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## Complying with Export Laws Without Importing Discrimination Liability: An Attempt to Integrate Employment Discrimination Laws and the Deemed Export Rules

Sandra F. Sperino

University of Cincinnati - College of Law, [sandra.sperino@uc.edu](mailto:sandra.sperino@uc.edu)

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**COMPLYING WITH EXPORT LAWS WITHOUT IMPORTING  
DISCRIMINATION LIABILITY: AN ATTEMPT TO INTEGRATE  
EMPLOYMENT DISCRIMINATION LAWS AND THE DEEMED  
EXPORT RULES**

SANDRA F. SPERINO\*

Always and never are two words you should always remember never to use.

—Wendell Johnson<sup>1</sup>

INTRODUCTION

Government agencies, human resources professionals, and other employment law experts often advise employers that it is inappropriate to make pre-employment inquiries into an applicant's country of citizenship.<sup>2</sup>

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\* Visiting Assistant Professor of Law, University of Cincinnati College of Law. I would like to thank Stephen F. Befort, Matthew T. Bodie, and Jarod S. Gonzalez for their insightful comments on earlier drafts of this Article. Special thanks to Mark D. Menefee, who is currently Of Counsel at Baker & McKenzie LLP and former director of the Office of Export Enforcement, Bureau of Industry and Security, U.S. Department of Commerce, for assisting me in wading through the deemed export thicket. I also received helpful input from participants at the Second Annual Colloquium on Current Scholarship in Labor/Employment Law, especially Sachin S. Pandya.

1. Butch Barker, *Words of Wit and Wisdom*, CHARLESTON DAILY MAIL, Nov. 18, 2002, at 1C.

2. See, e.g., Cornell College, Equal Opportunity/Affirmative Action Handbook, [http://www.cornellcollege.edu/human\\_resources/eoaa\\_booklet.pdf](http://www.cornellcollege.edu/human_resources/eoaa_booklet.pdf) (last visited Jan. 3, 2007) (indicating that it would be inappropriate to ask individuals about their country of citizenship during an interview); Equal Opportunity Office, Eastern Kentucky University, Guide to Conducting a Search (Appendix J), [http://www.hr.eku.edu/Policy-and\\_Procedure/Guide\\_to\\_Conducting\\_a\\_Search1.pdf](http://www.hr.eku.edu/Policy-and_Procedure/Guide_to_Conducting_a_Search1.pdf) (last visited Jan. 15, 2008) [hereinafter Guide to Conducting a Search] (indicating that interviewers can ask general questions about whether an applicant is authorized to work within the United States, but discouraging further questions about that status, except regarding whether the employer's assistance will be needed in procuring a visa); Pennsylvania Human Relations Commission, Pre-employment Inquiries: What may I ask? What must I answer?, <http://www.phrc.state.pa.us/publications/literature/Pre-Employ%20QandA%208x11%20READ.pdf> (last visited Jan. 15, 2007) [hereinafter Pre-employment Inquiries] (stating that employer should only ask whether an individual is eligible to work within the United States); see also AUSTIN T. FRAGOMEN, JR. & STEVEN C. BELL, IMMIGRATION EMPLOYMENT COMPLIANCE HANDBOOK § 7:4 (2007) (indicating that it would be a mistake for an employer to ask "a job applicant questions relating to employment eligibility prior to making an offer of employment,"

While the employer may inquire whether an individual is eligible to work within the United States, it should not make further inquiries about an individual's country of citizenship or the basis for his or her work eligibility until after a hiring decision is made. After the individual is hired, the employer may then gather the documents necessary to verify that the individual is authorized to work within the United States, but should make no further inquiries.<sup>3</sup> After all, asking certain questions may subject the employer to claims of discrimination under Title VII<sup>4</sup> or the Immigration Reform and Control Act (IRCA).<sup>5</sup>

Like most generalized advice, this advice has some utility, but it also has a fairly nuanced, and unfortunately often unrecognized, exception. This exception comes into play at the intersection of two federal anti-discrimination statutes and the federal regulations governing exports, the latter of which have been gaining increased prominence since September 11, 2001.<sup>6</sup>

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but also noting that potential liability could be limited by a carefully crafted company policy allowing such questioning under limited circumstances).

3. See, e.g., Guide to Conducting a Search, *supra* note 2; Pre-employment Inquiries, *supra* note 2.

4. Civil Rights Act of 1964, Pub. L. No. 88-352, Title VII, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000e-2000e-17 (2000)).

5. IRCA amended the Immigration and Nationality Act. Pub. L. No. 99-603, 100 Stat. 3359 (1986) (codified as amended in scattered sections of 8 U.S.C.). For clarity of reference, the Article will refer to IRCA and not the Immigration and Nationality Act. It should be noted that the provisions of Title VII and IRCA do not prohibit employers from asking these questions; however, employers fear that asking these questions might provide evidence of discriminatory intent in a subsequent lawsuit.

6. See Bureau of Industry and Security, U.S. Dep't of Commerce, Policies and Regulations, <http://www.bis.doc.gov/policiesandregulations/index.htm> (last visited Jan. 15, 2008) (listing deemed exports as a key regulatory area); see also Conan P. Grames & Terry L. Fund, *U.S. Government Raises the Bar on "Deemed Exports" and Continues Other Trade Restrictions*, 1 INT'L L. & MGMT. REV. 321, 321 (2005) ("[T]he U.S. Government has taken a number of steps to tighten its regulations on so-called deemed exports"); Linda M. Weinberg & Lynn Van Buren, *The Impact of U.S. Export Controls and Sanctions on Employment*, 35 PUB. CONT. L.J. 537, 538 (2006) (noting that "recent enforcement initiatives and proposed rule changes have enhanced industry anxiety about their compliance implications"). In one case, individuals with dual citizenship have filed complaints with the Ontario Human Rights Tribunal, claiming that a company's attempts to comply with deemed export rules constituted illegal discrimination. See Canadian Legal Information Institute, *Sinclair v. General Motors Defence*, Ontario Human Rights Tribunal (Nov. 15, 2006), available at <http://www.canlii.org/en/on/onhrt/doc/2006/2006hrto30/2006hrto30.html>. The company settled the claims with the complainants, agreeing to an undisclosed monetary settlement, and agreeing in the future to attempt to secure deemed export licenses on behalf of employees. See Ontario Human Rights Comm'n, *Human Rights Settlement Reached With General Motors of Canada Ltd. With Respect to Workers With Citizenship Other Than Canadian or American*, <http://www.ohrc.on.ca/en/resources/news/gm> (last visited Jan. 15, 2008).

It would be a misunderstanding to think that export rules only apply when a piece of equipment or technology passes from one country to another. Under federal deemed export rules, an illegal export happens when particular controlled technology or software is released to certain individuals, even if the exchange happens within the United States.<sup>7</sup>

Importantly for this discussion, the federal deemed export rules prohibit certain individuals from receiving any information about certain technologies without the required license, even if those individuals are otherwise authorized to work within the United States.<sup>8</sup> In other words, employers who deal with technology or software subject to export control may be considered to be illegally exporting such technology or software, simply by allowing certain foreign nationals to work with or gain information about the restricted items.

Enforcement efforts have led to substantial penalties for employers violating the deemed export rules. For example, the government assessed a \$125,000 administrative penalty against a company that failed to obtain export licenses for Chinese and Ukrainian nationals who were provided access to commercial digital fiber optic transmission and broadband switching technology.<sup>9</sup> A \$560,000 administrative penalty was assessed against a company that made extended range programmable logic devices and technical data available to Chinese nationals.<sup>10</sup> In another case, a company received a \$200,000 penalty when it allowed two Iranian nationals and a Chinese national access to controlled manufacturing technology.<sup>11</sup>

This Article will attempt two moderately simple tasks and one more difficult. The first task is to identify the tensions that exist between the

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7. 15 C.F.R. § 734.2(b)(2)(ii) (2007); 22 C.F.R. § 120.17(a)(3)–(4) (2007). It should be noted that there is disagreement regarding whether the deemed export regulations are properly supported by appropriate statutory authority. *See, e.g.*, Gregory W. Bowman, *E-Mails, Servers and Software: U.S. Export Controls for the Modern Era*, 35 *GEO. J. INT'L L.* 319, 340 n.95 (2004). Additionally, there are continuing calls for the entire export regime to be modified based on concerns that it has failed to keep pace with the changing technological environment and that some items subject to U.S. export controls are available from other nations. *See* Christopher F. Corr, *The Wall Still Stands! Complying with Export Controls on Technology Transfers in the Post-Cold War, Post-9/11 Era*, 25 *HOUS. J. INT'L L.* 441, 445–46 (2003) (describing the historical development of export controls). These topics have been explored in other articles, and the Author expresses no opinion regarding these issues, instead assuming for purposes of this Article that employers are bound by deemed export requirements and that because the export regime provides political cover for the government, the larger export regime is unlikely to undergo significant change in the near future.

8. *See generally* Part I, *infra*.

9. *See* Bureau of Industry and Security, U.S. Dep't of Commerce, Major Cases List: December 2007, at 14, <http://www.bis.doc.gov/ComplianceAndEnforcement/Majorcaselist.pdf> (last visited Jan. 15, 2008) [hereinafter Major Cases List].

10. *See id.*

11. *See id.* at 14–15.

deemed export rules and the federal anti-discrimination statutes, creating awareness about potential issues that might arise if employers use general human resources advice, while neglecting deemed export requirements. Because the deemed export requirements depend upon the citizenship (and sometimes the country of permanent residence) of a foreign national, employers must be aware that they need to be able to identify those employees and applicants who would trigger the deemed export requirements.

Second, the Article will attempt to demonstrate how employers who want to become involved in the complex deemed export regime can do so, consistent with the federal anti-discrimination statutes. While concern exists that employers complying with the deemed export rules may be placing themselves in violation of Title VII and IRCA,<sup>12</sup> this Article argues that, in most cases, employment screenings for deemed export requirements should not yield liability under either Title VII or IRCA.

The third task is more complex. To comply with deemed export law, an employer must obtain an employee-specific export license prior to making the restricted technology available to the foreign national.<sup>13</sup> The required licenses often take months to obtain,<sup>14</sup> and it may be difficult or impossible for employers to obtain such licenses for certain employees.<sup>15</sup> To comply with the deemed export requirements in a hiring or promotion context, the employer would be required to limit an employee's job responsibilities to non-export controlled work or to place the foreign national employee on unpaid leave until the government made its decision on whether to issue the license. This places the employer in the position of leaving certain tasks unperformed or requiring

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12. See, e.g., Fenwick & West, LLP, *Weekly Employment Brief*, July 8, 2002, at 1 (indicating that attempts to comply with deemed export rules may create potential Title VII liability), available at <http://www.fenwick.com/publications/>.

13. 15 C.F.R. § 734.2(b)(ii) (2007); 22 C.F.R. § 123.1(a)(1) (2007). Bureau of Industry and Security, U.S. Dep't of Commerce, Guidelines for Preparing Export License Applications Involving Foreign Nationals, <http://www.bis.doc.gov/DeemedExports/foreignnationals.pdf> (last visited Jan. 15, 2008) [hereinafter Guidelines for License Applications Involving Foreign Nationals].

14. Directorate of Defense Trade Controls, U.S. Dep't of State, License Processing Times, <http://pmdtc.state.gov/process/time.htm> (last visited Jan. 15, 2008) [hereinafter License Processing Times].

15. Theodore W. Kassinger, Deputy Sec'y, U.S. Dep't of Commerce, Keynote Address at the Conference on U.S.-China Trade: Opportunities and Challenges (April 14-15, 2005), in 34 GA. J. INT'L & COMP. L. 101, 107 (2005) ("BIS also approved 469 deemed export license applications (or 35% of all China-related licenses) involving Chinese foreign nationals working on controlled technology in the United States."); Weinberg & Van Buren, *supra* note 6, at 543-44 ("U.S. companies can find themselves in a position where they have hired a foreign national employee for certain projects but unable to obtain a license to allow the employee to perform his or her responsibilities.").

other employees to take on additional job responsibilities during the interim, potentially causing project delays.

Once an employer becomes involved in the deemed export regime, it has responsibilities to ensure that the employee's access to technology remains within the granted license and that all of the conditions of the license continue to be met.<sup>16</sup> This Article argues that, consistent with the federal anti-discrimination statutes, employers should be able, in certain instances, to choose not to hire, assign, or promote certain foreign nationals, simply because to do so would trigger the employer's involvement in the legally perilous, complex, and uncertain deemed export regime.<sup>17</sup> Additionally, the Article argues that employers should be allowed to engage in a cost-benefit analysis regarding whether the value added by particular job positions merits involvement with the deemed export regime.

To be clear, this Article does not advocate that all employers begin to consider national origin or country of citizenship when hiring. Nor does it advocate that an employer should be able to use the deemed export rules as a pretext for discrimination based on national origin or citizenship. Rather, the Article demonstrates that neither Title VII nor IRCA prohibit an employer from refusing to hire an individual, if the reason for that decision is a desire to avoid becoming involved in the deemed export regime.

#### I. EXPLORING THE DEEMED EXPORT RULES

Before delving more deeply into the intricacies of deemed export regulation, an overview of the regulations, as well as an examination of the policy issues driving the development of these regulations, might be helpful.

Under the International Traffic in Arms Regulations (ITAR) and the Export Administration Regulations (EAR), the release of certain technology to a "foreign person" is unlawful without an appropriate export license.<sup>18</sup> Under

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16. See, e.g., Guidelines for License Applications Involving Foreign Nationals, *supra* note 13, at 5 (requiring employer to provide details of internal control mechanisms); *id.* at 7 (indicating that the employer must agree to comply with applicable conditions related to the license); *id.* at 7–10 (detailing license restrictions that may be applied).

17. See, e.g., Ronald J. Sievert, *Urgent Message to Congress—Nuclear Triggers to Libya, Missile Guidance to China, Air Defense to Iraq, Arms Supplier to the World: Has the Time Finally Arrived to Overhaul the U.S. Export Control Regime?—The Case for Immediate Reform of Our Outdated, Ineffective, and Self-Defeating Export Control System*, 37 TEX. INT'L L.J. 89, 92 (2002) (quoting former Deputy Chief Counsel for Export Administration, U.S. Department of Commerce, Cecil Hunt's description of U.S. export law as a "frightful labyrinth").

18. 15 C.F.R. § 734.2(b)(2)(ii); 22 C.F.R. § 120.17(a). The Treasury Department's Office of Foreign Assets Controls (OFAC) also limits exports of U.S.-origin technology to certain countries, and may also trigger deemed export concerns. See, e.g., 31 C.F.R. § 560.418 (2007) (prohibiting the release of technology that is intended for use in Iran or by the government of Iran). OFAC issues are beyond the scope of this Article.

both sets of regulations, any such release “is deemed to be an export to the home country or countries of the foreign national.”<sup>19</sup>

“Foreign person” means “any natural person who is not a lawful permanent resident as defined by 8 U.S.C. § 1101(a)(20) or who is not a protected individual as defined by 8 U.S.C. § 1324b(a)(3) [the Immigration and Naturalization Act].”<sup>20</sup> In other words, “foreign nationals who have been granted H-B1 visas and other work authorizations,” including student visas and fiancé visas, may lawfully be employed within the United States; however, their presence in certain positions may at the same time violate deemed export rules.<sup>21</sup>

As discussed in greater detail in the following sections, the term “export” encompasses a wide swath of typical employment activities, including allowing visual inspection of items or having conversations about these items.<sup>22</sup> Given the recent exponential increase in the use of Internet and computer technology in business, a whole host of common transactions may have deemed export rule implications, including intercompany communications or meetings at which technology or software is discussed or conveyed or the sharing of these same items over the Internet.<sup>23</sup> The deemed export regulations clearly place restrictions on skilled workers who work with controlled technology and software. However, companies that deal with controlled technology must consider deemed export rules even when hiring non-technical employees, if those employees would have access to restricted materials. One government agency that oversees export issues has indicated that the deemed export rules can affect a laundry list of foreign nationals, including, “students, businesspeople, scholars, researchers, technical experts, sailors, airline personnel, [and] salespeople.”<sup>24</sup>

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19. 15 C.F.R. § 734.2(b)(2)(ii); *see also* 22 C.F.R. § 120.17(a).

20. 22 C.F.R. § 120.16 (ITAR); *see also* 15 C.F.R. § 734.2(b)(2)(ii) (similar definition under EAR).

21. Weinberg & Van Buren, *supra* note 6, at 549 (“Entities that employ foreign nationals should be aware that the rules for granting visas and work authorizations are separate from U.S. export control laws, and a visa or work authorization does *not* authorize the release of technology to a foreign national.”).

22. *See, e.g.*, 15 C.F.R. § 734.2(b)(3); Bureau of Industry and Security, U.S. Dep’t of Commerce, “Deemed Export” Questions and Answers, <http://www.bis.doc.gov/DeemedExports/DeemedExportsFAQs.html#2> (last visited Jan. 15, 2008) [hereinafter “Deemed Export” Questions and Answers] (indicating that “[t]echnology is ‘released’ for export when it is available to foreign nationals for visual inspection (such as reading technical specifications, plans, blueprints, etc.); when technology is exchanged orally; or when technology is made available by practice or application under the guidance of persons with knowledge of the technology”).

