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Discrimination and Deemed Export Laws Intersect

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Your client is considering offering a job involving sensitive engineering processes to a non-U.S. citizen dual national of Canada and Iran. The client is aware that federal law restricts its ability to offer sensitive jobs to nationals of certain countries, and that it requires the company first receive a license before providing such information. Not only that, but the employer needs to monitor whether the employee continues to have access to sensitive information once employed. Rather than bother with this rigmarole, can the company simply decline to consider foreign nationals for the job?

The answer to this question involves the intriguing intersection between U.S. discrimination laws and "deemed export" laws designed to protect U.S. national security. Several federal laws fall into this latter category.

ITAR, EAR, and OFAC

Title VII of the Civil Rights Act of 1964 prohibits discrimination on the basis of national origin, and (subject to certain exceptions discussed below), the Immigration Reform and Control Act prohibits discrimination on the basis of citizen status.

Both the International Traffic in Arms Regulations (ITAR) and the Export Administration Regulations (EAR), 15 C.F.R. §734.2(b)(2)(ii), however, prohibit the release of certain technology to a "foreign person" without an appropriate export license.[1] Any such release "is deemed to be an export to the home country or countries of the foreign national." Id. Even allowing visual inspection or having conversations about these items may constitute a "deemed export." Id.

The ITAR regulations were promulgated under, and provide guidance concerning, the enforcement of the Arms Export Control Act, which authorizes the president to "control the import and the export of defense articles and defense services and to provide foreign policy guidance to persons of the United States involved in the export and import of such articles and services."[2] The ITAR regulations prohibit issuing licenses for exports to numerous specifically identified countries, including those that are subject to U.S. and United Nations arms embargoes.

Generally, EAR requires scrutiny of an individual's most recent country of citizenship or permanent residency. Under ITAR, however, all of a "foreign person's" countries of citizenship or permanent residency must be listed on the deemed export license application.[3] On the other hand, the U.S. Department of Commerce's Bureau of Industry and Security (BIS), which is tasked with administering and enforcing the EAR, 15 C.F.R. §730.1, states that the agency looks only at a person's latest citizenship or legal permanent residence in determining restrictions.[4] So, for example, an Iranian national who subsequently becomes a Canadian citizen generally will be treated as Canadian by the EAR. The issue may be different if the individual is a dual citizen, in which case the guidance would require looking at both.

In addition to the restrictions created by ITAR and EAR, the Office of Foreign Assets Control (OFAC) of the U.S. Department of the Treasury administers and enforces economic and trade sanctions against certain foreign countries and regimes, as well as

designated individuals and companies owned or controlled by, or acting on behalf of, targeted countries.[5] In general, unless licensed by OFAC, goods, technology, or services may not be exported, re-exported, sold or supplied, directly or indirectly, from the United States or by a U.S. person, wherever located, to these countries or entities. Further, with certain exceptions, foreign persons who are not U.S. persons are prohibited from re-exporting sensitive U.S.- origin goods, technology or services to Iran or the Government of Iran.

Complying with these laws significantly implicates U.S. anti-discrimination rules, and creates compliance headaches for all companies engaged in sensitive industries.

National Security Exception

Title VII contains a "national security exception," which permits an employer "to fail or refuse to hire and employ any individual for any position, for an employer to discharge any individual from any position" if the job "is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President…."[6]

The Equal Employment Opportunity Commission Guidelines on the Use of the National Security Exception[7] require that employers must enforce any national security requirements in a non-discriminatory way. In other words, it would not be appropriate for an employer to indicate that clearances are needed for employees of certain races while not imposing such requirements on individuals of other races.[8]

The Guidance makes clear that the EEOC does not have authority to review security clearance decisions imposed by the federal government. Moreover, the EEOC recognizes that "no one has a 'right' to a security clearance."[9] Instead, analysis of whether an employer is properly invoking Title VII's national security exception "should focus on the position in question and the individual applicant's circumstances to ensure that…the charging party…cannot meet the necessary national security requirements."

Interestingly, the EEOC Guidance describes an unpublished EEOC finding that an employer did not violate Title VII when it failed to promote a naturalized U.S. citizen from Yugoslavia, even though he was the most qualified applicant for the promotion, because it would take six months to a year for the employee to receive the necessary security clearance for the job. Critical to the decision were that no one from within the company was promoted to the position, the employer ultimately hired persons who already had the required security clearance, and there was no evidence that applicants of other nationalities received more favorable treatment in securing the position.

