

ITAR/EAR Non-Discrimination Obligations

There is an inherent conflict between compliance with International Traffic in Arms Regulations (ITAR) and Export Administration Regulations (EAR) obligations and non-discrimination obligations, including Title VII of the Civil Rights Act of 1964. Title VII prohibits discrimination to members of a protected class. National origin is a protected class. An employer is liable for violating Title VII when such a policy has the effect of disproportionately screening out a Title VII protected group and the employer cannot demonstrate that the policy or practice is necessary for the employer's legitimate business goals. Even where an employer can show that there is a legitimate business goal, a plaintiff can still prevail by showing that there is a less discriminatory employment practice that serves the same goals. A similar tension exists between compliance with The Immigration and Nationality Act (INA) and non-discrimination obligations.

In the case of hiring for ITAR/EAR protected positions, the U.S. Office of Special Counsel and U.S. the Department of Justice have made it clear that ITAR obligations do not prevent employers from hiring non-U.S. citizens, but rather requires that employers obtain export licenses for non-U.S. personnel if their positions require access to ITAR information. ITAR obligations are not a justification for national-origin discrimination, either in hiring or any other employment action, such as staffing a project.

The DOJ will pursue litigation against companies who restrict projects to U.S. citizens only, even if the restriction is based on a good-faith belief that only U.S. citizens could work on ITAR projects. One such suit, against Clifford Chance US LLP, resulted in a civil penalty of \$132,000 and an agreement to allow DOJ oversight for two years after the firm removed non-U.S. citizen employees from reviewing ITAR documents, see [Justice Department Settles Immigration-Related Discrimination Claim Against International Law Firm](#) (Aug. 29, 2018). There have been a number of other similar suits against contractors in recent years, including Honda Aircraft and Setpoint Systems.

Of course, this landscape makes it difficult to comply with both a contractor's ITAR and non-discrimination obligations, but there are various strategies for minimizing those risks. At a minimum, to the extent information related to citizenship is being collected due to the company's legitimate security or business concerns, it is critical that the company have a policy in place to govern the collection of that information.

Wiley has developed a number of hiring practices that are further designed to minimize potential liabilities through the use of targeted language in job postings and applications and can assist in creating such a policy, as well as addressing specific issues, providing guidance, and assisting in the event of a claim of discrimination.