NOTES

NORRIS v. ARIZONA: A MOVE TOWARD UNISEX INSURANCE

In the landmark case of City of Los Angeles v. Manhart, the Supreme Court held that a mandatory, employer-funded, defined benefit pension plan which used sex-linked actuarial tables to compute the periodic payments, thus obliging a woman to contribute more to obtain the same benefits as a man, violated title VII of the Civil Rights Act. Two years later, Nathalie Norris, an employee of the state of Arizona who had chosen to participate in an optional deferred compensation plan, filed a class action suit alleging that the state violated title VII by administering a plan that discriminates on the basis of sex. Thus, five years after its decision in Manhart, the Supreme Court was asked to review a deferred compensation plan (DCP) authorized by Arizona statute, to which employees could make optional contributions (but to which the state, as employer, contributed nothing). The employees’ contributions could be made to investment and annuity plans administered by a limited number of private companies selected by the state. Some of these plans offered future benefits tied to sex-linked actuarial tables (i.e., sex was the only factor used to distinguish individuals of the same age). The tables did not incorporate other factors which correlated with longevity. The United States Supreme Court affirmed the lower courts, holding that this reward plan violated title VII. The Court found that if it was discriminatory to oblige a woman to pay larger contributions to obtain benefits equal to a man’s, as held in Manhart, it was equally illegal to pay her lower benefits when she has

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2. 435 U.S. at 705, 98 S. Ct. at 1373-74 (The plan in question was a defined benefit plan where male and female employees received equal benefits upon retirement. The greater average cost of a female’s pension was compensated for by requiring female employees to make a larger contribution to the plan during pre-retirement years. Thus, females received less take-home pay than similarly situated males.).
5. The employee could select from three options: a single lump sum payment upon retirement, periodic payments of a fixed sum for a fixed period of time, or monthly annuity payments for the remainder of the employee’s life. An employee was to select the option upon registration with one of the employer-selected companies. Upon retirement, the employee was free to change options. Norris v. Arizona Governing Comm., 103 S. Ct. 3492, 3494 (1983).
made the same contributions as a man. The Court ordered the employer
to provide optional benefits to prospective retirees as if a sex-neutral ac-
tuarial table was used. The case was remanded to determine if retroactive
relief was appropriate. Norris v. Arizona Governing Committee, 103 S.
Ct. 3492 (1983).6

Leading to Manhart

Although much had been written on whether title VII barred
discriminatory employer-sponsored pensions programs, the Supreme Court
failed to directly address the issue prior to Manhart,7 and commentators
disagreed on how the issue should be resolved.8 The title VII cases decided
during the period of scholarly speculation mainly addressed discrimina-
tion in employer hiring practices.9 Manhart presented to the Court the
question of whether an employer-sponsored, compulsory, defined benefit
pension plan, which because of the use of sex-linked actuarial tables re-
quired female employees to make larger contributions to receive the same
benefits as male employees, violated title VII.11 Manhart differed from
earlier title VII "hiring practice" cases in that the disparate treatment
at issue was statistically justifiable.11 Since women generally live longer