23. *See* Bowman, *supra* note 7, at 323–24. This article contains a lengthy discussion of the applicability of the deemed export rules in the context of computer-related transactions. *See generally id.*

24. “Deemed Export” Questions and Answers, *supra* note 22.

### A. Policy Discussion

Although the United States has engaged in an export control regime for several decades, the focus of the controls has changed significantly over that time. During the Cold War, export regulations focused largely on the Soviet Union and Eastern Bloc countries.<sup>25</sup> Although some of the export controls relating to the former Soviet Union and Eastern Bloc countries were removed at the end of the Cold War,<sup>26</sup> the U.S. government became concerned that certain dual use items were being diverted from allied countries to other nations and then being used for military development in those nations.<sup>27</sup> The export regime became increasingly complex as the system imposed “broad new controls on dual-use exports to entities involved in international terrorism and countries seeking to acquire biological, chemical, or nuclear weapons and missile delivery systems.”<sup>28</sup>

After September 11, 2001, the Bush administration began focusing on strengthening and enforcing export controls.<sup>29</sup> As one commentator noted: “Since the events of September 11, 2001, the trend to tighten restrictions has gathered pace, casting a pall over the entire licensing process, not only anti-terrorism controls aimed at so-called ‘rogue’ states and end-users with potential terrorist connections.”<sup>30</sup> Additionally, increased development of and reliance on computer technology, advanced telecommunications, and the Internet made it increasingly difficult for regulators to monitor exports of information and software.<sup>31</sup> During this period, the government began to increasingly rely on private business for compliance functions related to export control.<sup>32</sup>

At the same time, the Internet and other computer applications made businesses and universities more reliant on “e-commerce-oriented internet technology transfers, globalized computer networks, and encryption software.”<sup>33</sup> These tools were also radically changing the workforce, as more

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25. See Corr, *supra* note 7, at 450–58 (describing the historical development of export controls during the Cold War); Sievert, *supra* note 17, at 90 (noting that export control began during the Cold War); see also Tara L. Dunn, *Surviving United States Export Control Post 9/11: A Model Compliance Program*, 33 DENV. J. INT’L L. & POL’Y 435, 436 (2005).

26. Corr, *supra* note 7, at 457–58.

27. See Dunn, *supra* note 25, at 436–37.

28. Anne Q. Connaughton, *Factoring U.S. Export Controls and Sanctions Into International Trade Decisions*, 27 STETSON L. REV. 1211, 1221 (1998).

29. Corr, *supra* note 7, at 458–59.

30. *Id.* at 445–46.

31. See Berne C. Kluber, *Global Distributions: The Effect of Export Controls*, 23 HOUS. J. INT’L L. 429, 430–31 (2001); Andres Rueda, *The Implications of Strong Encryption Technology on Money Laundering*, 2 ALB. L.J. SCI. & TECH. 1, 83 (2001).

32. Corr, *supra* note 7, at 447.

33. *Id.*



companies became involved in international commerce.<sup>34</sup> The rapid development of technological and scientific innovation also led to an increased need for international collaboration, with many U.S. companies and universities seeking to utilize the expertise of foreign nationals as international competition increased.<sup>35</sup>

It is at the intersection of these complex historical, societal, and regulatory forces that the export control laws intersect with the U.S. employment laws.<sup>36</sup>

The various statutes and agencies involved in the deemed export regime truly present an alphabet soup of Orwellian proportions. The following sections modestly attempt to provide a broad overview of the deemed export rules that might affect employers. Attempting to balance thoroughness with brevity, many of the nuances of the deemed export rules are contained within the footnotes pertaining to the broader discussion.

### B. *The ITAR*

The Arms Export Control Act (AECA) authorizes the President to “control the import and the export of defense articles and defense services and to provide foreign policy guidance to persons of the United States involved in the export and import of such articles and services.”<sup>37</sup> Importantly for our later consideration of the national security exception to Title VII, the AECA is supported by two overarching concerns: national security and foreign policy.<sup>38</sup> The AECA provides that in making decisions regarding export licenses, the

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34. See, e.g., Kenneth G. Dau-Schmidt, *Employment in the New Age of Trade and Implications for Labor and Employment Law*, 76 IND. L.J. 1, 1–2, 11 (2001).

35. See, e.g., Bureau of Industry and Security, U.S. Dep’t of Commerce, Electronic FOIA Reading Room, Public Comments: Advance Notice of Proposed Rulemaking: Revision and Clarification of Deemed Export Related Requirements, at 30–31 [hereinafter Public Comments on Proposed Rulemaking] (comment by George W. Clark arguing that the participation of foreign national researchers was integral to various scientific projects), available at <http://efoia.bis.doc.gov>; *id.* at 429–33 (comment by Sandee Vincent arguing that expertise of foreign national employees is important to Intel’s business development); Edward T. Foley & Mark C. Hersam, *Assessing the Need for Nanotechnology Education Reform in the United States*, 3 NANOTECH. L. & BUS. 467, 479–80 (2006) (arguing that the United States increasingly relies on the science skills of foreign nationals); see generally Ayelet Shachar, *The Race for Talent: Highly Skilled Migrants and Competitive Immigration Regimes*, 81 N.Y.U. L. REV. 148, 148 (2006) (arguing that the immigration regimes of other countries are better poised to attract highly skilled foreign nationals); Katherine V.W. Stone, *A New Labor Law for a New World of Work: The Case for a Comparative Transnational Approach*, 28 COMP. LAB. L. & POL’Y J. 565, 565–56 (2007) (discussing how globalization trends affect employment).

36. This Article does not discuss the interaction of the deemed export rules with other country’s employment laws. However, U.S. companies hiring individuals in foreign countries should be aware that foreign employment laws provide different protections for employees.

37. 22 U.S.C. § 2778 (2000 & Supp. I 2004); see also 22 C.F.R. § 120.1(a)(1) (2007) (discussing authority for regulations).

38. 22 U.S.C. § 2778(a) (also listing world peace as an objective of the AECA).

government should take into account whether the export decisions “would contribute to an arms race, aid in the development of weapons of mass destruction, support international terrorism, increase the possibility of outbreak or escalation of conflict, or prejudice the development of bilateral or multilateral arms control or nonproliferation agreements or other arrangements.”<sup>39</sup>

The International Traffic in Arms Regulations (ITAR) were promulgated under a delegation of authority by the President to the Secretary of State and provide further guidance regarding the actions prohibited and required under the AECA.<sup>40</sup> Under the ITAR, an export includes “[d]isclosing (including oral or visual disclosure) or transferring in the United States any defense article to an embassy, any agency or subdivision of a foreign government (e.g., diplomatic missions); or . . . [d]isclosing (including oral or visual disclosure) or transferring technical data to a foreign person, whether in the United States or abroad.”<sup>41</sup> The regulations also prohibit the performance of defense services “on behalf of, or for the benefit of, a foreign person, whether in the United States or abroad.”<sup>42</sup> In turn, “defense services” are broadly defined to include:

- (1) The furnishing of assistance (including training) to foreign persons, whether in the United States or abroad in the design, development, engineering, manufacture, production, assembly, testing, repair, maintenance, modification, operation, demilitarization, destruction, processing or use of defense articles;
- (2) The furnishing to foreign persons of any technical data controlled under this subchapter . . . , whether in the United States or abroad.<sup>43</sup>

Technical data includes any information “which is required for the design, development, production, manufacture, assembly, operation, repair, testing, maintenance or modification of defense articles,” including “blueprints, drawings, photographs, plans, instructions or documentation.”<sup>44</sup> The term “technical data” also includes software directly related to defense articles.<sup>45</sup>

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39. 22 U.S.C. § 2778(a)(2).

40. Exec. Order No. 11,958, 42 Fed. Reg. 4311 (Jan. 24, 1977); *see also* 22 C.F.R. § 120.1(a)(1) (discussing authority for regulations).

41. 22 C.F.R. § 120.17(a)(3)–(4).

42. *Id.* § 120.17(a)(5).

43. *Id.* § 120.9 (a)(1)–(2). Although the ITAR do not use the term “deemed export,” they apply a broad definition of the term “export” to include domestic transfers, which has a similar regulatory effect. *Id.* § 120.17(a)(2).

44. *Id.* § 120.10(a)(1). The definition does exclude “information concerning general scientific, mathematical or engineering principles commonly taught in schools, colleges and universities or information in the public domain” or certain marketing materials. *Id.* § 120.10(a)(5).

45. *Id.* § 120.10(a)(4). The ITAR also provide exceptions. *See, e.g., id.* § 120.17(a)(5). Exceptions to deemed export rules for fundamental research and for educational information are

The ITAR provide further description of the items that are considered to be defense articles or services.<sup>46</sup> The items governed by ITAR are divided into twenty categories, including items such as firearms, aircraft, missiles, and military training equipment.<sup>47</sup> Subject to certain exceptions listed throughout the regulations, these items, as well as technical data regarding these items, fall within the deemed export requirements, which means that in some instances a license must be obtained prior to the sharing of any information regarding these items with foreign nationals from certain countries or prior to providing any defense services, such as providing certain types of assistance or training, to those foreign nationals.

In some instances, it is extraordinarily difficult or impossible to obtain such licenses for the foreign nationals of certain countries. Under the ITAR, licenses for exports of defense articles and services to a number of countries are generally prohibited. Countries included on this list are Belarus, Burma, China, Cuba, Iran, Liberia, North Korea, Somalia, Sudan, Syria, Venezuela, and Vietnam.<sup>48</sup> As one commentator has noted: “Generally, a presidential waiver is required to overcome the policy of denial, but such waivers are granted infrequently and only for large-scale projects in which the United States has an over-whelming interest in promoting, such as the destruction of

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beyond the scope of this Article, and thus this Article does not necessarily address the ways the deemed export rules apply differently in the academic context. For a full description of these issues, see Benjamin Carter Findley, Comment, *Revisions to the United States Deemed-Export Regulations: Implications for Universities, University Research, and Foreign Faculty, Staff, and Students*, 2006 WIS. L. REV. 1223 (2006). When this Article discusses items that are subject to the deemed export licensing requirements, it is referring to those items that fall within one of the two discussed regulatory regimes and for which no exceptions, including licensing exemptions, are available.

46. 22 C.F.R. § 121.1.

47. *See id.* The regulations have twenty-one categories; however, section XIX is reserved and does not presently contain restrictions. More specifically, the ITAR regulations contain the following categories: (I) firearms, close assault weapons and combat shotguns; (II) guns and armament; (III) ammunition and ordinance; (IV) launch vehicles, guided missiles, ballistics, missiles, rockets, torpedoes, bombs and mines; (V) explosives and energetic materials, propellants, incendiary agents and their constituents; (VI) vessels of war and special naval equipment; (VII) tanks and military vehicles; (VIII) aircraft and associated equipment; (IX) military training equipment and training; (X) protective personnel equipment and shelters; (XI) military electronics; (XII) fire control, range finder, optical and guidance and control equipment; (XIII) auxiliary military equipment; (XIV) toxicological agents, including chemical agents, biological agents and associated equipment; (XV) spacecraft systems and associated equipment; (XVI) nuclear weapons, design and testing related items; (XVII) classified articles, technical data and defense services not otherwise enumerated; (XVIII) directed energy weapons; (XIX) contains no restrictions (reserved for later use); (XX) submersible vessels, oceanic and associated equipment; and (XXI) miscellaneous articles. *Id.*

48. *Id.* § 126.1(a).

abandoned chemical weapons in China.”<sup>49</sup> Significant limitations also exist on the ability to obtain licenses for exports to Iraq, Afghanistan, Rwanda, the Democratic Republic of Congo, Haiti, and Libya.<sup>50</sup>

However, it would be an error to think that a license can be obtained in all situations where a foreign national is from a country that is considered to be an ally of the United States. For example, permission to transfer certain items that might contribute to the proliferation of chemical, biological and nuclear weapons are evaluated on a case-by-case basis and, in the few instances they are granted, come with restrictive provisions.<sup>51</sup>

Companies seeking to export to foreign persons non-classified items subject to ITAR and for which a license exemption is not available must apply for and be granted a license for such a deemed export.<sup>52</sup> However, it is not appropriate under the licensing regime for an employer to indicate that the company is seeking general permission to export to a foreign national from a particular country. Rather, the license application is specific to the particular technology or information that is being exported and specific to the particular foreign national to whom the technology is being released.<sup>53</sup> An important consequence of these requirements is that an employee or a potential employee may not seek a deemed export license on his or her own behalf; rather, the license may only be sought through the employer.

An employer is required to provide a detailed description of the access that an employee or potential employee will have to specific technology.<sup>54</sup> Therefore, if a license is granted for a deemed export and the scope of the

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49. Weinberg & Van Buren, *supra* note 6, at 543–44.

50. 22 C.F.R. § 126.1(f)–(k).

51. Missile Technology Control Regime, Guidelines for Sensitive Missile-Relevant Transfers, <http://www.mtrc.info/english/guidetext.htm> (last visited Jan. 15, 2008).

52. Directorate of Defense Trade Controls, U.S. Dep’t of State, Supplementary Instructions/Guidelines for Completing Applications for Foreign National Employment in the United States, at 3 [hereinafter Foreign National Employment Application Guidelines], available at [http://www.pmdtc.state.gov/docs/Foreign\\_National\\_Employment.doc](http://www.pmdtc.state.gov/docs/Foreign_National_Employment.doc); see also 22 C.F.R. § 123.1(a)(1). Other forms govern temporary export of items and classified items. See *id.* § 123.1(a)(2), (a)(4).

If a foreign person employed in the United States is to receive a defense service from the employer or another U.S. person (e.g., training in the use of defense hardware), in addition to the DSP-5 approval for employment, the technical assistance provided by the U.S. person would generally require a separate approval (e.g., a Technical Assistance Agreement (TAA)).

Foreign National Employment Application Guidelines, *supra*.

53. Directorate of Defense Trade Controls, U.S. Dep’t of State, Guidelines for Completion of a Form DSP-5 Application, Request for Permanent Export of Unclassified Defense Articles and Related Unclassified Technical Data, at 2, 6 (describing the requirement that all items to be exported must be listed in the application) [hereinafter DSP-5 Application Guidelines], available at [http://pmdtc.state.gov/docs/DSP\\_5\\_Guidelines.pdf](http://pmdtc.state.gov/docs/DSP_5_Guidelines.pdf).

54. *Id.* at 11.

employee's project changes to include additional technology or information covered by the rules, an additional license must be procured. In addition, if defense services are to be provided to the foreign national, additional approvals may be required.<sup>55</sup> In practical terms, it often is difficult for an employer to define the scope of an individual's access to technology that is specific enough to provide an adequate description for regulators, without being so limited that minor changes in an employee's job description trigger a need for an additional license.

The Directorate of Defense Trade Controls, which is the directorate under the State Department tasked with oversight of the ITAR,<sup>56</sup> has studied the time it takes for a deemed export license to be reviewed. In a given month in 2006, the median time for obtaining an export license ranged from eight to twenty-one days, if the application did not require coordination with another agency; and from twenty-four to forty-three days, if such coordination was required.<sup>57</sup>

However, that time can vary greatly depending on the technology or information that is the subject of the deemed export.<sup>58</sup> In fiscal year 2000, over 5,000 export license requests took more than ninety days to process.<sup>59</sup> Additionally, the country to which the item is being exported also may play a role in the length of time required for processing a license, with licenses being processed faster for export to NATO countries than to non-NATO countries.<sup>60</sup> In fiscal year 2000, approximately eighty percent of the requested export licenses were granted; although some were granted with restrictions.<sup>61</sup> Once a license is obtained, it expires after four years or upon the expiration of the work visa, whichever is earlier.<sup>62</sup>

Notably, the ITAR specifically provides that the duties they impose are in addition to, and not in lieu of, other obligations that a company may have

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55. *Id.*

56. 22 C.F.R. § 120.1, (a), (b)(2).

57. License Processing Times, *supra* note 14; *see also* Cynthia J. Lange & Richard J. Pettler, *Recruiting Workers Post 9-11: How to Avoid Immigration Discrimination While Considering Export Control Concerns*, 1340 PLI/CORP 95, 101 (2002) ("Depending on the nature of controls, nationality of the foreign national, and other applicable licensing policies, the adjudication process may take 2 to 18 months.").

58. GENERAL ACCOUNTING OFFICE, EXPORT CONTROLS: STATE AND COMMERCE DEPARTMENT LICENSE REVIEW TIMES ARE SIMILAR 2-5 (providing a review of the timelines for license applications in fiscal year 2000, as well as providing information about the internal processes used by government agencies in considering license applications) [hereinafter GAO TIMING REPORT], available at <http://www.gao.gov/new.items/d01528.pdf>.

59. *Id.* at 6.

60. *Id.* at 4.

61. *Id.* at 5. The Author suspects that this number is so high because the applicant pool is self-selected. In other words, companies and employers are applying for licenses when they believe it is likely that such a license will be forthcoming.

