

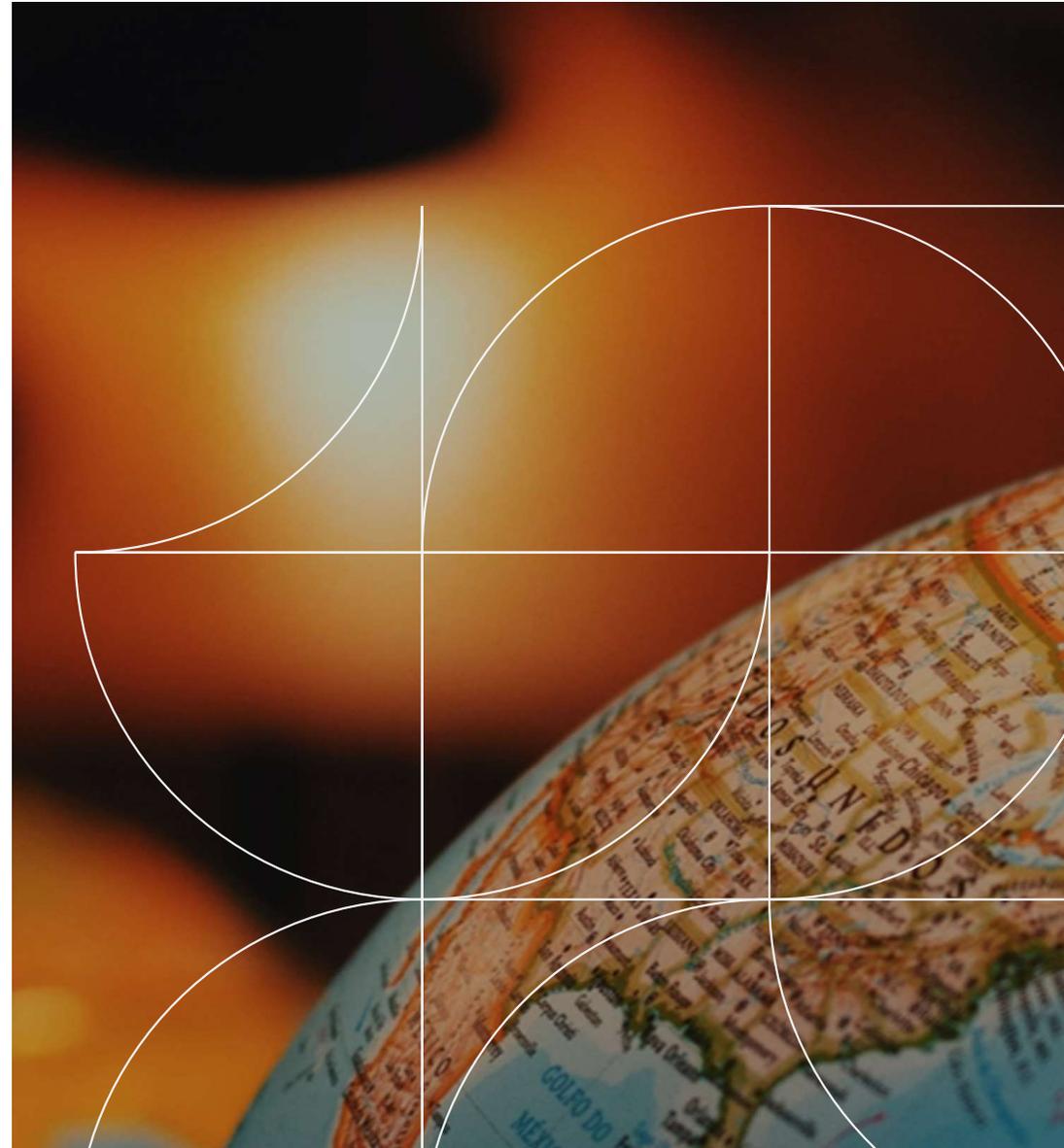


A Cross-Practice Series on Top Legal Considerations for Government Contractors

*Part 2: Anti-Discrimination
Compliance in the Face of Export
Control Requirements*

Seyfarth Shaw LLP

"Seyfarth" refers to Seyfarth Shaw LLP (an Illinois limited liability partnership).
©2023 Seyfarth Shaw LLP. All rights reserved. Private and Confidential



Legal Disclaimer

This presentation has been prepared by Seyfarth Shaw LLP for informational purposes only. The material discussed during this webinar should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The content is intended for general information purposes only, and you are urged to consult a lawyer concerning your own situation and any specific legal questions you may have.

