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International Trade Alert

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If you only read one thing...

- DOJ Civil Rights Division issued a letter highlighting the risk of discrimination claims when employers request citizenship or national origin information from applicants and employees to comply with U.S. export control laws.
- Companies should evaluate their hiring policies and procedures to ensure that they are taking appropriate steps to comply with U.S. export control laws while minimizing the risk of discrimination claims.

DOJ Civil Rights Division Underscores Risk of Discrimination Claims When Requesting Information from Applicants and Employees for Export Compliance

On March 31, 2016, the Department of Justice's Civil Rights Division ("DOJ") issued a technical assistance letter (TAL) that highlights the potential for employers to create discrimination claims inadvertently when requesting and reviewing citizenship and national origin information for applicants and employees for compliance with the U.S. export control laws. While the practical implications of U.S. export control laws often require employers to obtain citizenship and nationality information in the hiring process, employers must take a cautious and narrowly tailored approach in obtaining this information and making employment decisions to avoid creating potential liability under U.S. antidiscrimination laws.

Background

Under U.S. export control laws, including the International Traffic in Arms Regulation (ITAR) and the Export Administration Regulations (EAR), employers are prohibited from employing certain "foreign nationals" in positions where they have access to "controlled technology" (also referred to as "technical data"), unless the employer obtains an export license for those employees. U.S. export control laws dictate that citizens of certain countries and individuals of certain nationalities cannot view, access or use controlled technology that is subject to the export control laws without a license. These restrictions do not apply to "U.S. persons," who are generally defined under U.S. export control laws as (i) a U.S. citizen, (ii) a U.S. lawful permanent resident or (iii) a "protected individual" (e.g., an asylee or refugee) in the United States. Although U.S. export control laws do not require any particular procedures to obtain and review citizenship and national origin information when employing or recruiting employees, as a practical matter, employers must vet applicants and employees for jobs with access to controlled technology by asking for information about their citizenship and national origin.

Employers have separate obligations to avoid violating U.S. antidiscrimination laws. For example, Title VII of the Civil Rights Act of 1964 ("Title VII") prohibits employers from discriminating against applicants and employees on the basis of national origin, and the Immigration and Naturalization Act (INA) protects U.S. citizens and nationals, refugees, asylees, and certain recent lawful permanent residents from citizenship discrimination and national origin discrimination. Although Title VII and the INA have exceptions permitting employers to use national origin and citizenship information when required to comply with U.S. laws, such as ITAR and EAR, or in the interest of national security,[1] these exceptions are narrowly construed.

Technical Assistance Letter

The TAL was written in response to an inquiry about whether employers, including staffing agencies, could ask job applicants or newly hired employees questions regarding their status as a U.S. person. In the proposed scenario, if applicants or new employees indicate that they are not a U.S. person, the employer requests that they identify their citizenship and U.S. immigration status. However, the employer also permits the applicant or new employee to opt out of these questions if they do not want to be considered for a position "whose activities are subject to Export Control Laws."

Despite the disclaimer permitting applicants and employees to bypass these questions, the DOJ cautioned employers in asking them, even if provided to "all new applicants in a nondiscriminatory manner." The DOJ found that the questions could cause "confusion among applicants or human resource personnel" when reviewing this information for jobs that are not subject to U.S. export control laws. For jobs that require access to controlled technology, the DOJ found that these questions could deter protected individuals, such as asylees and refugees, from applying for employment, because they could misconstrue their eligibility for the position (e.g., they might have a different understanding of the word "admitted").

The DOJ noted that, if all applicants or newly hired employees were asked these questions to determine whether an export license is needed, then the questions are unlikely to be discriminatory under the INA. The DOJ cautioned, however, that employers who refuse to hire individuals (or staffing agencies that limit the scope of assignments) based on the applicant's country of origin may create discrimination claims. The TAL also notes that the questions are problematic, because they could:

- cause employers (including human resources personnel) to make unlawful assumptions about an applicant's eligibility based on his or her citizenship or national origin
- lead rejected applicants to file discrimination claims on the belief that they were rejected because of their protected status.

