

The State of South Carolina



Office of the Attorney General

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ATTORNEY GENERAL

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October 31, 1988

Joseph F. Munnerlyn, Jr., Esquire
Legislative Council of the General Assembly
P. O. Box 11489
Columbia, South Carolina 29211

Dear Mr. Munnerlyn:

As you are aware, your letter dated September 27, 1988, to Attorney General Medlock has been referred to me for response. Referencing recent amendments [H.R. 4154 signed into law on November 1, 1986] to the federal Age Discrimination in Employment Act [ADEA] (29 U.S.C. §621 et seq.) and 1988 S.C. Acts 663, you seek an opinion responding to these two questions:

Does the act of Congress from 1986 supersede the pertinent provisions of South Carolina laws regarding retirement from employment based on age? Is Section 9-1-1530 now invalid, in view of Congress' action, at least to the extent that it prohibits any and every State employee over the stated age or ages from continuing to work?

This Office has previously analyzed H. R. 4154 and S.C. Code Ann. 9-1-1530 (1976) in two separate Opinions. S.C. Att'y Gen. Ops., January 13, 1987, & January 21, 1987. [Copies of these two Opinions are attached for your convenience.] In both of those Opinions, this Office opined: "Thus H.R. 4154 supersedes this State's mandatory retirement laws except where a previous exception to coverage under the Act remains applicable." Id.

In 1988, the South Carolina General Assembly amended S.C. Code Ann. §9-1-1530 (1976) by 1988 S.C. Acts 663, §3. Former §9-1-1530 provided:

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Any employee or teacher in service who has attained the age of seventy years shall be retired forthwith, except that:

- (1) With the approval of his employer he may remain in service until the end of the year following the date on which he attains the age of seventy years;
- (2) With the approval of his employer and the Board he may, upon his request therefor, be continued in service for a period of one year following each such request until such employee has reached the age of seventy-two years; and
- (3) With the approval of his employer, upon his request therefor, be continued in service for such period of time as may be necessary for such employee to qualify for coverage under the old age and survivors insurance provision of Title II of the Federal Social Security Act, as amended.

It shall be mandatory for any employee or teacher whether or not appointed and regardless of whether or not a member of the South Carolina Retirement System to retire no later than the end of the fiscal year in which he reaches his seventy-second birthday.

This section shall not apply to any person holding an elective office.

This section shall take effect July 1, 1969. Provided, however, no person affected by the provisions of this section shall be required to retire prior to July 1, 1971.

Provided, however, that excepting constitutional offices, this section shall not apply to appointive offices receiving per diem or travel allowances as total compensation or to employees of the State Court System when such court employees are employed on a part-time basis.

S.C. Code Ann. §9-1-1530 (1976) (later amended in 1988). The newly amended §9-1-1530 provides:

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Any employee, described in Section 1-13-80(h)(8), (10), or (12), who has attained the age of seventy years shall be retired forthwith, except that:

(1) with the approval of his employer he may remain in service until the end of the year following the date on which he attains the age of seventy years;

(2) with the approval of his employer and the Board he may, upon his request therefor, be continued in service for a period of one year following each such request until such employee has reached the age of seventy-two years; and

(3) with the approval of his employer, upon his request therefor, be continued in service for such period of time as may be necessary for such employee to qualify for coverage under the old age and survivors insurance provision of Title II of the Federal Social Security Act, as amended.

It shall be mandatory for any employee, described in Section 1-13-80(h)(8), (10), or (12), whether or not a member of the South Carolina Retirement System to retire no later than the end of the fiscal year in which he reaches his seventy-second birthday.

This section shall not apply to any person holding an elective office.

This section shall take effect July 1, 1969. Provided, however, no person affected by the provisions of this section shall be required to retire prior to July 1, 1971.

Provided, however, that excepting constitutional offices, this section shall not apply to appointive offices receiving per diem or travel allowances as total compensation or to employees of the State Court System when such court employees are employed on a part-time basis.

1988 S.C. Acts 663, §3 (amending S.C. Code Ann. §9-1-1530 (1976)).

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In light of 1988 S.C. Acts 663, §3, the question arises as to whether the same analysis of former §9-1-1530 by this Office would apply to amended §9-1-1530. In addition to amending §9-1-1530, 1988 S.C. Acts 663 also amended S.C. Code Ann. §§1-13-30(c) & -80(h) (1976) [The South Carolina Human Affairs Law]. Nevertheless, none of these amendments appears to eliminate the conflicts between H.R. 4154 and §9-1-1530 because 1988 S.C. Acts 663 does not abolish the upper age limit in the State's mandatory retirement laws. As a result of H.R. 4154, coverage under the ADEA has no upper age limit. S.C. Att'y Gen. Op., January 13, 1987, & January 21, 1987. Consequently, the same analysis applied in the cited opinions to former §9-1-1530 would apply to §9-1-1530 as amended by 1988 S.C. Acts 663.

For the foregoing reasons, your first question must be answered in the affirmative. Similarly, your second question requires an affirmative response subject to analyzing whether exceptions to or exemptions from the ADEA's applicability would be relevant with respect to a particular individual.

If I can answer any further questions, please do not hesitate to contact me.

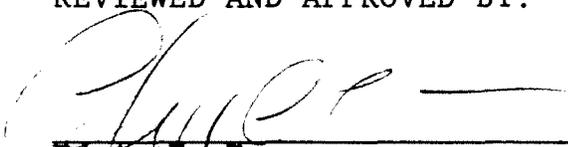
Sincerely,

Samuel L. Wilkins

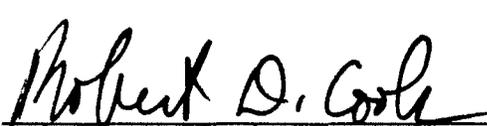
Samuel L. Wilkins
Assistant Attorney General

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REVIEWED AND APPROVED BY:



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