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Navigating Export Compliance and Anti-Discrimination: What DOJ's Recent Settlement with Honda Aircraft Teaches Us

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The Department of Justice (DOJ) recently reached a settlement with Honda Aircraft Company, LLC (Honda Aircraft) resolving a claim that Honda Aircraft violated the Immigration and Nationality Act's (INA) anti-discrimination provisions by unlawfully requiring applicants for certain job postings *to be U.S. citizens or lawful permanent residents*. By restricting potential applicants only to those two categories, Honda Aircraft impermissibly restricted the pool of job candidates available for the job positions. These overly restrictive and discriminatory job postings resulted from Honda Aircraft's almost certain unintentional misunderstanding of its obligations per U.S. export control regulations to prevent the unauthorized release of controlled technology to foreign persons.

The Honda Aircraft settlement is the latest in a series of recent DOJ settlements[1] addressing situations where companies' INA compliance has gone awry due to well-intended efforts to comply with the International Traffic in Arms Regulations (ITAR) and/or the Export Administration Regulations (EAR), the two regulations central to U.S. export controls. What Honda Aircraft, and other companies, failed to understand is that compliance with U.S. export control laws need not, and should not, come at the expense of compliance with the anti-discrimination provisions of the INA. In other words, Honda Aircraft did not appreciate its obligations to comply both with the INA and U.S. export control regulations in its hiring process. HR departments in particular must be cognizant of both sets of laws in their hiring practices, and companies should have in place written policies and procedures that provide a clear path to compliance.

What Do U.S. Export Control Regulations Require?

Through the above-mentioned export control regulations, the United States regulates not only the actual export of certain goods, products or services from the United States to a "foreign person"[2] but also the release of certain technology or "technical data"[3] within the United States if the technical data is being released to a foreign person. Under the ITAR, technical data is released through: "(1) [v]isual or other inspection by foreign persons of a defense article that reveals technical data to a foreign person; or (2) [o]ral or written exchanges with foreign persons of technical data in the United States or abroad."[4] It is this type of export—releasing technical data within the United States to a foreign person—that companies are often attempting to prevent by placing overly-restrictive limitations on job postings. This type of export is referred to as a "deemed export" because the release of technical data to a foreign person is deemed to be an export to the foreign person's country or countries of nationality.[5]

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[1] In June 2018, DOJ settled an anti-discrimination claim against Setpoint Systems, Inc. for $17,475, resulting from the company's unlawful policy of hiring only U.S. citizens for certain professional positions based on the company's erroneous understanding of the ITAR. In August 2018, DOJ settled an anti-discrimination claim against Clifford Chance US LLP for $132,000, resulting from the law firm's discriminatory hiring practice in refusing to consider work-authorized non-U.S. citizens and dual citizens for a document review project based on the firm's misunderstanding of the ITAR.

[2] The ITAR uses the term "foreign person" to refer to any natural person who is not a lawful permanent resident of the United States or a protected individual. The EAR uses the term "foreign national" to refer to the same category of individuals.

[3] The ITAR defines "technical data" to mean information which is required for the design, development, production, manufacture, assembly, operation, repair, testing, maintenance or modification of defense articles; certain classified information; information covered by an invention secrecy order; or certain software directly related to defense articles. 22 C.F.R. § 120.10.

[4] *See* 22 C.F.R. § 120.50.

[5] The ITAR and the EAR differ in one important respect in their interpretation of a deemed export. Pursuant to the EAR, the Department of Commerce's Bureau of Industry and Security (BIS) treats a foreign national's most recent country of citizenship or permanent residency as the country of export. The Department of State's Directorate of Defense Trade Controls (DDTC) takes a more expansive view under the ITAR, considering the release of technical data to a foreign person to be an export to *all* countries where that person holds or has ever held citizenship or permanent residency.

Deemed exports can happen in a variety of ways: forwarding an e mail that attaches export-controlled technical data to a work colleague who is a foreign person, not appropriately limiting access to shared company drives that contain export-controlled technical data, leaving a technical drawing out on the floor in a manufacturing facility, or orally discussing technical data with a foreign person.

In order to comply with U.S. export laws, and to avoid an unauthorized deemed export to a "foreign person," a company must ensure that export-controlled technical data is only disclosed to "U.S. persons," or the company must obtain a license prior to releasing export-controlled technical data to a foreign person.

Thus, it is critical to understand who is considered a "U.S. person" for export control purposes. A "U.S. person" is either a lawful permanent resident (i.e., a green card holder) *or* a protected individual, as that term is defined by the INA. A "foreign person" is just the opposite—anyone who is not a lawful permanent resident or a protected individual.

What Does the INA Require?

The INA prohibits discrimination in hiring based on an individual's national origin or, in the case of a "protected individual," citizenship status.[6] Protected individuals, as defined by the INA, encompass U.S. citizens, U.S. nationals, lawfully admitted permanent residents, refugees and asylees, and certain individuals lawfully admitted for temporary residence under specific amnesty provisions.[7] Thus, as relevant to the intersection of the hiring protections encapsulated in the INA and U.S. export control compliance, companies' hiring practices cannot discriminate against these categories of protected applicants. The INA also prohibits unfair documentary practices, meaning that employers may not request specific documents during the Form I-9 employment authorization verification process.[8]

How Do Companies Comply with Both Export Control Laws and the INA?

Honda Aircraft (and other employers) got themselves into hot water by applying an overly restrictive meaning to "U.S. person" in order to comply with export control laws. Honda Aircraft published job announcements specifying that only applicants who were lawful permanent residents and/or U.S. citizens would be considered for employment of the advertised positions. This restriction was likely the well-intended attempt by Honda Aircraft to properly limit access to export controlled material per the export control regulations. The fallacy in this approach, however, was that Honda Aircraft did not need to impose such restrictive language in its job postings in order to comply with export control laws. Honda Aircraft should, and could, have created job postings that were available to any U.S. person, specifically including all protected individuals.

Thus, the key takeaway from the Honda Aircraft settlement, and similar settlements before it, is that companies must take care to avoid crafting overly-restrictive job postings in the name of export compliance.

Best practice instead dictates that companies separate their hiring decisions from their export compliance practices. First, companies must ensure that all job postings, even job postings for export-controlled positions, are not overly restrictive or anti-discriminatory, and, in particular do not exclude protected individuals. Second, companies should never refuse to hire an applicant based on the applicant's citizenship or nationality, so long as the applicant can establish his or her authorization to work in the United States through the Form I-9 verification process. Third, once a new employee is hired, and if the position for which he or she has been hired is export-controlled, a company may undertake an export screening process to confirm whether the employee meets the definition of a U.S. person for export control purposes.[9] Fourth, if that employee does not meet the U.S. person definition, the company should apply for the necessary export license(s).

Thus, with the proper advanced planning and written procedures, the INA and export control laws can work in harmony.

If you have any questions regarding the topics discussed in this article, please contact **Marques O. Peterson** at +1 (202) 312 3038, **Kirsten W. Konar** at +1 (312) 609 7588 or any Vedder Price attorney with whom you have worked.

[6] Title VII of the Civil Rights Act also prohibits employment discrimination based on race or national origin, among other things. 42 U.S.C. § 2000e-2(a).

[7] 8 U.S.C. § 1324b(3).

[8] 8 U.S.C. § 1324b(6).

[9] Any document verification process for compliance with export control laws must be completely separate and distinct from the I-9 process, and a company should only seek to establish U.S. person status for job positions that involve export-controlled products or technology.