SHIPMAN & GOODWIN LLP®
COUNSELORS AT LAW

International Trade Compliance and Enforcement Bulletin

August 29, 2016

Compliance Conundrum – Unauthorized Exports v. Discrimination: Find a Win in a Lose-Lose Scenario

Authors:

Alfredo G. Fernández
(860) 251-5353
afernandez@goodwin.com

Ashley E. Mendoza
(860) 251-5018
amendoza@goodwin.com

Imagine your company has employed a research scientist to support your technology programs. The scientist is a citizen of the People's Republic of China and holds an H-1B visa, but is not authorized to view certain export-controlled technical data. Unclear of the restrictions in place, other company employees provide the foreign scientist with technical data related to a military program in the course of his job duties. This real life scenario [www.state.gov/r/pa/prs/ps/2016/06/258979.htm] recently resulted in a $100,000 settlement penalty with the U.S. State Department this summer.

It appears that a company policy to screen out foreign candidates for job openings of this sensitive nature would have prevented this violation and penalty, but a company also faces the challenge of avoiding discrimination in its hiring practices. Is this a lose-lose scenario? Not quite, but companies must pay close attention to recent guidance and regulatory revisions to understand their compliance obligations.

The Tricky Intersection of Legal Obligations

On March 31, 2016, the U.S. Department of Justice Office of Special Counsel for Immigration-Related Unfair Employment Practices (the "OSC") released its most recent guidance to employers to aid them in navigating the murky waters where export regulations meet immigration antidiscrimination regulations.

These two regulated areas may contradict each other when it comes to the hiring practices of U.S. companies soliciting candidates for a position where the job duties impose compliance with export control laws. Unfortunately, the limited governmental guidance confounds some employers when it comes to complying with both sets of regulations in certain scenarios. The OSC's recent guidance and upcoming definitional changes within the export control laws do provide some general direction for employers; however several ambiguous issues remain unresolved.

What We Know About the Export Regulations in this Context

Exports are commonly associated with the shipment of a tangible item to a foreign country, but the U.S. export regulations have a much broader application. An export also includes the transfer of controlled *technical data* or *technology* to foreign persons, even when the transfer takes place within the geographic territory of the United States. Such a transfer is "deemed" to be an export to the country of the foreign person and is referred to as a "deemed export."

Although not the only federal agencies administering export control laws, the U.S. State and Commerce Departments manage the two broadest export control systems. The U.S. State Department's Directorate of Defense Trade Controls administers the International Traffic in Arms Regulations ("ITAR"), found at 22 C.F.R. §§ 120-130, which control defense articles and services. The U.S. Commerce Department's Bureau of Industry and Security ("BIS") administers the Export Administration Regulations ("EAR"), found at 15 C.F.R. §§ 730-774, which control commercial and dual-use items, as well as limited low-sensitivity military items. Generally speaking, all articles controlled under the ITAR and many articles controlled under the EAR require an export license *before* the export, including a deemed export, occurs.

Each set of regulations accounts for deemed exports but have slightly different definitions of key terms. In fact, new and revised definitions under both regulations become effective September 1, 2016. One primary intention of the definitional changes is to better harmonize the analogous definitions in both systems. Under both regulations, the deemed export rule applies only to foreign persons and, by definition, does not apply to U.S. citizens, persons lawfully admitted for permanent residence in the United States (e.g., green card holders) or to persons who are protected individuals under the Immigration and Nationality Act ("INA")(e.g., certain refugees and asylees).

The below table showcases a few of the new definitions, including the improved harmonization for key terms such as *export* and *release*.

