ADEA 208
"PD" ADEA 304

U.S. DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION
WASHINGTON, D.C. 20210

29 April 1974

This is in reply to your letter of January 18, 1974, with enclosure, in which you request an opinion as to the application of the Age Discrimination in Employment Act to the proposed Profit-Sharing Thrift Plan of . You ask specifically whether the eligibility limitation to individuals who have not attained the age of 60, as provided in Article II, Section 10(b), would fall within the exception contained in section 4(f)(2) of the Act. We regret the delay in responding to your inquiry.

The Age Discrimination in Employment Act protects individuals who are at least 40 but less than 65 years old from age discrimination in most phases of employment. Section 4(f)(2) of the Act provides that it shall not be unlawful for an employer to observe the terms of "any bona fide employee benefit plan such as a retirement, pension, or insurance plan . . . ." Thus, not all employee benefit plans but only those similar to the kind enumerated come within this provision, and it would not seem that a profit-sharing plan as such would be within its terms. While Interpretative Bulletin, Part 860, section 860.120(b), (copy enclosed) recognizes that plans financed from profits may qualify as retirement plans under section 4(f)(2), your client's plan would not qualify as such because of its mandatory employee contribution requirements.

In determining whether particular plans fall within the section 4(f)(2) exception, attention must also be given to its legislative history. This history shows that the exception was enacted because of Congressional concern that the costs of retirement, pension or insurance plans would become prohibitive if employers could not continue to observe their terms and conditions as established in accordance with sound actuarial formulas. Thus, the purpose of section 4(f)(2) was to protect existing retirement, pension and insurance plans and to enable employers to hire older workers without jeopardizing the continued maintenance and operation of such plans.

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Nothing in this history would justify extending the section 4(f)(2) exception to the combination profit-sharing and thrift plan here involved since its costs are not geared in any way to the age of participating employees. Thus, unlike a true retirement plan where contributions depend upon amounts which are actuarially necessary to provide stipulated retirement benefits to participants, contributions here depend upon the amount of the company's profits, if any, and the payroll deductions authorized by participants which must be not less than three percent of their annual earnings.

Therefore, since the plan defines an "eligible employee" as one who is between 25 and 60 years of age, and since Article VII of the plan could be read as requiring compulsory retirement for 60-year olds who have at least 15 years of continuous service (unless the company, in its discretion, decides that such employees may continue in its employ), it is our opinion that the plan, if adopted, would violate the Age Discrimination in Employment Act.

Sincerely,

/s/ Warren D. Landis
Warren D. Landis
Acting Administrator
Wage and Hour Division

Enclosure