuity benefits on the "open market" for males will create a natural tension for employer operated retirement plans which allow for both lump-sum distribution and for employer-arranged lifetime annuities. Where the open market benefit is superior for males, it is inevitable that males with adequate financial counseling will elect the lump-sum distributions when all other factors are equal (e.g., risk, investment, etc.). The net result will be that such employer-sponsored group-rated annuities will gravitate toward female-oriented benefits as the males exercise their lump-sum distribution option in the marketplace.

2. *Smaller Employers*

In the Civil Rights Act of 1964, Congress exempted smaller employers (with fewer than 15 employees) from the requirements of the Act.[153] As a result, the *Norris* decision will not impact employers with fewer than 15 employees.[154]

Practitioners should, however, be aware of the fact that forty-five states have adopted fair employment practices acts.[155] Most such provisions paral-

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150. 42 U.S.C. § 2000e(b) (1976). For the statutory definition, see *supra* note 6.

151. *Id.*

152. As the *Manhart* Court noted, Title VII "primarily govern[s] relations between employees and their employers, not between employees and third parties." Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. at 718 n.33.

153. 42 U.S.C. § 2000e(b) (1976).

154. *See supra* text accompanying note 10.

155. *See, e.g.*, IOWA CODE § 601A.6 (1983). *See also* CALIF. LAB. CODE §§ 1411-33 (West

lel the sex-discrimination provisions of Title VII.[156] Further, although the definition of "employer" in each jurisdiction's act is similar to the Title VII definition, the majority of the acts also cover employers with *fewer* than 15 employees.[157]

Although several jurisdictions exempt retirement, pension or other similar employee benefit plans from their act,[158] in many jurisdictions the administrative agency that is responsible for enforcing the jurisdiction's fair employment practices act has adopted all, or a portion of, the Equal Employment Opportunity Commission's (EEOC's) sex discrimination guidelines.[159] Most of these jurisdictions have adopted a regulation similar or identical to the EEOC's sex discrimination guidelines, which state, "[i]t shall be unlawful employment practice for an employer to have a pension or retirement plan which establishes different optional or compulsory retirement ages based on sex, or which differentiates in benefits on the basis of sex. . . ."[160] This guideline is merely an administrative interpretation of Title VII.[161] However, in light of the *Norris* decision, this guideline may take on added meaning. In sum, practitioners should be aware of the possible ramifications which *Norris* may have on such statewide fair employment practices.

3. *Requisite Employer Participation*

One issue raised, but left unresolved, by the *Norris* decision is the nature of employer involvement that is required to make the related benefit a "term, condition or privilege" of employment.[162] It is clear to the authors that this issue will prompt extensive litigation.

Employer participation in providing any given benefit to employees might range, for example, from offering a group health insurance policy with the employer paying the entire premium (clearly *Norris* would apply to this arrangement) to simply providing the master list of employees to a life in-

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1980 & Supp. 1983); FLA. STAT. ANN. § 23.167 (West Supp. 1983); ILL. ANN. STAT. ch. 68 § 2-102 (Smith-Hurd Supp. 1983-84); MICH. COMP. LAWS ANN. § 37.2202-11 (Supp. 1983).

156. *See* 42 U.S.C. § 2000e, 2000e-1 to -17 (1976 & Supp. I 1977, Supp. II 1978, Supp. III 1979, Supp. IV 1980, Supp. V 1981).

157. *See, e.g.*, IOWA CODE § 601A.2(6) (1983). *See also* CAL. GOV'T CODE § 12926(c) (West 1980); FLA. STAT. ANN. § 23.162(6) (West 1983 Supp.); ILL. ANN. STAT. ch. 68 § 2-101(B)(b) (Smith-Hurd Supp. 1983-84); MICH. COMP. LAWS ANN. § 37.2201 (Supp. 1983).

158. A typical example of this statutory exception states, "It shall not be an unlawful discriminatory practice for an employer to observe the conditions of a bona fide seniority system or a bona fide employee benefit system such as retirement, pension or insurance plan which is not a subterfuge to evade the purposes of this chapter. . . ." D.C. CODE ANN. § 1-2513(a) (Supp. 1983).

159. 29 C.F.R. § 1604 (1982).

160. *Id.*

161. 42 U.S.C. § 2000e (1976 & Supp. II 1978).