Speakers



Dawn Lurie
Senior Counsel
WASHINGTON, DC

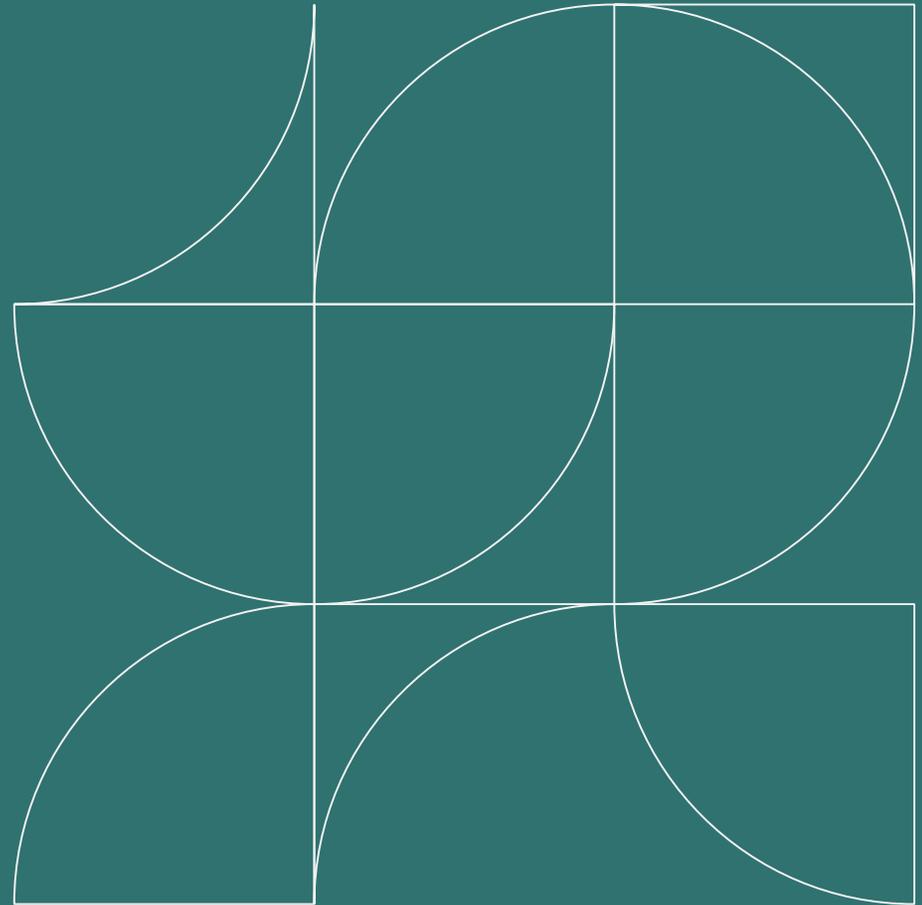


Erica Bakies
Counsel
WASHINGTON, DC

Agenda

- 01** Applicability of U.S. Export Controls
- 02** Anti-Discrimination Laws in the United States
- 03** Avoiding Discrimination When Hiring
- 04** Q&A

