

United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: May 11, 2017

TO: Dennis P. Walsh, Regional Director
Region 4

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: IBM Corporation
Case 04-CA-183191

506-0170
506-6090-6300
506-6090-8200
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The Region submitted this case for advice as to whether the Employer violated Section 8(a)(1) by requiring laid off employees, as a condition of receiving severance pay, to waive their right to file suit under the Age Discrimination in Employment Act (“ADEA”) and instead to adjudicate any ADEA claims, having arisen during their employment, individually in final and binding arbitration.¹ We conclude that the charge should be dismissed, absent withdrawal, because the arbitration agreement is voluntary and does not require employees to waive their prospective rights to file individual or collective actions concerning future ADEA claims.

FACTS

The Charging Party was employed by IBM Corporation (“the Employer”) for over (b) (6), (b) (7)(C) years when, on (b) (7)(C), (b) (6), 2016, (b) (7)(C) was informed that (b) (7)(C) would be laid off as part of the Employer’s companywide reduction in force.² The Employer refers to the layoffs as a “resource action” and presented laid off employees, including the Charging Party, with a thirty-three page document titled, “Resource Action Information Package for Employees.” Among other things, the package encourages laid off employees to apply for other open positions with the Employer. Importantly, it offers

¹ Similar charges have been filed by approximately twenty-three individuals in various Regions around the country and were consolidated by Region 4 into the instant case before Advice.

² The Charging Party is not a member of any union nor is there evidence of any recent organizing activity at the Employer’s facility.

laid off employees various payments, benefits, and services³ in exchange for signing an agreement that, among other conditions, waives the signing employee's right to bring a class or collective ADEA claim against the Employer arising prior to the agreement and, instead, allows the employee to only bring such an individual ADEA claim via final and binding arbitration. The arbitration agreement does not require employees to waive their right to file unfair labor practice charges before the Board. Specifically, the agreement states in relevant part:

You agree that any and all legal claims or disputes between you and [the Employer] under the [ADEA] . . . *will be resolved on an individual basis by private, confidential, final and binding arbitration . . .* [.] You understand and agree that you are giving up your right to a court action for [ADEA or other claims], including any right to a trial before a judge or jury in federal or state court. This agreement to arbitrate does not apply to government agency proceedings.

To the maximum extent permitted by applicable law, *you agree that no [ADEA or other claims] may be initiated, maintained, heard or determined on a class action, collective action or multi-party basis* either in court or in arbitration, and that you are not entitled to serve or participate as a class action member or representative or collective action member or representative or receive any recovery from a class or collective action involving any [ADEA or other claims] either in court or in arbitration [emphasis added].

The agreement further states that employees who sign the agreement do not release any claims that arise after the date the agreement is signed. Employees have up to twenty-one days to sign the agreement after it has been presented to them.

ACTION

We conclude that the Employer's arbitration agreement does not violate Section 8(a)(1) because it is a voluntary severance agreement and it does not require employees to waive their right to file individual or collective ADEA actions as to any future claims. Accordingly, the Region should dismiss the charge, absent withdrawal.

³ Benefits include a lump sum payment equivalent to one month's pay, up to one year coverage in a transitional medical plan and transitional group life insurance, career transition services, and up to \$2,500 reimbursement for job-related skills training.

In *D. R. Horton, Inc.*⁴ and as affirmed in *Murphy Oil USA, Inc.*,⁵ the Board held that requiring employees to sign, as a condition of employment, arbitration agreements that waive employees' right to bring collective legal actions is unlawful. In *On Assignment Staffing Services*, the Board answered the question left open by *D. R. Horton* and *Murphy Oil* as to whether voluntary arbitration agreements—i.e., that do not require signing as a condition of employment—waiving employees' rights to bring collective actions are unlawful.⁶ In *On Assignment*, the Board stated that such voluntary arbitration agreements are unlawful if they preclude employees from pursuing protected concerted legal activity in the future because they amount to a prospective waiver of employees' Section 7 rights.⁷

Conversely, the corollary of the Board's *On Assignment* holding is that a voluntary arbitration agreement with only former employees that does not seek to bind them from bringing a collective action on future claims is lawful.⁸ Indeed, the Board has consistently held that voluntary severance agreements waiving employees' rights to bring actions on past claims are lawful.⁹ For example, in *First National Supermarkets*, the employer sought a release of past claims from a terminated employee in exchange for three weeks' vacation pay.¹⁰ There, the Board disagreed with the ALJ's interpretation that the release's use of the phrase "total employment"

⁴ 357 NLRB 2277 (2012), *enforcement denied in relevant part*, 737 F.3d 344 (5th Cir. 2013).