62. 22 C.F.R. § 123.21(a) (2007); DSP-5 Application Guidelines, *supra* note 53, at 11.

under federal law.<sup>63</sup> Failure to comply with ITAR can result in severe administrative and criminal penalties.<sup>64</sup>

### C. *The EAR*

Like the ITAR, the Export Administration Regulations (EAR) also prohibit export of certain items to foreign nationals,<sup>65</sup> with a broad definition of what it means to “export” an item. Thus, an export happens when there is “[a]ny release of technology or source code subject to the EAR to a foreign national” anywhere, including in the United States.<sup>66</sup> The regulations explicitly provide that the release of technology or software includes allowing visual inspection of such items or having conversations about these items.<sup>67</sup>

The EAR govern the export of certain items that may affect national security, missile technology, nuclear nonproliferation, chemical and biological weapons, anti-terrorism, crime control, regional stability, as well as items that are in short supply or that are subject to certain United Nations sanctions.<sup>68</sup> Although many items are regulated by the EAR, not all of those items require an export license.<sup>69</sup> Importantly, some technologies may have export restrictions for only certain countries.<sup>70</sup>

As with the ITAR requirements, to obtain a deemed export license, an employer must submit information to the government about both the controlled technology and the employee.<sup>71</sup> Even if a license is granted, the license may be issued with restrictions, which may require the employer to alter the job

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63. 22 C.F.R. § 126.11.

64. Kluber, *supra* note 31, 432–35.

65. 15 C.F.R. § 734.2(b)(2)(ii). The EAR were initially promulgated under the authority of the Export Administration Act of 1979, as amended. Pub. L. No. 96-72, 93 Stat. 503 (codified as amended at 50 U.S.C. §§ 2401–2420). That Act is not permanent legislation and has currently lapsed. *See* Exec. Order No. 13,222, 66 Fed. Reg. 44,025 (Aug. 22, 2001). The EAR continues to have force under the International Emergency Economic Powers Act. Notice of August 2, 2005: Continuation of Emergency Regarding Export Control Regulations, 70 Fed. Reg. 45,273 (Aug. 5, 2005); Exec. Order No. 13,222, 66 Fed. Reg. 44,025 (Aug. 22, 2001).

66. 15 C.F.R. § 734.2(b)(2)(ii) (2007).

67. *Id.* § 734.2(b)(3).

68. *Id.* § 730.6.

69. The complexities of the EAR make complete discussion of its exceptions difficult in an article designed to address other issues. However, some common exceptions to EAR exist. *See id.* § 734.3(b)(3) (for certain publicly available technology); *id.* §§ 734.3(4), 734.4 (for certain foreign-made items); *id.* § 734.7 (for certain published information and software); *id.* § 734.9 (for certain educational information); *id.* § 734.8 (for certain fundamental research). For other exceptions, see, e.g., *id.* §§ 734.3(b), 734.10, 734.11. Likewise, certain licensing exemptions exist under the EAR. *See generally id.* §§ 740.1–740.18. For example, items falling within License Exception TSR under the EAR may require that the employer have the employee sign a non-disclosure agreement. *Id.* § 740.6.

70. *Id.* § 736.2; *see id.* §§ 738.1–738.4; *id.* § 738, Supp. 1.

71. Guidelines for License Applications Involving Foreign Nationals, *supra* note 13.

responsibilities of the employee.<sup>72</sup> For example, the employer may be required to limit the employee's access to other types of technologies, pursuant to the licensing restrictions.<sup>73</sup> Additionally, the employer may be required to monitor whether the employee maintains a green card or leaves the company prior to obtaining a green card, to establish written procedures to ensure that the terms of the license are met, and to place certain company employees in charge of monitoring such compliance.<sup>74</sup>

The U.S. Department of Commerce's Bureau of Industry and Security (BIS) is tasked with administering and enforcing the EAR.<sup>75</sup> On March 28, 2005, BIS issued an "Advance Notice of Proposed Rulemaking: Revision and Clarification of Deemed Export Related Regulatory Requirements" in the Federal Register.<sup>76</sup> One of the issues under consideration was whether the deemed export rules should be adjusted to rely on the birthplace of individuals, rather than just the individual's current citizenship status.<sup>77</sup> The BIS received numerous public comments in opposition to the changes, many from universities concerned about the effect such a change would have on foreign faculty and graduate students performing work in research labs.<sup>78</sup> In rejecting such a change, BIS noted that a

decrease in the number of foreign nationals in U.S. academic institutions and U.S. industry has already been detrimental to the economy of the United States. These comments argued that a change in the deemed export licensing policy from country of citizenship to country of birth would further adversely impact the United States.<sup>79</sup>

Significant civil and criminal penalties can attach to corporations, organizations, and individuals who violate EAR or ITAR, including monetary fines, withdrawal of export privileges, and criminal penalties, including

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72. *Id.* at 7–10 (listing requirements that are typically mandated with grant of license); see also Benjamin H. Flowe, Jr., *Exporting Technology and Software, Particularly Encryption*, 892 *PLI/COMM* 157, 175 (2006).

73. Guidelines for License Applications Involving Foreign Nationals, *supra* note 13, at 7–10 (providing a list of technologies for which the licensed employee would have no access).

74. *Id.* at 7–10.

75. 15 C.F.R. § 730.1 (2007).

76. Revision and Clarification of Deemed Export Related Regulatory Requirements, 70 *Fed. Reg.* 15,607 (Mar. 28, 2005) (to be codified at 15 C.F.R. pts. 734 and 772).

77. *Id.* at 15,608.

78. See, e.g., Public Comments on Proposed Rulemaking, *supra* note 35, at 120–21 (letter from Sandra J. Degen, Ph.D., arguing that current security processes and safeguards adequately protect from improper export and changing the rules would "treat as enemies those legitimate scientists in our labs . . . who are residents of countries that have not been deemed a security risk to the U.S.>").

79. Revisions and Clarification of Deemed Export Related Regulatory Requirements, 71 *Fed. Reg.* 30,840, 30,842 (May 31, 2006) (to be codified at 15 C.F.R. pts. 734 and 772).

imprisonment.<sup>80</sup> Importantly, under the EAR, at least one court has determined that civil penalties may be incurred on a strict liability basis, meaning that the government does not have the burden of proving that an employer knowingly or intentionally violated the regulations.<sup>81</sup>

*D. Potential Employees Affected by the ITAR and EAR*

As discussed earlier, the deemed export rules are triggered when an employer releases certain technology to a “foreign person” who holds citizenship or permanent residency in certain countries to whom export is restricted.<sup>82</sup> As a general policy the EAR’s deemed export licensing requirements are based on an individual’s most recent country of citizenship or permanent residency.<sup>83</sup>

However, greater care needs to be taken in the ITAR context. Under ITAR, if an individual is a “foreign person” and holds citizenship or permanent residency in more than one country, all of the countries of citizenship or permanent residency must be listed on the deemed export license application.<sup>84</sup> Thus, an employer needs to not only consider whether the foreign national’s most recent country of citizenship causes deemed export problems, but also whether an individual’s dual citizenship or past citizenship raises such issues. For example, if a person is a permanent resident of a nation for which a deemed export license would not be required, say Canada, but is a citizen of another country that triggers deemed export concerns, a deemed export license should be procured.

The deemed export rules cover potentially large swaths of an employee’s work environment. According to BIS, “Technology is ‘released’ for export when it is available to foreign nationals for visual inspection (such as reading technical specifications, plans, blueprints, etc.); when technology is exchanged orally; or when technology is made available by practice or application under the guidance of persons with knowledge of the technology.”<sup>85</sup> Although unlikely to be prosecuted, even the most innocuous lapses can result in

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80. See 50 U.S.C. app. §§ 2410(a), 2410(b)(1), 2410(c)(1) (2000) (providing penalties for EAR violations). For an overview of these penalties, see Kluber, *supra* note 31 at 432–33; see also Major Cases List, *supra* note 9 (identifying enforcement initiatives, including efforts to enforce deemed export rules against companies that made technology available to foreign nationals within the United States).

81. *Iran Air v. Kugelman*, 996 F.2d 1253, 1259 (D.C. Cir. 1993) (holding that “the language of the statute and the pertinent regulations adequately indicated that civil sanctions could be assessed on a strict liability basis”).

82. 15 C.F.R. § 734.2(b)(2)(ii) (2007); 22 C.F.R. § 120.17(a) (2007).

83. “Deemed Export” Questions and Answers, *supra* note 22, Q & A 6.

84. DSP-5 Application Guidelines, *supra* note 53, at 11.

85. 15 C.F.R. § 734.2(b)(3); “Deemed Export” Questions and Answers, *supra* note 22, Q & A 2.



violations of the deemed export rules. As one commentator noted: “[f]or example, if you leave a listing of a program that contains code that would require a license to export it on your desk when you are visited by a foreign national, the [BIS] considers it a violation of the EAR.”<sup>86</sup>

These broad definitions of the term “export” in ITAR and EAR mean that certain foreign national employees must have restricted access to certain material and cannot even be trained to complete certain tasks, unless a license is obtained. In order for the proper access restrictions to be in place, it will be necessary for companies to make certain inquiries about the employee near the time of hiring. Additionally, given the complex nature of ITAR, EAR, and the deemed export requirements, and the likelihood that human resources personnel and other involved in the hiring process may not be trained in these areas, some companies may not realize they are violating these rules until an export audit or other mechanism exposes the problem. Therefore, employers must be able to deal with a scenario in which, subsequent to hiring, the employer discovers that a particular worker falls within the deemed export rules.

A description of one company’s experience with the deemed export rules provides an anecdotal understanding of the problem. In response to a proposed rulemaking, Intel described its problems with the deemed export rules in the following manner:

Since the inception of the deemed export rule in 1994, Intel has applied for an estimated 1500 deemed export licenses, exclusive of renewals and upgrades. U.S. government review and approval of these applications has often been marked by delays, with some lasting 6 months or more. To comply with the terms and conditions of the deemed export licenses, Intel has instituted a rigorous internal control program to ensure that illegal technology transfers do not occur. Examples of standard operating procedures include classifying technology to ascertain its export control status; screening the nationality of job candidates and employees prior to making controlled technology transfers; acquiring needed export licenses, upgrades and renewals; and administering physical, remote access, non-disclosure and other security safeguards.<sup>87</sup>

Unfortunately, the federal government appears to ignore the challenges employers may face in complying with both the deemed export rules and federal and state anti-discrimination laws. For example, in the “Deemed Export” Questions and Answers provided by the BIS, a question is provided regarding how an employer is supposed to collect the information needed to

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86. Kluber, *supra* note 31, at 448. The BIS was formerly known as the Bureau of Export Administration (BXA). For consistency of reference, this Article refers to the Bureau by its current name throughout the Article.

87. Public Comments on Proposed Rulemaking, *supra* note 35, at 429 (letter from Sandee Vincent, Sr. Export Administration Manager, Intel Corporation).

process license applications without violating discrimination laws.<sup>88</sup> In particular, the question notes that the license application requires information about the citizenship and country of origin of certain individuals.<sup>89</sup> In response, BIS indicates:

The information we normally request derives from a curriculum vitae/resume or from company background checks. The information that [BIS] may request as part of the license application process is requested in order to determine whether [BIS] should authorize the release of such controlled sensitive technology. The hiring of foreign nationals is not prohibited nor regulated by the Export Administration Regulations (EAR). The EAR does not regulate employment matters.<sup>90</sup>

While this statement may appear to be innocuous, it masks real concerns that employers using certain technology or software face when deciding whether to hire, to promote, or to give different job responsibilities to foreign nationals. As demonstrated in the following section, compliance with the deemed export rules may cause an employer to be concerned that it is violating Title VII and the Immigration Reform and Control Act, as well as state laws that prohibit employment discrimination.<sup>91</sup> The next section discusses the two federal anti-discrimination statutes that appear to be in tension with the deemed export rules.

## II. PROVIDING A FRAMEWORK FOR DISCUSSION: RELEVANT PORTIONS OF FEDERAL ANTI-DISCRIMINATION LAWS

### A. *Title VII's General Requirements*

Title VII is the federal statute that prohibits an employer from discriminating against its employees based on several protected traits, including national origin and race.<sup>92</sup> Title VII does not prohibit discrimination based on citizenship.<sup>93</sup>

More specifically, the statute prohibits a broad range of discriminatory conduct by the employer, including discriminating against the employee in the

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88. "Deemed Export" Questions and Answers, *supra* note 22, Q & A 12.

89. *Id.*

90. *Id.*

91. A discussion of all fifty states' antidiscrimination laws is beyond the scope of this Article. The Author notes that many of the tensions that exist with federal discrimination laws and the deemed export rules also may have implications in the state law context as well.

92. 42 U.S.C. § 2000e-2(a) (2000).

93. *See id.*; *see also, e.g.,* Blakely v. Anesthetix of Iowa, P.C., No. CO4-3031-MWB, 2005 WL 1588543, at \*9 (N.D. Iowa June 23, 2005) (holding that Blakely, a doctor, had no viable Title VII claim based on an argument that the employer preferred to hire doctors who were not United States citizens).

terms or conditions of employment or limiting or segregating employees in ways that would deprive them of “employment opportunities or otherwise adversely affect his status as an employee . . . .”<sup>94</sup> Notably, Title VII’s prohibitions on discrimination based on national origin or race do not require an employer to make accommodations for employees or applicants.<sup>95</sup> Rather, an applicant is required to meet all of the legitimate, objective requirements of the position in question, and the individual’s failure to meet these legitimate requirements will not result in a violation of Title VII.<sup>96</sup>

*B. The National Security Exception*

Relevant to the inquiry into the interaction of Title VII and deemed export rules is the national security exception to Title VII. Under 42 U.S.C. § 2000e-2(g):

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ any individual for any position, for an employer to discharge any individual from any position, or for an employment agency to fail or refuse to refer any individual for employment in any position, or for a labor organization to fail or refuse to refer any individual for employment in any position, if—

(1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President; and

(2) such individual has not fulfilled or has ceased to fulfill that requirement.<sup>97</sup>

The EEOC Guidance relating to the national security exception cautions that employers must enforce any national security requirements in a non-discriminatory way. In other words, it would not be appropriate for an

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94. 42 U.S.C. § 2000e-2(a)(2).

95. *See id.* § 2000e-2(a) (containing no requirement that employers provide accommodations); *see also id.* § 2000e(j) (2000) (requiring reasonable accommodation of religion).

96. *See, e.g.,* *Mitani v. IHC Health Servs., Inc.*, 53 F. App’x 48, 52 (10th Cir. 2002) (holding that the employee failed to state a claim because the job required a bachelor’s degree and plaintiff did not hold the required degree); *see also Molerio v. FBI*, 749 F.2d 815, 823 (D.C. Cir. 1984) (finding that the plaintiff was not qualified for a job because he could not obtain the required security clearance).

97. 42 U.S.C. § 2000e-2(g) (2000).

employer to indicate that clearances are needed for employees of certain races while not imposing such requirements on individuals of other races.<sup>98</sup>

In its Guidance, the EEOC describes an unpublished commission decision that is relevant in the deemed export context.<sup>99</sup> A private employer who performed work for the military refused to promote a naturalized United States citizen from Yugoslavia.<sup>100</sup> Even though the employee was the most qualified for the position, he was not promoted because “it would take six months to a year for the employee to receive the necessary security clearance for the job . . . .”<sup>101</sup> The Commission held that it was not a violation of Title VII for the employer to fail to promote the employee.<sup>102</sup> In making its decision, the Commission noted that the employer ultimately hired persons who had the required security clearance and “there was no evidence that applicants of other nationalities received more favorable treatment in securing the position.”<sup>103</sup>

There are few reported decisions discussing the intersection of Title VII and national security interests.<sup>104</sup> Of these cases, the most helpful case is *Molerio v. FBI*.<sup>105</sup> Molerio applied for a position as a special agent with the Federal Bureau of Investigation (FBI).<sup>106</sup> Molerio claimed that the FBI discriminated against him based on his national origin when it failed to hire him because he had close relatives who lived in Cuba.<sup>107</sup> The appellate court affirmed the district court’s grant of summary judgment in favor of the FBI, reasoning that the policy did not demonstrate “evidence of discrimination on the basis of race or national origin, since it would apply to any person, of any race or nationality, with relatives in the pertinent country.”<sup>108</sup> In its decision,

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98. See EEOC, Policy Guidance on the Use of the National Security Exception Contained in § 703(g) of Title VII of the Civil Rights Act of 1964, as Amended, § 7.II, [http://www.eeoc.gov/policy/docs/national\\_security\\_exemption.html](http://www.eeoc.gov/policy/docs/national_security_exemption.html) (last visited Jan. 15, 2008) [hereinafter EEOC, Policy Guidance on National Security Exception].

99. *Id.* § 7.IV.

100. *Id.*

101. *Id.*

102. *Id.*

103. EEOC, Policy Guidance on National Security Exception, *supra* note 98, § 7.IV.

104. See, e.g., *Bennett v. Chertoff*, 425 F.3d 999, 1000 (D.C. Cir. 2005) (noting in its decision that security clearance issues were not reviewable under Title VII); *Tenenbaum v. Caldera*, 45 F. App’x 416, 417–18 (6th Cir. 2002) (same); *Ryan v. Reno*, 168 F.3d 520, 524 & n.3 (D.C. Cir. 1999) (noting that its decision that security clearance issues were not reviewable under Title VII was bolstered by the national security exception language in Title VII); *Becerra v. Dalton*, 94 F.3d 145, 149 (4th Cir. 1996) (same); *Perez v. FBI*, 71 F.3d 513, 515 (5th Cir. 1995); see also EEOC, Policy Guidance on National Security Exception, *supra* note 98, § 7.III (noting lack of case law regarding exception).