U.S. Export Controls



Primary Export Control Regimes

Export Administration Regulations

U.S. Department of Commerce
Bureau of Industry and Security

15 C.F.R. Part 730 et seq

Dual-Use

International Traffic in Arms Regulations

U.S. Department of State
Directorate of Defense Trade Controls

22 C.F.R. Parts 120-130

Military

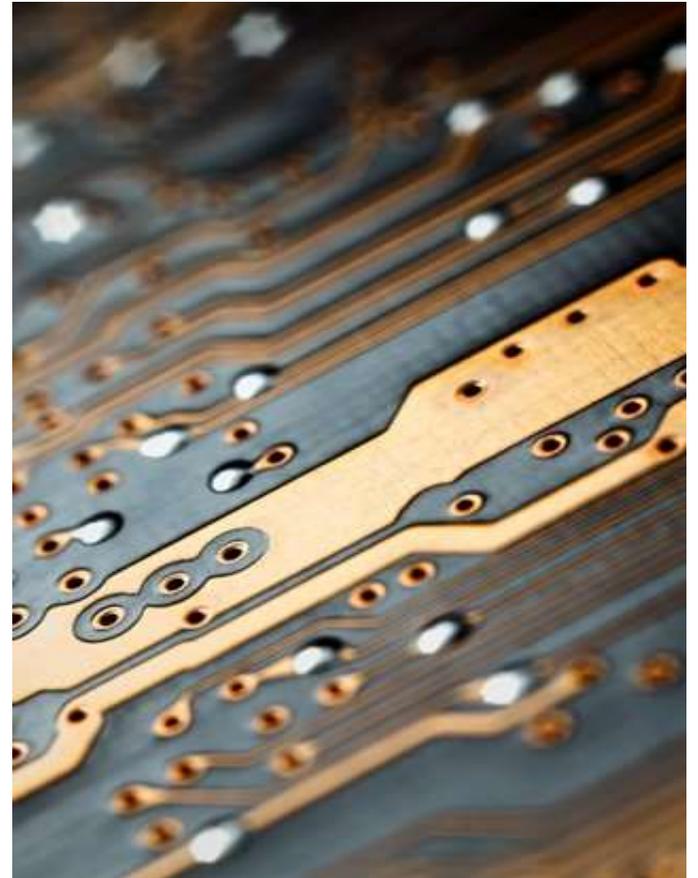
Items Subject to Export Controls

ITAR

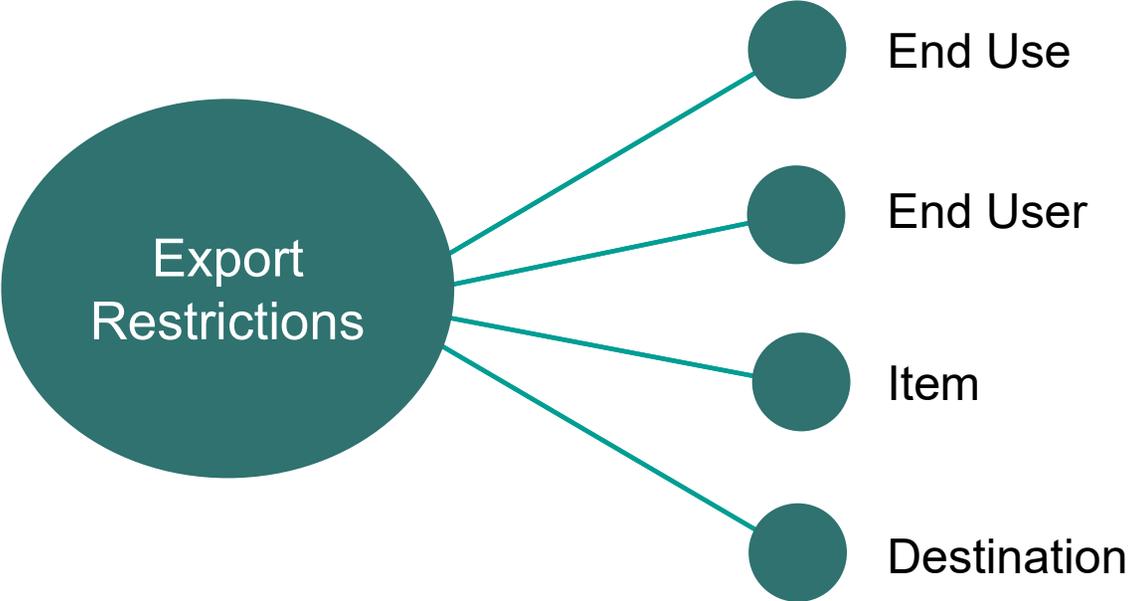
“Defense articles” and related technical data and “defense services”

EAR

“Items subject to the EAR”; commodities, software, and technology



Types of Restrictions



“Deemed Exports”

Definitions:

- For the EAR, any release in the United States of technology or source code to a foreign person.
- For the ITAR, any release in the United States of ITAR-controlled technical data to a foreign person.

“Destination” is:

- For the EAR, the person’s most recent country of citizenship or permanent residency.
- For the ITAR, any country of citizenship or permanent residency held at any time, including those relinquished.