6. Id. at 3502-04.
7. For other aspects of title VII litigation, see Comment, Sex Discrimination in Employ-
    ment: An Attempt to Interpret Title VII of the Civil Rights Act of 1964, 1968 Duke L.J.
    671; Comment, Developments in the Law, Employment Discrimination and Title VII of
    the Civil Rights Act of 1964, 84 Harv. L. Rev. 1109 (1971); Note, Norris v. Arizona Gover-
    ning Committee: Title VII's Applicability to Arizona's Deferred Compensation Plan, 24 Ariz.
    L. Rev. 1032 (1982).
8. See Bernstein & Williams, Title VII and the Problem of Sex Classifications in Pension
    Programs, 74 Colum. L. Rev. 1203, 1204 (1974) (noting that current pension practices
do not meet the mandate of title VII); Note, Sex Discrimination and Sex-Based Mortality
Tables, 53 B.U.L. Rev. 624 (1973) (urging that unisex tables should be used throughout
the industry). But see Benston, The Economics of Gender Discrimination in Employee Fringe
Benefits: Manhart Revisited, 49 U. Chi. L. Rev. 489 (1982) [hereinafter cited as Benston,
Manhart Revisited]; Benston, Discrimination and Economic Efficiency in Employee Fringe
Benefits: A Clarification of Issues and a Response to Professors Brilmayer, Laycock, and
    of Educ., 620 F.2d 362 (2d Cir. 1980) (relegation of female elementary school teachers to
lower grade levels violates title VII); Sprogis v. United Airlines, 444 F.2d 1194 (7th Cir.),
cert. denied, 404 U.S. 991 (1971) (no-marriage rule for stewardesses violates title VII); Iowa
Dep't of Social Servs. v. Iowa Merit Empl. Dep't, 261 N.W.2d 161 (Iowa 1977) (absent
a bona fide occupational qualification, women cannot be denied employment as a Correc-
tions Officer (grade II) merely because of more contact with inmates).
10. City of Los Angeles v. Manhart, 435 U.S. 702 (1978). See Bernstein & Williams,
supra note 8, at 1205 (noting that the employer's interest in keeping his contribution level
to the estimated longevity as determined by the sex-mix of his work force collides with
the strong public policy against per se classifications and against discrimination).
11. 435 U.S. at 707. But see Brilmayer, Hehiler, Laycock & Sullivan, Sex Discrimina-
tion in Employer-Sponsored Insurance Plans: A Legal and Demographic Analysis, 47 U.
than men, the benefits they receive upon retirement will continue for a longer period of time. Both parties to the litigation accepted the statistics supporting this fact as unquestionably correct. The question in Manhart was "whether the existence or nonexistence of 'discrimination' [for purposes of title VII] is to be determined by comparison of class characteristics or individual characteristics." The Court, when faced with the "unambiguous" language of title VII, held that the individual employee's characteristics, rather than those of a class of employees, must be at the core of any discrimination inquiry. From a policy standpoint, the Court noted that "[t]he basic policy of the statute requires that we focus on fairness to individuals rather than fairness to classes." The Court, however, did limit its holding that the employer had violated title VII. First, the Court stated that nothing in its holding prevented employers from setting aside equal contributions for each employee and letting each retiree purchase the largest benefit his accumulated contribution could bring on the open market. Second, the Court stated that while title VII only proscribes discriminatory criteria for the employer-employee relationship, an employer cannot avoid its title VII responsibility by delegating a discriminatory program to corporate shells or agents.

Norris: A Step Beyond

Manhart and its progeny caused an uneasiness among employers and the insurance industry. Employers were primarily concerned with assembling a plan that would survive title VII scrutiny, while the insurance industry was concerned with the possible extension of the Manhart rationale.

Chi. L. Rev. 505, 530-33, 540 (1980) (arguing that the longevity distinction between men and women is based on environmental and behavioral factors rather than sex) [hereinafter cited as Brilmayer, Sex Discrimination].

12. 435 U.S. at 707, 98 S. Ct. at 1374-75.
13. Id. at 708, 98 S. Ct. at 1375.
14. See supra note 3.
15. 435 U.S. at 708, 98 S. Ct. at 1375.
16. Id. at 709, 98 S. Ct. at 1375-76.
17. Id. at 717, 98 S. Ct. at 1380.
18. Id. at 718 n.33, 98 S. Ct. at 1380 n.33. Decisions rendered since Manhart have clarified its holding. An employer cannot contract with third parties to relieve itself of liability under title VII. Additionally, the Manhart rationale applies to defined contribution plans. Defined contribution plans, of which the plan at issue in Norris is representative, are those retirement plans in which the contributions made by comparable male and female employees are equal. The disparity appears in lower monthly benefits paid out to female retirees. See Equal Employment Opportunity Comm'n v. Colby College, 589 F.2d 1139 (1st Cir. 1978) (an employer's requiring participation in a plan using sex-linked tables violated title VII); Women in City Gov't United v. City of New York, 515 F. Supp. 295 (S.D.N.Y. 1981); Hannahs v. New York State Teachers Retirement Sys., 26 Empl. Prac. Dec. (CCH) no. 32,037 (S.D.N.Y. 1981) (compulsory plan administered by a public pension corporation fell within title VII); Spirt v. Teachers Ins. & Annuity Ass'n, 475 F. Supp. 1298 (S.D.N.Y. 1979), aff'd, 691 F.2d 1054 (2d Cir.), vacated, 103 S. Ct. 3565 (1983).
into their industry. The stage was set for Norris.

