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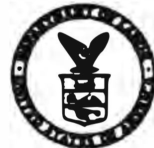
U.S. DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION
Wage and Hour Division
WASHINGTON, D.C. 20210



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In his letter dated December 31, 1968, [redacted] inquired whether employees who were hired while in the 40 to 65 year old age group protected by the Age Discrimination in Employment Act could be lawfully excluded from participation in their employer's pension or retirement plan. If so, [redacted] further asked whether the employer would nonetheless be required to pay other, equivalent cash benefits to excluded employees in lieu of the benefits provided for in the pension plan.

In our response dated February 9, 1970, we stated that at that time we were not prepared to conclude that the exclusion of newly hired older employees from pension or retirement plans would violate the Act. Nor were we prepared to conclude at that time that the employer's failure to pay other, equivalent cash benefits in lieu of pension benefits would violate the Act.

Since that time we have taken positions with respect to many specific plans and it is the purpose of this letter to set forth in one document a current and more detailed response to [redacted] original questions. The pertinent statutory language is set forth in Section 4(f)(2) of the Act (29 U.S.C. 623(f)(2)), which provides in pertinent part that:

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4(f) It shall not be unlawful for an employer, employment agency, or labor organization --

* * * *

> (2) 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 is apparent from this language, an employer must demonstrate that the exclusion of any employees protected by the Act from an employer's pension or retirement plan is not a subterfuge to evade the purposes of the Act. In other words, the exclusion must be clearly based on nonage factors.

Thus, where a pension plan provides for a defined benefit, such as a flat dollar amount per month after retirement or an amount determined by a formula based on salary and years of service, Section 4(f)(2) may justify the exclusion of an older worker hired when he or she is less than five years from the plan's stated "normal retirement age". 1/ The employer, in our view, would be able in such a case to demonstrate that the plan provision authorizing the exclusion is not a subterfuge to evade the purposes of the Act, since the substantial cost of funding a specific level of benefits in a relatively short period of time would be the reason for the exclusion. In other words, the employer could prove that cost, rather than age, explains the otherwise discriminatory practice. Under these circumstances, we would not assert any violation, provided that the other tests of the exception were met.

1/ Normal retirement age is the age at which an employee has the option of retiring without suffering an actuarial reduction in retirement benefits.

This assumption of legality would not apply to a provision which excluded employees from a defined benefit plan who were hired when they were more than five years from normal retirement age and, in those cases, the employer, in order to qualify for the exception, would have to demonstrate that the longer exclusionary period was based on substantial cost considerations.

Similarly, where a retirement plan is funded by defined contributions, as in a money purchase or deferred profit-sharing plan, the age of an employee when hired makes no difference in the employer's contributions. In a defined contribution plan, the employer does not have to fund for a specific level of benefits, and the benefit received by an employee at retirement equals only the value of the contributions made on his behalf. Thus, neither actuarial considerations nor age affect the level of an employer's contributions. Accordingly, we would consider the exclusion of a newly hired older worker from a defined contribution plan to be a violation of the ADEA that is not excused under Section 4(f)(2).

In answer to your second question, we have concluded, after a careful reexamination of the matter, that where an employer excludes a newly hired older worker from a retirement plan, and that exclusion meets the terms of Section 4(f)(2) as set out above, the Act does not require that the excluded employee receive other payments in lieu of the employer's contributions to the benefit plan. In our judgment, it would be inconsistent with the purposes of Section 4(f)(2) to require that an employer, who is excused from making pension contributions on the employee's behalf, to nevertheless make those payments in cash, particularly where the purpose of pension plans is to provide deferred, rather than present compensation. The Section 4(f)(2) exception was intended to protect the older worker's opportunities for employment, and so long as the primary objective of employment is met, no other compensatory payments are required by the Act, where the employer proves entitlement to the exception. There may, of course, be other types of employee benefit plans (other than pension or retirement plans) where an equivalent cash value would be required.

This letter supplements and replaces our previous letter of February 9, 1970.

Sincerely,

/s/ Warren D. Landis

Acting Administrator

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