



ALERTS

International Trade Law - DOJ Issues Guidance On Balancing Employer Non-Discrimination Obligations With ITAR And EAR Compliance

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On March 31, the U.S. Department of Justice (DOJ) issued guidance on balancing an employer's obligation to comply with the anti-discrimination provisions of U.S. employment regulations with its obligation to comply with the "deemed export" provisions of U.S. export control laws, in particular, the International Traffic and Arms Regulations (ITAR) and Export Administration Regulations (EAR).

Under the ITAR and EAR, a disclosure of controlled technical data or technology to a foreign person in the U.S. is considered an export and may require an export license. This "deemed export" licensing requirement affects U.S. companies with employees working in the U.S. under temporary work authorizations, e.g., H1-B visa. In particular, the requirement impacts U.S. companies involved in defense and "high-tech" industries.

The DOJ guidance clarifies that while the ITAR and EAR may require an export license for non-U.S. persons to access controlled technical data, these regulations do not restrict the recruitment and hiring of non-U.S. persons. As such, the guidance discouraged inquiries regarding the citizenship and immigration status of applicants or new hires for all positions. However, the guidance indicates that an employer hiring for a position involving access to ITAR or EAR-controlled information may inquire about immigration status so long as they ask all applicants for that position and make clear that inquiry is being made solely to comply with export licensing requirements. Additionally, the guidance states that a staffing agency cannot restrict potential assignment to a job requiring

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access to ITAR- or EAR-controlled technical data based upon an individual's immigration status.

Moreover, DOJ cautions that any document verification process implemented by an employer to determine whether an employee triggers the ITAR and EAR licensing requirements must be kept separate and distinct from that employer's employment eligibility verification process.

To ensure compliance while navigating this difficult area, companies may consider having their export compliance officer ask about citizenship and immigration status only after an offer has been extended for a position requiring access to ITAR- or EAR-controlled data. Additionally, the company should consider informing the employee in writing that the sole purpose of such inquiry is to determine applicable ITAR and EAR licensing requirements. Companies may want to discuss this DOJ guidance with their employment counsel and review their current export control policies and procedures to ensure they are consistent with that guidance.

For more information, contact the Barnes & Thornburg attorney with whom you work, or Linda Weinberg at 202-408-6902 or linda.weinberg@btlaw.com or Karen McGee at 202-408-6932 or karen.mcgee@btlaw.com.

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