162. *See* Arizona Governing Committee v. Norris, 103 S. Ct. at 3499.

surance salesman (it is questionable whether *Norris* would apply to this arrangement). Although the *Norris* opinion does not provide a method for determining whether the degree of employer participation in a given instance will bring the provision of a benefit within the purview of Title VII and *Norris* liability, it appears that the judgment will be made utilizing a case by case, totality of the circumstances test.

With respect to plans connected to employment, the following factors may be either individually or collectively relevant in determining *Norris'* application: (1) whether payroll deduction facilities are provided by the employer; (2) whether the employer contributes to the cost of the plan (*i.e.* whether the plan has economic value to the employee); (3) whether the employer selects the insurer; (4) whether the employer makes literature about the coverage available to the employees; (5) whether in its literature the employer characterizes the coverage as a fringe benefit or other benefit of employment; (6) whether the affected employee has terminated employment; and (7) whether the employees initiated the request for the provision of the plan.

In brief, the application of the *Norris* holding to a particular benefit may be contingent on a wide range of interrelated facts.

III. Application of *Norris* to Employee Fringe Benefits

Having reviewed the scope and rationale of the *Norris* decision from a legal perspective, we would like to explore how we believe *Norris* should be applied prospectively to fringe benefit plans. We would first like to outline some of the current fringe benefits being offered in the employment context, noting those which may have discriminatory features in view of the *Norris* decision.

We will then explore a range of possible options for complying with the *Norris* decision and those options which are most likely to be used by those responsible for the administration of fringe benefit plans.

A. *Fringe Benefit Offerings*

Through its tax policy, the Congress has encouraged private employers to sponsor retirement plans for their employees. Most of these plans, which must be qualified under section 401(a) of the Internal Revenue Code to be eligible for the favorable tax treatment, offer a distribution in the form of an annuity which is payable monthly for as long as the employee lives.[163] For example, for non-governmental plans "qualified" under section 401, contributions made in a given year by an employer are deductible from the employer's income, but are not includible in the taxable income of the employ-

163. I.R.C. § 401(a) (CCH July, 1983).

ees until distributed as benefits.[164]

1. *Defined Benefit Plans*

a. *General.* In a defined benefit plan, the employer, through his plan document, promises to pay a specified benefit to the employee at retirement. This benefit at retirement is quite often based on the employee's salary and years of service. Although the employee cannot determine in advance the precise amount of retirement income, he or she is certain of the formula which will be used to determine the income.[165]

Since the promise of these plans is the income at retirement, it is not always necessary to have the employer's contributions segregated into individual accounts for each employee. The employer contribution is based on an actuarial valuation of how much money must be contributed over the working years of all of the employees in the plan in order to fund their promised benefits.[166] In determining the employer contribution necessary to fund the promised benefits, the actuary[167] takes into account the individual characteristics of the employees, including age, sex, salary, expected retirement age, etc., in advising the employer what his contribution must be in order to fund the promised benefits. Defined benefit plans provide for a "normal" retirement age and for a form of annuity in which the promised benefit will be paid, which is called the "normal form" of benefit.[168] If similarly situated men and women would both take their incomes in the normal form, they would receive equal benefits.

b. *Optional Benefits.* Defined benefit plans generally allow the employee to elect to begin receiving benefits at an age earlier or later than the normal retirement age and in a form of benefit that is different than the normal form. Plans subject to ERISA[169] are required to offer a joint-and-

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164. *Id.* §§ 402, 404.

165. A plan might provide that the annual pension will equal three percent of the sum of the employee's total earnings, or a percentage of the employee's final year's earnings multiplied by the number of years of employment.

166. The ultimate cost of a defined benefit plan is uncertain. This uncertainty in the past has been more acceptable to larger corporate employers. Smaller employers have traditionally turned to defined contribution plans for closer cost control. Recently, larger employers have considered changing from defined benefit plans to defined contribution plans for pension cost control. *See, e.g., Pension Plans Get More Flexible*, 2764 Bus. Wk. 82, 82, 87 (1982).

167. Internal Revenue Code section 6059 requires that an actuarial report prepared by an enrolled actuary for the plan be filed in the first year of the plan and in every year thereafter. I.R.C. § 6059 (CCH July, 1983). An "enrolled actuary" is defined by the Internal Revenue Code as "a person who is enrolled by the Joint Board for the Enrollment of Actuaries established under subtitle C of the Title III of the Employee Retirement Income Security Act of 1974." *Id.* § 7701(a)(35).