ITAR	EAR
Export means releasing or otherwise transferring technical data to a foreign person in the United States.	Export means releasing or otherwise transferring technical data to a foreign person in the United States.
Any release in the United States of technical data to a foreign person is deemed to be an export to all countries in which the foreign person: • has held or holds citizenship; or • holds permanent residency §120.17 -- Export	Any release in the United States of technology to a foreign person is a deemed export to the foreign person's most recent country of citizenship or permanent residency. §734.13 -- Export
Technical data is released through: • Visual or other inspection by foreign persons of a defense article that reveals technical data to a foreign person; or • Oral or written exchanges with the foreign person of technical data in the United States or abroad. §120.50 -- Release	Technology is released through: • Visual or other inspection by a foreign person of items that reveals technology subject to the EAR to a foreign person; or • Oral or written exchanges with a foreign person of technology in the United States or abroad. §734.15 -- Release

Releases, as defined above, may be made through oral, visual, or other means and may seem innocuous. For example, deemed exports may occur through:

- a live or recorded demonstration;
- a telephone call or voice message;
- a laboratory or plant visit;
- an exchange of paper or electronic communication;
- a web-based meeting with a shared screen;
- posting non-public data on the Internet or company intranet; or
- carrying a device with controlled technical information or software to a foreign destination.

Therefore, employers must be aware of the potential need to seek an export license before allowing a release of controlled technical data or technology to a foreign person. The ability to evaluate the qualification of a candidate based on nationality and similar demographics, however, is itself another compliance challenge given certain federal antidiscrimination protections.

What We Know About the Antidiscrimination Immigration Regulations

The INA is the controlling federal statute governing immigration into the United States. The INA contains antidiscrimination provisions, which are codified at 8 U.S.C. § 1324b and which protect U.S. citizens, U.S. nationals, lawful permanent residents, and asylees and refugees from citizenship and immigration status discrimination, as well as all work-authorized individuals, from national origin discrimination, document abuse and retaliation. These provisions prohibit: (1) discrimination based on national origin, citizenship or immigration status with respect to hiring, firing, recruitment, or referral for a fee; (2) unfair documentary practices with respect to verifying employment eligibility based on national origin, citizenship or immigration status; and (3) intimidation of or retaliation against any individual for intending to or filing a charge or complaint, testifying, assisting, or participating in an investigation, proceeding or hearing under this antidiscrimination provision.

The codified antidiscrimination provisions set forth three specific exceptions where the antidiscrimination provisions do not apply, including (1) where a person or entity employs three or fewer employees; (2) where discrimination based on national origin is covered under section 703 of the Civil Rights Act of 1964[1]; and (3) where discrimination based on citizenship occurs because citizenship status is required in order to comply with law, regulation, or executive order, or required by government contract, or which the Attorney General determines to be essential for an employer to do business with a government agency or department. The codified antidiscrimination provisions also set forth an additional exception, allowing for a person or other entity to prefer to hire, recruit, or refer an individual who is a citizen or national of the United States over another individual who is an alien if the two individuals are equally qualified.

The penalties for noncompliance with these regulations can be severe. If, after the requisite proceedings have taken place, an Administrative Law Judge determines that a person or entity

1 Title VII of the Civil Rights Act of 1964 is a federal law that prohibits employers with 15 or more employees from discriminating against employees on the basis of sex (including pregnancy, gender identity and sexual orientation), race, color, national origin, and religion.

engaged in an unfair immigration-related employment practice, the judge will issue a cease and desist order. This order may, at the Judge's discretion, require the violator to comply with strict documentation of their future hiring practices above what the regulations typically require; to hire individuals directly and adversely affected, with or without back pay; to pay a civil penalty ranging from $178 to $17,816[2] per discrimination victim depending on the nature of current and prior violations; to educate employees and personnel about their rights and compliance with the regulations; and to pay the prevailing party's attorney's fees, among other penalties.

So, What is a U.S. Employer To Do?

Notwithstanding commentary on the upcoming definitional changes in the ITAR and EAR, the leading guidance is a March 31, 2016 letter from OSC, written in response to this very question.

In its response, the OSC clarifies that the ITAR "does not limit the categories of work-authorized non-U.S. citizens an employer may hire." The letter stresses that U.S. employers may apply for export licenses for non-U.S. person employees if their positions require access to information governed by ITAR. Companies must be prepared for the burden of drafting export license applications and waiting up to several months for approval before controlled technical data or technology may be released to the foreign person.

