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Achieving Compliance in Hiring Under U.S. Export Control and Anti-Discrimination Laws

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International Trade Controls, Employment

In February 2019, the U.S. Department of Justice ("DOJ") announced a settlement with Honda Aircraft Company LLC regarding claims that Honda Aircraft violated the Immigration and Nationality Act ("INA") by discriminating against non-U.S. citizens in an attempt to comply with requirements of the International Traffic in Arms Regulations ("ITAR") and the Export Administration Regulations ("EAR"). This was the latest in a series of recent enforcement actions pursuant to which DOJ has targeted companies that misinterpreted their duties under the export control laws in a way that violated the INA. These settlements serve not only as a caution for employers, but also a roadmap for those trying to comply with legal requirements under two overlapping regimes. Companies can take several steps, outlined below, to comply with both trade control and anti-discrimination laws.

Legal Background

The Department of State and the Department of Commerce regulate the export, reexport, and transfer of technology, technical data, or software source code to foreign parties under the ITAR and EAR, respectively. The ITAR regulates defense services, defense articles, technology, and technical data, while the EAR regulates commercial goods, software, and technology, including "dual-use" items that may have both commercial and military applications, as well as certain less sensitive defense items.

Both the ITAR and the EAR impose limitations on who may access regulated technology and software source code, even within the United States. Specifically, the ITAR limits the disclosure or transfer of sensitive technology or technical data to "U.S. persons" unless authorized by the State Department, while the EAR considers the release or disclosure of technology or software source code to non-U.S. persons to be a "deemed" export that may require licensing. Under both the ITAR and the EAR, "U.S. persons" are defined as, *inter alia*, U.S. citizens, U.S. lawful permanent residents (i.e. "green card" holders), or any individual granted protected status under the INA (8 U.S.C. § 1324b(a)(3)), including asylees and refugees.

Limitations on who can access technology or software source code under export control regulations must be harmonized with anti-discrimination considerations under federal law. Specifically, the INA, as amended by the Immigration Reform and Control Act ("IRCA"), prohibits employers from discriminating in hiring or recruitment based on a person's citizenship,

immigration status, or national origin. Title VII of the Civil Rights Act of 1964 also prohibits discrimination on the basis of national origin.

The tension between these two legal regimes is apparent: one places status-based restrictions on access to certain technology and software source code within the United States, while the other prohibits treating applicants for employment and employees differently on those bases. Both U.S. export regulations and employment law contain exceptions, however, which can be applied to reconcile the two regimes.

The anti-discrimination laws permit certain types of discrimination under limited circumstances. For example, under the INA, employers may consider protected characteristics if there is a legal basis for doing so, such as a law, regulation, or government contract that requires citizenship restrictions. The regulations also permit preferential recruitment and hiring of U.S. citizens or nationals over foreign persons where the two are equally qualified. Title VII contains a national security exception, which permits national origin discrimination under certain circumstances where national security laws apply. And both Title VII and the INA recognize a bona fide occupational qualification ("BFOQ") exception when a protected characteristic, such as citizenship, must be considered as a specific job requirement. These exceptions suggest that an employer may disqualify employees or applicants based on ITAR and EAR requirements.

But the ITAR and EAR introduce complexity into the analysis, given that neither contains a flat prohibition on transfers of technology or software source code to foreign persons. Instead, both the ITAR and EAR provide for licenses and license exceptions that may enable the transfer or release of sensitive technology or software source code to foreign persons under certain circumstances. Under the ITAR, for example, an exporter may apply to the State Department for a license to share technology with a non-U.S. party. Similarly, where technology or software source code is controlled by the EAR, an export license may be obtained from the Department of Commerce's Bureau of Industry and Security ("BIS") for transfer to non-U.S. persons. The EAR also provides a variety of license exceptions that enable access to controlled technologies or software source code by non-U.S. persons. Employers are not *required* to obtain the licenses or rely on license exceptions for transfers to non-U.S. persons, but because employers *may* do so, a presumption that a candidate is ineligible for a position that requires access to controlled technology or software source code based on citizenship alone is unwise.

Further, recent DOJ settlements demonstrate that the interaction between employment law and export laws is far from straightforward, and there is little authoritative guidance explaining the precise contours of how these laws interact. Consequently, companies can inadvertently violate provisions of *either* employment laws or export control laws through attempts to comply with the other, particularly if the requirements and exceptions are not fully understood.

DOJ Enforcement and Guidance

Recently, in February 2019, Honda Aircraft settled a claim with DOJ after it allegedly published at least 25 job postings that restricted certain positions to only U.S. citizens or lawful permanent residents because the roles involved access to export-controlled information. DOJ's investigation revealed that Honda Aircraft misread the term "U.S. persons" under the ITAR and the EAR to mean only U.S. citizens and lawful permanent residents. DOJ concluded that by requiring U.S. citizenship or permanent residency as a condition of employment, the postings created discriminatory barriers and unlawfully excluded qualified candidates from consideration.

DOJ assessed a $44,626 penalty and required Honda Aircraft to implement certain training on the INA's anti-discrimination provisions as part of the settlement.

Two other settlements are also instructive. In 2018, DOJ reached a similar settlement with Setpoint Systems, Inc., which DOJ accused of having an unlawful policy of hiring only U.S. citizens for positions involving ITAR-controlled information. The settlement included a $17,457 penalty and requirements to implement training programs and modify internal policies. DOJ also reached a settlement with the law firm Clifford Chance US LLP in 2018 after it accused the firm of shutting out dual-citizens and non-citizens authorized to work in the United States based on a similar misreading of the ITAR. DOJ rejected Clifford Chance's argument that the discriminatory decisions were made in "good faith," stating that no such exception to the anti-discrimination laws exists. The law firm was assessed a $132,000 penalty and was required to implement training programs and revisions to its policies as part of the settlement.