168. For example, the normal form of benefit may be a lifetime annuity, but the plan may offer other options, such as joint-and-survivor annuities, annuities for fixed periods of time and lifetime annuities with guaranteed periods (such as five or ten years).

169. Employee Retirement Income Security Act of 1974, Pub. L. 93-406, 88 Stat. 829

survivor pension that will continue until the deaths of the employee and spouse.[170] The benefit must be automatically paid on this basis in the absence of a contrary election by the employee.[171]

If an optional benefit is elected because the employee has chosen a different retirement age or form of annuity, these defined benefit plans provide for an adjustment in the amount of the retirement income. These adjustments are usually made on an actuarially equivalent basis.[172] The objective is to make the cost of the optional benefit approximately equal to the cost of the normal-form benefit at the normal retirement age. The actuarially equivalent adjustment is customarily based on the sex of the employee. Since women generally live longer than men, the adjustment to an optional form usually results in a lower optional-form benefit for women than for similarly situated men.

If one of the optional benefits is a lump-sum cash option, it is also customarily based on the sex of the employee. When this option is elected, women receive a larger amount of lump-sum cash than men receive, due to their greater longevity.

c. *Forms of Funding.* Defined benefit plans may be funded in a variety of investment vehicles. They may be funded through a trust that invests in different investment alternatives,[173] through a group annuity contract with an insurance company, through life insurance policies issued by an insurance company, or through some combination of these.[174] As we will discuss later, the probable impact of *Norris* will depend upon the type of funding vehicle utilized.[175]

2. *Defined Contribution Plans*

a. *General.* Defined contribution plans[176] specify in the plan document

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(1974) (codified as amended at 5 U.S.C. §§ 5108-09; 18 U.S.C. §§ 664, 1027, 1954; I.R.C. §§ 37, 46, 50A, 56, 62, 72, 101, 122, 219-20, 275, 401-15, 501 note, 503, 801, 805, 871, 877, 901, 1304, 1348, 1379, 2039, 3401, 4971-75, 6033, 6047, 6051, 6057-59, 6103-04, 6161, 6201, 6204, 6211-14, 6344, 6501, 6503, 6511-12, 6601, 6652-53, 6659, 6676-77, 6679, 6682, 6688, 6690, 6692-93, 6861-62, 7422, 7451, 7459, 7476, 7482, 7701, 7802; 29 U.S.C. §§ 441, 1001-03, 1021-31, 1051-61, 1081-86, 1101-14, 1131-44, 1201-04, 1221-22, 1231-32, 1241-42, 1301-09, 1321-23, 1341-48, 1361-68, 1381; 31 U.S.C. §§ 846, 1037; 42 U.S.C. § 1320b-1 (1976 & Supp. I 1977, Supp. II 1978, Supp. III 1979, Supp. IV 1980, Supp. V 1981)).

170. *See* I.R.C. § 401 (a)(11) (CCH July, 1983).

171. *Id.*

172. "Actuarially equivalent" means that the optional benefit has the same actuarial present value as the benefit based on the normal form. The actuarial present value is based on the age and sex of the participants, and of the beneficiary if a death benefit is involved.

173. For example, direct investment in common stocks, bank certificates of deposit, other fixed income securities, mutual funds, group annuity contracts, etc.

174. *See* 29 U.S.C. §§ 1081-86 (1976 & Supp. IV 1980).

175. *See infra* text accompanying notes 179-85.

176. Defined contribution plans could be money purchase plans, profit sharing plans, thrift or savings plans, etc.

the amount of the contribution to be made by the employer, rather than the level of benefits to be provided to the employee upon retirement. Since the employer's contribution for each individual employee is defined by the plan, it is necessary to maintain accounts for each employee.[177] It is very rare for a defined contribution plan to provide different contributions for similarly situated males and females.[178] At the time of retirement, a male and a female with identical service records and salary histories, and whose accounts have been invested in the same way, will have accumulated exactly the same amount in their accounts.

b. *Optional Benefits.* These defined contribution plans often provide for the payment of the accumulated account to the employee in a lump sum. They generally also provide for other forms of payment such as lifetime annuities or annuities for a fixed period. These annuities are provided through the purchase, by the trustee or employer, of an annuity from an insurance company. Since insurance companies use sex-distinct mortality tables, the lifetime annuities provide smaller periodic payments to women than to men for the same accumulated amount.