The OSC also addresses potential citizenship status and national origin discrimination. The OSC clarifies that if an employer were to *take action* and reject a protected individual's application based on his/her answers to questions involving citizenship status or national origin, the employer may be engaging in illegal discrimination. The OSC leaves ambiguous, however, whether *asking* the proposed questions of all job applicants or new hires to determine whether the employer will need an export license violates the INA antidiscrimination provisions. The OSC adds that asking those questions would likely not violate the INA, but the OSC discourages inclusion of such questions on all applications to avoid confusion among applicants and human resources.

An acceptable alternate approach for employers when initially screening job applicants is to inquire about immigration sponsorship rather than immigration status, citizenship or national origin. In 1998, the OSC recommended the phrasing *"Will you now or in the future require sponsorship for employment visa status?"*[3] Applicants who answer "yes" to this question will not qualify as U.S. persons under the ITAR or EAR. In this manner, employers may gather information that will alert them to the possibility that an export license may be required for applicants.

The OSC has also confirmed that it is acceptable for an employer to have a policy of not hiring individuals who are not "protected individuals" based solely on the person's citizenship status.[4] Therefore, if an applicant answers 'yes' to the sponsorship question posed above on a job

2 The U.S. Department of Justice published the Civil Monetary Penalties Inflation Adjustment Rule on June 30, 2016 that raised the penalty amounts effective August 1, 2016.
3 This recommended phrasing was reaffirmed in the OSC's September 6, 2013 technical assistance letter.
4 Confirmed in the OSC's February 25, 2013 technical assistance letter.

application, he/she is not a "protected individual" under the INA in terms of citizenship and immigration status discrimination. An employer may lawfully reject that application based on a company policy not to provide immigration sponsorship.

If the employer is willing to provide immigration sponsorship, however, the hiring process is more complicated. Based on the currently available OSC guidance, if an applicant answers 'yes' to the sponsorship question posed above on a job application and the employer offers immigration sponsorship, an employer that rescinds a job offer or refuses to hire a work-authorized individual based on subsequently learned knowledge of that individual's country of origin may be committing illegal national origin discrimination.

Finally, the OSC addresses potential *unfair documentary practices* in the employment eligibility verification process. The OSC clarifies that an employer that implements a document verification process to determine only a new employee's immigration or citizenship status to comply with export control laws is unlikely to violate the INA antidiscrimination provisions if the document verification process is separate and distinct from the employment eligibility verification process. The OSC has previously stated that it is permissible to implement a verification procedure under the ITAR requiring the presentation of documents establishing citizenship or immigration status necessary to ensure compliance with the ITAR, for new employees that is *separate and distinct* from a Form I-9 employment eligibility verification procedure.[5] The OSC warns employers that if these processes appear to be integrated due to proximity in time, candidates may assume discriminatory document verification processed led to an unfavorable hiring decision.

Conclusion

Employers are left to master a delicate dance: on one hand, avoiding an unauthorized export to a foreign employee, and on the other avoiding unlawful discrimination in the hiring process. Although the OSC letter provides some insight to ease the quandary, employers still face pitfalls with their export compliance and in their hiring processes without an appropriate export compliance management program and with inadequate recruiting and onboarding procedures. As the appropriate analyses of these issues are highly fact-specific, employers are encouraged to consult counsel before posting a job opening that requires access to export-controlled information.

Questions or Assistance:

If you have any questions, please contact Alfredo G. Fernandez at (860) 251-5353 or afernandez@goodwin.com or Ashley E. Mendoza at (860) 251-5018 or amendoza@goodwin.com.

5 Confirmed in the OSC's October 6, 2010 technical assistance letter.

289 Greenwich Avenue
Greenwich, CT 06830-6595
203-869-5600

One Constitution Plaza
Hartford, CT 06103-1919
860-251-5000

265 Church Street - Suite 1207
New Haven, CT 06510-7013
203-836-2801

400 Park Avenue - Fifth Floor
New York, NY 10022-4406
212-376-3010

300 Atlantic Street
Stamford, CT 06901-3522
203-324-8100

1875 K St., NW - Suite 600
Washington, DC 20006-1251
202-469-7750

www.shipmangoodwin.com