Employer Update

Weil

August 17, 2023

Limited Time Period in Which to Assert Arbitration Claims Upheld by Second Circuit

By John P. Barry, Celine J. Chan, and Brett Bonfanti

On August 4, 2023, the Second Circuit Court of Appeals upheld an arbitration provision that was included as part of a form separation agreement presented by International Business Machines ("IBM") to dozens of terminated IBM employees, which provision, among other things, imposed a 300-day deadline to raise age discrimination claims to IBM. *Abelar v. Int'l Bus. Machs. Corp. (in Re IBM Arb. Agreement Litig.)*, No. 22-1728, 2023 WL 4982010 (2d Cir. Aug. 4, 2023).

Most claims under federal anti-discrimination laws require a plaintiff to exhaust administrative remedies by filing a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") or its state equivalents within 180 or 300 days of the alleged unlawful conduct. The arbitration provision in IBM's separation agreements required that individuals wishing to arbitrate such claims must submit an arbitration demand to IBM "no later than the deadline for the filing of such a claim" if it is one that must first be brought before a government agency (the "Timeliness Provision"). The Age Discrimination in Employment Act ("ADEA") typically requires plaintiffs to file a charge with the EEOC within 300 days of the alleged discrimination, so individuals who signed the agreement had 300 days to submit demands for arbitration to IBM. Otherwise, per the terms of the agreement, the claim would be deemed waived. The Timeliness Provision further provided that filing a charge with a government agency would not substitute for or extend the time for submitting a demand for arbitration with IBM.

Joining the Eleventh Circuit that recently interpreted a similar IBM Timeliness Provision, the Second Circuit affirmed the District Court's ruling in rejecting the plaintiffs' argument that the Timeliness Provision was unenforceable. *See id; Smith v. Int'l Bus. Machs. Corp.*, No. 22-11928, 2023 WL 3244583 (11th Cir. May 4, 2023). The plaintiffs argued that the Timeliness Provision was unenforceable because it waived a purported substantive, non-waivable right, namely the "piggybacking rule." The "piggybacking rule"—sometimes called the "single filing rule"—is a judge-made exception to the administrative-exhaustion requirement under the federal anti-discrimination laws. It allows a plaintiff who has not timely filed a charge of discrimination to "piggyback" off another individual's timely filed charge and to join in the action if both claims "'aris[e] out of similar discriminatory treatment in the same time frame.'" *Snell v. Suffolk County*, 782 F.2d 1094, 1101 (2d Cir. 1986) (quoting *Ezell v. Mobile Housing Board*, 709 F.2d 1376, 1381 (11th Cir. 1983)). In this case, other former IBM employees had timely filed EEOC charges, and plaintiffs—who missed the agreed-upon deadline—sought to "piggyback" off those charges. However, the Second Circuit held the "piggybacking rule" is not applicable in the arbitration context, and in all events, it could be waived by contract because it is not a substantive right under the ADEA.

Factual and Procedural Background

In the 2010s, IBM terminated thousands of workers. Many signed a separation agreement in exchange for severance benefits. The terms of the separation agreement did not include a release of claims under the ADEA, but required individual arbitration of claims arising out of the employees' termination, including ADEA claims. The Timeliness Provision also provided:

> To initiate arbitration, you must submit a written demand for arbitration to the IBM Arbitration Coordinator . . . [I]f the claim is one which must first be brought before a government agency, [you must submit a demand for arbitration] no later than the deadline for the filing of such a claim. If the demand for arbitration is not timely submitted, the claim shall be deemed waived. The filing of a charge or complaint with a government agency…shall not substitute for or extend the time for submitting a demand for arbitration.

Abelar, 2023 WL 4982010 at *1.

Plaintiffs in *Abelar* included 24 employees who signed the separation agreement, but submitted written demands for arbitration of ADEA claims *after* the Timeliness Provision's deadline. Each of the arbitrators dismissed the plaintiffs' claims as untimely. Plaintiffs sought a declaration that the deadline in the separation agreement was unenforceable because it waived a substantive, and therefore non-waivable, right under the ADEA, namely the "piggybacking rule."

Piggybacking Rule Not a Non-Waivable Substantive Right

The Second Circuit rejected the plaintiffs' contention that the Timeliness Provision was unenforceable for two reasons.

First, the "piggybacking rule" is an exception to the administrative-exhaustion requirements of certain civil rights laws and functionally waives the administrative-exhaustion requirement. The administrative-exhaustion process, as a matter of statute, applies only to civil actions, and not to arbitrations. In other words, the plaintiffs in this case were under no obligation to file a charge of discrimination with the EEOC in order to arbitrate their ADEA claims, so there was no need to take advantage of the "piggybacking rule" exception to the administrative-exhaustion requirement.