Other theories under discrimination law may justify differing treatment of individuals based on their national origin or citizenship.

BFOQ Affirmative Defense

The BFOQ exception of Title VII permits employers to hire employees considering national origin as a requirement, where it is "reasonably necessary to the normal operation of that particular business or enterprise."[10] The Supreme Court has held that the defense is "written narrowly," and therefore should be construed narrowly.[11] It seems clear that the BFOQ exception of Title VII would permit an employer to refuse to hire an individual whose national origin causes him or her to be unable to obtain a proper export license. Despite the EEOC Guidance, it is not so clear that the BFOQ defense would permit an employer to refuse to hire an individual based on their national origin based on the mere possibility that obtaining a license would be difficult or costly. However, faced with hard evidence of this, the Guidance may support invoking this defense.

IRCA's Provison

IRCA prohibits employers from, among other things, making hiring and termination decisions based on a person's national origin and citizenship. IRCA prohibits national origin discrimination against any individual other than an unauthorized alien. However, aliens who are not permanent residents, temporary residents, or refugees or asylees, with or without employment authorization, are not protected by IRCA's citizenship discrimination provisions.

Moreover, it is not an unfair practice under IRCA for an employer 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." IRCA Regulations, 8 C.F.R. §1324(b)(a)(4).

Hence, it appears that IRCA would not require an employer to seek a license for a non-citizen applicant.

Accommodation

Neither Title VII nor IRCA requires an employer to hire someone who is not able to perform the functions of the job. Nor do these laws require that an employer provide an accommodation for such employees. To prove hiring discrimination based on circumstantial evidence under Title VII, the applicant must prove, among other things, that she was qualified for the position in question.

Moreover, an employer is not required to sponsor a foreign person for a work visa or an export license, so it may be extrapolated that an employer may legitimately reject a foreign national applicant if the nature of the employment would require an export license.[12]

Thus, the intersection of discrimination and deemed-export laws presents affected employers with a dilemma: Complying with the deemed export laws requires that they make inquiries concerning national origin and citizenship, and possibly exposing them to liability under civil rights laws. While it is not settled whether an employer may avoid the entire imbroglio by declining to offer security-sensitive jobs to individuals of certain national origin or citizenship, rather than seeking a license, some precedent appears to support this practice. An employer should consult with experienced employment counsel prior to making this decision; and, as the EEOC has said, an analysis of whether Title VII is implicated requires a fact-specific analysis.

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Endnotes:

1. The restriction, however, "does not apply to persons lawfully admitted for permanent residence in the United States and does not apply to persons who are protected individuals under the Immigration and Naturalization Act (8 U.S.C. 1324b(a)(3)."

2. 22 U.S.C. §2778; see also 22 C.F.R. §120.1(a)(1) (discussing authority for regulations).

3. "Foreign person" means "any natural person who is not a lawful permanent resident as defined by 8 U.S.C. 1101(a)(20) or who is not a protected individual as defined by 8 U.S.C. 1324b(a)(3) [the Immigration and Naturalization Act]." In other words, "foreign nationals who have been granted [H-1B] visas and other work authorizations," including student visas and fiancé visas, may lawfully be employed within the United States; however, their presence in certain positions may at the same time violate deemed export rules. See S. Sperino, "Complying with Export Laws Without Importing Discrimination Liability: An Attempt to Integrate Employment Discrimination Laws and the Deemed Export Rules," 52 St. Louis University Law Journal 375, 392-93 (2008) nn. 20 and 21 (hereafter cited as Sperino).

4. Department of Commerce, "Revisions and Clarification of Deemed Export Related Regulatory Requirements," 71 Federal Register 30840, 30841 (May 31, 2006). ??

5. http://www.treasury.gov/about/organizational-structure/offices/Pages/Office-of-Foreign-Assets-Control.aspx.

6. 42 U.S.C. §2000e-2(g)

7. http://www.eeoc.gov/policy/docs/national_security_exemption.html.

8. EEOC Policy Guidance on the Use of the National Security Exception Contained in §703 of Title VII of the Civil Rights Act of 1964; see also Sperino at 392-93.

9. Citing *Department of Navy v. Egan*, 108 S. Ct. 818, 824 (1988).

10. 42 U.S.C. §2000e-2(e).

11. *International Union, United Auto., Aerospace and Agr. Implement Workers of America, UAW v. Johnson Controls*, 499 U.S. 187, 201 (1991)