B. *Areas of Greatest Impact*

In a technical sense, the *Norris* decision only applies to deferred compensation plans of the type operated by the State of Arizona, *i.e.* salary reduction deferred compensation plans.[179] It would not be prudent, however, for a plan sponsor to only apply the principles enunciated in *Norris* to such salary reduction deferred compensation plans. The *Norris* decision clearly states that "classification of employees on the basis of sex is no more permissible at the pay-out stage of a *retirement plan* than at the pay-in stage."[180]

1. *Defined Benefit Plans*

As was noted earlier in this article, defined benefit plans generally operate on a unisex basis so long as the normal form of benefit is paid to participants.[181] However, if the plan offers optional forms of benefit, optional retirement ages or, in some plans funded on an individually allocated basis, ancillary benefits such as life insurance benefits, then these optional benefits will be affected by *Norris*. For example, assume that a defined benefit plan allows retirement to occur anytime between fifty-five and seventy, with a

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177. I.R.C. § 414(i) (CCH July, 1983).

178. Retirement plans may or may not be contributory and provide for employee contributions in addition to those of the employer. These employee contributions are generally the same for similarly situated males and females, unlike the plan in *Manhart*.

179. Arizona Governing Committee v. Norris, 103 S. Ct. at 3493.

180. *Id.* at 3497 (emphasis added).

181. *See supra* text accompanying notes 165-68.

normal retirement age of sixty-five, has a straight life annuity as the normal form of benefit and provides an option to receive a lump sum cash distribution. Both of these optional benefits (early retirement and the lump-sum benefit option) consider the sex of the participant in determining the amount of the distribution under the optional benefit. As a result of *Norris*, such a plan will have to equalize, or remove entirely from the plan, the factors used to adjust from age sixty-five to the age benefits actually commence, and the factors used to determine the amount of optional lump-sum cash. *Norris* requires this equalization for benefits accrued after August 1, 1983.[182] However, the plan sponsor must decide whether to keep the pre-*Norris* benefit accruals separate from the post-*Norris* accruals or to simply apply the principles in *Norris* to all benefits accrued to date. The splitting up of the accrued benefits before and after August 1, 1983 may be unnecessarily complex.

2. *Defined Contribution Plans*

Defined contribution plans are also greatly impacted. As was mentioned before, nearly all defined contribution plans offer optional forms of lifetime annuity income at retirement.[183] The lifetime annuities available from insurance companies have recognized the different life expectancies of males and females, and thus provided lower lifetime incomes for females.[184] The plan sponsor must either remove these sex-distinct lifetime annuity options or find a way to equalize the benefits available from these optional benefits.

3. *Life Insurance*

Some defined contribution plans also offer the option of using a portion of the employer contribution to buy life insurance.[185] The employee who uses a portion of his employer contribution in this way will have a pre-retirement death benefit of the face amount of the policy and is often entitled to receive some or all of the cash value of the policy in the event of his termination of employment or retirement. Such policies' premiums and/or cash values generally reflect the sex of the insured. The result may be different amounts of death benefit and/or different cash values for similarly situated males and females. For benefits derived from contributions made after August 1, 1983, the face amounts and cash values must be equalized.

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182. Arizona Governing Committee v. Norris, 103 S. Ct. at 3509-10 (Powell, J., concurring in part & dissenting in in part).

183. *See supra* text accompanying note 171.

184. Based on current annuity rates, males receive approximately eight percent more annuity income on a straight life basis than do females.

185. Under current IRS regulation, up to 50% of an employer's contribution could be used to purchase life insurance. *See* Rev. Rul. 57-213, 1957-1 I.R.B. 157.

C. *Possible (and Likely) Solutions*

1. *Defined Benefit Plans*

As we have implied before, the *Norris* decision will have little effect upon defined benefit plans so far as the normal form pension benefit is concerned.[186] The normal form already pays equal annuity incomes to similarly situated males and females. However, we construe *Norris* to require equalization of *all* optional benefits to avoid conflict with Title VII.[187]

Plan sponsors would have three solutions to the problem: (1) eliminate these optional forms of benefits, (2) adopt a "unisex" approach, or (3) equalize these optional benefits through the use of the more liberal optional factor.