A March 2016 guidance memo from DOJ focused on when and how employers may ask questions about citizenship or immigration status for the purpose of complying with the ITAR and EAR and sheds further light on the agency's approach. According to the memo, employers should limit the scope of inquiries about protected characteristics to positions actually involving access to export-controlled information, and should use those inquiries to determine whether the individual's access to sensitive information will require an export license rather than as a disqualifying tool. Those employees responsible for assessing ITAR and EAR considerations during the hiring process should therefore be specially trained and perhaps even separated from the standard human resources function.

Guidance for Employers

DOJ guidance and enforcement actions provide employers with insight on how to balance obligations under export control and anti-discrimination laws. Perhaps most importantly, these recent enforcement actions remind companies that the legal term "U.S. persons" encompasses protected individuals, including refugees and asylees, in addition to U.S. citizens and lawful permanent residents. Employers seeking to comply with export controls must be cognizant that the ITAR and EAR do not permit hiring practices based on a narrower definition.

Further, because both the ITAR and EAR provide for the possibility of licenses and license exceptions, even non-U.S. persons may be able to work with export-controlled technology or software source code. Therefore, restricting job postings on the basis of citizenship or immigration status can be considered a violation of the INA or Title VII, even when made in a good faith attempt to comply with the ITAR and EAR, if the focus appears to be the applicant's or employee's citizenship status or national origin instead of on the need to obtain a license or identify an applicable license exception for the contemplated release of technology or software source code.

There are several steps employers can take to assess the export control implications of a particular hire without running afoul of the anti-discrimination laws, and importantly, employers are not prohibited from inquiring about citizenship and immigration status entirely.

1. **Employers should implement a consistent assessment strategy tailored to evaluating candidates against the company's legitimate business needs.** For example, companies should designate ahead of time — ideally before applications are

received — which positions will require access to export-controlled technology or software source code. If appropriate, employers can include language in the posted job description making it clear that the position may include access to technology and/or software source code that is subject to U.S. export controls.

2. **Consider sending a form letter (perhaps an auto-response) to applicants explaining that the position may be subject to U.S. export control requirements under the ITAR or the EAR.** The form letter can indicate that employment with the company is contingent on either verifying U.S.-person status or obtaining any necessary license, that the applicant will be required to answer certain questions for export control purposes, and that the information will be reviewed by compliance personnel to ensure compliance with federal law. This letter should also state that the employer may choose not to apply for a license for such individuals whose access to export-controlled technology or software source code may require authorization and may decline to proceed with an applicant on that basis alone.

3. **The export control evaluation process should be bifurcated from the rest of the hiring process.** Companies can develop a standalone document that asks citizenship and immigration status questions and explains information sought in conjunction with requirements under U.S. export control laws. Though not required by law, these forms should be submitted to an export control or compliance officer who does not serve in a human resources function to best ensure compliance with anti-discrimination requirements. The compliance officer can request and verify appropriate documentation and report to human resources whether an export license would be required for the individual applicant without providing human resources or other hiring decision makers with any information about citizenship, immigration status, or national origin.

4. **A company can reduce its legal risk by waiting to assess export control issues until after it extends a conditional offer of employment.** If a job offer is made contingent on assessing whether a license will be needed by a person hired into a specific role, this information should be made clear in the offer letter and a process similar to the one described above should be used. Of course, the possibility that an offer to a candidate chosen after a lengthy application process may need to be rescinded if the employer is not able to obtain a license or decides not to seek one may be burdensome for employers, and is not a requirement in order to comply with the law.

In sum, employers have discretion to decide whether or not they are willing to pursue an export license for a particular position. If an employer decides at the outset that it is not willing to seek export licenses for a position, then it may decline to consider or hire applicants for whom a license would be required. However, employers must identify that requirement in the job posting, and any decision not to proceed with or hire an applicant should be based on (and refer to) the need for the license and not on the individual's citizenship or status as a U.S. person.

The nexus between export control law and employment law is dynamic. The recent DOJ enforcement actions highlight the importance of understanding the interaction between these legal regimes to ensure an appropriate approach is undertaken to mitigate risk with respect to both anti-discrimination and export control law. Complying with the suggestions outlined above should mitigate risks associated with compliance. However, it remains essential that companies stay up to date and vigilant with regard to potential legal change in this area.

Covington has strong capabilities in both export control and employment law. We will continue to monitor developments in this area, and we are well-positioned to advise companies who may wish to review their existing hiring practices in light of these recent DOJ actions. If you have any questions concerning the material discussed in this client alert, please contact the following members of our firm:

Peter Flanagan	+1 202 662 5163	pflanagan@cov.com
Peter Lichtenbaum	+1 202 662 5557	plichtenbaum@cov.com
Lindsay Burke	+1 202 662 5859	lburke@cov.com
Corinne Goldstein	+1 202 662 5534	cgoldstein@cov.com
Kimberly Strosnider	+1 202 662 5816	kstrosnider@cov.com
David Addis	+1 202 662 5182	daddis@cov.com
Tom Plotkin	+1 202 662 5043	tplotkin@cov.com
Alexandra Francis	+1 202 662 5917	afrancis@cov.com