

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

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This is in reply to your inquiry requesting an opinion on the application of the Age Discrimination in Employment Act (ADEA). We apologize for any inconvenience you may have experienced due to our delay in responding.

Firstly, you inquire as to the legality of Section 1190 of the Borough Code of the Commonwealth of [REDACTED] with respect to the prescribed manner for reducing the number of police for economic reasons. Essentially, the Code provides for the reduction of the police or fire force initially through the selection of employees eligible for retirement, beginning with the oldest first and following in order of age respectively. The Code also provides that if sufficient reductions cannot be achieved in this way, then employees shall be furloughed on the basis of their seniority, with the last employee appointed to be laid off first.

Secondly, you inquire as to the legality of ordinances passed by municipalities which establish a lower mandated retirement age for police than for other employees in the same municipality.

The Wage and Hour Division of the Department of Labor enforces the ADEA, which protects, among others, most State and local government employees who are at least 40 but less than 65 years of age from discrimination on the basis of age in most phases of employment. Effective May 1, 1974, coverage under this law was extended by the Fair Labor Standards Amendments of 1974 to most State and local government employment. Enclosed for your information are a copy of the statute and an information pamphlet.

Generally, the Act prohibits covered employers from basing employment decisions which may adversely affect individuals in the 40-65 age bracket on the factor of age. There are, however, a number of exceptions from the prohibitions as contained in Section 4(f) of the Act. Whether or not an exception applies depends on the facts of the particular situation.

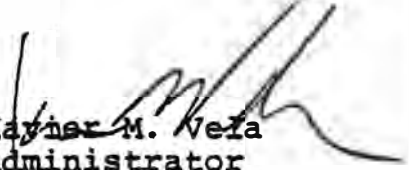
With respect to your first question, assuming those eligible for retirement are between 40 and 65, it is our opinion that termination of such employees because they are eligible for retirement would violate the Age Discrimination in Employment Act. Reducing from the force those employees eligible for retirement and/or those who have reached a certain age cannot be justified under any of the exceptions contained in the Act. On the other hand, where employees are laid off in observance of the terms of a bona fide seniority system, no violation of the ADEA results so long as the system is not a subterfuge to evade the purposes of the ADEA. The seniority system you describe appears to meet this standard.

Your second question concerning mandated retirement provisions touches upon an area of continuing concern. Generally, the Department takes the position that mandated retirements before age 65, whether applicable to certain occupational categories or all employees (as defined by the Act), are unlawful unless it can be established that the retirement provision is not designed to eliminate older workers (i.e., is not a subterfuge to evade the purposes of the Act), but is based on some legitimate factor other than age. In addition, the provision for mandatory retirement must be contained in a bona fide pension plan and must be required by the terms of the plan and not be optional.

Finally, we call your attention to the Supreme Court's decision in National League of Cities v. Usery, 426 U. S. 833 (1976), holding that the 1974 extension of the minimum wage and overtime provisions of the Fair Labor Standards Act to certain employees employed by State and local governments is unconstitutional and cannot be sustained under Congress' commerce clause authority. This decision, however, does not apply to the 1974 extension of the Age Discrimination in Employment Act to public employees, including police officers. Since the decision, the courts, referring both to the Fourteenth Amendment and Congress' commerce clause authority, have uniformly upheld the constitutionality of the ADEA's application to public employees.

We trust this information will be helpful to you and apologize again for the delay in our response.

Sincerely,



Xayner M. Vela
Administrator

Enclosures