Complying with U.S. export controls without violating anti-discrimination laws

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The U.S. export controls do not only apply to exports that are made overseas. U.S. companies also have to comply with the so-called “deemed export” rule. Under this rule, the release of controlled technical data to a non-U.S. person is effectively treated as an export to the individual’s home country and may trigger licensing requirements, even if such information does not leave the U.S. For example, if a Chinese employee on an H1-B visa works in a laboratory or on the production floor of a U.S. company and has access to export-controlled technical data, then that access is deemed to be an export to China and is treated the same way as if the U.S. company actually exported the controlled technical data to China. Similarly, the release of controlled technical data in a foreign country to a national or citizen from a third country can be deemed a reexport to that third country under the U.S. deemed export rule.

A release generally includes any transfer of information through visual observation, oral communication, experience, or practice. A company need not transfer information intentionally for the rule to apply; the fact that a non-U.S. person is exposed to the information in the course of his or her job constitutes a release. An e-mail message, a facility tour, or even access to a computer that is unsecured can give rise to a deemed export violation. Like regular exports to destinations outside the United States, deemed exports may require export licenses from the Commerce Department’s Bureau of Industry and Security or the State Department’s Directorate of Defense Trade Controls depending on the nature of the technical data and whether it is subject to the Export Administration Regulations (EAR) or the International Traffic in Arms Regulations (ITAR).1

1 The EAR regulate the export of most commercial items, including “dual-use” products, software, and technologies (i.e., those suitable for both military and nonmilitary uses). The ITAR focus on the export of “defense articles” (including technical data) and “defense services.”
Deemed exports present unique challenges to U.S. companies and entities that employ and interact with non-U.S. persons and can arise in both business and academic settings. Penalties for non-compliance can reach $500,000 per violation or more. It is, therefore, critically important for U.S. companies with export controlled technical data to establish effective technology control plans and related procedures to comply with the deemed export rule and other export control requirements. However, there are many traps well-intentioned employers can fall into when developing hiring policies or otherwise trying to comply with the deemed export rule if they fail to consider the interplay between the U.S. export control laws and the anti-discrimination provisions found in the Immigration Reform and Control Act (IRCA) and Title VII.

Who qualifies as a “U.S. person” under the U.S. export control laws?

The EAR and the ITAR definitions of a “U.S. person” cite IRCA’s definition of a “citizen or intending citizen.” Under IRCA, a “citizen or intending citizen” means an individual who is (1) a citizen or national of the U.S., (2) a lawful permanent resident, (3) admitted as a refugee, or (4) granted asylum.

What is citizenship status discrimination?

IRCA specifically prohibits discrimination against citizens or intending citizens (as defined above) on the basis of their citizenship status with respect to the hiring, recruitment, or referral for a fee of the individual for employment or the discharging of the individual from employment. Hiring policies that exclude any of the four protected classes of citizens or intending citizens are, therefore, generally discriminatory. For example, a policy of hiring only U.S. citizens is almost always discriminatory.

Under IRCA, it is only permissible to discriminate against a citizen or intending citizen where the discrimination is required to comply with law, regulation, or executive order, or required by federal, state, or local government contract. This exception is very narrow and still does not permit employers to restrict hiring generally, but rather only with respect to the particular positions subject to such law, regulation, executive order, or contract’s requirement. Therefore, a blanket “citizens only” hiring policy would still constitute citizenship status discrimination because it is overly broad and would impact hiring for positions not subject to the restriction, such as technical staff working on other contracts, receptionists, and cafeteria workers.

Title VII, on the other hand, prohibits (amongst other things) discrimination based on national origin, i.e., the country from which one’s ancestors came. This is distinct from one’s citizenship or immigration status. Title VII does not, therefore, offer the same protections as IRCA and an individual who alleged that an employer violated Title VII when it failed to hire or terminated an individual who lacked appropriate authorization to work in the United States would not prevail under Title VII. Nonetheless, employers should be aware of Title VII when taking adverse action against foreign nationals for other reasons to ensure there is no potential Title VII claim lurking.
Designing a non-discriminatory hiring policy that complies with the deemed export rule

There are several policies that are both compliant with the deemed export rule and non-discriminatory. Each employer must determine which policy is most appropriate given its particular business and hiring needs. Some policies have the advantage of administrative ease, but as a result, restrict the pool of eligible candidates an employer can hire. Others do not restrict hiring but can present administrative challenges of their own because they require the employer to secure any necessary licenses and develop a technology control plan to prevent the inadvertent release of controlled technology to non-U.S. persons.

Regardless of the policy an employer chooses to adopt, it is important that it be adhered to without exception. Deviations from the established policy can result in costly discrimination claims and export control violations so it is important that all employees involved in hiring and export controls compliance understand the policy and how it is to be enforced.

Please contact a Nixon Peabody attorney if you’d like to discuss how your company can comply with the deemed export rule without running afoul of the anti-discrimination provisions.

For further information, please contact your Nixon Peabody attorney or:

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