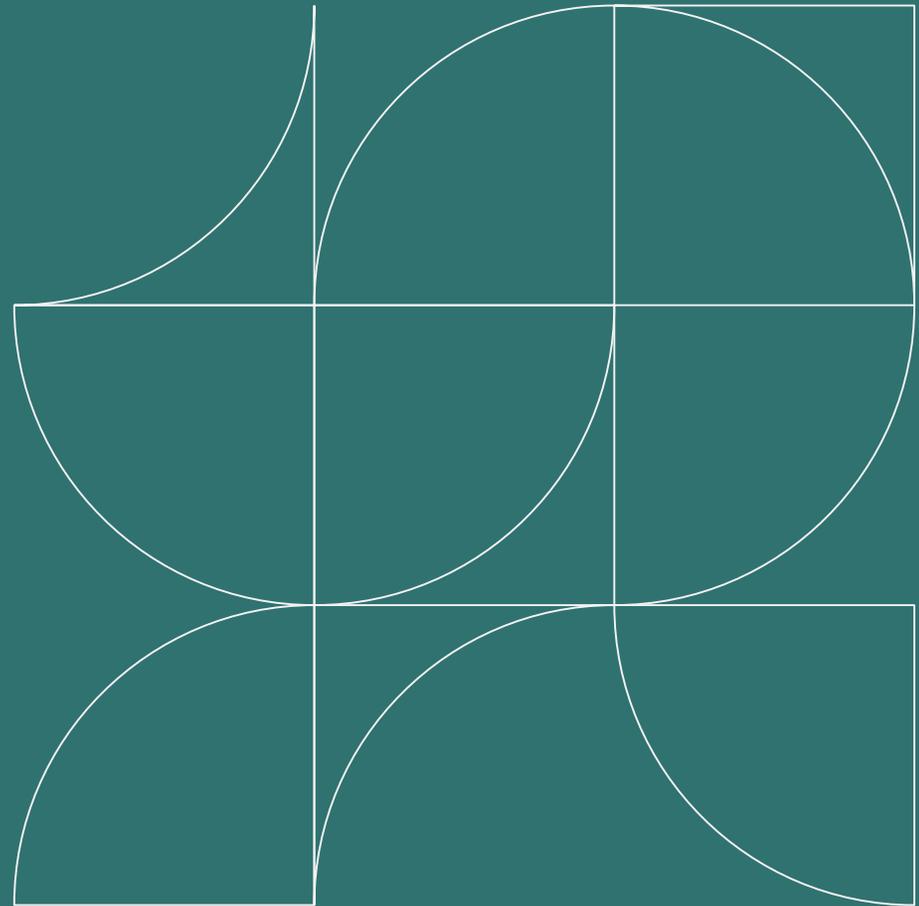
Deemed Export Considerations

- What are the classifications of the items that your company deals with?
- Does an employee's job require them to access export controlled software source code or technology/technical data?
- Does an employee's job permit them to visually inspect export controlled items such that they could derive technical data from that inspection?
- Would visitors have access to software source code or technology/technical data?
- Are there readily-available physical copies of export controlled software source code or technology/technical data?
- How is export controlled software source code and technology/technical data stored in the cloud? Are there appropriate access controls?
- Do you share your data with manufacturers, suppliers, potential customers, vendors, outside counsel?

Why Should I Care?

- **Violations of export controls are a strict liability offense**
- **Knowledge of a violation is not a requirement for imposition of a penalty**
- **EAR:**
 - Civil liability can result in fines of up to \$350,000 per violation
 - Criminal liability can result in up to \$1 million in fines and/or 20 years in prison
- **ITAR:**
 - Civil liability can result in fines of \$1.2 million or twice the value of the transaction
 - Criminal liability can result in fines of \$1 million for each violation and/or 20 years in prison
- **Other administrative penalties could include:**
 - Loss of use of licenses
 - Loss of export privileges
 - Seizure of goods
 - Suspension and debarment

Preventing Discrimination



- Enforced by The Department of Justice's Civil Rights Division, Immigrant and Employee Rights Section (IER)
- The anti-discrimination provisions of the INA prohibit 4 types of unlawful conduct:
 - Citizenship or immigration status discrimination
 - National origin discrimination
 - Unfair documentary practices during Form I-9 process and,
 - Retaliation
- The INA requires employers to treat all authorized workers in the same manner during the employment eligibility verification process, regardless of their national origin or citizenship status

Immigration and Nationality Act (INA)

Form I-9

Employment Eligibility Verification
 USCIS
 Form I-9
 OMB No. 1615-0047
 Expires 10/31/2022

Department of Homeland Security
 U.S. Citizenship and Immigration Services

▶ **START HERE:** Read instructions carefully before completing this form. The instructions must be available, either in paper or electronically, during completion of this form. Employers are liable for errors in the completion of this form.

