FENWICK & WEST LLP

Weekly Employment Brief

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This Special Edition of the Fenwick & West LLP W.E.B. Update is designed to help employers comply with both anti-terrorism export control and national-origin discrimination laws.

EMPLOYERS MUST AVOID NATIONAL ORIGIN DISCRIMINATION IN COMPLYING WITH EXPORT CONTROL LAWS

INTRODUCTION

Under federal export control laws, certain companies in the high technology industry must avoid exporting controlled technology to countries covered by an export embargo. The current embargoed countries are: Cuba, Iran, Iraq, Libya, North Korea, Sudan and Syria (the embargo of Syria is only partial). The requirement is complicated by the "deemed export rule" that prohibits even the visual inspection by, or verbal exchange of information with, a national of an embargoed nation. This special edition of the W.E.B. Update focuses on how employers must balance their obligation to comply with the export control laws with the equally important requirement to avoid violating national-origin employment discrimination laws. The tension between export control and discrimination laws often arises when an employer makes necessary inquiries to determine whether a job applicant is a national of a country covered by the export embargo. This article does not cover the related but separate issue of exports to "proscribed" countries.

THE DEEMED-EXPORT RULE

The "deemed-export" rule is based on export control regulations stating that the release of technology or source code to a foreign national is deemed to be an export to the home country of that individual. A "release" of technology or source code is defined to include visual inspection by foreign nationals of U.S.-origin equipment and facilities, or oral exchanges of information in the United States or abroad. Thus, simply showing to, or discussing covered technology with, a foreign national of an embargoed country may constitute a prohibited "deemed export."

As a practical matter, it is next to impossible for an employer to employ a foreign national of an embargoed country who is not otherwise exempt from the deemed export rule. Although the employer may apply for an export license to employ the individual, the federal Department of Commerce regulation states a general policy of denying most license applications to embargoed destinations.

Some foreign nationals of embargoed countries may be exempt from the deemed export rule because it does not apply to persons lawfully admitted for permanent residence in the United States, or "protected individuals" under the Immigration and Naturalization Act (such as refugees and applicants for political asylum). The rule also does not apply to U.S. citizens who originally came from one of the embargoed countries. Accordingly, in order to determine whether an applicant may be a national of an embargoed country, an employer must inquire about his or her nationality.

NATIONAL ORIGIN DISCRIMINATION LAWS

Conversely, both Title VII of the Civil Rights Act of 1964 and the Immigration and Reform and Control Act ("IRCA") prohibit discrimination on the basis of national origin. How, then, can an employer lawfully inquire about an applicant's national origin and then make an adverse employment decision because of his or her nationality? In 1998, the federal Equal Employment Opportunity Commission opined that a carefully tailored inquiry in this regard may be lawful. The EEOC stated that:

> "Title VII does not explicitly prohibit pre-employment inquiries about a person's national origin" so long as the questions are supported by a legitimate nondiscriminatory reason."

However, the EEOC cautioned that:

> "[T]he real question at issue here appears to be whether [the employer] may lawfully exclude from employment certain individuals on the basis of their national origin. . .
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> "Under a disparate treatment analysis, the employer must prove that its reliance on national origin is justified under an affirmative defense, i.e., as a bona fide occupational qualification. ... In an adverse impact claim, an employer must show that its facially neutral policy - here, the reliance on citizenship or the availability of an export license - is job-related and consistent with business necessity. . . .
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> "Regardless of the analytical approach, however, the availability of a defense seems likely to depend on the extent to which the export control regulations in fact require, or effectively require, exclusion of individuals from particular countries."

RECOMMENDATIONS

Therefore, to avoid a national origin discrimination claim, we make the following suggestions. These suggestions are not the sole means for obtaining legal compliance. Legal advice should be sought to address these complex issues.

First, it is critical that the employer establish that its technology is indeed covered by the deemed export rule.

Second, if covered, the employer should make a careful analysis to determine whether the job or jobs in question are actually affected. It is important to perform a separate analysis of each job (versus simply

concluding that all the company's positions are automatically covered by export controls).

Third, assuming both the technology and the particular position(s) are covered, the employer should make the inquiry regarding nationality of all applicants for the job (and not just, for instance, of applicants who look "foreign"). Further, the employer should carefully narrow its national-origin inquiry to ask:

1) whether the applicant is exempt from the deemed export rule (because s/he is a citizen or permanent resident of the U.S. or a "protected individual" under federal immigration laws); and then
2) if not, whether the individual is a national of an embargoed country.

Fourth, even if the applicant's responses show that his or her employment would constitute a deemed export, we do not recommend an automatic refusal to hire the applicant. Rather, we recommend a case-by-case analysis to determine whether to apply for a license from the Department of Commerce to allow employment of the individual. Although we do not suggest that an application for an export license is always required, such an individualized determination is more defensible in the event of a national origin discrimination claim than an automatic rule of exclusion.