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ALERTS

DOJ's Suit Against SpaceX: The Perils Of Conflating Export Control And I-9 Requirements

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Highlights

The U.S. Department of Justice (DOJ) sued SpaceX for violating the Immigration and Nationality Act through alleged discriminatory hiring practices based upon incorrect interpretations of export control laws

Only a few months earlier, the DOJ announced a settlement in a similar case against General Motors

The SpaceX and General Motors cases illustrate the risks of misrepresenting export control and I-9 requirements; employers cannot always use those laws to deny jobs to candidates based upon citizenship, immigration status, or national origin

Space Exploration Technologies Corporation, known as SpaceX, is the latest company to be scrutinized by the U.S. Department of Justice (DOJ) for its alleged violation of the Immigration and Nationality Act (INA) through discriminatory hiring practices founded on incorrect interpretations of the export control laws.

In its 13-page complaint filed on August 23, the DOJ alleges that SpaceX discriminates against asylees and refugees through its hiring practices,

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including during recruitment, screening, and selection; discourages asylees and refugees from applying to the company by incorrectly stating that SpaceX can only hire U.S. citizens and lawful permanent residents; and fails to fairly consider asylees and refugees who apply to roles at SpaceX and has refused to hire such applicants due to their citizenship status.

The DOJ alleges that from September 2018 to September 2020, SpaceX exclusively hired U.S. citizens and lawful permanent residents. Further, the jobs at issue in the complaint are not limited to those involving advanced degrees or export-controlled items. The DOJ notes that SpaceX also recruits and hires for positions such as "welders, cooks, crane operators, baristas, and dishwashers," and describes the company's practices as "routine, widespread, and longstanding."

The complaint also alleges that hiring managers and other "SpaceX recruiters regularly told job candidates that with a few exceptions, SpaceX is only able to hire U.S. citizens or lawful permanent residents due to [International Traffic in Arms Regulations] ITAR."

This careful scrutiny of SpaceX's hiring practices may seem familiar, as it was only a few months ago, in April 2023, when the DOJ announced a settlement with General Motors. Following the settlement, the DOJ issued guidance to help employers avoid discrimination under the Immigration and Nationality Act (INA) when complying with U.S. export control laws.

For background, the International Traffic in Arms Regulations (ITAR) and the Export Administration Regulations (EAR) control the export of commodities, software, and technology, as well as govern and restrict "deemed exports," such as the release of technical data, technology, or source code to individuals within the U.S. who are not "U.S. persons." Under U.S. export control laws, a U.S. person is defined as any individual who is a U.S. citizen, lawful permanent resident, refugee or asylee. Refugees and asylees thus are permitted to view certain controlled items on equal footing with U.S. citizens and permanent residents.

An employer engaging in exports may need to conduct export compliance screening to obtain details regarding a candidate's citizenship, residency, or immigration status to determine whether the individual meets the export control definition of a U.S. person. If not, employers may need to obtain a license from the U.S. government to authorize deemed exports of controlled information to non-U.S. persons employed by them in the U.S., including those on a nonimmigrant employment-based visa, such as an L-1 or H-1B. With these requirements in mind, employers must carefully balance compliance with U.S. export controls with compliance with the anti-discrimination provisions of the INA.

Both the SpaceX and General Motors cases have highlighted the perils of conflating export control and I-9 requirements. It is best practice to consider these do's and don'ts:

- Don't combine an export licensing assessment with the Form I-9 process
- Do make it clear that U.S. persons include more than U.S. citizens

when discussing export control requirements with job candidates

- Don’t use the ITAR or the EAR as a reason to limit jobs to candidates with certain citizenship, immigration status, or national origin
- Do ensure that the people who handle hiring and onboarding processes receive training to prevent discrimination based on citizenship, immigration status, and national origin
- Don’t conduct export licensing assessments for workers whose positions do not require working with export-controlled items
- Do perform export licensing assessments for all candidates for positions requiring work with export-controlled items, not just those candidates you suspect may be non-U.S. persons, and inform all candidates of the purpose of the assessment

For more information, or to request training, please contact the Barnes & Thornburg attorney with whom you work or Tejas Shah at 312-214-5619 or tejas.shah@btlaw.com or Kristen Krishnamurthy at 202-831-6708 or kristen.krishnamurthy@btlaw.com. This alert was co-authored by Tieranny Cutler, independent contract attorney.