

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



October 10, 1974

This is in reply to your letter of August 26, 1974, concerning the status of your earlier inquiry about the application of the Age Discrimination in Employment Act to a proposed revision in a client's pension plan. We regret the delay in responding to your correspondence and apologize for our inadvertence in not acknowledging your letter sooner.

It appears that your client currently has a retirement Pension Plan for all company employees who have satisfied each of four eligibility requirements:

1. An employee must fully retire from the company's employment;
2. An employee must be at least 60 years of age at the time of retirement and his employment by the company must be continuing to the time of retirement;
3. An employee must have been in the company's employment for at least 20 years at the time of retirement; and
4. No employee whose employment is terminated for cause (such as dishonesty, drunkenness on duty or other serious offense) shall be eligible for any pension.

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You indicate that this plan was put into effect and approved by the Internal Revenue Service prior to the passage of the Age Discrimination in Employment Act.

Your client intends to revise the eligibility requirements of the Pension Plan as follows:

1. An employee must fully retire from the company's employment;
2. An employee's employment by the company must be continuing to the time of retirement; or, an employee must have been in the company's employ for at least 25 years at the time of retirement;
3. No employee whose employment is terminated for serious cause (such as dishonesty, drunkenness on duty or other serious offense) shall be eligible for any pension;
4. Any employee who has satisfied all of the above requirements may, at the discretion of the company, be involuntarily retired. The decision concerning involuntary retirement will not be made on the basis of an employee's age, sex, race, color, creed or national origin.

You state that the purpose of the proposed revision is not to discriminate against an employee on the basis of age or any of the other enumerated factors. You state further that it is designed to involuntarily retire those employees who have ceased to meet the company's employment standards (a combination of attitude, production standards, punctuality, etc.).

There is nothing in the Act which would prohibit an employer from terminating any individual in the 40-65 age bracket where age has not been a factor in the decision to terminate. In this regard, it should be noted that the Act specifically provides an exception from its prohibitions in section 4(f)(1) where a ". . . differentiation is based on reasonable factors other than age;". Thus, where evaluation factors such as quantity or quality of production can be shown to have a valid relationship to job requirements and where the criteria or personnel policy establishing such factors are applied uniformly to all employees, regardless of age, this exception may apply. (See Interpretative Bulletin, Part 860, section 860.103(f)(2).)

The Act also contains an exception in section 4(f)(2) which 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, 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 . . ." As a general rule we have reservations about the bona fides of a plan that does not by its provisions

spell out its conditions and limitations and instead is governed by an undefined policy entirely within the discretion of the employer outside the plan. It has been our experience that the operation of a plan in practice is of equal significance as the explicit terms of the plan in determining an employer's compliance status. We would therefore be reluctant to conclude that the involuntary termination of a participant in a plan such as has been proposed would, without more, be within the scope of this exception.

It should also be pointed out that the vesting provisions of the recently enacted pension reform legislation prohibit the forfeiture of vested benefits under circumstances such as have been described in your correspondence, but the provisions do not become effective until January 1, 1976. The Atlanta, Georgia, office of the Department's Labor-Management Services Administration may be able to give you further information on the effect of this legislation on your client's plan. That office is located at 1371 Peachtree Street, N.E., Atlanta, Georgia 30309.

Sincerely,

/s/ Betty Southard Murphy

Betty Southard Murphy
Administrator
Wage and Hour Division

Enclosures