Unlike Manhart, Norris involved an optional deferred compensation plan\(^9\) (DCP) to which the employer contributed nothing. The employer (the state of Arizona) adopted the plan, made the selection of companies which would administer the plan, approved participation in the plan, and deducted the appropriate amount of employee contributions from participants' salaries. All of the selected companies used sex-linked actuarial tables to compute future annuity payment schedules. The Court found a violation of title VII in that females who chose the annuity option\(^2\) were paid lower monthly benefits than were men of the same age.\(^2\)

The Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans, in urging the inapplicability of title VII, attempted to distinguish Manhart from Norris by arguing that in Norris there was no employer involvement, a condition precedent to a title VII action.\(^2\) The Court found, however, that Manhart did not stand for this proposition, and held that even though the DCP was not employer operated, sufficient employer involvement existed to bring the DCP under title VII scrutiny.\(^2\) Second, the Governing Committee argued that unlike Manhart, the Arizona employees were not compelled to participate in the DCP.\(^2\) The district court had held that the determinative factor in finding a title VII violation is not the mandatory nature of the plan, but whether as a result of implementation there would be a discriminatory effect.\(^2\) This rationale has long been a guidepost for finding a title VII violation.\(^2\) The court of appeals affirmed, although on other grounds, and held that the retirement plan, although voluntary, was a "privilege"

19. Norris, 103 S. Ct. at 3494 (1983) (The plan is funded entirely by employee contributions. Employees who choose to participate in the plan may thereby postpone the receipt of a portion of their wages until retirement. By doing so, they postpone paying federal income tax.). See M. Cannan, Qualified Retirement Plans §§ 1-6, at 12-13 (1977).

20. See supra note 5.

21. 103 S. Ct. at 3492. For other lower court decisions raising similar issues, see Equal Employment Opportunity Comm’n v. Colby College, 589 F.2d 1139 (1st Cir. 1978) (equal mandatory pension contributions; smaller monthly payments to women); Sobel v. Yeshiva Univ., 477 F. Supp. 1161 (S.D.N.Y. 1979) (equal mandatory pension contributions; smaller monthly payments to women); Peters v. Wayne State Univ., 476 F. Supp. 1343 (E.D. Mich. 1979) (women contributing equally but receiving smaller monthly payments after retirement), rev’d, 691 F.2d 235 (6th Cir. 1982), vacated, 103 S. Ct. 3566 (1983); Henderson v. Oregon Bureau of Labor, 405 F. Supp. 1271 (D. Or. 1975) (equal mandatory retirement contribution; smaller monthly payments to women). These cases differ from Norris in that the pension contributions were mandatory, whereas in Norris participation in the DCP was optional.

22. 103 S. Ct. at 3499.

23. Id. at 3501.

24. Id. at 3499.


of employment and thus governed by title VII. Even though the facts of *Manhart* and *Norris* would have justified distinguishing the two cases, the Court refused to do so, noting that "neither the voluntariness of the plan nor the lack of employer involvement saved the plan from Title VII scrutiny." The *Norris* Court, by deciding that the DCP was governed by title VII, effectively expanded the proscriptions of title VII to cover every employer sponsored benefit plan using sex-linked actuarial tables and not merely those with active employer involvement.

After title VII was found applicable, the Governing Committee argued that the DCP was not discriminatory. First, the Governing Committee stressed that the *Norris* plan gave employees non-discriminatory options. The *Norris* Court followed prior jurisprudence on this point and held that the existence of other non-discriminatory options was inadequate because the plan did not offer equal benefits to women. Second, the Committee argued that the three-option DCP reflected the possible alternative payment schemes offered in the open market. Therefore, because the open market, and not the employer's actions, had the discriminatory effect, the DCP did not violate title VII according to *Manhart*.

The Court disagreed, thereby initiating a jurisprudential trend requiring employers to provide plans in which *all* options available to employees provide equal benefits to men and women. Third, the Committee argued that the DCP was non-discriminatory in that even though men and women were paid unequal benefits, when reduced to their "present value" equivalent, the actual benefits provided under the plan were equal. The Court rejected


29. Id. at 3492-3502.

30. Id. at 3500.

31. Id. One commentator has noted that other courts have faced the same issue. One case held that non-discriminatory options would not exempt other discriminatory portions from review. Another held that the mere existence of non-discriminatory options did not guarantee that a plan would meet constitutional standards. Note, supra note 7, at 1042 nn.94-95 (1982) (citing Shaw v. International Ass'n of Machinists & Aerospace Workers, 24 Fair Empl. Prac. Cas. (BNA) 995, 997 (C.D. Cal. 1980); Reilly v. Robertson, 360 N.W.2d 171, 177-78 (Ind.), cert. denied, 434 U.S. 825 (1977)).