105. 749 F.2d 815, 822–23 (D.C. Cir. 1984).

106. *Id.* at 818.

107. *Id.* at 822–23.

108. *Id.* at 823.

the appellate court opined more broadly on the national security exception, holding that the exception “specifically acknowledges the general validity of national security clearance requirements, and we hold as a matter of law that the mere fact that such requirements impose special disabilities on the basis of connection with particular foreign countries is not alone evidence of discrimination.”<sup>109</sup>

Separate from the national security exception, federal courts have held that if an employee is required to have a security clearance to work in a particular job, the employer may refuse to hire or may terminate the employee if the security clearance is denied.<sup>110</sup> The decision to deny a person a security clearance is not reviewable under Title VII.<sup>111</sup>

In a case involving government employees, the Supreme Court explained that “[t]he grant of a clearance requires an affirmative act of discretion on the part of the granting official” and that in making this determination the official was attempting to predict the future potential behavior of individuals “and to assess whether, under compulsion of circumstances or for other reasons, he might compromise sensitive information.”<sup>112</sup> In making these determinations, government officials may consider past or present conduct, and also “concerns completely unrelated to conduct, such as having close relatives residing in a country hostile to the United States.”<sup>113</sup> The Court has further characterized the grant or denial of security clearances as “an inexact science at best.”<sup>114</sup>

Instructive to the issue at hand is the case of *Ryan v. Reno*.<sup>115</sup> In *Ryan*, the Immigration and Naturalization Service (INS) wanted to hire immigration inspectors to work in Ireland.<sup>116</sup> The INS interviewed candidates for the open positions and made offers to the selected candidates.<sup>117</sup> Although the INS informed the employees that they would be terminated if they did not pass the required security clearance, the INS officials wanted the selected individuals to begin work immediately.<sup>118</sup> In order for the inspectors to begin work, the INS had to apply for a waiver package, essentially allowing the employees to work with nonclassified information pending the approval of their security

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109. *Id.*

110. *See, e.g., Bennett*, 425 F.3d at 1000–01; *Tenenbaum*, 45 F. App’x at 417–18; *Ryan*, 168 F.3d at 521, 524 & n.3; *Becerra*, 94 F.3d at 148–49; *Perez*, 71 F.3d at 514–15.

111. *See, e.g., Bennett*, 425 F.3d at 1000; *Tenenbaum*, 45 F. App’x at 417–18; *Ryan*, 168 F.3d at 524 n.3; *Becerra*, 94 F.3d at 149; *Perez*, 71 F.3d at 515; *Brazil v. Dep’t of Navy*, 66 F.3d 193, 195 (9th Cir. 1995).

112. *Dep’t of Navy v. Egan*, 484 U.S. 518, 528 (1988).

113. *Id.* at 528–29.

114. *Id.* at 529 (quoting *Adams v. Laird*, 420 F.2d 230, 239 (D.C. Cir. 1969)).

115. 168 F.3d 520 (D.C. Cir. 1999).

116. *Id.* at 522.

117. *Id.*

118. *Id.*

clearances.<sup>119</sup> The Department of Justice denied the waivers, and the employees were terminated.<sup>120</sup> The employees sued the INS, claiming that they had been denied the positions based on their citizenship and national origin in violation of Title VII.<sup>121</sup>

The appellate court held that the denial or revocation of employment based on the denial of a security clearance is not actionable under Title VII.<sup>122</sup> In so concluding, the court reasoned as follows:

Certainly, it is not reasonably possible for an outside nonexpert body to review the substance of such a judgment and to decide whether the agency should have been able to make the necessary affirmative prediction with confidence. Nor can such a body determine what constitutes an acceptable margin of error in assessing the potential risk.<sup>123</sup>

The court further explained: “[T]he protection of classified information must be committed to the broad discretion of the agency responsible, and this must include broad discretion to determine who may have access to it.”<sup>124</sup> At least one court has held that failure to obtain other required certifications that do not technically fall within the definition of a security clearance also are unreviewable.<sup>125</sup>

### C. *The Contours of the BFOQ Affirmative Defense*

Under the BFOQ exception, an employer may hire an employee using religion, sex, or national origin as a requirement, where such a requirement is “reasonably necessary to the normal operation of that particular business or enterprise.”<sup>126</sup> As might be imagined, the courts have had a difficult time defining the exact contours of the BFOQ defense. This is probably due to the fact that the rationale underlying the BFOQ rule goes against the grain of the anti-discrimination statutes. As one scholar noted: “The *raison d’être* of the BFOQ concept is that a policy of overt bias is sometimes ‘reasonably necessary to the normal operation of that particular business . . . .’ An

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119. *Id.*

120. *Ryan*, 168 F.3d at 522.

121. *Id.* at 522–23.

122. *Id.* at 524.

123. *Id.* at 523.

124. *Id.*

125. *Brazil v. Dep’t of Navy*, 66 F.3d 193, 195 (9th Cir. 1995) (finding that an individual may be terminated upon the revocation of a Nuclear Weapons Personnel Reliability Program certification). *But see Jones v. Ashcroft*, 321 F. Supp. 2d 1, 8 (D.D.C. 2004) (holding that decision based on pre-security clearance background check could be reviewed by court).

126. 42 U.S.C. § 2000e-2(e) (2000).

employer asserting a BFOQ defense is, in essence, saying ‘yes, I discriminate . . . but here is the reason why that policy is necessary.’”<sup>127</sup>

Cases where the courts commonly recognize a BFOQ defense appear to be limited to a few specific categories, including: (1) the safety of other individuals, such as other employees or customers; (2) the authenticity of a product or service; and (3) privacy.<sup>128</sup> In some instances, courts have been willing to consider cost<sup>129</sup> or reliance on another law as potential bases for a BFOQ defense.<sup>130</sup> Laying aside the authenticity and privacy rationales as not applicable to the topic at hand,<sup>131</sup> this section will first focus on the general contours of the BFOQ defense and then discuss the safety, cost, and other law rationales.

127. Stephen F. Befort, *BFOQ Revisited: Johnson Controls Halts the Expansion of the Defense to Intentional Sex Discrimination*, 52 OHIO ST. L.J. 5, 9 (1991) (quoting 42 U.S.C. § 2000e-2(e)).

128. See *id.* at 17–20; see also Michael J. Frank, *Justifiable Discrimination in the News and Entertainment Industries: Does Title VII Need a Race or Color BFOQ?*, 35 U.S.F. L. REV. 473, 484 (2001) (arguing for a limited BFOQ based on race for authenticity reasons in the entertainment industry).

129. See, e.g., *Johnson v. American Airlines, Inc.*, 745 F.2d 988, 993 & n.3 (5th Cir. 1984); see also *Int’l Union, United Auto., Aerospace and Agric. Implement Workers of Am., UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 223–24 (1991) (Scalia, J., concurring) (suggesting that cost might be considered as part of the BFOQ calculus in limited situations, using as an example “that a shipping company may refuse to hire pregnant women as crew members on long voyages because the on-board facilities for foreseeable emergencies, though quite feasible, would be inordinately expensive.”); *id.* at 215 (White, J., concurring) (suggesting that the costs of protecting the unborn children of workers would be an appropriate consideration for a court in considering BFOQ).

130. See, e.g., *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 123 n.17 (1985) (indicating that neither party had challenged assertion that FAA regulations could serve as a BFOQ for the position of captain); *Coupe v. Fed. Exp. Corp.*, 121 F.3d 1022, 1024–25 (6th Cir. 1997) (finding that reliance on FAA regulations may be BFOQ in age context). However, courts have consistently rejected reliance on conflicting state laws as a basis for a BFOQ. See, e.g., *Gately v. Mass.*, 2 F.3d 1221, 1229 (1st Cir. 1993) (finding that a state law mandating retirement of policy officers did not establish a BFOQ); *Garrett v. Okaloosa Cty.*, 734 F.2d 621, 624 (11th Cir. 1984) (“The mere fact that a state enacts a discriminatory regulation does not create a BFOQ defense for one who follows such a regulation.”); *Rosenfeld v. Southern Pac. Co.*, 444 F.2d 1219, 1227 (9th Cir. 1971) (indicating that compliance with state law does not transform a discriminatory practice into a BFOQ). But see *Dothard v. Rawlinson*, 433 U.S. 321, 334 (1977) (noting that hiring regulation fits within narrow BFOQ exception); see also 42 U.S.C. § 2000e-7 (2000) (“Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter.”).

131. These rationales have been discussed extensively in other articles. See generally Befort, *supra* note 127, at 18; Emily Gold Waldman, *The Case of the Male Ob-Gyn: A Proposal for Expansion of the Privacy BFOQ in the Healthcare Context*, 6 U. PA. J. LAB. & EMP. L. 357 (2004) (discussing privacy).

Before beginning that discussion, it is important to note that there are few reported cases containing a significant discussion of BFOQ in the context of national origin, other than to note that Title VII theoretically allows such a defense.<sup>132</sup> There are likely several reasons for this. One reason for this may be that national origin and race are often related to one another. Because the BFOQ affirmative defense technically is not available for classifications based on race, employers may shy away from claiming a national origin BFOQ for fear that such a defense could lead to an admission of race discrimination.<sup>133</sup> Second, as a matter of practical reality it will be difficult to make an argument that national origin is a requirement for a particular job, rather than certain traits (such as language skills or familiarity with a geographic area) that may be related to but not directly correlative with national origin.

The Supreme Court has held that the BFOQ defense is “written narrowly,” and, therefore, should be construed narrowly.<sup>134</sup> In a case where the Court was asked to apply gender as a BFOQ, the Court indicated that the defense “reaches only special situations.”<sup>135</sup> In so emphasizing, the Court pointed to the limitations in the statutory language, that make such discrimination permissible only in “‘certain instances’ where . . . discrimination is ‘reasonably necessary’ to the ‘normal operation’ of the ‘particular’ business.”<sup>136</sup> To prove BFOQ, the employer should demonstrate that the BFOQ is required by an “objective, verifiable requirement” that concerns “job-related skills and aptitudes.”<sup>137</sup>

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132. In *Avigliano v. Sumitomo Shoji America, Inc.*, the Second Circuit Court of Appeals suggested that a Japanese company doing business in the United States should be able to justify its decision to grant promotions to individuals from Japan based on a national origin BFOQ. 638 F.2d 552, 559 (2d Cir. 1981). However, this portion of the court’s decision was dicta, and the decision of the appellate court was later reversed by the Supreme Court on other grounds, when the Court held that the company in question was a United States company, not a Japanese company. *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 189 (1982). In a subsequent unreported decision, a district court in New York held that a Japanese company could not use national origin as a BFOQ for its policy of only promoting people from Japan to top positions within the company. However, the case provides no indication that the Japanese company put forward evidence that the policy fit within the BFOQ defense. *Shane v. Tokai Bank, Ltd.*, Nos. 96CV5167(HB) & 96CV8351(HB), 1997 WL 639255, at \*6 (S.D.N.Y. Oct. 15, 1997); see also *Goyette v. DCA Adver. Inc.*, 828 F. Supp. 227, 237 (S.D.N.Y. 1993) (same); *Lemnitzer v. Philippine Airlines*, 783 F. Supp. 1238, 1245 (N.D. Cal. 1991) (finding that treaty allows company to prefer people from the Philippines in employment); George Rutherglen, *Discrimination and Its Discontents*, 81 VA. L. REV. 117, 140 (1995).

133. See, e.g., *Gordon v. JKP Enters. Inc.*, 35 F. App’x 386 (5th Cir. 2002) (holding that race cannot be a BFOQ under Title VII); see also Rutherglen, *supra* note 132 (arguing that race and national origin are often closely linked to one another).

134. *Johnson Controls*, 499 U.S. at 201.

135. *Id.*

136. *Id.*

137. *Id.*



In the age context, the Supreme Court has adopted a multi-part test for determining whether a BFOQ exists. An employer asserting a BFOQ defense has the burden of proving that the restriction meets the following requirements:

(1) [the restriction] is reasonably necessary to the essence of the business, and either (2) that all or substantially all individuals excluded from the job involved are in fact disqualified, or (3) that some of the individuals so excluded possess a disqualifying trait that cannot be ascertained except by reference to age. If the employer's objective in asserting a BFOQ is the goal of public safety, the employer must prove that the challenged practice does indeed effectuate that goal and that there is no acceptable alternative which would better advance it or equally advance it with less discriminatory impact.<sup>138</sup>

In determining whether a classification is "reasonably necessary," the Supreme Court first considers whether the employer has provided an appropriate reason for the requirement. Three potential rationales apply in the deemed export context: safety or national security, cost, and reliance on a conflicting federal law.

Safety is recognized as a legitimate basis for having a discriminatory employment practice, in limited circumstances.<sup>139</sup> The cases that have come before the Court have dealt with the personal safety of the employees, clients, and other third parties, and not broader concerns about national security.

In most cases where the courts have found a BFOQ based on safety under Title VII, the alleged harm is usually not to the individual in question, but to other third parties.<sup>140</sup> Thus, the Supreme Court has held that gender may be used as a BFOQ for prison guards at a male only, maximum-security penitentiary, where the prison could demonstrate that the presence of female guards posed a potential danger to prisoners and other guards.<sup>141</sup> The Court also has cited with approval cases in which airlines had rules requiring layoffs of pregnant flight attendants during their pregnancy "on the ground that the employer's policy was necessary to ensure the safety of passengers."<sup>142</sup>

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138. *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 417 n.24 (1985).

139. *Johnson Controls*, 499 U.S. at 202.

140. *Dothard v. Rawlinson*, 433 U.S. 321, 335 (1977) (holding that women could be excluded from being prison guards in certain areas of a maximum security, male penitentiary where it created a risk to other inmates and guards for a woman to hold such a position).

141. *Id.*

142. *Johnson Controls*, 499 U.S. at 202 (citing *Harriss v. Pan Am. World Airways, Inc.*, 649 F.2d 670 (9th Cir. 1980); *Burwell v. Eastern Air Lines, Inc.*, 633 F.2d 361 (4th Cir. 1980); *Condit v. United Air Lines, Inc.*, 558 F.2d 1176 (4th Cir. 1977); *In re Nat'l Airlines, Inc.*, 434 F. Supp. 249 (S.D. Fla. 1977)). However, the Court has limited the breadth of the personal security BFOQ, at least in the gender context. Applying these requirements in the gender context, the Court in *Johnson Controls* determined that a company could not exclude women in their child-

Two other rationales for a discriminatory policy also may come into play in the deemed export context. In a few cases, courts have considered the argument that another law requires discrimination. In the context of state laws that mandate such a result, the courts have, for the most part, determined that reliance on a discriminatory state law will not justify a BFOQ.<sup>143</sup> However, when the law in question is a federal law, some courts have been willing to find that a federal restriction results in a BFOQ.

In *Coupe v. Federal Express Corp.*, the Sixth Circuit considered whether the Federal Aviation Administration's (FAA) rule prohibiting pilots from flying after the age of sixty was a BFOQ for purposes of the Age Discrimination in Employment Act.<sup>144</sup> The Sixth Circuit first noted that technically the FAA cannot determine whether particular requirements are a BFOQ for a position. It reasoned, "That is not the FAA's function; 'Congress has not provided for agency determination of whether a particular age is a BFOQ for a particular occupation.'"<sup>145</sup> However, the court held that Federal Express could rely on the FAA rule to justify terminating or reassigning the pilot because the FAA had essentially performed a BFOQ analysis when creating the flying restriction based on age.<sup>146</sup> The Sixth Circuit found that the "the FAA determined—though not in so many words, of course—that its age 60 requirement 'is reasonably necessary to the essence of the business . . .'" and that "[t]he rule was first promulgated . . . because of concerns that a hazard to safety was presented by utilization of aging pilots in air carrier operations."<sup>147</sup>

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bearing years from taking certain jobs that might expose them to levels of lead that would be harmful to a fetus if the woman became pregnant. See *Johnson Controls*, 499 U.S. at 206.

143. See, e.g., *Gately v. Massachusetts*, 2 F.3d 1221, 1229 (1st Cir. 1993) (finding that a state law mandating retirement of policy officers did not establish a BFOQ); *Garrett v. Okaloosa Cty.*, 734 F.2d 621, 624 (11th Cir. 1984) ("The mere fact that a state enacts a discriminatory regulation does not create a BFOQ defense for one who follows such a regulation."); *Rosenfeld v. Southern Pac. Co.*, 444 F.2d 1219, 1227 (9th Cir. 1971) (indicating that compliance with state law does not transform a discriminatory practice into a BFOQ). But see *Dothard*, 433 U.S. at 334 (1977) (noting that hiring regulation fits within narrow BFOQ exception); see also 42 U.S.C. § 2000e-7 (2000) ("Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter.").

144. *Coupe v. Fed. Exp. Corp.*, 121 F.3d 1022, 1024–25 (6th Cir. 1997). The ADEA has a BFOQ exception. See 29 U.S.C. § 623(f) (2000).