⁵ 361 NLRB No. 72 (Oct. 28, 2014), *enforcement denied in relevant part*, 808 F.3d 1013 (5th Cir. 2015), *cert. granted* 137 S.Ct. 809 (2017).

⁶ 362 NLRB No. 189 (Aug. 27, 2015), *enforcement denied*, 2016 WL 3685206 (5th Cir. 2016).

⁷ *Id.*, slip op. at 5–6.

⁸ See *Armour Steel Company*, Case No. 20-CA-076573, Advice Memorandum dated Dec. 19, 2012, at 8 (recognizing that if arbitration agreement at issue was limited to only former employees' claims arising from their period of prior employment then agreement may have been lawful).

⁹ See, e.g., *BP Amoco Chemical-Chocolate Bayou*, 351 NLRB 614, 615 (2007) (Board has consistently found that it would effectuate policies of Act to give effect to waiver and release agreements signed by employees in exchange for enhanced severance benefits) (citing cases).

¹⁰ 302 NLRB 727, 727 (1991).

meant releasing the employer from claims arising from any possible future employment; instead, the Board found that “total employment” related only to claims arising during the totality of the employee’s past employment with that employer.¹¹ The Board explained that there was no evidence that the parties to the release intended to compromise the rights or obligations that might grow out of any future employment relationship, that the release was limited to the employee’s past employment and, accordingly, it did not violate the Act.¹²

There is no evidence that the Employer has provided severance benefits in the past and, even if there were such evidence, there is no union here to obligate the Employer to follow any past practice.¹³ Accordingly, the Employer’s arbitration agreement is lawful because it is voluntary and does not preclude laid off employees from bringing individual or collective ADEA actions based on future legal claims. Indeed, the arbitration agreement specifically states that by signing the agreement employees are not releasing any claims arising after the date the agreement is signed. Although there is evidence that the Employer affirmatively encourages employees to apply to open positions, and thus creates the possibility of a future employment relationship, the arbitration agreement does not preclude employees from filing suit or seeking collective action to resolve future legal disputes should they work for the Employer in the future.

¹¹ *Id.* at 727–28.

¹² *Id.* See also *Regal Cinemas*, 334 NLRB 304, 306 (2001) (employer’s condition of signing release in exchange for severance pay to laid off employees not unlawful where release dealt with specific issue of employees’ termination and did not seek to bind employees from litigating future labor disputes), *enforced* 317 F.3d 300 (D.C. Cir. 2003). Cf. *Ishikawa Gasket America, Inc.*, 337 NLRB 175, 175–76 (2001) (employer’s overly broad separation agreement with terminated employee unlawful because it prohibited employee from engaging in union and other protected activities for one-year period in exchange for monetary settlement), *enforced* 354 F.3d 534 (6th Cir. 2004).

¹³ See, e.g., *Onan Corp.*, 338 NLRB 913, 913 (2003) (during union organizing campaign, employer must act as it would in absence of campaign and has the burden of showing that benefits granted or withheld during election are consistent with past practice); *Phillips Pipe Line Co.*, 302 NLRB 732, 732 (1991) (union not entitled to demand bargaining over severance benefits conditioned on signing release because employer not contractually obligated to offer enhanced pay to employees who did not sign release and no evidence nor allegation that employer unilaterally imposed extra-contractual condition on receipt of contractually-mandated benefits).

Accordingly, for the foregoing reasons, the charge should be dismissed, absent withdrawal.

/s/
B.J.K.

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