ANTI-DISCRIMINATION NOTICE: It is illegal to discriminate against work-authorized individuals. Employers CANNOT specify which document(s) an employee may present to establish employment authorization and identity. The refusal to hire or continue to employ an individual because the documentation presented has a future expiration date may also constitute illegal discrimination.

Section 1. Employee Information and Attestation (Employees must complete and sign Section 1 of Form I-9 no later than the first day of employment, but not before accepting a job offer.)

Last Name (Family Name) First Name (Given Name) Middle Initial Other Last Names Used (if any)

Address (Street Number and Name) Apt. Number City or Town State ZIP Code

Date of Birth (mm/dd/yyyy) U.S. Social Security Number Employee's E-mail Address Employee's Telephone

I am aware that federal law provides for imprisonment and/or fines for false statements or use of false documents in connection with the completion of this form.

I attest, under penalty of perjury, that I am (check one of the following boxes):

1. A citizen of the United States.
 2. A naturalized national of the United States (See instructions).
 3. A lawful permanent resident (Alien Registration Number/USCIS Number).
 4. An alien authorized to work until (expiration date, if applicable, mm/dd/yyyy).
 Some aliens may write "NA" in the expiration date field. (See instructions).

Aliens authorized to work must provide only one of the following document numbers to complete Form I-9:
 An Alien Registration Number/USCIS Number OR Form I-94 Admission Number OR Foreign Passport Number.

1. Alien Registration Number/USCIS Number: _____
 OR
 2. Form I-94 Admission Number: _____
 OR
 3. Foreign Passport Number: _____
 Country of issuance: _____

Signature of Employee Today's Date (mm/dd/yyyy)

Preparer and/or Translator Certification (check one):

I did not use a preparer or translator. A preparer(s) and/or translator(s) assisted the employee in completing Section 1. (Fields below must be completed and signed when preparers and/or translators assist an employee in completing Section 1.)

I attest, under penalty of perjury, that I have assisted in the completion of Section 1 of this form and that to the best of my knowledge the information is true and correct.

Signature of Preparer or Translator Today's Date (mm/dd/yyyy)

Last Name (Family Name) First Name (Given Name)

Address (Street Number and Name) City or Town State ZIP Code

Employer Completes Next Page

Form I-9 (10/21/2019)

Employment Eligibility Verification
 USCIS
 Form I-9
 OMB No. 1615-0047
 Expires 10/31/2022

Department of Homeland Security
 U.S. Citizenship and Immigration Services

Section 2. Employer or Authorized Representative Review and Verification
 (Employer or first authorized representative must complete and sign Section 2 within 3 business days of the employee's first day of employment. You must physically examine one document from List A OR a combination of one document from List B and one document from List C as listed on the "Lists of Acceptable Documents.")

Employee info from Section 1 Last Name (Family Name) First Name (Given Name) M.I. Citizenship/Immigration Status

List A	List B	List C
Identify and Employment Authorization	Identify	Employment Authorization
Document Title	Document Title	Document Title
Issuing Authority	Issuing Authority	Issuing Authority
Document Number	Document Number	Document Number
Expiration Date (if any) (mm/dd/yyyy)	Expiration Date (if any) (mm/dd/yyyy)	Expiration Date (if any) (mm/dd/yyyy)
Document Title	Additional Information	
Issuing Authority		
Document Number		
Expiration Date (if any) (mm/dd/yyyy)		
Document Title	OR Code: Section 2 & 3 Do Not Write in This Space	
Issuing Authority		
Document Number		
Expiration Date (if any) (mm/dd/yyyy)		

Certification: I attest, under penalty of perjury, that (1) I have examined the document(s) presented by the above-named employee, (2) the above-listed document(s) appear to be genuine and to relate to the employee named, and (3) to the best of my knowledge the employee is authorized to work in the United States.

The employee's first day of employment (mm/dd/yyyy): _____ (See instructions for exemptions)

Signature of Employer or Authorized Representative Today's Date (mm/dd/yyyy) Title of Employer or Authorized Representative

Last Name of Employer or Authorized Representative First Name of Employer or Authorized Representative Employer's Business or Organization Name

Employer's Business or Organization Address (Street Number and Name) City or Town State ZIP Code

Section 3. Reverification and Rehires (To be completed and signed by employer or authorized representative.)

A. New Name (if applicable) Last Name (Family Name) First Name (Given Name) Middle Initial **B. Date of Rehire (if applicable)** Date (mm/dd/yyyy)

C. If the employer's previous grant of employment authorization has expired, provide the information for the document or receipt that establishes continuing employment authorization in the space provided below.