145. *Coupe*, 121 F.3d at 1024–25 (quoting *Hahn v. City of Buffalo*, 770 F.2d 12, 15–16 (2d Cir. 1985)).

146. *Id.* at 1025.

147. *Id.* However, in *EEOC v. Boeing Co.*, the Ninth Circuit Court of Appeals considered a similar question regarding whether the FAA's age restriction for pilots could create a BFOQ. 843 F.2d 1213, 1215 (9th Cir. 1988). The court held that the pilot in question did not technically fall within the FAA regulation; however, the court continued with an extensive discussion in which it

It is unclear whether cost considerations can play a role in determining whether a particular employee can be excluded from certain positions. In the age discrimination context, some courts have approved strict age cut-offs for the hiring of new pilots when the airline's refusal to hire was based on "length of on-the-job training and ability of the employer to recoup its investment."<sup>148</sup> While the Supreme Court has held that a company may not consider the costs of potential future tort liability in deciding whether to hire women,<sup>149</sup> some members of the Court have posited that cost might be a valid consideration in the gender discrimination context,<sup>150</sup> and at least one federal appeals court has so held.<sup>151</sup> For the most part, however, courts seem reluctant to allow cost considerations to come into play.<sup>152</sup>

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found that the FAA rule did not, on its own, constitute a BFOQ. *Id.* at 1220. The Ninth Circuit concluded that a jury must determine whether a BFOQ exists on a case-by-case basis. *Id.* at 1218. While the FAA rule could be admitted as evidence in support of a BFOQ, it did not establish a BFOQ per se. For purposes of applying the deemed export rule, the *Boeing* case can be distinguished, because in that case the employer was not applying the federal rule, but rather expanding the individuals affected beyond the technical requirements of the rule.

148. *Johnson v. American Airlines, Inc.*, 745 F.2d 988, 993 n.3 (5th Cir. 1984). *But see* *Leftwich v. Harris-Stowe State Coll.*, 702 F.2d 686, 692 (8th Cir. 1983) ("[E]conomic savings derived from discharging older employees cannot serve as legitimate justification under the ADEA for an employment selection criterion.").

149. *See also* *Int'l Union, United Auto., Aerospace and Agric. Implement Workers of Am., UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 210 (1991); *see also id.* at 210–11 ("We, of course, are not presented with, nor do we decide, a case in which costs would be so prohibitive as to threaten the survival of the employer's business. We merely reiterate our prior holdings that the incremental cost of hiring women cannot justify discriminating against them."); *Olsen v. Marriott Int'l, Inc.*, 75 F. Supp. 2d 1052, 1066 (D. Ariz. 1999) (relying on *Johnson Controls* in rejecting defendant's cost argument, finding that employer had not presented evidence that the potential costs threatened the economic survival of the company).

150. *See Johnson Controls*, 499 U.S. at 223–24 (Scalia, J., concurring); *id.* at 215, (White, J., concurring).

151. *See Reed v. County of Casey*, 184 F.3d 597, 600 (6th Cir. 1999) (holding that gender could be a valid BFOQ for placing a female guard on the night shift, considering that other options "placed financial strains on the Jail when it was forced to pay overtime and caused fatigue to the deputy jailer overseeing the transfer, who then had to work the next day"); *see also EEOC v. Sedita*, 816 F. Supp. 1291, 1297 (N.D. Ill. 1993) (holding that question of whether cost considerations justified a BFOQ was better left to jury). *But see Johnson Controls*, 886 F.2d at 913–14 (7th Cir. 1989) (Easterbook, J., dissenting) (arguing that the potential of future tort liability or medical expenses did not justify using gender as a BFOQ), *rev'd*, 499 U.S. 187 (1991).

152. *Wilson v. Southwest Airlines Co.*, 517 F. Supp. 292, 304 (N.D. Tex. 1981) (rejecting argument by Southwest Airlines that hiring male flight attendants would decrease the number of male passengers who would want to fly on the airline, and that continuing to employ only female flight attendants was part of its marketing campaign and crucial to the airline's continued financial success); *see also Smallwood v. United Air Lines, Inc.*, 661 F.2d 303, 309 (4th Cir. 1981); *Olsen*, 75 F. Supp. 2d at 1066.

Perhaps a more nuanced understanding of the costs issue is that there is no absolute rule prohibiting consideration of costs. As one commentator noted: “Almost *any* discrimination permitted by a BFOQ could be avoided by spending enough money,” and, therefore, all BFOQ defenses to some degree involve cost considerations.<sup>153</sup> However, courts will carefully scrutinize costs arguments, under the theory that most cost considerations will not excuse discriminatory practices.

#### D. *The Immigration Reform and Control Act (IRCA)*

##### 1. General Requirements

The Immigration Reform and Control Act makes it illegal for an employer to hire undocumented workers and requires employers to verify an employee’s status to work legally.<sup>154</sup> If an employer asks for verification documents other than those allowed under the statute, such a request is considered to be an unlawful practice.<sup>155</sup>

Legislators were concerned that imposing penalties on employers for hiring undocumented workers would result in discrimination against workers who could legally work within the United States, but who employers might think, based on appearance or other factors, could not.<sup>156</sup> To alleviate this concern, IRCA also contains anti-discrimination provisions. IRCA prohibits certain employers<sup>157</sup> from, among other things, making hiring and termination

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153. Ernest F. Lidge, III, *Financial Costs as a Defense to an Employment Discrimination Claim*, 58 ARK. L. REV. 1, 17 (2005). Professor Lidge provides the following example of when cost plays a legitimate role in BFOQ:

An elderly woman, who is not a critical care case, desires that her intimate care be handled by a female. An opening occurs on the day shift. A male and female both apply for the position. Both are qualified, but the male has more experience and is better qualified in other ways. The employer, however, hires the female because of the privacy interests of the elderly patient. Do we reject the BFOQ because the employer could have hired both applicants, allowing the female attendant to take care of the intimate care while allowing the male attendant to help out with other care? No, the cost of hiring two attendants instead of one permits the privacy-based BFOQ.

*Id.* at 17–18.

154. 8 U.S.C. § 1324a (2000 & Supp. 2004).

155. *Id.* §1324b(a)(6) (2000).

156. H.R. REP. NO. 99-682, pt. 1, at 68 (1986) (expressing committee’s “deep concern that the imposition of employer sanctions will cause extensive employment discrimination against Hispanic Americans and other minority group members”).

157. IRCA’s discrimination provisions govern persons or entities with more than three employees. *See* 8 U.S.C. § 1324b(a)(1). This language also covers entities, such as recruiting agencies, who are not employers. This Article focuses on IRCA’s application to employers.

decisions<sup>158</sup> based on a person's national origin, and, in certain circumstances, on an individual's country of citizenship.<sup>159</sup> Under IRCA,

[i]t is an unfair immigration-related employment practice for a person or other entity to discriminate against any individual (other than an unauthorized alien, as defined in section 1324a(h)(3) of this title) with respect to the hiring, . . . of the individual for employment or the discharging of the individual from employment—

(A) because of such individual's national origin, or

(B) in the case of a protected individual (as defined in paragraph (3)), because of such individual's citizenship status.<sup>160</sup>

The term "unauthorized alien" means "that the alien is not at that time either: (1) [l]awfully admitted for permanent residence, or (2) authorized to be so employed by [IRCA] or by the Attorney General."<sup>161</sup>

The IRCA provisions prohibiting discrimination based on national origin apply to any individual, other than an unauthorized alien. However, protection from citizenship discrimination is more limited, because only individuals defined as "protected individuals" fall within the scope of this provision. The term "protected individual" means an individual who,

(A) is a citizen or national of the United States, or

(B) is an alien who is lawfully admitted for permanent residence, is granted the status of an alien lawfully admitted for temporary residence under section 1160(a) or 1255a(a)(1) of this title, is admitted as a refugee under section 1157 of this title, or is granted asylum under section 1158 of this title.<sup>162</sup>

158. The explicit language of IRCA does not prohibit other types of discriminatory employment decisions, such as pay or promotion decisions. *Id.* § 1324b(a)(1). The IRCA regulations support such a reading. 8 C.F.R. § 1274a.1(c)–(f) (2007). In the deemed export context, it may be possible for an employer to argue that certain employment actions do not result in liability under IRCA.

159. 8 U.S.C. § 1324b(a)(1). The sentence indicates that only certain employers are bound by the IRCA discrimination requirements because the statute does not apply to employers who have three or fewer employees. *Id.* § 1324b(a)(2)(A).

160. *Id.* § 1324b(a)(1).

161. 8 C.F.R. § 1274a.1(a).

162. 8 U.S.C. § 1324b(a)(3). Subsection 1324b(a)(3)(B) continues by excepting from IRCA citizenship discrimination protection:

(i) an alien who fails to apply for naturalization within six months of the date the alien first becomes eligible (by virtue of period of lawful permanent residence) to apply for naturalization or, if later, within six months after November 6, 1986, and (ii) an alien who has applied on a timely basis, but has not been naturalized as a citizen within 2 years after the date of the application, unless the alien can establish that the alien is actively pursuing naturalization, except that time consumed in the Service's processing the application shall not be counted toward the 2-year period.

Three restrictions within IRCA are important in the deemed export context. First, an individual may be legally entitled to work within the United States, and yet, not be a protected person within the citizenship discrimination provisions of IRCA.<sup>163</sup> Second, it is not an unfair practice under IRCA for an employer to prefer “to hire, recruit, or refer an individual who is a citizen or national of the United States over another individual who is an alien if the two individuals are equally qualified.”<sup>164</sup>

Finally, IRCA contains a statutory exception that makes it permissible for an employer to discriminate because of citizenship status, if such discrimination is otherwise required to “comply with law, regulation, or executive order, or required by Federal, State, or local government contract, or which the Attorney General determines to be essential for an employer to do business with an agency or department of the Federal, State, or local government.”<sup>165</sup>

## 2. Procedures and Remedies

As discussed later in Part III.A.1, differences in remedies and procedures between Title VII and IRCA may lead aggrieved parties to prefer to proceed with a national origin claim under Title VII, rather than a citizenship discrimination claim under IRCA.<sup>166</sup> Individuals who allege an IRCA violation must file a charge with the Special Counsel for Immigration-Related Unfair Employment Practices within the Department of Justice.<sup>167</sup> An IRCA complaint is then pursued through an investigation by the Special Counsel and/or through proceedings with an administrative law judge.<sup>168</sup> IRCA provides aggrieved individuals with an administrative enforcement mechanism, which does not provide a private cause of action in court.<sup>169</sup> IRCA provides for judicial review only after administrative procedures have been exhausted.<sup>170</sup> In contrast, individuals who are alleging a violation of Title

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163. *Id.* § 1324b(a)(3).

164. *Id.* § 1324b(a)(4).

165. *Id.* § 1324b(a)(2)(C).

166. IRCA applies to a different set of employers than Title VII. While an employer must have at least fifteen employees to fall within Title VII, employers with at least four employees are covered by IRCA. *Id.* § 1324b(a)(2)(A); 42 U.S.C. § 2000e(b) (2000). It should be noted that the IRCA national origin discrimination provisions are designed so as not to interfere with Title VII claims. *See* 8 U.S.C. § 1324b(a)(2)(B) (excluding national origin discrimination claims under IRCA if “that individual is covered under section 703 of the Civil Rights Act of 1964”); *see also id.* § 1324b(b)(2).

167. *Id.* § 1324b(b)(1), (c); *see also* 28 C.F.R. § 44.101(a) (2006) (describing the contents of a charge).

168. 8 U.S.C. § 1324b(d)–(g).

169. *Id.* § 1324b(b)–(j).

170. *Id.* § 1324b(i); *see also, e.g.*, *Tudoriu v. Horseshoe Casino Hammond*, No. 2:04CV294, 2006 WL 752490, at \*2 (N.D. Ind. Mar. 21, 2006). IRCA also allows the Special

VII must first file a Charge of Discrimination with either the EEOC or a comparable state agency.<sup>171</sup> A Title VII plaintiff is then entitled to file a claim in state or federal court, which is a separate proceeding from the prior administrative process.<sup>172</sup>

IRCA provides a limited spectrum of remedies, which consists largely of backpay for aggrieved workers, attorneys' fees,<sup>173</sup> civil penalties, and orders directing the employer to refrain from discrimination or to perform certain tasks to ensure that discrimination does not occur.<sup>174</sup> Even these limited remedies are further limited in mixed motive cases, in which backpay and reinstatement cannot be ordered.<sup>175</sup>

### III. SORTING OUT THE CONFLICTS

#### A. *Statutory Coverage Under Title VII*

##### 1. Whether Deemed Export Decisions Are Based on a Protected Trait Under Title VII

As discussed earlier, Title VII prohibits discrimination based on race and national origin.<sup>176</sup> Notably, Title VII does not prohibit discrimination based on citizenship.<sup>177</sup> In theory, a company's employment decisions based on concerns about deemed export rules and licensing requirements should not create an intentional discrimination claim under Title VII. At heart, decisions based on deemed export rules are not technically based on a protected class, but rather a determination regarding whether to become involved in a complex regulatory scheme. However, employers who want to avoid deemed export concerns related to their employees will be making decisions based on citizenship.

In an ideal decision making process, an employer would first determine whether it uses controlled technology or software subject to ITAR or EAR and whether certain individuals' access thereto triggers deemed export licensing concerns. Next, the employer would determine whether an applicant for a

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Counsel to request a federal district court to enforce orders issued by an administrative law judge. See 8 U.S.C. § 1324b(j).

171. 42 U.S.C. § 2000e-5 (2000).

172. *See id.*

173. 8 U.S.C. § 1324b(g)(2)(B), (h), (j).

174. *Id.* § 1324b(g)(2)(B), (h).

175. *Id.* § 1324b(g)(2)(C).

176. 42 U.S.C. § 2000e-2(a) (2000).

177. *See id.*; *see also* H.R. REP. NO. 99-682, pt. 1, at 13 (1986) ("Since Title VII does not provide any protection against employment discrimination based on alienage or non-citizen status, the Committee is of the view that the instant legislation must do so.").

position in question is a “foreign person” under the deemed export rules. If the individual is not a “foreign person,” he or she does not fall within the deemed export rules and no further inquiries regarding countries of citizenship or national origin should be relevant to the employment decision. However, if the individual is a “foreign person” under the deemed export rules, the employer would determine whether the individual’s current or past countries of citizenship (or permanent residency) are ones for which an export license would be required. Under this process, the decisions are based on citizenship, which is not a basis for a Title VII intentional discrimination claim.

What makes the problem complicated in the deemed export context is that only citizens of particular countries fall within the deemed export rules. In other words, the employer is not making a decision between foreign nationals and citizens, but rather decisions based upon which country a particular foreign national holds his or her citizenship. A deemed export only occurs if it would be improper to actually export the technology or software at issue to the country, and there are many countries to which few EAR controls apply, especially for less security sensitive technology and software.<sup>178</sup>

Despite this complication, decisions based upon ITAR or EAR deemed export considerations rely on inquiries about citizenship; however, the employment decision would only affect a subset of countries of citizenship, rather than all possible countries of citizenship. This is still technically different than a decision based on national origin, which refers to the “country where a person was born, or, more broadly, the country from which his or her ancestors came.”<sup>179</sup> A person’s citizenship and country of origin do not always coincide with one another; however, because citizenship and country of origin often coincide, the line where a citizenship claim ends and a national origin claim begins is a fine one.

As one commentator noted: “More problematic is the subtle, and sometimes elusive, line between illegal national origin discrimination and lawful preferences based on citizenship or nationality. That line is easily crossed.”<sup>180</sup> Even the Supreme Court has recognized that discrimination based on citizenship might result in cognizable national origin discrimination under

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178. 15 C.F.R. § 734.2(b)(2)(ii) (2007); 15 C.F.R. pt. 738, Supp. 1 (2007) (chart listing EAR export restrictions, providing few restrictions for countries such as Canada and Denmark); 22 C.F.R. § 120.17(a)(3)–(4) (2007). There are fewer country exceptions under ITAR; however, exceptions do exist. *See, e.g.*, 22 C.F.R. § 126.5 (providing certain exceptions for export to Canada).

179. *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 88 (1973).

180. Michael Starr, *Who’s the Boss? The Globalization of U.S. Employment Law*, 51 BUS. LAW. 635, 644 (1996).



Title VII.<sup>181</sup> The EEOC has indicated that while citizenship discrimination is not technically cognizable under Title VII, “citizenship discrimination does violate Title VII where it has the ‘purpose or effect’ of discriminating on the basis of national origin.”<sup>182</sup> Lower courts often have difficulty drawing lines between citizenship and national origin issues.<sup>183</sup>

This line may be even blurrier in certain ITAR scenarios. Under ITAR, a license is required for foreign persons if the individual’s current country of citizenship or past countries of citizenship, including their original place of citizenship, are countries to which export is prohibited.<sup>184</sup> Because individuals’ original places of citizenship often coincide with their birth country, the line between citizenship and national origin is even closer in certain ITAR scenarios. Unlike the ITAR, unofficial guidance from the BIS suggests that EAR’s deemed export licensing requirements are based on an individual’s most recent citizenship or permanent residency.<sup>185</sup>

While the license process technically relies on the citizenship of an individual, the license applications under both the ITAR and EAR, require the employer to provide information about the employee’s place of birth,<sup>186</sup> further complicating the question whether an employer was using citizenship or national origin in making a deemed export-based hiring decision. As discussed in Part III.D *infra*, careful information gathering and decision making processes can help to lessen exposure to Title VII liability in the deemed export context.