Under the so-called "unisex" approach, these optional benefits would be equalized through an analysis of the sex composition of the group, and then establishing the optional factors based on the group's characteristics. There are several ways to implement the "unisex" approach. First, the employer could use factors based on the sex make-up of the employer group.[188] If an employer's work group was made up of sixty percent females, the employer would use the unisex factors that reflect a sixty percent female/forty percent male population. This percentage in the employee population, however, could change over time, and would require adjustments in the future. Second, the employer could use general population characteristics. For the majority of the working age population, slightly more than fifty percent are female. For ease in calculation, a fifty-fifty weighting between the male and female factors could be used. This should require little or no adjustment in the future. Lastly, the employer could base its factor on the actual male/female percentage that elect each option. For example, assume that an analysis of those electing a lump-sum annuity option shows that eighty percent of those electing the option are male. The lump sum benefit option could be based on an eighty percent male/twenty percent female factor. This would probably require periodic adjustments in the future.

It should be noted that the unisex factor approach would be required for accruals after August 1, 1983. However, splitting the accruals into pre- and post-August 1, 1983 accruals and using different factors for each may be unnecessarily complicated in view of the employer's cost.

If the employer chooses to equalize the optional benefits through the use of the more liberal option factor, he would use the factors which would

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186. *See supra* text accompanying notes 165-68.

187. Note that *Norris* does not prohibit an insurance company from using sex-distinct factors when setting defined benefit annuity incomes, nor does it prevent the actuary from doing the actuarial valuation on a a sex-distinct basis. *See* Arizona Governing Committee v. Norris, 103 S. Ct. at 3511 (O'Connor, J., concurring).

188. Justice O'Connor mentioned this method in her concurring opinion. *Id.* at 3512-13 n.4.

develop the highest benefit. For the early retirement and optional benefit forms, the female optional factors would be used. This would result in increased benefit amounts for males and the same benefit amounts for females. As with the unisex option, this approach could either be used for all accruals or only for those accruals occurring after August 1, 1983. This approach would result in greatly increased employer costs, but is not required by the *Norris* decision.[189]

The elimination of optional benefits would mean that much of the flexibility of the employer's retirement program would be lost. Also, the employer would not be able to provide a lifetime annuity for his employees, except as the normal form of annuity. It is not likely, therefore, that defined benefit sponsors will remove the early retirement and/or optional benefit forms from their benefit plans. Thus, the most likely solutions for defined benefit plans will be to either use blended[190] unisex factors or to use the most liberal factors. The decision as to which of these solutions will be adopted may depend on cost considerations for an employer. Using a blended set of unisex factors would keep the employer cost approximately level, while the use of the most liberal factors would increase the employer's cost.[191] The number of plan participants will also influence the decision of which solution will be selected. Larger plans will be more likely to use the blended unisex approach than smaller plans.[192]

2. *Defined Contribution Plans*

a. *Annuity Benefits.* Defined contribution plans that offer both lifetime annuities and lump-sum cash options have the three options similar to those enumerated above for defined benefit plans, for equalizing benefits.[193] First, the employer could eliminate the lifetime annuity option[194] and allow employees to take lump-sum cash. The employee could then purchase individual annuities in the marketplace. This would be an acceptable option, as it

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189. *See id.* at 3512. *See also id.* at 3504-05 n.1 (Powell, J., concurring in part & dissenting in part).

190. The blended rate could be determined using any of the methods mentioned previously. *See supra* pp. 938-39.

191. Note, however, that even the use of blended rates may result in employer cost increases. For example, assume a 50-50 male-female split in a plan which allows a lump sum cash option. Under the blended approach, lump sum cash options could be set halfway between male and female factors. Because of the anti-selection inherent with the lump sum option, it would be possible for males to take a lump-sum cash option and utilize a rollover IRA option to buy an annuity on a sex-distinct basis which would be greater than that available through the plan. Females could not be expected to utilize the lump sum option, as they would receive a greater benefit by choosing the plan's annuity option. The result would be an increase in the employer's cost.

192. *See supra* note 166.

193. *See supra* pp. 938-39.