Document Title	Document Number	Expiration Date (if any) (mm/dd/yyyy)
----------------	-----------------	---------------------------------------

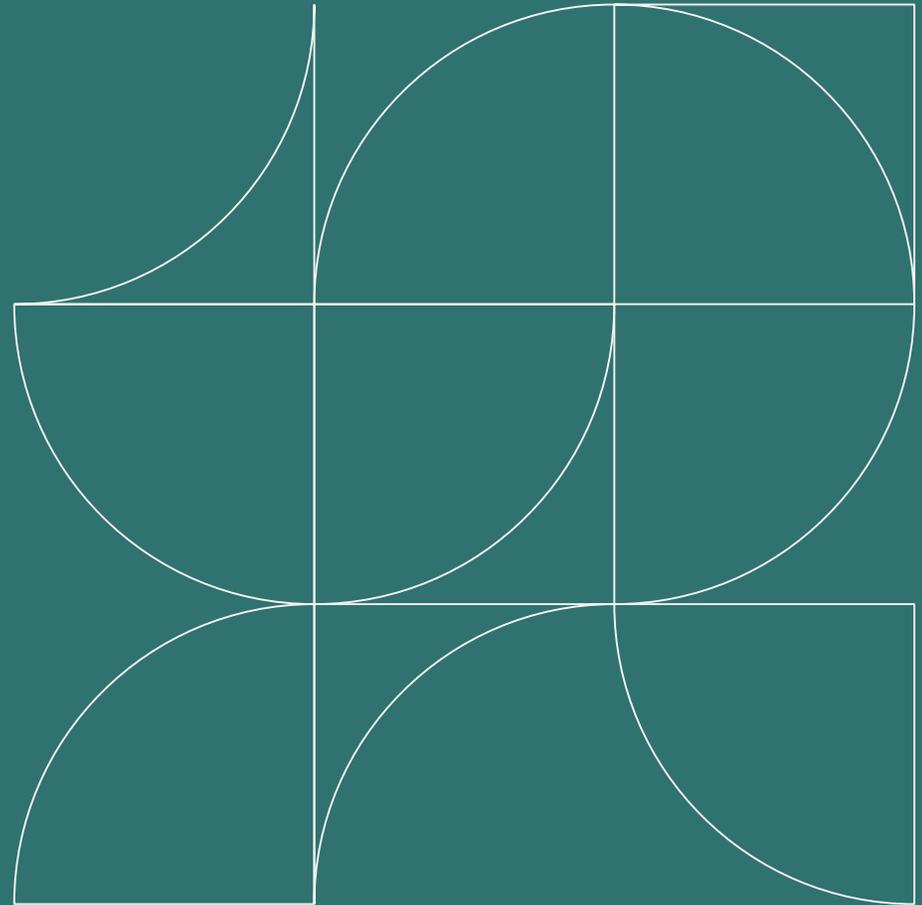
I attest, under penalty of perjury, that to the best of my knowledge, this employee is authorized to work in the United States, and if the employee presented document(s), the document(s) I have examined appear to be genuine and to relate to the individual.

Signature of Employer or Authorized Representative Today's Date (mm/dd/yyyy) Name of Employer or Authorized Representative

Form I-9 (10/21/2019) Page 2 of 3

- Used to verify identity and employment eligibility
- **NOT** to verify a particular immigration status
- Completed **AFTER** worker accepts a job offer

Avoid Discrimination When Checking Export Control Authorization



IER Is Focused on Deemed Exports Violations

- The ITAR and EAR do not require employers or recruiters, including staffing agencies, to limit jobs or recruitment to U.S. citizens, or workers with other citizenship or immigration statuses (i.e., “U.S. persons”).
- They require a license if one is needed when access to export controlled information is required
- Obtaining an export license is a separate process from the Form I-9 process
- Let’s talk licenses

Requirements

- **Licenses**
 - In some cases, by virtue of a particular job, an employee might require access to export controlled items and therefore might need to obtain a license
 - For deemed exports, whether a license is required depends on the particular software source code or technology to be released to the employee (or obtained through visual inspection) as well as the employee's country of citizenship or permanent residency
 - Licenses can take 6 months to 1 year to obtain

What's the difference?

