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DOJ Issues Long-Awaited Guidance on Hiring Non-U.S. Persons in Export-Controlled Positions

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Companies subject to export controls have long been left wondering how to navigate the process of hiring employees into positions that require access to export-controlled products, technology, or software. On one hand, the International Traffic in Arms Regulations (ITAR) and Export Administration Regulations (EAR) require authorization from the Departments of State and/or Commerce before foreign nationals are permitted access to certain export-controlled technology or software. On the other hand, federal non-discrimination law prohibits employers from discriminating against applicants or employees on the basis of individuals' national origin, citizenship, or immigration status (unless otherwise required by law). Despite the tension between export control and non-discrimination rules, over the years, the Department of Justice (DOJ) has been consistent, in words and in enforcement actions, taking the position that export control compliance regarding foreign national access to export-controlled items neither requires, nor excuses, discriminatory hiring practices.

While taking a number of enforcement actions against companies that allegedly violated the non-discriminatory hiring requirements under the Immigration and Nationality Act (INA) in the name of ITAR or EAR compliance, the DOJ has never provided meaningful guidance to companies as to how to navigate these two, otherwise seemingly, competing demands until now. The latest in DOJ's enforcement campaign was a $365,000 settlement with General Motors, in which the DOJ claimed that GM's "violations stemmed in part from its failure to properly consider the INA's nondiscrimination requirements when also complying with export control laws." Along with the GM settlement, the DOJ announced for the first time that it was issuing (long-awaited) guidance to assist employers as they navigate the complicated intersection between export controls and federal non-discrimination law. The key takeaways of the DOJ's guidance are:

1. **Remove citizenship requirements from job postings for positions that require access to ITAR or EAR-controlled technology or software.**

The DOJ has been clear: the ITAR and EAR do not make it impossible for foreign nationals to work in export-controlled positions. For that reason, employers cannot use these export control regulations as an excuse or defense to citizenship or national origin discrimination claims. From the DOJ's perspective, the ITAR and EAR require only that employers establish appropriate authorization before granting access to export-controlled technology, which means employers must treat all applicants equally regardless of whether or not they are U.S. persons for export control purposes. It is important to emphasize to applicants that the definition of "U.S. persons" for export control purposes is

not strictly limited to U.S. citizens. It can also mean U.S. nationals, lawful permanent residents, refugees, and asylees. By implying that anyone other than a U.S. citizen will require export licensing, employers may discourage lawful residents or individuals of other immigration statuses from applying.

2. **Do not commingle the employment eligibility verification process and the export compliance assessment.**

Employers should never require more documents than necessary to complete the I-9 verification process, as this can be considered citizenship discrimination. Employees are permitted to choose which of the eligible documents they present for I-9 verification. In GM's case, the DOJ noted that the company unlawfully required lawful permanent residents to show an unexpired foreign passport as a condition of employment, "imposing a discriminatory barrier in the hiring process." To the extent additional information is needed to assess the need for export licensing, this request should be separate from the employment eligibility verification process. Indeed, even any documents requested as part of the export compliance assessment should be stored separately from documents related to the employment eligibility verification process.

3. **Policies and training are key.**

Company personnel involved in employee hiring and onboarding for export-controlled positions must receive proper training on non-discrimination laws and the importance of separating the employment verification process from the export compliance assessment. The DOJ guidance makes it apparent that a lack of adequate policies and training will be held against a company in any enforcement action.

4. **There is still no guidance on how to handle new hires from proscribed countries.**

Though the DOJ's guidance answers some previously unanswered questions, some employers are still left unsure how to treat new hires who are determined to be nationals of a proscribed country via the export compliance assessment, i.e., a country to which the Department of State or the Department of Commerce has a policy of denial when it comes to granting export licenses. In other words, if a non-U.S. person from a proscribed country is hired for a position that requires access to export-controlled technology or software that is proscribed to that person's home country, do employers still need to apply for an export license despite the near certainty that they will be denied so as to not run afoul of non-discrimination law? The guidance has not addressed this question, so employers are left to guess.

Despite the guidance from the DOJ, employers with export-controlled technology or software still face a challenging paradox when it comes to interviewing and hiring non-U.S. persons. Contact a Dentons International Trade Group or Employment and Labor Group attorney if you have any questions about reconciling export control compliance with non-discrimination employment requirements.

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