32. 103 S. Ct. at 3501.

33. Id. at 3502. Title VII has never been construed to allow an employer to maintain a discriminatory practice merely because it reflects the market place or available options outside the employment context.

34. Id. at 3497 n.11. The circuitousness of this argument is readily apparent. Present
this argument and reiterated that an individual, not a class, gives rise to title VII scrutiny.

The Norris Court limited its holding, thereby easing some of the insurance industry’s fears, by expressly stating that the business of insurance was not at issue and that the opinion would “in no way preclude any insurance company from offering annuity benefits that are calculated on the basis of sex-segregated actuarial tables.” The Court noted that the application of title VII in this case did not supersede the application of any state law governing insurance. Thus, the McCarran-Ferguson Act, which was intended primarily to protect inter-industry cooperation in the underwriting of risks, was not violated by the application of title VII.

The Court declined to decide whether retroactive relief should be granted, thus side-stepping a determination of the significance, if any, to be accorded the distinction made in dicta between “pre-Manhart” contributions and “post-Manhart” contributions. The Court, in an attempt to aid the lower court on remand, did note that once a violation of a statute has been found, retroactive relief should be denied only for reasons which, if applied generally, would frustrate the central statutory purpose of eradicating discrimination.

Value tables consist of factors which are cross-indexed based on the number of years applicable and the appropriate interest rate. To achieve the equality of payments as argued, there must be an estimated value for the life expectancy. These estimates are based on sex-linked actuarial tables, the validity of which is at issue.

35. Id.
36. Id. at 3498-99.
37. 103 S. Ct. at 3500 n.17.
38. Id.
40. 103 S. Ct. at 3500 n.17.
41. Id. at 3502.
42. Id. at 3503 ("To the extent, however, that the disparity in benefits that the District Court required petitioners to eliminate is attributable to contributions made before Manhart, the court gave insufficient attention to this court's recognition in Manhart that until that decision the use of sex-based tables might reasonably have been assumed to be lawful."). But see 103 S. Ct. at 3512 (O'Connor, J., concurring) (arguing for prospective relief only, citing Chevron Oil Co. v. Hudson, 404 U.S. 97, 105-109 (1971)).
43. 103 S. Ct. at 3503 (stating that there is "no unfairness in requiring petitioners to pay retired female employees whatever sum is necessary each month to bring them up to the benefit level that they would have enjoyed had their post-Manhart contributions been treated in the same way as those of similarly situated male employees").
44. Id. at 3502 (citing Albemarle Paper Co. v. Moody, 422 U.S. 405, 421 (1975)).
Beyond Norris: A Speculation on Its Economic Ramifications

Although Norris is expressly limited to the employer-employee relationship, requiring employers to furnish benefit plans which have a sex-neutral effect towards employees, Norris and its predecessors, have given rise to speculation that eventually the underwriting of all types of insurance will be required to be based on sex-neutral tables. Therefore, it is necessary to examine the impact such tables would have and to speculate on the reaction of employers and employees to that impact.

Employers have no reason to create either mandatory or voluntary pension plans unless a large number of employees prefer fringe benefits to currently paid cash wages. If a significant number of employees desire employers to furnish some form of benefit plan, the employees must have reason to prefer the benefits to current wages. The Internal Revenue Code section 415 provides the most probable source of the benefit in that it provides that an employee may defer income taxation on larger amounts of his or her compensation if contributing to an employer-sponsored plan rather than to an individual retirement account (IRA). Due to economies of scale, employers are presumably more efficient purchasers of these plans than are employees, and this makes attracting employees cheaper for employers who use such plans in lieu of some wage-amount-equivalent (i.e., a sum greater than or equal to the cost of the plan). Because employers can reduce operating costs by providing benefit plans, they will do so. Thus, whether benefit plans will be available in the future is of particular importance to both employers and employees.

