



Has IBM Violated the ADEA?

Laid-off employees claim that age bias is rampant at Big Blue

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The legal tactics IBM has used in recent layoffs, terminations, and forced retirements and resignations of older workers may be lawful in isolation but collectively contrary to the spirit of the Age Discrimination in Employment Act (ADEA) and may violate the law, according to Jay Holland, an attorney with Joseph, Greenwald & Laake in Greenbelt, Md.

A *ProPublica* article asserts that the company (<https://features.propublica.org/ibm/ibm-age-discrimination-american-workers/>):

- No longer discloses the positions and ages of all the people laid off and does not provide the same information about those who stay during layoffs.
- Lays people off over long periods of time so it won't have to comply with the Worker Adjustment and Retraining Notification (WARN) Act.
- Ended many telecommuting arrangements and required workers to report to new, distant locations, a change that may have a disproportionate impact on older workers.

In a statement, IBM said, "We are proud of our company and our employees' ability to reinvent themselves era after era, while always complying with the law. Our ability to do this is why we are the only tech company that has not only survived but thrived for more than 100 years."

Older Workers Cut

IBM has in recent years aggressively reduced the number of older workers, and age bias may have been the reason, according to *ProPublica*. In the past five years, IBM slashed more than 20,000 American employees ages 40 and over, about 60 percent of its estimated total U.S. job reductions. The ADEA prohibits age discrimination against workers who are 40 years of age and older.

IBM executives referred to Baby Boomers in a 2006 IBM Business Consulting Services paper as "gray hairs" and "old heads" and said that "successor generations ... are generally much more innovative and receptive to technology than Baby Boomers."

Since Virginia Marie "Ginni" Rometty took over in 2012, the company has shifted its HR focus to Millennials, *ProPublica* reported. At an invitation-only IBM event in December 2014, company researchers said in a presentation that Millennials "are not likely to make decisions in isolation" but instead "depend on analytic technologies to help them." People 50 or over were characterized as "more dubious" of analytics, placing "less stock in the advantages data offers" and "less motivated to consult their colleagues or get their buy-in. ... It's Baby Boomers who are the outliers," the presenters said. The company must, according to the presentation, "become one with the Millennial mindset," *ProPublica* reported. Other IBM presentations subsequently used similar language. A company planning presentation called for "correct[ing] the seniority mix" by hiring more early-career professionals—shorthand for recent college graduates.

"They got rid of highly skilled, highly effective, highly respected women, including me, for a reason nobody knows," said Marjorie Madfis, who was a 57-year-old digital marketing strategist and 17-year employee when she and six members of her nine-person team—all women in their 40s and 50s—were laid off in July 2013. The two remaining employees were younger men. "The only explanation is our age," Madfis said. The article shared other similar stories.

Disclosures Stopped

IBM has sought to avoid the disclosure requirements in the amendment to the ADEA known as the Older Workers Benefit Protection Act (OWBPA), Holland told *SHRM Online* in reaction to the piece. When there is a layoff of two or more employees in a particular unit, the employer must, in exchange for a severance and waiver of age claims, provide a list of all persons laid off, listed by position and age but not including their names, and a similar list of those not laid off.

"That type of information can be very revealing to employment attorneys to discern a pattern of discrimination," Holland said. Instead of providing those stats, IBM chose to exclude age from the claims being waived in the severance agreements. If age claims are not waived, the theory goes, the lists are not required, he noted. Plus, IBM required all nonwaived claims to be arbitrated and all class claims waived.

IBM made a "shrewd calculus" with this change, Holland said. "It remains to be seen if the strategy will be legally sustainable," he stated, calling it a "very interesting tactic."

But Robin Shea, an attorney with Constangy Brooks, Smith & Prophete in Winston-Salem, N.C., said, "It is legal for the employer to make this choice."

An IBM spokesman said the change was made to protect employee privacy, *ProPublica* noted.

Shea also said that employers may replace highly compensated workers with lower-paid ones to cut costs, even if the impact falls more heavily on older workers, who may be more likely to be highly compensated.

No WARN Act Notices

In the case of a plant closing, the WARN Act requires that employees and the local government receive a minimum of 60 days' notice when the workers will be laid off within a 30-day period or when a significant percentage of employees will be laid off within a 90-day period, Holland noted.

[*SHRM members-only toolkit: Managing Downsizing by Means of Layoffs* (www.shrm.org/resourcesandtools/tools-and-samples/toolkits/pages/managingdownsizing.aspx)]

IBM stopped sending these notices in some instances by spreading layoffs over long periods of time, *ProPublica* found.

IBM is using "whatever tools might be available in the toolbox to minimize its legal exposure and avoid negative publicity associated with larger-scale layoffs," he said. "By the express terms of the act, that may be lawful, although it may be contrary to the spirit of the act."

Telecommuting Ended

IBM also ended telecommuting arrangements and required employees to report to new, distant sites, which may have had a disparate impact on older workers, according to *ProPublica*.

Shea disagreed, saying, "It would be a real stretch to argue that such a rule would have a disparate impact on older workers. If anything, I would think the impact would be more severe on younger employees with school-age children."

But David Lopez, an attorney with Outten & Golden in Washington, D.C., and former general counsel with the Equal Employment Opportunity Commission, said that age discrimination is pervasive. He told *SHRM Online* that there is a "danger of normalizing age discrimination and not treating it like other forms of discrimination."

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