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"PD"

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



JL 1 1977  
JULY 1, 1977

This is in further reply to your letter requesting an opinion on the application of the Age Discrimination in Employment Act (ADEA) to an employer's practice of excusing employees above a specified age from comparatively undesirable work assignments. These work assignments, such as evening shifts and holidays, are filled first on a volunteer basis. If there are not enough volunteers, the remaining employees are required to take turns filling these vacancies. However, employees above a certain age, generally 55 but in some cases 50, are excused from compulsory rotation into these assignments. Consequently, such vacancies are filled primarily by younger employees, including some employees 40 and older.

You believe that such scheduling practices which favor older workers are consistent with the Act's stated purpose as well as its legislative history. It would, of course, be illegal to deny older employees the opportunity to work on evening shifts or holidays where their age is a factor in the decision. Here, however, such work is initially staffed by volunteers, and the older employees are thus initially free to do the undesirable work assignments if they wish. The question is whether the employer can validly exclude them from compulsory weekend or holiday work.

We think that under the situation described above, an employer can exclude them. Although Section 4(a) of the Act prohibits employment practices which discriminate against the older worker in his compensation, terms, conditions or privileges of employment, not every distinction based on age is unlawful under the Act. The purpose of the ADEA is to protect the older worker from employment practices which discriminate against him in favor of younger workers. There are no such practices suggested in the situation you describe. On the contrary, the initial scheduling on a volunteer basis assures that all employees, regardless of age, have the same opportunity to perform evening and holiday work. Under these circumstances, we see no violation of the ADEA.

The position which you have taken and which we agree with is, you believe, apparently at variance with the Department's Interpretative Bulletin in 29 CFR 860.91(a), as well as with several opinion letters issued by the Wage and Hour Administrator. You will be interested to know that the May 1, 1970, opinion letter you refer to has been revoked and that section 860.91(a) of the Interpretative Bulletin will be amended accordingly. Enclosed are copies of the June 25, 1976, and August 26, 1976, opinion letters which revoke that opinion.

The two other opinion letters mentioned in your correspondence -- dated August 7, 1968, and January 7, 1969, -- pertain to the issue of discrimination within the protected age group in connection with hiring, a matter which is not at issue in the situation described in your letter. I might add, however, that these letters are being reconsidered in connection with the revision of section 860.91(a).

We trust this information will be helpful to you and we apologize for any inconvenience you may have experienced due to our delay in responding.

Sincerely,

/s/ Warren D. Landis

Acting Administrator

Enclosures