Employers generally will be faced with two possible choices in complying with title VII as interpreted by Norris. They could stop offering annuities or other related benefit plans for which the true economic costs are linked with life expectancies, and instead offer either lump sum payments upon retirement or fixed period payments (to the extent possible, employers would discontinue pre-existing plans). Alternatively, employers could adopt sex-neutral mortality tables in continuing their

45. Note, Challenges to Sex-Based Mortality Tables in Insurance and Pensions, 6 Women's Rights Law Reporter 59, 64 n.52 (1980).
46. The analysis of the decisions made by the affected parties is based on the author's understanding of general principals accepted in the field of economics. The author wishes especially to thank Professor James Bowers, whose many insights and helpful comments aided the author in formulating the economic analysis. The author, however, accepts full responsibility for any erroneous assertions. For a general discussion of the economic effect of the Norris decision see Benston, A Response, supra note 8.
47. 26 U.S.C. § 415(c)(2) (1982). The statute provides in part that employee contributions to a defined contribution plan may not exceed $30,000 or 25% of the participant's annual compensation.
48. Benston, Manhart Revisited, supra note 8, at 535-36; Benston, A Response, supra note 8, at 265, 274-75.
previous plans. Each choice, although similar in some respects, has different effects.

Should the employer decide to stop providing life expectancy type benefit plans, both male and female employees who consider such plans as a desirable wage substitute, particularly those employees whose tax deferred contributions to the plan were greater than those allowable under an IRA, will experience a reduction in total wages. Both male and female employees may, because of the reduced total wages, resign their positions, since they are presumably receiving just enough total benefits before the discontinuance of the benefit plan (wages plus extras) to prefer their present employment to some alternative employment or retirement. (The employees most likely to resign are those who are the most productive and thus are the highest paid.) For these employees, one of the most important benefits received is the ability to defer income taxation on larger portions of their already adequate salaries than would be possible under an IRA. If these employees find alternative tax shelters allowing them to achieve the same net tax effect as before the discontinuance of the plan, they would likely maintain their present employment. To the extent they could not, no realistically available increase in cash wages would adequately compensate them for the loss of tax benefits received from an employer sponsored plan. Thus, they would be led either to form or migrate to business organizations not covered by title VII. Unlike the most productive and highly paid employees, lower paid, less productive employees would be willing to accept increased cash wages, since the tax deferment ability provided by an employer-sponsored plan is not the most

49. The concept of maximizing utility (utility being defined as the ability of goods to satisfy wants or needs) is applicable here, and the employee's utility is not maximized to the extent that he is forced to accept something he prefers less.


51. Practically speaking, while a multitude of other tax shelter options are available, none can provide the same benefits as the DCP. The reason is apparent. Contributions to a DCP are in pre-tax dollars, whereas contributions to any other tax sheltered investment are in post tax dollars. For example, assume an employee has $10,000 per year to contribute to a tax sheltered investment, that his or her tax rate is 50%, and that the rate of return on any investment is 10%. If the employee invests in a DCP, he invests the $10,000 in year one and thereby earns $1,000. At the beginning of year two, $11,000 plus an additional $10,000 is rolled over. In other investments, the employee can only invest $5,000 (post-tax) in the first year and his return on investment is $250 (post-tax). In the second year, therefore, $5,250 plus an additional $5,000 is rolled over. At the end of an employee's work life the difference in the accumulated amounts is substantial.

52. For example, employees could opt for self-employment or a partnership organizational structure. In both of these structures there is no employer-employee relationship, so title VII arguably would not apply. For small businesses with a small work force, it may be desirable to make employees limited partners to avoid the applicability of title VII. This is because the statute effectively forces a small business with a workforce composed of a majority of men, and which desires to provide a sex-linked benefit plan, to pay the higher costs associated with the required use of sex-neutral actuarial tables.
important feature to them. Employers who discontinue life-expectancy linked benefits would, to the extent they are in a tight labor market or one which requires extensive job training, have to raise current wages of these less productive employees to equalize total benefits to those paid before the termination of the plan and thereby retain these employees. Thus it can be speculated that after Norris, if the employer cannot achieve an equivalency of benefits, its labor force will decrease, resulting in employers producing fewer goods and services and society presumably being worse off.