194. *But see supra* p. 939.

would fall under the *Manhart* open-market exception.[195] Second, the employer could equalize annuity incomes for similarly situated males and females through the use of a blended unisex rate based on the group's characteristics, general population characteristics or actual usage characteristics.[196] Lastly, the employer could equalize annuity incomes through the use of the most conservative annuity purchase rates, *i.e.* the female-based annuity purchase rates.[197] The use of the most conservative rates may be necessary to avoid anti-selection by those choosing annuities.[198]

Although the State of Arizona has eliminated lifetime annuity options from its plan as a means for complying with the *Norris* decision,[199] we do not believe that large numbers of employers will adopt this solution. The second or third options will be the more likely solutions.

Trying to price unisex annuity purchase rates presents a difficult problem for insurance companies. To determine the blended unisex rate, the actuary must make an estimate of the proportions of males and females who will elect to take the annuity. This will be difficult to predict so long as other plan options (i.e., lump sum cash) allow the male employees to seek male-based purchase rates in the marketplace. It is impossible to predict at this time what the response of insurance companies will be. Some insurers may withdraw from this market altogether. Other companies may seek to provide annuities initially on a conservative basis with a "truing-up"[200] of annuity incomes based on the actual sex-composition of the group.

b. *Life Insurance Benefits.* The Internal Revenue Service allows an employee to use up to fifty percent of his account to purchase optional life insurance.[201] To accomplish this, the employer will apply the designated portion of his contribution to buy insurance. Although the amount used to buy life insurance may be the same for a similarly situated male and female, the face amount of insurance and/or the cash value will be different. We believe that this result is in violation of *Norris*. The employer will be required to equalize benefits from contributions made after August 1, 1983. This will mean that they will have to either eliminate the life insurance benefits altogether or find an insurance company that is marketing individual insurance with unisex premium rates and cash values.

c. *Section 412(i) Plans.* Section 412(i) plans are individually allocated products for funding defined benefit plans with characteristics defined by the Internal Revenue Code.[202] These products are considered fully insured

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195. Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. at 713 n.33.

196. *See supra* p. 938.

197. *See supra* pp. 938-39.

198. *See infra* p. 940.

199. Arizona Governing Committee v. Norris, 103 S. Ct. at 3506 (Powell, J., concurring in part & dissenting in part).

200. *I.e.*, later adjustment of the benefit amount to reflect actual experience.

201. *See* Rev. Rul. 57-213, 1957-1 I.R.B. 157.

202. I.R.C. § 412(i).

and are thus exempt from the ERISA funding standards.[203] If the product provides for pre-retirement death benefits, (such as retirement income policies), there is substantial conflict with *Norris*, since these products often have sex-distinct premiums, cash values and dividends.

It will be difficult to find solutions that will bring these plans into compliance with *Norris*. The Internal Revenue Code requires a level premium[204] to qualify for the funding standard account exclusion.[205] If these policies adjust the premium in order to comply with *Norris*, the level premium requirement[206] will not be met and the exclusion from the minimum funding requirement[207] may be lost. If the policies are put on paid-up[208] and new unisex policies are issued, a similar result might occur.[209] Assuming there is no relief granted by the IRS for plans adopting such solutions in order to comply with *Norris*, these plans may need to be funded in some other way.

D. *Application of Norris to Other Fringe Benefits*

The broad application of the *Norris* reasoning would seem to prohibit any employer-offered fringe benefit which provided a sex-based distinction in the benefit structure.[210] Many types of benefits will be impacted. *Norris* clearly applies to individual policy pension plans. These products are modeled after individual life insurance products. They charge different premiums for males and females and/or develop different cash values. The life insurance amounts and the cash values will have to be equalized for contributions after August 1, 1983 in order to comply with *Norris*. This may require a major revamping of this type of product.

Group life and health benefits will also be impacted by the Norris decision. Generally the sex mix of a group will affect the overall price, but rates are quoted on a sex-neutral basis. Benefits are not generally different by sex,

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203. *Id.* § 412(h)(2).

204. *Id.*

205. *Id.* § 412(i)(2).

206. *See id.* § 412(h)(2).

207. *See id.* § 412.

208. "Putting a policy on paid-up" refers to terminating the payment of the premiums and applying the cash value of the policy to buy a deferred annuity on a sex-distinct basis according to the rates guaranteed in the policy.

209. Since the premium rates for the new policy would be based on mortality assumptions, the rates will not be the same as before; thus, the premiums will not be level pre and post-Norris.