The DOJ also warned employers that requesting and reviewing documentation to confirm compliance with U.S. export control laws could violate the INA's prohibition against unfair documentary practices. According to the DOJ, an employer's process for collecting documents to verify compliance with U.S.

[1] *See* 42 U.S.C. § 1324b (a)(2)(c); 42 U.S.C. § 2000e-2(g).

export control laws must be separate and distinct from the employer's process of collecting documents for determining eligibility for employment in the United States under the Form I-9.

Practical Implications

The TAL demonstrates the tension and pitfalls for employers in complying with both nondiscrimination laws and U.S. export control laws in the hiring process. It is important to note that the TAL is not a binding authority, and it is not indicative of how other agencies or DOJ divisions outside of the Office of Civil Rights would address violations of U.S. export control or sanctions laws. In addition, the TAL does not address discrimination claims when employers screen applicants and employees to comply with the requirements not to hire or do business with persons that have been "blacklisted" by the U.S. government on various denied party lists, including the Specially Designated Nationals and Blocked Persons List and the Denied Persons List.

The opinion, however, reveals how the DOJ's Office of Civil Rights may assess potential allegations of discrimination during investigations and enforcement actions. It can also be used as a persuasive authority for reference by a court or administrative law judge. Accordingly, employers can take the following steps to minimize the risk of discrimination claims when requesting and reviewing citizenship and national origin information for export control law:

- Implement clear written employment and export control policies and procedures that are consistently followed and are examined for compliance with this TAL. For example, if an employer solicits citizenship or national origin information at the application stage to comply with U.S. export control laws, then all applicants that apply for those positions should be asked those same questions. Asking some applicants and not others for the same position, certain questions about their national origin or citizenship could be seen as discriminatory.
- Request only citizenship or national origin information that is required by the export control law(s) that are applicable to the position in question. For instance, if the position requires access to information where the employer must only request and consider an applicant's citizenship and not his or her country of origin, then only request information related to the applicant's citizenship and not their country of birth or their national origin.
- Restrict questions soliciting citizenship and national origin information to positions that have access to information subject to export control laws. Avoid blanket questions on employment applications used for a number of positions, including positions that involve technical data that is not subject to the U.S. export control laws. Employers should make reasonable efforts to confirm that controlled technology covered by U.S. export control laws may be released to the positions that are asked these questions. The statutory exemptions under Title VII and the INA may not apply when employers obtain information about citizenship and national origin for positions that are not implicated by the export control laws.
- Confirm and modify restrictions as part of ongoing compliance efforts. Because U.S. export control laws frequently change, employers export control compliance teams should work closely with human

resources to amend hiring policies and practices on an ongoing basis. For example, U.S. export control rules may modify restrictions, such that citizens from certain countries are no longer prohibited from accessing controlled technology. Similarly, controls may be removed from certain controlled technology such that positions where those controls were removed no longer require the employer to request citizenship or national origin information for export control purposes.

- For any applicants who are not hired (or employees terminated) because they cannot access controlled technology required for a relevant position, document clearly the reasons that they were rejected or terminated. Antidiscrimination claims often arise based on miscommunication between managers and applicants/employees regarding the reasons for an adverse employment decision. For instance, a statement that an employee was not hired "because he is Chinese" is susceptible to misinterpretation. If an applicant hears this, he may assume that he was denied employment because of his Chinese national origin, while the employer, in fact, lawfully made the decision under the export control laws based on his citizenship.
- Consider only soliciting citizenship and national origin information for export compliance purposes after a conditional offer has been made. Moving these questions to later in the recruitment process will reduce the likelihood of large class action discrimination claims, because fewer individuals will be subject to these questions.
- Train human resources personnel and other relevant employees so that they understand the tension between employment laws and U.S. export control laws and follow the defined hiring process for complying with both sets of laws.
- Create separate and distinct policies and procedures for requesting documentation for compliance with U.S. export control laws and requesting documentation for completing the Form I-9.

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