Further, plaintiffs and private attorneys have practical incentives to try to cast claims as national origin or race discrimination under Title VII, rather than citizenship discrimination claims which would fall under IRCA. IRCA provides aggrieved individuals with an administrative enforcement

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181. *Espinoza*, 414 U.S. at 92 (“Certainly Tit[le] VII prohibits discrimination on the basis of citizenship whenever it has the purpose or effect of discriminating on the basis of national origin.”)

182. EEOC, Compliance Manual § 13-VI, <http://www.eeoc.gov/policy/docs/national-origin.html> (last visited Jan. 15, 2008).

183. *See, e.g.*, *EEOC v. Technocrest Sys., Inc.*, 448 F.3d 1035, 1039 (8th Cir. 2001) (indicating that documents requested by EEOC subpoena might be relevant to both citizenship and national origin discrimination); *Fortino v. Quasar Co.*, 950 F.2d 389, 393 (7th Cir. 1991) (noting that the district court failed to keep citizenship determinations separate from those based on national origin).

184. Foreign National Employment Application Guidelines, *supra* note 52.

185. “Deemed Export” Questions and Answers, *supra* note 22, Q & A 6 (providing unofficial interpretation of EAR in dual citizenship situations, indicating that only the last country of citizenship is considered).

186. Foreign National Employment Application Guidelines, *supra* note 52 (indicating that a deemed export license under EAR requires the employer to list the employee’s place of birth, along with the citizenship of the individual).

mechanism, which does not provide a private cause of action in court.<sup>187</sup> IRCA provides for judicial review only after administrative procedures have been exhausted.<sup>188</sup> And, as discussed above, IRCA provides a limited remedial scheme.

Although deemed export-based employment decisions should fall outside Title VII's statutory coverage for intentional discrimination because the decisions are not made based on a protected trait, it is also necessary to consider whether such conduct might lead to liability under a disparate impact theory. The following section explores that issue.

## 2. Whether a Disparate Impact Cause of Action Might Lead to Liability

Title VII not only recognizes intentional discrimination claims, but also allows plaintiffs to prove discrimination by establishing that a specific policy creates a disparate impact based on a protected trait.<sup>189</sup> Evidence of discriminatory animus is not required to establish discrimination under a disparate impact claim.<sup>190</sup> Therefore, it becomes necessary to examine whether a policy in which an employer declines to apply for deemed export licenses on behalf of potential employees may result in disparate impact liability under Title VII based on either race or national origin as the protected class.<sup>191</sup>

To establish a disparate impact claim under Title VII, the plaintiff must prove that a particular employment practice has a significant disparate impact on a protected class.<sup>192</sup> Once the plaintiff meets this burden, both the burdens of persuasion and production move to the employer, who must then establish that the challenged business practice is related to the job in question and consistent with business necessity.<sup>193</sup> If the employer meets its burden, the

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187. 8 U.S.C. § 1324b(b)–(j) (2000).

188. *See, e.g.,* Tudoriu v. Horseshoe Casino Hammond, No. 2:04CV294, 2006 WL 752490, at \*2 (N.D. Ind. Mar. 21, 2006).

189. *Griggs v. Duke Power Co.*, 401 U.S. 424, 429–30 (1971).

190. *Id.* at 432.

191. IRCA's statutory language is silent regarding whether a disparate impact claim exists under the statute. 8 U.S.C. § 1324b(a)(1). However, the agency regulations interpret the statute as only prohibiting a person or other entity from “knowingly and intentionally discriminat[ing]” or from “engag[ing] in a pattern or practice of knowing and intentional discrimination.” 28 C.F.R. § 44.200 (2007).

192. *See* 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2000); *see also, e.g.,* *Anderson v. Westinghouse Savannah River Co.*, 406 F.3d 248, 265 (4th Cir. 2005) (discussing disparate impact framework under Title VII); *Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 160–61 (2d Cir. 2001) (same); *Firefighter's Inst. for Racial Equality ex rel. Anderson v. City of St. Louis*, 220 F.3d 898, 904 (8th Cir. 2000) (same).

193. *See* 42 U.S.C. § 2000e-2(k)(1)(A)(i); *see also, e.g.,* *Anderson*, 406 F.3d at 265 (discussing disparate impact framework under Title VII); *Robinson*, 267 F.3d at 160–61 (same); *Firefighter's Inst. for Racial Equality ex rel. Anderson*, 220 F.3d at 904 (same).

employee can still prevail by demonstrating that non-discriminatory alternative employment practices exist and the employer refused to adopt the alternate employment practice.<sup>194</sup> Any alternate practice suggested by the plaintiff “must be equally effective” as the employer’s chosen procedure, meaning that “the fact finder may consider factors such as efficiency, cost, or other burdens associated with the alternative.”<sup>195</sup>

To establish a prima facie case, plaintiffs “must offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group.”<sup>196</sup> In other words, the plaintiff must first establish “either a gross statistical disparity, or a statistically significant adverse impact coupled with other evidence of discrimination.”<sup>197</sup> In many instances, an employment practice based on deemed export concerns will simply not affect enough people in the aggregate or enough people from a particular national origin or race to result in the types of statistical disparities from which disparate impact liability might be found.<sup>198</sup>

However, assuming in a small number of cases that a plaintiff may be able to establish such a statistical disparity, the question becomes whether the employer can establish that the policy of not applying for deemed export licenses is job-related and consistent with business necessity.<sup>199</sup>

Before analyzing whether an employer would be able to meet this requirement, it first becomes necessary to examine whether the type of

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194. See 42 U.S.C. § 2000e-2(k)(1)(A)(i).

195. *Davey v. City of Omaha*, 107 F.3d 587, 593 (8th Cir. 1997).

196. *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994–95 (1988). My prior work discusses how disparate impact claims are difficult to establish and how the costs inherent in developing and presenting statistical evidence, often with the assistance of expensive statistical and other experts, make practitioners wary of proceeding under a disparate impact theory. See Sandra F. Sperino, *The Sky Remains Intact: Why Allowing Subgroup Evidence is Consistent with the Age Discrimination in Employment Act*, 90 MARQ. L. REV. 227, 259–61 (2006). As one scholar noted, disparate impact claims are a “relatively less vital tool, compared with theories of intentional discrimination.” Elaine W. Shoben, *Disparate Impact Theory in Employment Discrimination: What’s Griggs Still Good For? What Not?*, 42 BRANDEIS L.J. 597, 597 (2004).

197. See, e.g., *Waisome v. Port Authority of New York and New Jersey*, 948 F.2d 1370, 1375 (2d Cir. 1991); *Duncan v. New York City Transit Authority*, 127 F. Supp. 2d 354, 360 (E.D.N.Y. 2001); *McClain v. Lufkin Indus., Inc.*, 187 F.R.D. 267, 272 (E.D. Tex. 1999).

198. See, e.g., *Lewis v. Aerospace Cmty. Credit Union*, 114 F.3d 745, 750 (8th Cir. 1997) (finding that group of three affected employees was not large enough to be statistically significant); *Pasco v. Arco Alaska, Inc.*, No. 94-36142, 1996 WL 118521, \*3 (9th Cir. Feb. 9, 1996) (holding that plaintiff has not established an inference of discrimination by showing that 72% of the twenty-five employees who were affected by employment decision were at least forty years old); *Lander v. Montgomery County Bd. of Comm’rs*, 159 F. Supp. 2d 1044, 1061 (S.D. Ohio 2001) (total labor pool of twenty employees was not sufficient to establish a statistically significant disparity).

199. See 42 U.S.C. § 2000e-2(k)(1)(B)(ii).

decision at issue even fits within the disparate impact framework. Typical disparate impact cases involve consideration of an employer-imposed requirement.<sup>200</sup> In contrast, in the deemed export context it is the federal government, not the individual employer, who is imposing the requirement that an employee possess a license prior to working with certain items. As discussed in Part III.C.2, the employer is then making a decision regarding whether or not to accommodate employees by applying for the license that the government requires. It is important to remember that Title VII does not require such an accommodation. Therefore, application of the disparate impact analysis to this type of decision does not make the appropriate comparisons.

Providing an example in another context may be helpful. Let us assume that a state requires an individual to have a bachelor's degree in nursing prior to performing certain tasks. An employer may choose several ways to comply with this requirement. First, it may hire only nurses with bachelor's degrees for jobs requiring performance of those tasks. In the alternative, the employer could hire registered nurses for similar positions that did not require performance of the tasks, pay for those registered nurses to complete bachelor's degrees and then promote those nurses into jobs requiring performance of the tasks. Assuming that the first choice creates a disparate impact, it would not be appropriate to hold the employer liable for not choosing the second alternative because Title VII does not require the employer to provide the requested accommodation.

However, if a court determined that application of disparate impact was appropriate, it is unclear whether an employer could meet its burden to establish that the required practice is job-related and consistent with business necessity. Part of this ambiguity relates to the lower court's difficulty in articulating how this standard operates.<sup>201</sup> As one district court noted: "it is not

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200. See, e.g., *Connecticut v. Teal*, 457 U.S. 440, 443 (1982) (written examination imposed by employer); *Dothard v. Rawlinson*, 433 U.S. 321, 323–24 (1977) (height and weight requirements imposed by employer); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 408 (1975) (written aptitude tests imposed by employer); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (diploma and testing requirement imposed by employer); *Int'l Bhd. of Elec. Workers, AFL-CIO, Local Unions Nos. 605 & 985 v. Mississippi Power & Light Co.*, 442 F.3d 313, 319 (5th Cir. 2006) (in which plaintiffs argued that cutoff scores for test created a disparate impact).

201. See, e.g., *El v. Southeastern Pennsylvania. Transp. Auth.*, 479 F.3d 232, 241 (3d Cir. 2007) ("Unfortunately, as numerous courts and commentators have noted, *Griggs* and its progeny did not provide a precise definition of business necessity."); William Gordon, *The Evolution of the Disparate Impact Theory of Title VII: A Hypothetical Case Study*, 44 HARV. J. ON LEGIS. 529, 543 (2007) (discussing the historical development of the disparate impact cause of action and suggesting that the courts' interpretation of the terms "job-related" and "consistent with business necessity" has changed over time); Amos N. Jones & D. Alexander Ewing, *The Ghost of Wards Cove: The Supreme Court, the Bush Administration, and the Ideology Undermining Title VII*, 21 HARV. BLACKLETTER L.J. 163, 175 (2005) ("Ultimately, a judge interpreting 'job-related and consistent with business necessity' will be able to search through the cases preceding *Wards Cove*

clear whether Congress intended the standard to be that adherence to the challenged practice is required to conduct the employer's business; that the practice is closely related to a legitimate business purpose; or something in between."<sup>202</sup>

Under one articulation, "[i]f an employment practice which operates to exclude [a protected group] cannot be shown to be related to job performance, the practice is prohibited. To satisfy the standard, an employment test must 'bear a demonstrable relationship to successful performance of the jobs for which it was used.'"<sup>203</sup> While a license is required for immediate performance of jobs relating to deemed exports, many licenses will be granted in a short period of time.<sup>204</sup> Thus, an employer who does not need employees to begin work immediately may find it difficult to articulate how its policy of not applying for licenses relates to the job performance of employees. Focusing on the license application itself, however, would be a mistake. Employers who hire individuals subject to the deemed export license requirements face continued responsibilities in adhering to the license requirements and in monitoring the employee's access to technology. It is difficult to surmise how these concerns would be weighed in a disparate impact claim when the court is using the stricter articulation of the second prong.

However, other courts appear not to require separate articulations of job-relatedness and business necessity, with one appellate court holding that a defendant can prevail on the second prong of the disparate impact analysis by showing "that the practice or action is necessary to meeting a goal that, as a matter of law, qualifies as an important business goal for Title VII purposes."<sup>205</sup> Another court explains the standard in the following way:

the term "consistent with business necessity" requires something less than a showing that the challenged practice is essential to the conduct of the employer's business but something more than a showing that it serves a legitimate business purpose. What it appears to require is proof that the

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and find a standard that suits the result he or she wishes to effect."); Pamela L. Perry, *Two Faces of Disparate Impact Discrimination*, 59 FORDHAM L. REV. 523, 582-83 (1991) (discussing different theories underlying disparate impact cause of action); Michael R. Sarno, *Employers Who Implement Pre-Employment Tests to Screen Their Applicants, Beware (or Not?): An Analysis of Lanning v. Southeastern Pennsylvania Transportation Authority and the Business Necessity Defense as Applied in the Third Circuit Employment Discrimination Cases*, 48 VILL. L. REV. 1403, 1409 (2003) (discussing conflicting standards).

202. *Donnelly v. Rhode Island Bd. of Governors for Higher Educ.*, 929 F. Supp. 583, 593 (D. R.I. 1996).

203. *Bew v. City of Chicago*, 252 F.3d 891, 894 (7th Cir. 2001) (quoting *Griggs*, 401 U.S. at 431) (internal citations omitted).

204. *See, e.g., License Processing Times*, *supra* note 14 (describing average lengths of time for license issuance).

205. *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1118 (11th Cir. 1993).

challenged practice is reasonably necessary to achieve an important business objective.<sup>206</sup>

Under these less stringent articulations of the second prong, the employer may be able to meet its burdens of production and persuasion by arguing that the avoidance of the costs and risks associated with the deemed export regime are reasonably necessary to achieve an important business objective.<sup>207</sup> While it is unlikely that minor cost concerns or administrative hassles would meet the required burden at this stage, the costs and risks associated with the deemed export licensing requirements are not minor. As discussed throughout the Article, employers who hire employees subject to licensing requirements may face numerous costs. The most apparent costs are the ones that the employer faces from the time the employee is hired until the license is granted, which could result in project delays or other employees performing job tasks while the license is under consideration. Even if a license is granted, the employer still faces costs and risks, including (1) creating, monitoring, and complying with a deemed export procedure; (2) monitoring compliance with any licensing restrictions, including ensuring that an employee's job responsibilities are not altered in ways that trigger an additional license application; (3) educating human resources personnel and supervisors about the deemed export rules and their responsibilities to monitor compliance; and (4) the risk to the company in penalties and possible imprisonment, if the deemed export requirements are not properly followed. Most importantly, as discussed in Part III.E, these costs and risks are amplified by the complexity of the deemed export requirements, along with the limited assistance provided by the government in helping employers navigate the complex statutory and administrative requirements.

Once an employer establishes the second step in the disparate impact inquiry, the employee may still prevail by establishing an alternate practice that does not result in a disparate impact.<sup>208</sup> Here, the employee may suggest that the employer hire the best applicant for the job and then apply for a deemed export license. Reliance on this third prong may prove problematic for plaintiffs for several reasons. First, any showing that the alternate practice would not result in a disparate impact would be based on speculation at best.

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206. *Donnelly*, 929 F. Supp. at 593.

207. *See, e.g.*, Jarod S. Gonzalez, *A Matter of Life and Death—Why the ADA Permits Mandatory Periodic Medical Examinations of “Remote-Location” Employees*, 66 LA. L. REV. 681, 731 (2006) (arguing that concerns about cost and liability may justify employer action in some instances); Lidge, *supra* note 153, at 24–38 (discussing whether costs can rebut a plaintiff's prima facie case of disparate impact). *But see* Ian Ayres, *Market Power and Inequality: A Competitive Conduct Standard for Assessing When Disparate Impacts are Unjustified*, 95 CAL. L. REV. 669, 669 (2007) (arguing that cost considerations are not a valid basis for policies that create a disparate impact when those “policies . . . extract supra-competitive profits disproportionately from racial minorities and other protected classes”).

208. *See* 42 U.S.C. § 2000e-2(k)(1)(A)(ii) (2000).

Given that the government makes individualized determinations regarding whether a particular person will be granted a deemed export license based on a particular technology, an employee cannot prove that a policy of applying for such licenses will not create a disparate impact. Rather, the employee can only rely on generalized evidence regarding the percentage of licenses that are likely to be granted for particular subsets of employees. Second, an alternate policy of requiring license applications will not meet the requirements of the third step in the disparate impact inquiry, because the alternative is more burdensome to the employer than the original practice.<sup>209</sup> As discussed in more detail throughout this Article, an employer that becomes involved in the deemed export regime incurs significant costs and risks that are not fully present if the employer refuses to hire employees subject to its requirements.

Third, as discussed more fully in this section, it is questionable whether a plaintiff could prevail under the third stage in the disparate impact inquiry by suggesting an alternate practice that the employer is not required to engage in under Title VII. In other words, if Title VII does not require an employer to accommodate individuals, it is also unlikely that an employee could require an employer to adopt a practice requiring such an accommodation to avoid disparate impact liability.