Second, the "piggybacking rule" is a waivable, non-substantive right under the ADEA. Generally, arbitration agreements that amount to "a substantive waiver of federally protected civil rights will not be upheld." *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 249 (2009). The "piggybacking rule," on the other hand, is a procedural right that stems from a judge-made exception to the statutory filing requirements, and is not even found in the text of the ADEA (or Title VII). The Second Circuit explained that at its core, the "piggybacking rule" is not about timeliness. Its purpose is not to ensure that charges of discrimination are filed timely, but to eliminate the need for multiple individuals, all of whom experienced similar types of discrimination within similar timeframes, to file EEOC charges prior to filing a lawsuit. Even under the Timeliness Provision, plaintiffs could pursue their rights under the ADEA, but failed to do so before the agreed-upon deadline.

For these reasons, the Second Circuit found the Timeliness Provision enforceable, and the arbitrators' decisions dismissing the ADEA claims were upheld.[1]

Considerations for Employers

The Second Circuit's decision, along with the Eleventh Circuit's recent similar decision, are positive developments for employers who seek to resolve their employment-related disputes via arbitration. Time period limitations are important parts of arbitration agreements, as employers want, among other things, certainty concerning when and how many claims might be brought related to a termination event and to ensure the preservation of information needed to address and potentially defend against the claim(s).

Beyond that good news, an important take-away from this decision is that employers must ensure agreements to arbitrate do not seek the waiver of a substantive right. Substantive rights include the right to be free from discrimination in the workplace (on the basis of age, sex, race, or other protected classes), entitlements to reasonable accommodations under the Americans with Disabilities Act, entitlements to leaves of absence under the Family and Medical Leave Act, or rights to engage in protected activity under the National Labor Relations Act, for example. An arbitration agreement that imposes arbitration costs on an employee so high that the employee is effectively precluded from arbitrating any claim may also amount to a *de facto* waiver of a substantive right.

Furthermore, while this was not an issue in the IBM decision because IBM did not seek to shorten the applicable statutory limitations period in its arbitration agreement, there is authority allowing for parties to shorten time periods in arbitration agreements. Specifically, a number of circuit courts have recently explained that parties may, in the arbitration context—unless prohibited by the underlying statute—contractually shorten a statutory limitations period so long as the deadline by which to raise the claim in arbitration does not become so unreasonably short that an employee de facto waives a substantive right. Time periods of one year to bring employment claims in arbitration have been upheld, *see, e.g., Bracey v. Lancaster Foods LLC*, 838 Fed. Appx. 745, 749 (4th Cir. 2020), but any time periods shorter than a statutory limitations period may be unenforceable if they significantly shorten the otherwise applicable statute of limitations or would not practically give a potential plaintiff enough time to avail him or herself of their substantive rights.

Finally, IBM appears to have decided not to require the terminated employees to waive ADEA claims in exchange for certain severance benefits. However, employers can of course seek enforceable waivers of ADEA claims. For such waivers to be enforceable, employers must adhere to the requirements of the ADEA including the Older Workers Benefit Protection Act that amended the ADEA. The statutes include specific requirements including with respect to time periods to consider a release agreement and a non-waivable revocation period after executing a release agreement, and under certain circumstances, informational disclosures to ensure that any ADEA waiver is "knowing and voluntary," and thus enforceable.

* * *

[1] The Second Circuit also addressed an issue pertaining to a motion to seal filed by IBM, and further dismissed claims pertaining to certain plaintiffs' challenge to the arbitration agreement's Confidentiality Provision (found to be unripe) and plaintiffs' leave to amend to add a fraudulent inducement claim (found to have failed to meet Rule 9(b)'s heightened pleading standard).

Employer Update is published by the Employment Litigation and the Executive Compensation & Benefits practice groups of Weil, Gotshal & Manges LLP, 767 Fifth Avenue, New York, NY 10153, +1 212 310 8000, www.weil.com.

If you have questions concerning the contents of this issue, or would like more information about Weil's Employment Litigation and Executive Compensation & Benefits practices, please speak to your regular contact at Weil, or to the practice group members listed below.

Editors:

John P. Barry
Partner, Practice Group Leader
New York
+1 212 310 8150
john.barry@weil.com

Gary D. Friedman
Partner
New York
+1 212 310 8963
gary.friedman@weil.com

Celine Chan
Counsel
New York
+1 212 310 8045
celine.chan@weil.com

Rebecca Sivitz
Counsel
Boston
+1 617 772 8339
rebecca.sivitz@weil.com