Employers could, in order to retain both groups of employees, offer alternative fringe benefits not tied to life expectancy. Such alternative plans are probably not as efficient wage paying devices for employers, nor do they provide employees with the same level of benefits as life long fringe benefits (otherwise more of them would be in use already). Should employers offer a lump sum distribution, the most productive, highly paid employees would be able to contribute at the same level as they did before the sex-linked plans were terminated. However, such employees would not receive the same tax treatment, thereby reducing the level of total benefits. The lower paid, less productive employees would experience similarly reduced benefits. Should such a plan be implemented, both groups of employees could be subject to the risk of interest fluctuation. To the extent that current annuity plans permit an employee to “lock in” the present annuity rate, abandoning such plans would expose employees to uncertainty due to inflation. If interest rates used to compute annuities drop drastically upon their retirement, the employees who receive lump sums

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53. The effect of Norris is to prohibit employers from capturing the benefits they receive due to economies of scale. Hypothetically, if an employer can provide a plan for $100 which is equivalent to a wage payment to employees of $150, but the employer chooses not to equalize benefits, Norris would require the payment of $150. The employer is thus forced to pay increased labor costs. Output will decrease as a result of the increased labor costs, resulting in lower profits to employers. Thus, employers will be forced to invest in robots and machinery instead of labor (based on the cost per dollar benefit), compounding the already existing unemployment problem. Employers operating in a labor market with a plentiful labor supply will experience increased costs because they will not be able to capture the increased production benefits and the associated reduced costs attributable to the experience and training provided by the employer because the employer’s work force will become extremely transient. See D. Fusfeld, supra note 50 at 169-70.

54. See D. Fusfeld, supra note 50, at 197-214.

55. Even though lump sum distributions allow employees to make the same level of contributions, see supra note 47, the reduction of total benefits arises from the fact that upon retirement and the distribution of the lump sum, the employee must pay taxes on the entire amount. This should be contrasted with an annuity where tax payments are spread over the years of distribution.

56. Although the tax effect of a lump sum distribution is the same for higher-paid employees as it is for the lower-paid ones, the impact on the lower-paid employees is presumably more acute since these employees probably will not have the ready resources to pay the taxes.
would not be able to purchase an adequate annuity. Along with the described interest fluctuation risk, if the employer modifies the lump sum distribution by providing a plan which pays out contributions over a fixed term, the employee bears the risk of his or her longevity (the employee gambles that the payout term will equal his or her lifetime). Thus, if employers use alternative devices rather than annuities, they will experience increased labor costs which presumably would be transferred to consumers in the form of higher prices.

Alternatively, employers could pay the required "topping up" costs to women employees in order to keep the plan. Depending on the composition of the plan, different results will occur. If the plan includes life insurance, women would subsidize men. As to plans which offer medical and disability plans, and/or life annuities, men would subsidize women.

But as to these two subsidies,

it should be specified that the two problems [the subsidies by women and men for life insurance and life annuities, respectively] do not "off-set" each other. In the first place, the amount of life insurance written on the lives of women is considerably smaller than that written on the lives of men. In the second place, though there is considerable overlap, the individual persons who may be harmed or benefited in the case of life insurance are very different from those who may be harmed or benefited in the case of pensions and annuities.

If the plan offers annuities, employers, by providing optional benefits to prospective retirees as though sex-neutral actuarial tables were used, may comply with title VII, but in so doing they concentrate the effects of the resultant benefit reductions on their male employees. Men would receive less total benefits, and women would receive more total benefits, resulting in women becoming more costly to employ. The Court, by its decision in Norris, effectively prohibits employers from paying women salaries based
on their actual productivity. Since Norris creates a subsidy for women, it results in artificially high wages for women. To the extent that the individual woman’s productivity does not exceed the automatic increase in wages associated with the Court-mandated subsidy, she would probably be fired. 62 Even more probable is that employers will increase discriminatory hiring practices by employing fewer women, since for each woman employee the employer will experience increased costs. 63 The Court effectively imposes an employment barrier for women who are either unskilled or marginally productive because their total wages, as a result of Norris, now exceed their productivity. Employers could attempt to circumvent the effect of such benefit reductions to their male employees by offering some supplemental fringe benefits which, although not facially discriminatory, are likely to appeal more strongly to male employees. 64