It is unlikely that a plaintiff could prevail on a national origin or race disparate impact claim based on deemed export concerns. However, given the potential ambiguities that exist in whether a disparate impact claim based on deemed export concerns would be successful and in separating claims of intentional discrimination based on national origin from those based on citizenship, it is necessary to consider whether the national security exception to Title VII provides further protection for an employer. The following section explores whether the national security exception to Title VII alleviates the tensions between that statute and the deemed export rules.

### 3. Whether the National Security Exception Prohibits Liability

The national security exception provides a clear exemption from Title VII liability for employers in certain deemed export situations. First, if an individual's job requires access to certain technology or software, the export of which is always denied to certain countries for national security reasons, then the employer should be able to refuse to hire or to promote individuals whose current or prior citizenship would place the employer in violation of these restrictions. Under the terms of the national security exception, that individual

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209. See *Davey v. City of Omaha*, 107 F.3d 587, 593 (8th Cir. 1997); see also *Hack v. President and Fellows of Yale Coll.*, 237 F.3d 81, 101 (2d Cir. 2000) ("Factors such as the cost or other burdens of the proposed policy are relevant to a determination as to whether the defendant's refusal to adopt an alternative . . . procedure was reasonable."), *abrogated on other grounds by Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506 (2002).

would never be able to fulfill the national security requirements. Secondly, if the employer chooses to apply for a deemed export license on behalf of an employee for which a license is required for national security reasons, and that license is rejected, the employer may refuse to hire that individual under the national security exemption.

The more interesting question is whether the employer should be required to apply for a deemed export license for a potential employee or applicant for promotion, for whom the employer might be able to acquire such a license. The question posed assumes that the employer is acting in good faith and is not trying to use the deemed export requirements as a way to refuse to hire or promote individuals of a particular national origin.<sup>210</sup> First, it is possible that an employer for cost and compliance reasons discussed more fully in Parts III.C & E would want to avoid any exposure to the deemed export requirements based on its employee hiring. The employer would take the position that it will not hire any employee for whom it would need to acquire a deemed export license.<sup>211</sup>

In another scenario, the employer may choose to apply for deemed export licenses for certain positions, but not for other positions. For example, let us assume that a company handles technology or software that is subject to export controls for national security reasons. The company has two open positions: a secretarial position and an engineering position. The secretarial position requires typing and other similar skills. The engineering position requires advanced, technological knowledge in a particular area, which few people possess. May the company make an economic decision that it is worth the additional costs and delays to hire the engineer and to apply for the license, but

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210. For example, in most cases it would not be appropriate for an employer who was hiring for a particular position to hire foreign nationals from one country for whom a deemed export license would need to be obtained, while refusing to hire foreign nationals from another country for whom a license also would need to be obtained. In other words, the deemed export licensing requirements should not be used as a pretext for national origin or citizenship discrimination. As discussed later, a more nuanced question is whether the employer can make such distinctions based on the employer's reasonable belief that the government is more likely to grant the employer deemed export licenses for foreign nationals from certain countries, that the licenses for individuals with a certain citizenship are more likely to be granted with fewer restrictions, or that the processing time for certain licenses will be faster. Once an employer has decided that it will apply for a deemed export license for a particular position, the more prudent course is to select the best applicant and apply for the license without consideration of these factors between foreign nationals with different countries of citizenship; however, the Author leaves open the possibility that an employer could make such distinctions and be able to establish that its decision was not based on national origin or citizenship, as would be required to establish liability under the federal anti-discrimination laws.

211. It should be noted that this policy is different than a policy prohibiting all foreign nationals from obtaining employment. As discussed above, the federal export laws do not require that a deemed export license be obtained for every foreign national.



decide that the same costs and delay would not be justified for the secretarial position?

Under the national security exception, the employer should be able to make a decision to refuse to hire employees for all positions, or for particular positions, based upon the need to obtain a deemed export license for the applicant.<sup>212</sup> Re-reading the language of the national security exception proves helpful. The exception provides that it is not unlawful for an employer to make a decision to hire or terminate an employee under the following circumstances:

if—

(1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President; and

(2) such individual has not fulfilled or has ceased to fulfill that requirement.<sup>213</sup>

As discussed above, both the EAR and ITAR place “requirement[s] imposed in the interest of the national security” on certain foreign nationals who might access certain technology or software. Deemed export licenses required for national security reasons, therefore, fall within the national security exception. Because deemed export licenses are employer specific,<sup>214</sup> a particular employee will not be able to fulfill the requirement of a deemed export license unless he is hired by an employer, that employer applies for the license, and the license is then granted to the employer by the federal government.

The EEOC Guidance supports such a reading of the national security exception.<sup>215</sup> The EEOC Guidance indicates that it would not constitute discrimination for an employer to refuse to promote an individual who did not have a required security clearance, even though the individual was the most

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212. The Article uses more examples in the hiring context because the Author believes this context is the most helpful and universal. However, it should be reiterated that these same considerations may come into play in other situations. For example, an employer may need to make similar decisions in situations where certain foreign nationals seek promotions to positions requiring access to controlled technology and software, where the scope of a certain foreign national’s job description changes to require such access, or where a trade compliance audit reveals that a foreign national’s access to technology or software has violated the deemed export rules and where continued access to such materials must be discontinued.

213. 42 U.S.C. § 2000e-2(g).

214. DSP-5 Application Guidelines, *supra* note 53, at 6.

215. EEOC, Policy Guidance on National Security Exception, *supra* note 98.

qualified individual for the position.<sup>216</sup> One of the factors that the employer considered in requiring the security clearance at the time of application is that “it would take six months to a year for the employee to receive the necessary security clearance for the job.”<sup>217</sup> Using the language of the national security exception and the rationale expressed in the EEOC Guidance, employers should be able to use the national security exception to defend decisions based on deemed export concerns.

To some readers, it may seem unfair to deny individuals job opportunities based on their current or former countries of citizenship. These readers also may think that the employer should be required to hire the best applicant for a position and then apply for any license that would be required. However, as explained more fully in Part III.C, to read Title VII or IRCA as imposing such responsibilities would essentially require employers to make extensive accommodations for certain foreign national employees and applicants, accommodations that are not required to be made under those statutes. It is the federal government, not the individual employer, who has made the decision to impose these costs and risks on employers who employ individuals who fall within the deemed export rules.

Further, if the comments submitted in response to the BIS’s suggestion to change the deemed export rules are a proper indication of employer sentiment, many employers want to hire the most qualified individuals for positions, even at the cost of submitting and waiting for a deemed export license and being bound by the monitoring requirements that such a step entails.<sup>218</sup> However, even this option does not completely rid the company of discrimination concerns. Employees who are bound by the deemed export license requirements must be treated differently than other employees because their compliance with licensing provisos and requirements must be monitored, because a company must constantly monitor whether the scope of the employee’s job responsibilities require a new license, and because the company must apply for a new license upon license expiration.<sup>219</sup>

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216. *Id.*

217. *Id.*

218. Public Comments on Proposed Rulemaking, *supra* note 35, at 120–21 (letter from Sandra J. Degen, Ph.D., arguing that current security processes and safeguards adequately protect from improper export and changing the rules would “treat as enemies those legitimate scientists in our labs . . . who are residents of countries that have not been deemed a security risk to the U.S.”); *id.* at 245–47 (letter from Heather Finney indicating that Dow desires to hire foreign national employees); *id.* at 429–33 (letter from Sandee Vincent arguing that hiring certain foreign national employees is critical to Intel’s competitiveness); *see also* Revisions and Clarification of Deemed Export Related Regulatory Requirements, 71 Fed. Reg. 30,842 (May 31, 2006) (to be codified at 15 C.F.R. pts. 734 & 772).

219. *See, e.g.*, Public Comments on Proposed Rulemaking, *supra* note 35, at 245–47 (letter from Heather Finney expressing concern that Dow employees subject to the deemed export rules

If the national security exception provides a complete defense to potential Title VII liability, our inquiry into the intersection of Title VII and the deemed export license requirements should be complete. However, further discussion of Title VII is required for several reasons.

A potential complicating factor is that not all deemed export license requirements are based on national security concerns. Although many of the EAR restrictions are in place for the claimed purpose of national security, EAR restrictions are also allowed for items that are in short supply and for items that are prohibited from being exported due to United Nations sanctions.<sup>220</sup> If an employer needed to comply with the deemed export licensing requirements for these reasons, it may have a national security exception defense in some instances and not in others. Although the Author believes that the national security exception should provide the employer with a defense in all deemed export cases falling under ITAR and in most, if not all, cases falling under the EAR, very few cases have discussed the national security exception, making it difficult to predict with certainty how it will be interpreted. Thus, further discussion is required.

#### 4. BFOQ, Title VII, and the Deemed Export Rules

It should be reiterated that decisions made with regard to deemed export license requirements are not technically based on any protected class, but rather on larger concerns about regulatory compliance. Determining whether a particular individual would cause deemed export license issues relies on knowing the individual's citizenship, not national origin. Therefore, as discussed above, deemed export claims should not typically fall within the purview of Title VII.

Given this distinction, it would not be appropriate for an employer to use national origin as a BFOQ in the deemed export context because an individual's national origin does not provide an employer with the correct information to make a decision in the deemed export context. For example, if an individual has become a citizen of the United States, that person does not fall within the deemed export requirements, even if the individual was born in a country to which certain exports are prohibited.<sup>221</sup>

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may feel that they are being discriminated against due to the company's obligations to monitor those employees); *id.* at 429–33 (letter from Sandee Vincent expressing concern that Intel employees subject to the deemed export rules may feel that they are being discriminated against due to the company's obligations to monitor those employees).

220. 15 C.F.R. § 730.6 (2007).

221. *Id.* § 734.2(b)(2)(ii); *see also* 22 C.F.R. § 120.17(a) (2007).

Using national origin as a proxy for citizenship, therefore, is not “reasonably necessary to the essence of the business”<sup>222</sup> because although national origin may sometimes correlate with citizenship, it is not a close enough proxy to warrant reasonable reliance for making deemed export decisions. Additionally, if an employer uses national origin to determine whether a deemed export license could or should be sought on behalf of an individual, it would be wrong on many occasions, and so it cannot be said that “all or substantially all individuals excluded from the job involved are in fact disqualified, or . . . that some of the individuals so excluded possess a disqualifying trait that cannot be ascertained except by reference to [national origin].”<sup>223</sup>

### B. Statutory Coverage Under IRCA

As discussed earlier, IRCA prohibits discrimination in hiring and termination decisions against individuals based on their national origin and against certain “protected individuals” on the basis of citizenship.<sup>224</sup> This section explores how IRCA’s discrimination provisions interact with the deemed export requirements.

In some circumstances, it may be possible for an employer to refuse to hire or to terminate an individual based on his or her citizenship and deemed export concerns and face no liability under IRCA. Aliens who are not permanent residents, temporary residents, or refugees or asylees, with or without employment authorization, are not protected by IRCA’s citizenship discrimination provisions.<sup>225</sup> Thus, individuals who potentially trigger the deemed export provisions because of their status as a “foreign person,” are exempted from protection under IRCA’s citizenship discrimination provisions.

Additionally, if the employer has two equally qualified candidates for a job and chooses not to hire the non-U.S. citizen, such a decision is exempted from IRCA’s requirements.<sup>226</sup>

The third important exception provided under IRCA requires greater discussion. IRCA permits citizenship discrimination, if such discrimination is otherwise required to “comply with law, regulation, or executive order, or required by Federal, State, or local government contract, or which the Attorney

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222. *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 417 n.24 (1985) (discussing BFOQ in the age context).

223. *Id.*

224. 8 U.S.C. § 1324b(a)(1) (2000).

225. *Id.* § 1324b(a)(3); see also FRAGOMEN & BELL, *supra* note 2.

226. 8 U.S.C. § 1324b(a)(4).

General determines to be essential for an employer to do business with an agency or department of the Federal, State, or local government.”<sup>227</sup>

A strict interpretation of this exception provides employers assistance in certain deemed export contexts, but not in others. For example, if an employer applies for a deemed export license on behalf of an applicant or employee and that license is denied, the employer may terminate the individual’s employment or refuse to hire the individual because the employer is required by an executive order to prohibit the individual from having a position that would create unlawful deemed exports.

However, the IRCA exception provides employers with no guidance regarding whether they can refuse to hire employees who may be subject to the deemed export rules, rather than apply for a license on the potential employee’s behalf. Indeed, in an unofficial interpretation of the EAR, the BIS has indicated: “The hiring of foreign nationals is not prohibited nor regulated by the Export Administration Regulations (EAR). The EAR does not regulate employment matters.”<sup>228</sup>

A decision of the Ninth Circuit Court of Appeals appears to support this reasoning, although through an examination of different statutory provisions. In *Incalza v. Fendi North America, Inc.*, the employer terminated the plaintiff after the plaintiff’s work visa expired.<sup>229</sup> The employee then brought an action under California state law, arguing that he was terminated without good cause.<sup>230</sup> The employee prevailed in that action and was awarded damages.<sup>231</sup> The employer argued that IRCA preempted the California state law, because federal law prohibited the employer from employing a person who did not have the required visa.<sup>232</sup> The Ninth Circuit Court of Appeals held that the California state law and the federal law did not conflict because the employer could have placed the employee on unpaid leave and applied for the required visa.<sup>233</sup> In other words, federal and state law did not conflict because federal law did not require the employer to terminate the individual.

One important distinction between the facts of *Incalza* and our inquiry here is that the Ninth Circuit Court of Appeals noted that the employee’s visa problem could easily have been resolved, possibly within a fifteen-day window.<sup>234</sup> In contrast, as discussed more fully below, employers who are required to apply for deemed export licenses may face lengthier delays. It

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227. 8 U.S.C. § 1324b(a)(2)(C). The Article will not further discuss contractual requirements or Attorney General determinations that would permit discrimination.

228. “Deemed Export” Questions and Answers, *supra* note 22, Q & A 12.

229. 479 F.3d 1005, 1008 (9th Cir. 2007).

230. *Id.*

231. *Id.* at 1009.

232. *Id.*

233. *Id.* at 1010–13.

234. *Incalza*, 479 F.3d at 1010 n.3.

remains to be seen whether this distinction would ultimately make a difference to a court in the deemed export context. *Incalza*, however, lends some support to the argument that an employer cannot use IRCA's limited exception to excuse the employer's decision not to apply for deemed export licenses on behalf of potential employees.

Under a technical reading of IRCA, refusing to hire an individual because of the requirement that a deemed export license must be obtained is not technically "otherwise required" by another law. However, it is not necessary for the employer to fall within the exception in order to comply with IRCA. As discussed in Part III.C below, reading either Title VII or IRCA as requiring an employer to become involved in the deemed export regulations would change the fundamental nature of the applicable discrimination laws.

### C. *The Accommodation Issue*

Neither Title VII nor IRCA requires an employer to hire someone who is not able to perform the functions of a job.<sup>235</sup> Nor do these laws require that an employer provide an accommodation for such employees.<sup>236</sup> To prove hiring discrimination based on circumstantial evidence under Title VII, an applicant must prove, among other things, that she was qualified for the position in question.<sup>237</sup>

#### 1. Discussion of Accommodation Issues Related to Work Eligibility

Given the recently gained prominence of deemed export rules, there is no discussion within case law regarding whether an individual on whose behalf a license could be sought would be considered to be qualified for the position in question. There are a few cases in the visa context that allow us to consider the issue by analogy.

The Fourth Circuit Court of Appeals has twice considered whether an individual who does not have the required work authorization is qualified for a position, as required under Title VII. In *Egbuna v. Time-Life Libraries, Inc.*, the Fourth Circuit Court of Appeals held that an individual could not proceed on a discriminatory hiring claim under Title VII because the individual was not legally authorized to work in the United States at the time.<sup>238</sup> In reaching this decision, the court held that a plaintiff may only prevail on a Title VII claim

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235. 8 U.S.C. § 1324b(a)(1) (2000); 42 U.S.C. § 2000e-2(a)(1)–(2) (2000); *Egbuna v. Time-Life Libraries, Inc.*, 153 F.3d 184, 187–88 (4th Cir. 1998).

236. *See* 8 U.S.C. § 1324b(a)(1) (containing no requirement that employers provide accommodations); *see also* 42 U.S.C. § 2000e(j) (requiring reasonable accommodation of religion).

237. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

238. 153 F.3d at 188.

upon a successful showing that the applicant was qualified for employment. When the applicant is an alien, being “qualified” for the position is not determined by the applicant’s capacity to perform the job—rather, it is determined by whether the applicant was an alien authorized for employment in the United States at the time in question.<sup>239</sup>

The Fourth Circuit reached a similar result in a later case.<sup>240</sup>

In *Thiuri v. Shultz*, an individual who was terminated after his temporary work visa expired claimed that the employer discriminated against him based on his national origin by refusing to apply for permanent residency status.<sup>241</sup> The employer maintained that it had a policy that it would not make such applications on behalf of employees.<sup>242</sup> The court held that the plaintiff could not maintain a cause of action under Title VII, because he could not establish that the employer’s policy was discriminatory. Rather, the court held that the plaintiff’s claim was “primarily a challenge to the wisdom and justice of the [company’s] policy,” a claim which was not cognizable under Title VII.<sup>243</sup>

At least one district court has suggested that an employee who does not possess proper documentation at the time of hiring can maintain a claim of hiring discrimination under Title VII, if both the employer and the employee thought proper authorization would be obtained as part of the hiring process.<sup>244</sup> However, this distinction would not apply in a situation in which the employer had a policy of refusing to hire employees who would require deemed export licenses.