210. When *Norris* is read together with the *Newport News Shipbuilding* case, this conclusion is bolstered. Newport News Shipbuilding and Dry Dock Company v. EEOC, 103 S. Ct. 2622 (1983). In that case, the Court held that an employer's health insurance plan violated Title VII because it provided more extensive hospital benefits for pregnancy-related conditions to female employees than to wives of male employees. *Id.* at 2623, 2631-32. The Court stated, however, that Title VII does not protect the employees' wives, but that the discrimination against female spouses constituted discrimination against the male spouses when it occurs in the context of the provision of fringe benefits. *Id.* at 2631.

but by salary level or job classification.

Norris will also apply to employees' conversion rights to health benefits. The conversion right to a group health contract is required by a majority of state insurance laws.[211] They provide a terminating employee the right to purchase an individual health policy without evidence of insurability.[212] The premium for an individual conversion policy is often based on the sex of the terminating employee. Because the conversion occurs after the termination of employment, there is a technical argument that Title VII not apply. However, it may be prudent for an employer to consider altering its health insurance to ensure that this conversion right is offered on a sex-neutral basis.

It appears that unfunded deferred compensation plans could also be affected by the *Norris* decision, since these plans are sometimes funded through life insurance or annuity contracts. However, because the employee has no free-standing rights to the contract, *Norris* should not apply to these arrangements.

We believe that Internal Revenue Code section 79 and section 162 plans[213] will be subject to Title VII, and hence to the *Norris* conclusion. In addition, *Norris* will also apply to individual disability income policies sold to employer groups, group auto insurance, cafeteria plans, and split-dollar life insurance plans. Employer payroll deduction plans for individual life insurance will also need to be brought into compliance with the *Norris* decision. These plans may or may not involve a sex-differential in their rates, but due to the employer sponsorship, such plans will be affected by *Norris*.

In addition, section 415 limits will be affected by *Norris*.[214] The Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA) amended the Internal Revenue Code to require adjustment of the maximum benefit limits for retirement ages other than sixty-two to sixty-five and for normal forms other than straight life.[215] We believe that Norris will require such adjustments to be established on a unisex basis. The IRS has not yet issued regulations in this area.

IV. Other Considerations: Legislative Solutions

Justice O'Connor's concurring opinion emphasizes the judicially limited nature of the *Norris* decision: "our decision must ignore (and our holding has no necessary effect on) the larger issue of whether considerations of sex should be barred from all insurance plans, . . . an issue that congress is currently debating."[216] Congress has and is currently considering legislation

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211. *See supra* note 21.

212. *See id.*

213. I.R.C. §§ 79, 162 (CCH July, 1983).

214. *Id.* § 415.

215. *Id.*

216. Arizona Governing Committee v. Norris, 103 S. Ct. at 3511 (O'Connor, J., concurring).

which would prohibit sex-differentiation in both contributions (premiums) and benefits.[217] Speculation that the *Norris* decision will both enhance and diminish the likelihood of the passage of the legislation immediately followed the decision.[218]

In view of the facts that compliance with *Norris* can be accomplished, for example, by dropping the lifetime annuity option under a defined contribution plan,[219] and that purchase on the open market of such an option will continue to produce sex-distinct benefits,[220] the authors believe that *Norris* may provide both leverage and a possible rallying point for the legislation's proponents.

V. Conclusion

Norris has answered many of the questions that arose following the *Manhart* ruling. In fashioning the answer, however, the *Norris* decision will ultimately affect every employer fringe benefit program.

In this article, we have attempted to establish the reasoning of the Court, and to predict, to the extent possible, the effect that this decision will have on many employer provided benefits. Nonetheless, it will be many years before we will know with certainty the full impact of the *Norris* decision.

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217. *See* S. 372, 98th Cong., 1st Sess. (1983); H.R. 100, 98th Cong., 1st Sess. (1983).

218. *See, e.g., Justices' Ruling Awards Women Equal Pensions*, Wall St. J., July 7, 1983, at 18, col.2; *Employers Seen Facing Costly Changes in Wake of Retirement-Benefit Decision, July 7, 1983, at 2, col. 3.*

219. *See supra* p. 939.

220. Note that Title VII, and hence, *Norris*, "covers only discrimination in *employment*, and thus simply does not reach these other situations." Arizona Governing Committee v. Norris, 103 S. Ct. at 3511 (O'Connor, J., concurring).