Because of the alternating benefits to the sexes, the effect of Norris will be to change the retirement option selection made by employees. For women, single life annuities which provide for periodic payments to retirees for the remainder of their lives will become more attractive, 65 since they will receive benefits equal to those of men but for a longer period of time. For men, lump sum payment upon retirement, early retirement, and joint and survivor options will become more attractive. 66 These changes in option selection constitute adverse selection which will increase the cost of administering the plan. 67

An illustration of the impact of the Norris decision is helpful. On June 18, 1982, the County Counsel for Orange County, California issued Opinion 82-S35 advising all school and community college districts that the Ninth Circuit’s decision in Norris required them immediately to cease approving any employee fringe benefit utilizing sex-linked actuarial tables. 68 The opinion concluded that the law is abundantly clear and

62. Benston, Manhart Revisited, supra note 8, at 532-33.
64. For example, employers could offer such benefits as fishing or hunting trips. They could also offer a sex-linked “joint and survivor benefit” option. Using this device male employees can extend the payments past their lives and thus have them tied to the lives of their spouses which are statistically longer than their own (assuming that the husbands and wives are of the same age). This in effect discriminates against single males, a situation not covered by Title VII.
65. See Rankin, supra note 63, at 14.
66. Id.
67. Id. Adverse selection describes the situation in which those persons allowed to participate in the risk-sharing pool are those persons who create the greatest and most probable risk of loss to the members of the pool. It increases the cost of insurance by reducing the level of uncertainty surrounding a particular individual’s claim in that the risk insured against is more likely to occur for such persons.
requires all employers to either terminate any presently existing deferred compensation plans, group life insurance or tax sheltered annuity contracts based on sex differentiated actuarial tables or to continue them only on the condition that the employer or the contractor [private insurer] pay equal benefits to all employees, regardless of sex.69

In fact, the opinion "places insurers in the difficult position of having either to terminate existing tax sheltered annuities purchased by school teachers in Orange County, violate California Insurance Code section 790.03(f), or indemnify the school districts for any liability they incur for increased annuity benefits for female school teachers."70

Prompted to some extent by the expected decision in Norris, the 98th Congress of the United States has proposed the adoption of the "Non-discrimination in Insurance Act"71 which would require the use of the sex-neutral tables in all types of insurance72—thus unquestionably extending Norris into the private sector of insurance. "[T]he primary impact of unisex [sex-neutral] tables would fall on defined-contribution plans, which provide basic retirement coverage for about ten percent of American workers and supplemental coverage for another twenty-nine percent."73 Sex-neutral tables would have no impact on lump sum distributions and little impact on defined benefit plans which cover about ninety percent of American workers.74 But underscoring these specific areas of impact are the estimated costs associated with passage of the Act. These costs can be divided into two areas — "unfunded liabilities"75 and administrative costs.76 The Act would create unfunded liabilities because it requires the

69. Id. at 3a.
70. Brief Amicus Curiae in Support of Petition for Writ of Certiorari on Behalf of American Council of Life Insurance at 15, Norris (No. 82-52).
71. H.R. 100, 98th Cong., 1st Sess. (1983); S. 372, 98th Cong., 1st Sess. (1983) (S. 372 entitled the "Fair Insurance Practices Act" is identical to H.R. 100, and the two bills will be collectively referred to hereinafter as the "Act").
72. Section 4(a) of H.R. 100 states:
   It shall be unlawful discriminatory action for any insurer, because of . . . sex . . . to do any of the following with respect to any person . . .
   (2) to treat such applicant or insured differently than the insurer treats or would treat any other applicant or insured with respect to the terms, conditions, rates benefits, or requirements of such insurance contract. H.R. 100, 98th Cong., 1st Sess. §4(a) (1983).
73. See Rankin, supra note 63, at 4, col. 3.
74. See Rankin, supra note 63, at 4, col. 4.
75. Thompson, Statement of the Chief Economist Before the Subcommittee on Labor, Senate Committee on Labor and Human Resources on Economic Implications of Unisex Pensions, A.C.L.I. News Bulletin at 4 n.2 (October 4, 1983) ("We use the term 'unfunded liabilities' . . . to refer to the increase in liabilities for an insurance company which must be 'funded' by an increase in the [insurance] company's reserves.").
76. Id.
equalization of benefits by raising payments to the gender receiving lower benefits, rather than reducing payments to a level equivalent to that of the gender receiving lower benefits. The average level of payments to those insured would rise, at least on contracts written before the adoption of the Act, without necessarily being accompanied by a corresponding increase in revenue.\textsuperscript{77} It is estimated that in the area of pension plans, liabilities of 7.7 to 11.0 billion dollars will be experienced, of which 2.9 to 3.6 billion dollars would be borne by state and local governments, 4.0 to 6.4 billion dollars by private employees, and .8 to 1.0 billion dollars by insurance companies.\textsuperscript{78} The benefits received can be summarized as follows: "[t]he initial increase in pension benefits will be enjoyed by both men and women. Women would experience benefit increases from defined-contribution plans while men will experience benefit increases from defined-benefit plans."\textsuperscript{79} Similar trade-offs in benefits exist in other areas of insurance where the difference in either premiums paid or proceeds disbursed is tied to sex-linked tables. For example, the Act would require the same automobile insurance rate for men as for women who are similarly situated.\textsuperscript{80}