U.S. Person

- U.S. Citizens
 - U.S. Nationals
 - Lawful Permanent Residents (LPRs)
- and
- Certain classes of protected individuals ” as defined by 8 U.S.C. § 1324b(a)(3) including:
 - Asylees
 - Refugees

vs.

Foreign National/Foreign Person

- Any natural person who is not a lawful permanent resident of the United States, citizen of the United States, or any other protected individual as defined by 8 U.S.C. 1324b(a)(3).
- It also means any corporation, business association, partnership, trust, society or any other entity or group that is not incorporated in the United States or organized to do business in the United States, as well as international organizations, foreign governments and any agency or subdivision of a foreign government (e.g., diplomatic mission).

Definitions

U.S. Citizens

- **Born** anywhere in the United States or its territories
- **Derived** citizenship through U.S. citizenship parents either at birth or after birth
- **Naturalized** using a process by which U.S. citizenship is granted to a lawful permanent resident after meeting certain requirements

U.S. Nationals

- An individual born in:
 - American Samoa,
 - certain former citizens of the former Trust Territory of the Pacific Islands, and
 - certain children of noncitizen nationals born abroad.

Legal Permanent Residents (LPR)

- An individual who is not a U.S. citizen and resides in the United States under legally recognized and lawfully recorded permanent residence as an immigrant
- This term includes conditional residents.

Refugees & Asylees

- Granted to citizens of other countries who have been persecuted or have a reasonable fear that they will be persecuted on account of race, religion, nationality, membership in a particular social group, or political opinion in their country of origin

Export Compliance

- Who is authorized to access export-controlled items:
 - “U.S. persons”
 - Workers who are not U.S. persons but the technology or technical data is not restricted for export to their country of citizenship or permanent residency
 - Workers who are not U.S. persons whose employer applied for authorization from the appropriate federal agency
- IER has consistently emphasized the definition of "U.S. person" and have clarified that it includes U.S. citizens, U.S. nationals, lawful permanent residents, asylees, and refugees

US Citizen Only Policy

- Employers are not allowed to limit job applicants or hires to U.S. citizens unless required to do so by federal, state, or local laws or federal contracts
- This policy is not based in ITAR or EAR requirements
 - A *U.S. Person* is not the same as a *U.S. Citizen*



Pre-Hire: Job Advertisements

- Generally, employers can include language in the posted job description making it clear that the position may include access to technology and/or software source code that is subject to export controls. Here are a few examples:
- *To comply with U.S. export control regulations, applicants must be eligible for any required authorizations from the U.S. Government.*
- *Candidates must have the ability to fulfill the federally mandated requirements of U.S. export control laws.*
- *This position involves the use of information subject to the ITAR and the EAR. All applicants must either be U.S. persons as defined by ITAR and EAR or be eligible for any required authorizations from the U.S. Department of State and the U.S. Department of Commerce. U.S. person includes U.S. citizens, U.S. nationals, U.S. permanent residents (i.e., 'Green Card Holders'), asylees, or refugees.*

Pre-Hire: Applications and Screens

- *Applications*
- Asking applicants whether they are authorized to work in the US and whether they will require immigration sponsorship is allowable
 - This is not associated with the export control process
 - Drilling down into non-immigrant status is not recommended
 - Questions may inadvertently screen out refugees and asylees who are protected from citizenship status discrimination, and who may misunderstand the question to preclude their eligibility for employment
- *Recruiter Screening Calls*
 - Asking applicants if they are a US person is allowable
 - Drilling down at this point is not recommended

Compliance Assessment

- Because certain employees who are not U.S. persons might need export control licenses, employers may need to conduct an export compliance assessment to determine whether an export license is required
- Remember that an export compliance assessment is different than the process employers use to check an employee's permission to work in the United States
- Process usually involves asking workers to present documentation proving their citizenship or immigration status, to allow the employer to assess whether authorization is required

Best Practices: Pre-Hire

- Don't use the ITAR or the EAR as a reason to limit jobs to candidates with certain citizenships, immigration statuses, or national origins (for example, don't limit jobs to U.S. citizens because the job involves accessing export-controlled items)
 - Be careful not to overapply requirements
 - Business justifications-Let's chat
- Don't state in job advertisements or otherwise tell job applicants that export control regulations require applicants to have a specific citizenship, immigration status, or national origin
- When discussing export control requirements with job candidates or current employees make clear that U.S. persons include more than U.S. citizens

