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U. S. DEPARTMENT OF LABOR
Wage and Hour and Public Contracts Divisions
Washington, D. C. 20210

OWES

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Age Discrimination in Employment Act

ADEA 304.1
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[redacted]

This is in further reference to your letters of December 31, 1968 and August 20, 1969, concerning the application of the Age Discrimination in Employment Act of 1967 to pension and retirement programs. I regret the delay in responding to your questions.

Section 4(f)(2) of the Age Discrimination in Employment Act provides that it shall not be unlawful for an employer, employment agency, or labor organization to observe the terms of " . . . any bona fide employee benefit plan such as a retirement, pension or insurance plan, which is not a subterfuge to evade the purposes of this Act, except that no such employee benefit plan shall excuse the failure to hire any individual . . . ." Thus, an employer is not required to provide older workers who are otherwise protected by the Act with the same pension, retirement or insurance benefits as are provided to younger workers, so long as any differential between them is in accordance with the terms of a bona fide benefit plan.

The Senate and House Committee Reports, employing similar language, state: "It is important to note that /the exception/ applies to new and existing employee benefit plans, and to both the establishment and maintenance of such plans. This exception serves to emphasize the primary purpose of the bill -- hiring of older workers -- by permitting employment without necessarily including such workers in employee benefit plans . . . ." (House Report No. 805, October 23, 1967, Senate Report No. 723, November 4, 1967.)

The guidance contained in these Committee Reports, and in related statements made during the course of the legislative history, indicates that it was the intent of the Congress to subordinate the importance of adequate pension benefits for older workers in favor of the employment of such workers, without necessarily making equal treatment under pension plans a condition of that employment.

Nevertheless, the Congress itself implicitly recognized, by the inclusion of section 5 of the Act, that exclusion from pension or retirement programs poses difficult problems in dealing with the employment of older

workers. This section directs the Secretary of Labor "to undertake an appropriate study of institutional and other arrangements giving rise to involuntary retirement, and report his findings and any appropriate legislative recommendations to the President and to the Congress." Thus, there is clear indication that the Congress may well re-examine the continuance of the exception contained in section 4(f)(2), since any comprehensive study under section 5 necessarily entails an examination of the general operation of pension plans. The experience accumulated on this issue would certainly be one of the matters likely to be considered by the Congress in such a re-examination.

In light of the above, therefore, it is the general position of the Department of Labor that we are not at this time prepared to conclude that the exclusion of a newly-hired individual from a bona fide employee benefit plan is a violation of the statute, where the terms and provisions of the Age Discrimination in Employment Act otherwise apply. Similarly, we are not at this time prepared to conclude that an employer will violate the statute if an excluded employee is not provided with other compensatory benefits in lieu of those provided in the pension or retirement plan involved.

For further discussion on questions concerning the application of the Act to benefit plans, see Interpretative Bulletin, Part 860, section 860.120, a copy of which is enclosed.

Sincerely,

/s/ Robert D. Moran

Administrator