The Act would also entail substantial increases in administrative costs. These costs are estimated to be about 200 million dollars, some of which will have already been incurred implementing Norris.\textsuperscript{81} Insurers would be forced to use variables correlating with longevity other than sex to obtain the same distinctions provided by sex-linked tables. Obviously, since insurers failed to use these variables earlier, they must have felt that sex was an efficient predictor of longevity and that the costs associated with using other variables were not worth the marginal increase in benefits to be gained by differentiating further.\textsuperscript{82} The required use of other variables would increase the level of moral hazard in the underwriting of these plans.\textsuperscript{83} These two factors alone account for the majority of the administrative costs.

\textsuperscript{77} See supra note 75.
\textsuperscript{78} See Thompson, supra note 75, at 7. For other data on expected costs associated with the implementation of the proposed legislation or an application of the Norris decision across the board, see Ryan & Burkley, Nondiscrimination in Pension Plans, 34 Lab. L.J. 201, 206-07 (1983) ("First, the short-term pension costs of H.R. 100 [S. 372] could be substantial, upwards to $1.7 billion annually if employers are required to top up total payments for all retirees, as we understand the bill to require."); Norris, 103 S. Ct. at 3504 n.1.
\textsuperscript{79} See Thompson, supra note 75, at 10.
\textsuperscript{80} See Rankin, supra note 63, at 4, col.3 ("[T]he biggest impact would fall on automobile insurance, where women have historically benefited from lower rates. Unisex tables would mean that women would pay $700 million more for such coverage while men would pay $700 million less, according to the [American Academy of Actuaries].").
\textsuperscript{81} See Thompson, supra note 75, at 14.
\textsuperscript{82} Benston, A Response supra note 8. But see Brilmayer, Sex Discrimination, supra note 11 (advocating the proposition that sex is not an adequate or an efficient predictor of longevity).
\textsuperscript{83} "Moral hazard" is the ability of the insured to bring about the event that is being
Although beyond the scope of this paper, the insurance industry may have some defenses to the proposed Nondiscrimination in Insurance Act. The Act, when applied to states, could run afoul of the McCarran Act, and if the Act were to be applied to pre-existing contracts, serious doubt would arise as to the constitutionality of the bill.

If the proposed legislation is adopted, insurers may no longer use gender to distinguish between men and women. Instead, insurers will be forced to use other factors which differentiate to the same extent as sex. Employers and employees will face difficult choices, and the choices they make in response to Norris will have widespread effects throughout the labor market. It appears that the increased costs associated with compliance with either Norris (employer-employees) or the Act (insurers) do not exceed the benefits derived from the use of sex-linked tables. It is recommended that Congress reevaluate the “individual” standard prescribed by title VII in light of the foregoing discussion and other scholarly works, primarily focusing their attentions on a cost-benefit analysis. It must be remembered that while differences inevitably cause discrimination, not all discrimination needs to be legislatively prevented.

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insured against. Unlike other characteristics that might influence the risk against which an individual seeks to insure, an individual's sex is readily verifiable and not easily changed. Thus the insured, when longevity is based on gender, does not have the ability to extend the occurrence of the insured event in order to prolong the receipt of benefits. Benston, Manhart Revisited, at 519.


86. See Benston, Manhart Revisited, at 510, 519. The court in Norris seemed to imply that if other mortality-related factors besides sex had been used (even if sex was part of the distinguishing factors), the DCP would not have violated title VII. 103 S. Ct. at 3503-04. But see supra note 83.