TORRES LAW
INTERNATIONAL TRADE & NATIONAL SECURITY

Guide to Complying with U.S. Export Control and Immigration and Anti-Discrimination Laws

To comply with the various U.S. laws and regulations governing immigration, anti-discrimination, and export controls, companies must navigate the confusing legal landscape connecting these areas. The below guide should help companies understand the intersection of these laws and regulations and provides best practices for compliance.

Export Control Laws

The International Traffic in Arms Regulations (ITAR) (administered by the U.S. Department of State, Directorate of Defense Trade Controls (DDTC)) and the Export Administration Regulations (EAR) (administered by the U.S. Department of Commerce, Bureau of Industry and Security (BIS)) are the primary export control regimes in the United States.

Both the ITAR and EAR may require that an export license be obtained from DDTC or BIS, respectively, before the release of export-controlled technical data or technology to a "foreign person" (22 C.F.R. § 120.17(2); 15 C.F.R. § 734.13). A release of technical data or technology (whether oral/visual disclosure or provision of physical document or materials) may include virtually any exchange of information – including in-person discussions, telephone conversations, technical proposals, fax communications, e-mails and other electronic communications, the sharing of computer databases, briefings, or training sessions.

The release of technical data or technology to a foreign person that occurs within the United States is "deemed" to be an export to the foreign person's "home country," and whether an export license is required for a particular release may depend on both the nature of export controls applicable to the technology or technical data (including whether it is subject to the ITAR or EAR) as well as the citizenship of the foreign person.

When a foreign person is a national of more than one country, BIS will only consider the last country of citizenship or permanent residence in determining nationality under the EAR. However, for ITAR compliance purposes, DDTC will consider all countries of citizenship and permanent residence.

Under the export control regulations, a "U.S. person" (22 C.F.R. § 120.15; 15 C.F.R. § 772.1) is someone who is:

1) a U.S. citizen (whether born or naturalized);
2) a lawful permanent resident of the United States (*e.g.*, "green card" holders); or
3) a protected individual as defined by 8 U.S.C. § 1324b(a)(3) (*e.g.*, foreign persons such as refugees and asylees who are protected persons and considered U.S. persons for export control purposes).

Corporations incorporated in the United States are U.S. persons for purposes of the ITAR and EAR. Moreover, the export control regulations define "foreign person" to mean any person who is not a "U.S. person" as defined above. Generally, this means any foreign person in a foreign country, or any foreign person in the United States on a temporary work visa (*e.g.*, H-1B, L-1, TN, etc.) who does not have

lawful permanent resident status (*e.g.*, a green card) or who has not been admitted to the United States as a refugee or asylee. "Foreign person" also includes foreign corporations (including foreign corporations not incorporated or organized to do business in the United States), international organizations, and foreign governments.

U.S. Immigration and Anti-Discrimination Laws

The U.S. Immigration and Nationality Act (INA) and Title VII of the Civil Rights Act 1964 (Title VII) prohibit discrimination based on protected characteristics. The INA prohibits discrimination based on, among other characteristics, national origin or citizenship. Additionally, Title VII prohibits discrimination based on race and national origin, which typically includes discrimination based on citizenship or immigration status. Notably, the definition of "U.S. person" under the ITAR and EAR, includes the definition of "protected individuals" under the INA. Therefore, these protected individuals are not subject to the licensing requirements under the ITAR and EAR.

Furthermore, the INA prohibits "unfair documentary practices," which are identified as instances where employers request more or different documents than those necessary to verify employment eligibility or request such documents with the intent to discriminate based on national origin or citizenship.

The Intersection of Export Control Laws and U.S. Immigration and Anti-Discrimination Laws

The U.S. government has implemented immigration processes that recognize that export control laws and immigration laws and policy may impact one another. For instance, U.S. employers seeking to hire a non-U.S. citizen under certain work authorization (visa) programs must complete an "I-129 – Petition for a Non-Immigrant Worker Form." For certain types of visas (*e.g.*, H-1B), such form requires a certification by the U.S. employer as to whether an export license is required to release any technical data or technology to the foreign person. But aside from the certification, most companies may not be aware that U.S. export control laws apply to them or their employment of non-U.S. persons.

Using the work authorization example above, assume a company is fully compliant with U.S. immigration laws and has obtained a work visa for a foreign person employee; however, this company is also a manufacturer/exporter of export-controlled items and did not verify or put in place compliance controls to ensure this individual does not have access to controlled information without the required licenses. If the foreign person employee's co-workers discuss with the foreign person employee work-related matters regarding export-controlled technical data/technology, then the corporation will be in violation of the export control laws.

Given such a scenario, companies may initially believe that a simple solution is to have a U.S. person-only hiring policy. However, as described above, such a policy would likely constitute discrimination against individuals based on their national origin or citizenship status in violation of Title VII, the INA, and other federal, state, and local anti-discrimination laws.

DOJ Cases

As recent cases indicate, the DOJ is concerned about companies applying simple, overly broad solutions such as a U.S. person-only hiring policy, and instead expects companies to develop and implement hiring policies and processes that are non-discriminatory while also containing appropriate controls for

compliance with the U.S. export control laws. Failure to adhere to these standards can lead to penalties and government monitoring of the violating companies. The below selection of DOJ settlements provides evidence of the DOJ's stance with regards to the issue:

- Honda Aircraft Company, LLC (Feb. 1, 2019)
- Clifford Chance US, LLP (Aug. 29, 2018)
- Rose Acre Farms Inc. (Aug. 6, 2018)
- Setpoint Systems Inc. (June 19, 2018)

Collectively, these recent DOJ cases demonstrate that employers cannot seek to comply with U.S. export control laws by instituting a U.S. person- or U.S. citizen-only hiring policy when a position involves working with export-controlled items/information and, more generally, may not discriminate in their application of citizenship verification processes. Companies are expected to implement policies and procedures reasonably tailored to address export control compliance requirements while not engaging in unnecessary discrimination on the basis of citizenship or national origin.

Best Practices

Considering the DOJ's trend of investigating unlawful employment practices involving the misunderstanding of the export control laws, companies would be well advised to invest resources to review their compliance practices regarding U.S. export control, immigration, and anti-discrimination laws. Best practices in this area include:

- Adopt policies ensuring that both qualified U.S. persons and non-U.S. persons may be considered for all positions;
- Avoid using language such as "U.S. citizens only," in hiring notices; instead use "U.S. work authorized applicants only";
- Use questions during the hiring process consistent with advice from the DOJ Immigration and Employee Rights Section (IER), providing questions related to work authorization that employers can ask applicants during the hiring process without fear of violating Title VIII or the INA, including:
    - Are you legally authorized to work in the United States?
    - Will you now or in the future require employment visa sponsorship?
- Avoid including verification of "U.S. person" status when determining employment eligibility; and
- Avoid applying export control screening procedures to positions which are not reasonably likely to be impacted by export control laws.