Best Practices: Separating the I-9 and Export Control Processes

- **Export compliance assessments or questionnaires** used after extending a contingent job offer for ITAR/EAR Covered Roles
 - Often during the same stage as the background check and restricted party screenings
 - Conducting after the offer is made can reduce risk and provide employers with some protection against claims that hiring decisions were influenced by national origin
- If information is sought for export compliance and **not** for I-9 purposes, then
 - inquiring about an applicant's *citizenship* or *country of origin* generally **does not violate** the INA's anti-discrimination provision*

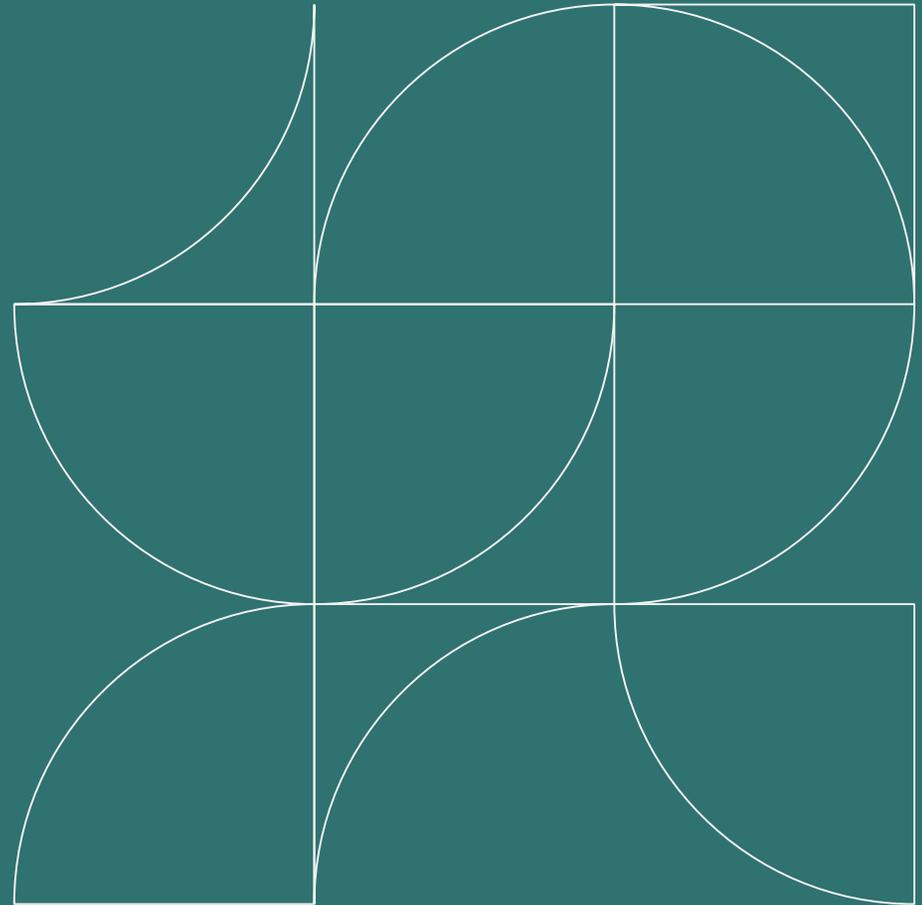
Consistency and Clarity Are Key

- 2016 DOJ Technical Assistance Letter
 - IER cautioned against asking job applicants questions about their immigration or citizenship status for positions subject to export control laws
 - it may deter protected individuals, such as refugees and asylees, from applying due to misunderstandings about their eligibility
- However, if an employer asks such questions of **all** job applicants or new hires solely to determine whether an export license would be necessary for specific individuals in particular positions, it is **unlikely that the employer would violate** the INA's prohibition against citizenship status discrimination

Consistency and Clarity Are Key

- 2016 DOJ Technical Assistance Letter
 - IER cautioned against asking job applicants questions about their immigration or citizenship status for positions subject to export control laws
 - it may deter protected individuals, such as refugees and asylees, from applying due to misunderstandings about their eligibility
- However, if an employer asks such questions of **all** job applicants or new hires solely to determine whether an export license would be necessary for specific individuals in particular positions, it is **unlikely that the employer would violate** the INA's prohibition against citizenship status discrimination

Questions?



Thank You

For more information please contact:

Dawn Lurie

Email: dlurie@seyfarth.com

Phone: (202) 828-5327

Erica Bakies

Email: ebakies@seyfarth.com

Phone: (202) 772-9737