

Understanding How U.S. Export Controls Affect Manufacturers' Hiring Practices

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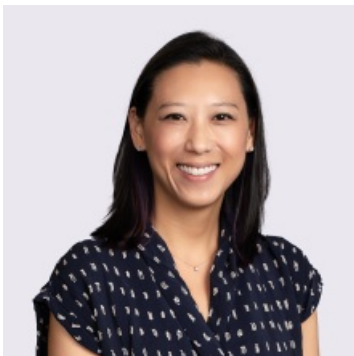
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The U.S. government has adjusted export control regulations in an effort to protect U.S. national security interests. The revisions primarily affect export of electronic computing items and semiconductors to prevent foreign powers from obtaining critical technologies that may threaten national security. As manufacturers are facing increased demand for their products and critical labor shortages, they may find themselves seeking to hire foreign national talent and navigating U.S. export control and immigration and anti-discrimination laws.

Export Control Laws in United States

The primary export control laws in the United States are the International Traffic in Arms Regulations (ITAR) and Export Administration Regulations (EAR). Under these regulations, U.S. Persons working for U.S. companies can access export-controlled items without authorization from the U.S. government. U.S. Persons include: U.S. citizens, U.S. nationals, Lawful permanent residents, Refugees, and Asylees. Employers might need authorization from the appropriate federal agency to “export” (in lay terms, share or release) export-controlled items to workers who are not U.S. Persons, which the regulations call foreign persons. Employers apply for such authorization from either the U.S. Department of State or the U.S. Department of Commerce, depending on the item.

The release of technical data or technology to a foreign person that occurs within the United States is “deemed” to be an export to the foreign person’s “home country.” Whether an export license is required for a particular release may depend on both the nature of export controls applicable to the technology or technical data (including whether it is subject to the ITAR or EAR) and the citizenship of the foreign person.

Recent revisions to the EAR cover controls on advanced computing integrated circuits (ICs), computer commodities that contain such ICs, and certain semiconductor manufacturing items, among other controls. These revisions particularly affect semiconductor and chip manufacturers and exporters.

Intersection With Immigration and Anti-Discrimination Laws

The U.S. Immigration and Nationality Act (INA) and Title VII of the Civil Rights Act 1964 prohibit discrimination based on protected characteristics.

The INA prohibits discrimination based on national origin or citizenship, among other characteristics. Title VII prohibits discrimination based on race and national origin, which typically includes discrimination based on citizenship or immigration status. Furthermore, the INA prohibits “unfair documentary practices,” which are identified as instances where employers request more or different documents than those necessary

to verify employment eligibility or request such documents with the intent to discriminate based on national origin or citizenship.

The intersection of export control laws, immigration, and anti-discrimination laws can create a confusing landscape for employers, particularly manufacturers or exporters of export-controlled items. Manufacturers and exporters, like all employers, must collect identity and employment authorization documentation to ensure I-9 compliance. At the same time, however, they must collect information relating to a U.S. Person in connection with export compliance assessments. To address these areas of exposure for employers, the U.S. Department of Justice's Civil Rights Division released an [employer fact sheet](#) to provide guidance for employers that includes best practices to avoid discrimination.

Implications

To ensure compliance under these rules, employers should separate the I-9 employment authorization documentation process from the export control U.S. Person or foreign person identification process. Employers should implement or revisit internal procedures and provide updated training to employees.

The export rule revisions highlight the challenges for employers in avoiding discrimination when complying with export control laws. Manufacturers and exporters should review their compliance practices regarding U.S. export control, immigration, and anti-discrimination laws with experienced counsel. Employers should implement policies and procedures reasonably tailored to address export control compliance requirements while not engaging in discrimination on the basis of citizenship or national origin.

If you have questions about this or other workplace issues, please reach out to a Jackson Lewis attorney.

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