## 2. Applying the Non-Accommodation Framework to Deemed Export Concerns

Because neither Title VII nor IRCA requires accommodations, employers can, consistent with these statutes, make hiring and promotion decisions based on deemed export considerations in certain situations. First, an employer

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239. *Id.* at 187. *But see* *Olvera-Morales v. Sterling Onions, Inc.*, 322 F. Supp. 2d 211, 220 (N.D.N.Y. 2004) (declining to grant summary judgment on behalf of employer, reasoning that even though the plaintiff did not have the required work authorization, the facts were unclear regarding whether both the employer and the employee thought proper authorization would be obtained as part of the hiring process). The discussion in this section is limited to consideration of Title VII and IRCA in the hiring context. Individuals who are unauthorized to work in the United States continue to enjoy the protection of other employment statutes. *See, e.g.*, *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891 (1984) (indicating that unauthorized workers were employees under the NLRA); *Contreras v. Corinthian Vigor Ins. Brokerage, Inc.*, 25 F. Supp. 2d 1053, 1056 (N.D. Cal. 1998) (indicating that an undocumented worker may allege violations of the Fair Labor Standards Act).

240. *Chaudhry v. Mobil Oil Corp.*, 186 F.3d 502, 504 (4th Cir. 1999).

241. 654 F. Supp. 46, 47 (D. D.C. 1986).

242. *Id.*

243. *Id.* at 49.

244. *Olvera-Morales*, 322 F. Supp. 2d at 220.

should be able to decide that it does not want to hire anyone into a position that would trigger deemed export requirements. In other words, the employer should be able to decide that it does not want to become involved in the complex deemed export regulatory regime.

To read either statute to require license applications would place potentially costly affirmative obligations on employers that are not mandated by law. In essence, an employer would have two options when hiring an employee who would be prohibited from accessing certain technologies without a license. First, the employer could conditionally hire an employee without pay until the export license is either obtained or denied, essentially requiring the employer to not engage in the work for which it was seeking an employee or require other employees to perform that position. Or, the employer could hire the individual for a position, strip the position of all deemed export contact until the license is obtained or denied, and then pay the employee to perform less than all of his or her job duties during that period.

If the federal employment statutes were read so as to require an employer to apply for a deemed export license on behalf of an employee, an employer faces the additional obligations of learning how to properly apply for such licenses and amending its trade enforcement compliance program to ensure that certain employees do not have access to certain technology or software, that after the license is issued the licensed employee's access is limited to the terms of the license, that if the scope of the employee's responsibilities with respect to restricted technology change, that the appropriate license is obtained, and ensuring that the employee's access to the restricted material ceases upon the expiration of the license. Further, the employer will bear the costs of project delays while either waiting for the required license or while waiting for license amendments should the scope of the project change.<sup>245</sup>

Importantly, the employer also places itself within a complex regulatory regime, which can result in both civil and criminal penalties if mistakes are made.<sup>246</sup> While an employer should have the option of choosing to undertake these costs of preparing and waiting for the required deemed export license, companies should not be forced to undertake these obligations to avoid the

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245. As one article notes, discoveries that certain foreign nationals have had improper access to technology "may cause delays in the project—as an internal investigation is conducted, control measures are implemented, and necessary licensing applications are prepared, filed, and processed by the U.S. Government—and can result in severe penalties, including debarment from participating in U.S. government contracts." Weinberg & Van Buren, *supra* note 6.

246. Employing individuals who require deemed export licenses may also complicate a company's ability to merge with or be acquired by other companies. Because these licenses are employer-specific, certain types of corporate transactions may require license reapplications. Harry L. Clark & Sanchitha Jayaram, *Intensified International Trade and Security Policies Can Present Challenges for Corporate Transactions*, 38 CORNELL INT'L L.J. 391, 397–98 (2005).



effects of the discrimination laws. Indeed, implying these affirmative obligations would be contrary to the language of these statutes.

Additionally, employers should be able to make position-specific determinations regarding whether it makes fiscal sense to apply for a deemed export license. In an ideal situation, this decision would be made prior to the announcement of the open position.<sup>247</sup> For example, an employer may decide that submitting to the deemed export regime makes financial sense for certain positions that require a high level of skill or knowledge. Whereas, the same employer might decide that the costs and risks are not warranted for an employee with a general skill set, for which numerous qualified applicants are available. Refusing to apply for a deemed export license on behalf of a foreign national in this latter category does not mean that the employer is discriminating against the individual based on a protected trait.

Employers who choose to follow this second strategy of selective deemed export license applications should understand that doing so places them at greater risk of being accused of using the policy as a pretext for discrimination, especially if the policy is poorly articulated or if the employer has few employees who trigger the policy's application.

#### *D. Best Practices*

As this Article demonstrates, employers may comply with federal anti-discrimination statutes by either choosing to hire employees who will require deemed export licenses or by having a policy prohibiting their hiring. Additionally, at some point in a hiring or promotion process, an employer who handles certain controlled technology or software is going to need to inquire about the current and/or past countries of citizenship for certain foreign nationals. This task also can be completed in compliance with federal anti-discrimination laws. It should be reiterated, that the proposed best practices assume that the employer is acting in good faith and not as a pretext for discrimination.<sup>248</sup>

To avoid problems, the following practices are recommended. All employers should first determine whether they handle controlled technology or software governed by either ITAR or EAR. If an employer does not deal with such items, it should only make general pre-employment inquiries regarding whether an employee is eligible to work within the United States.<sup>249</sup>

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247. The Author believes that the employer should still be able to prevail if it makes this decision during the hiring process; however, in these situations, it may be difficult for the employer to convince the court that its reasoning is not a pretext for discrimination.

248. Given the complexity of the deemed export requirements, it would take a fairly sophisticated employer to be able to use them as a sham requirement to discriminate against employees of a certain national origin.

249. *See supra* note 2.

Employers who handle technology or software governed by ITAR and EAR should identify which jobs might require ITAR or EAR deemed export licenses. The employer should consider whether any exceptions to the licensing requirements are available under ITAR or EAR.

Companies that want to apply for deemed export licenses on behalf of employees face less potential exposure to liability under Title VII or IRCA. These employers should follow the advice discussed above of only making limited pre-employment inquiries regarding an individual's ability to legally work within the United States. After the hiring decision is made for these decisions, the employer should have a blanket policy of determining whether the selected applicant is a foreign person, as defined under ITAR or EAR. The same inquiry should be made for every position to avoid claims that inquiries were made because an individual looked or sounded foreign. Ideally, applicants would be told that the reason for the inquiry is to comply with the deemed export rules. If the individual is not a foreign person, no further inquiries should be made regarding the individual's national origin or country of citizenship, other than those required to verify that the individual is legally allowed to work within the United States.

If the individual is a foreign person, the employer must then inquire about the individual's most recent country of citizenship (or permanent residency) for EAR requirements or the individual's current and past countries of citizenship (or permanent residency) for ITAR compliance. The citizenship information can then be used to determine whether deemed export license requirements apply. If a deemed export license is not required because an exception applies, the employer should ensure that it complies with the exception requirements. For example, under the EAR, an employer may be required to obtain non-disclosure agreements from certain employees to qualify for an exception.<sup>250</sup>

If an employee's citizenship triggers deemed export licensing rules, the employer must take steps to ensure that the employee does not have access to the restricted items prior to the issuance of the license. The employee should be informed how the employer has decided to accomplish these limitations, including being told that the employer's ultimate hiring decision is contingent upon the issuance of a deemed export license. The employer should take care in describing the access to controlled technology needed by the employee in broad enough terms to allow the employee to perform his or her job functions. However, the description also must be written narrowly enough to provide federal regulators with sufficient information to make an informed decision about the license being requested.

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250. 15 C.F.R. § 740.6 (2007).

After the license is issued, the employee, the supervisor, and human resources personnel should be made aware of any applicable licensing restrictions, the scope of the license, and its expiration date. All of these individuals also should be informed that should the scope of the employee's responsibilities change and require access to different technology or a changed access to the approved technology, another license must be sought.

An employer also should be able to determine that it is not willing to subject itself to the costs and risks associated with the deemed export regime or that such risks are only acceptable for certain positions. Although not required, an employer would ideally memorialize this decision into a written policy.<sup>251</sup> Such decisions should be made prior to accepting applications for a particular position.

For positions that require access to controlled technology or software and that would trigger deemed export licensing requirements, the employer may ask a series of limited, pre-employment questions to determine whether the applicant is a foreign person. First, the employer should ask a yes or no question to determine whether the individual falls within any of the categories exempted from deemed export licensing requirements. If an applicant falls within one of these categories, no further questions regarding the individual's national origin or citizenship should be asked.

If the individual indicates that he or she does not fall within the exempted categories, the employer may further inquire about the current and/or past citizenship of the individual, depending on whether the EAR or ITAR comes into play. The applicant should be told that the information is being requested to determine whether the employee would trigger deemed export concerns. Ideally, the applicant also would be informed of the employer's policy in this regard. Any inquiries would be limited to information necessary for the employer to determine whether a deemed export license would need to be sought, if the employee were hired.

Once the potential employee provides this information, the employer should decide whether the revealed citizenship triggers deemed export license requirements. If the citizenship does not, the employee can be placed into the potential applicant pool. Employers with the resources to do so may further decrease potential problems by making separate individuals responsible for the deemed export decision and the ultimate hiring decision, and keeping citizenship information away from the ultimate decisionmaker. Such separation would insulate the decisionmaker from any perceived bias based on citizenship. Employees who would trigger deemed export license

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251. Neither Title VII nor IRCA require that an employer utilize the best practices available. While this section attempts to provide guidance regarding best practices, the Author notes that the failure to follow these practices will not necessarily result in liability.

requirements should not be further considered for employment for positions requiring a deemed export license.

*E. Policy Issues*

The third goal of this Article is to convince readers that employers should be able to refuse to hire foreign nationals who would trigger deemed export licensing requirements and that such a choice is consistent with Title VII and IRCA. The Author does not reach this conclusion lightly, especially considering that, at first blush, the conclusion may appear to conflict with the general tenets underlying employment discrimination law. Further explanation of the complex policy reasons for such a conclusion are therefore warranted.

At this juncture, I should reiterate two principles. First, this Article does not advocate for discrimination against foreign nationals when their employment does not trigger deemed export concerns. Nor does it argue that the deemed export rules can be used as a pretext for discrimination. Rather, it argues that the complex regulatory structure of the deemed export rules, along with the fact that Title VII and IRCA do not require accommodation, create a unique situation in which the hiring of foreign nationals is not required.

First, the obligations imposed by the deemed export regime are not trivial, administrative hurdles. As discussed throughout this Article, employers who are subject to the deemed export licensing requirements face costs in implementing and monitoring control procedures, applying and waiting for licenses to be granted, and educating those tasked with implementing the control procedures. Once a license is granted, it typically comes with additional requirements, in addition to the employer's obligation to ensure that the employee's job functions remain within the license granted and to request extensions (and wait until those are extensions are approved) when necessary.

Second, obtaining a license on behalf of an employee does not eliminate concerns about discrimination. Employers who apply for licenses on behalf of foreign national employees complain that employees subject to the license requirements believe that their job prospects are curtailed by the deemed export rules, given that the company must continually monitor the employee's job responsibilities and access to technology and that the employer may be required to apply for an additional license upon expiration of the original license or when the employee's need to access controlled items changes.<sup>252</sup>

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252. See Public Comments on Proposed Rulemaking, *supra* note 35, at 245–47 (letter from Heather Finney expressing concern that Dow employees subject to the deemed export rules may feel that they are being discriminated against due to the company's obligations to monitor those employees); *id.* at 429–33 (letter from Sandee Vincent expressing concern that Intel employees subject to the deemed export rules may feel that they are being discriminated against due to the company's obligations to monitor those employees).

Third, the complexity of the deemed export regulatory rules, their ambiguity, and the significant penalties that attach for non-compliance, create incentives for companies to be overly cautious in their implementation of the rules. Tacitly, if not explicitly, the federal export regime encourages companies to overcomply with its requirements. A skeptic might suggest that the overcompliance incentive is politically expedient for the U.S. government, which wants companies to err on the side of caution when deciding whether to export a particular item or, in this case, to hire individuals for whom a deemed export license may or may not be granted.<sup>253</sup>

While there are times that it may be beneficial to force overcompliance through ambiguity, this is not the case here, where the costs of overcompliance may fall most heavily on the individual job applicant and where the costs of ambiguity appear to conflict with a general policy of non-discrimination in employment.<sup>254</sup>

This skepticism about intentional vagueness is borne out in practice with the export agencies' refusal to clarify how the deemed export regime interacts with the employment discrimination laws, even when specifically asked to address such issues.<sup>255</sup> The overcompliance incentive could be eliminated in several simple ways. First, it is possible to amend Title VII to clarify an employer's obligations in the deemed export context. Second, the EEOC, the agencies involved in deemed export compliance, or all or some of these entities could issue specific guidance on the intersection of these two areas.

Perhaps most effectively, the export regime itself could be changed in several significant ways. First, the deemed export licensing requirements themselves could be completely eliminated or significantly scaled back. Second, the licensing procedure could be made more transparent and wait times for license decisions could be reduced. Finally, and perhaps most importantly, the underlying export regime itself could be simplified.<sup>256</sup> Given

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253. As one commentator noted: "A precise rule typically induces people to conform exactly to the legal standard in order to avoid liability. Conversely, uncertainty may cause people to overcomply with the presumptive standard in order to allow for a margin of error in its application." Robert D. Cooter, *Introduction to Symposium: Void for Vagueness*, 82 CAL. L. REV. 487, 489 (1994); see generally Tom Baker, Alon Harel & Tamar Kugler, *The Virtues of Uncertainty in Law: An Experimental Approach*, 89 IOWA L. REV. 443, 445 (2004); Gillian K. Hadfield, *Weighing the Value of Vagueness: An Economic Perspective on Precision in the Law*, 82 CAL. L. REV. 541, 550 (1994). Of course, outside of the employment law context, the overcompliance incentive creates costs to businesses, such as lost sales opportunities and additional legal costs in determining how the rules apply in particular scenarios.

254. However, it should be noted again that Title VII does not prohibit discrimination based on citizenship and that IRCA does not protect from citizenship discrimination individuals who would trigger deemed export requirements.

255. "Deemed Export" Questions and Answers, *supra* note 22, Q & A 12.

256. Providing specific suggestions for the overhaul of the export regime is beyond the scope of the Article. The Author merely suggests that, if the underlying regime became less complex,

the political cover that the current regime provides the government in a post-September 11 world, it is unlikely that any of the changes to the export system are politically feasible at this time. Simply put, the onus should be on the federal government to make policy choices regarding the interaction between the complex historical, societal, and regulatory issues arising at the intersection of employment discrimination law and the deemed export rules. This is especially important because many of the companies who fall within the deemed export laws are not large, multinational corporations with large legal staffs.

Further, market forces exist to counterbalance the concerns that widespread discrimination will result from my proposal. Current market forces encourage employers to hire foreign nationals, even at the expense of becoming involved in deemed export issues. The decision not to hire foreign national employees who trigger deemed export concerns comes at a cost to the employer, at least for certain skilled positions. As discussed above, the struggle for global competitiveness and an increased need for workers with certain scientific and technological skills mitigates in favor of hiring foreign nationals. As demonstrated by the comments BIS received in response to a proposed rulemaking, many U.S. businesses and universities consider foreign nationals to be an integral part of their workforce with skills that cannot be completely replicated by other jobseekers.<sup>257</sup>

#### CONCLUSION

At a minimum, employers should be aware that the deemed export rules may require them to ask employees and potential employees about their countries of citizenship and permanent residency. While these inquiries should be made with due concern for the non-discrimination mandates of Title VII and IRCA, the inquiries themselves (when performed properly) do not trigger liability under either of these statutes. Additionally, employers who work with controlled technology or software must be aware of their deemed export obligations when making decisions about hiring, promoting, and reassigning foreign nationals.

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employers would face less ambiguity in understanding how to comply with the deemed export rules. Suggestions for improving the export system have been meaningfully discussed by others. See, e.g., Bowman, *supra* note 7, at 366–78; Corr, *supra* note 7, at 443–49.

257. Foley & Hersam, *supra* note 35; Public Comments on Proposed Rulemaking, *supra* note 35, at 30–31 (comment by George W. Clark arguing that the participation of foreign national researchers was integral to various scientific projects); *id.* at 245–47 (letter from Heather Finney indicating that Dow desires to hire foreign national employees); *id.* at 429–33 (comment by Sandee Vincent arguing that expertise of foreign national employees is important to Intel's business development); see generally Shachar, *supra* note 35; Stone, *supra* note 35.

While some employers will want to be able to utilize the talents of foreign national workers, even at the expense and risk of becoming involved in the deemed export rules, this Article argues that employers are not required to make that choice. Neither Title VII nor IRCA requires an employer to accommodate employees, and becoming involved in the deemed export regime imposes significant costs and risks on the employer.