

October 21, 1974

Dear                   :

This is in response to your memorandum of August 26, 1974, requesting our comments on a letter from of                   . requesting information concerning the Employee Retirement Income Security Act of 1974 (ERISA). In specific,                   asked whether the new law will in any way discriminate against women as a class.

Her letter alleges that the plan under which she is covered discriminates against women in two ways: (1) women must be employed for a longer period of time than men before they are eligible to participate in the plan and (2) women with comparable periods of service take a smaller pension if they retire early than do men who retire early.

The basic purpose of the new law is to ensure that employees who are covered by private pension plans receive benefits from those plans in accordance with their credited years of service with the employer. The law prescribes minimum standards for private pension plans, including standards regarding eligibility to participate in a plan, rates of accrual of benefits, and vesting but does not specifically address the issue of sex discrimination under these plans. With respect to participation (eligibility) requirements, section 202 of Title I and section 1011 of Title II of the new plan prescribe a minimum standard which must be met by plans for all covered employees, whether male or female. Generally, this new minimum participation standard provides that a plan may not exclude an employee who has reached age 25 and has one year of service with the employer, whichever occurs later. It should be noted, however, that the law provides only a minimum participation standard. Therefore, an employer might adopt a more liberal participation standard than that prescribed by the law which established different participation requirements for men and women. For example, there is no provision in the new law that explicitly prohibits a plan from adopting a participation rule under which men would be eligible to participate in the plan after the later of age 22 and one year of service and women would be eligible to participate in the plan at the later of age 22 and two years of service with the employer, since both standards exceed the minimum requirement of the law explained above.

Although such a sex discriminatory participation standard would not be prohibited per se under the ERISA, a discrimination in favor of the male employees over female employees might possibly in fact result in discrimination in favor of "employees who are officers, shareholders, persons whose principal duties consist in supervising the work of other employees, or highly compensated employees" and could jeopardize the qualified status of the plan under section 401 of the Internal Revenue Code. This Department cannot interpret the Internal Revenue Code, and question in this regard should be directed to the Internal Revenue Service.

Moreover, such a practice would, if men and women perform equal work, constitute a violation of the equal pay provisions of the Fair Labor Standards Act (29 U.S.C. sec. 201 et seq.). Inquiries regarding a possible violation of this Act should be referred to the Local Wage-Hour Office of the Employment Standards Administration of this Department.

A discriminatory participation schedule such as described above which provides eligibility for men to participate in a plan at a date earlier than women would also violate Title VII of the Civil Rights Act of 1964 (42 U.S.C. sec. 2000(e)). Inquiries concerning a violation of Title VII should be referred to the nearest regional office of the Equal Employment Opportunity Commission.

[Her] second question relates to women receiving smaller pension benefits than men if they retire before the plan's normal retirement age. Generally speaking, any plan participant who takes early retirement receives a pension benefit which is less than the benefit to which that participant would be entitled if he or she continued to work until the normal retirement age. Such reductions are based on standard actuarial calculations. In addition, if benefits take the form of an annuity, women generally receive smaller monthly payments than men because actuarial tables upon which such monthly payments are determined are based on the statistically proven assumption that women live longer on the average than do men. When an equal pension benefit amount is spread over an assumed longer lifetime of female participants, each monthly distribution made to a woman will be smaller than that made to a man.

At the present time the issue of sex discrimination as reflected in unequal benefit payments between the sexes is being considered by the Office of Federal Contract Compliance of the Labor Department's Employment Standards Administration in order to develop regulations on this issue. Although these regulations will not be enforced under the new pension reform law, but rather the equal pay provisions of the Fair Labor Standards Act and Executive Order 11246 (which prohibits sex discrimination in employment practices by government contractors and subcontractors), they could have a major effect on the payment of benefits under a great number of private pension plans.

[Her] second question is related to several complex and as yet unresolved issues involving unequal treatment of the sexes in pension plans. The sex discrimination regulations referred to above will help to clarify some of these issues and will be furnished to your office when promulgated. In the meantime, I hope this information will be helpful in responding to your constituent.

I apologize for the delay in responding to your request. The Department has been flooded with Congressional and other inquiries relating to the new law and although we are responding as rapidly as possible, some delays are occurring. We are endeavoring to keep these to a minimum.

Sincerely,