

# Hiring in the Export-Control Context: A Framework to Explain How Some Institutions of Higher Education are Discriminating Against Job Applicants

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*ABSTRACT: Export controls are a set of federal regulations that control the transfer of items and information with military capabilities to foreign entities and persons outside the United States as well as foreign persons within the United States. Transferring information to a foreign person within the United States is known as a deemed export, and in many instances a license is required before such a transfer is allowed. One such instance is when an employer is hiring for a position that will have access to export-controlled information, as any foreign person hired for the position may need to receive a license before beginning work. However, because the process for receiving a license can take several months and there is no guarantee a license will be granted, some employers may want to, and currently do, exclude foreign persons from applying altogether. Whether an employer violates any employment-discrimination statutes by excluding foreign persons from export-controlled positions has been debated by scholars. This Note proposes a new framework to better understand this debate. The framework divides employer approaches to hiring for export-controlled positions into five categories. This Note then applies the framework to recent job postings by institutions of higher education to show that at least some institutions are likely discriminating against applicants and otherwise unnecessarily restricting foreign persons from applying. This Note then proposes a three-step approach to prevent institutions, and other employers, from discriminating or otherwise unnecessarily restricting applicants.*

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## I. INTRODUCTION

Export controls are a set of federal regulations that aim to protect U.S. national-security interests by restricting the transfer of items and information with military capabilities to entities outside the United States.<sup>1</sup> The regulations

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1. See generally JOHN R. LIEBMAN, ROSZEL C. THOMSEN II, JAMES E. BARTLETT III & JOHN C. PISA-RELLI, *UNITED STATES EXPORT CONTROLS* (7th ed. 2013) (providing an overview of export controls and how they are used to impose restrictions on the transfer of goods, technology, and other information in the interest of national security).

restrict the transfer of items and information both to entities outside the United States as well as to foreign persons in the United States.<sup>2</sup> Transferring items and information to foreign persons within the United States is known as a “deemed export.” The rationale for regulating such a transfer is the assumption that most foreign persons will eventually return to their countries of citizenship, and thus any transfer to a foreign person is effectively a transfer to that individual’s country of citizenship.<sup>3</sup> In many instances, the entity who wishes to transfer an item or information to a foreign person as a deemed export must first receive a license, and failure to do so can result in severe penalties.<sup>4</sup>

The origins of export-control regulations trace back to the Cold War era, when the United States was concerned that the Soviet Union would try to steal U.S. technology and information to develop and advance its own military.<sup>5</sup> In response to these concerns, Congress established export controls to regulate and restrict the exportation of weapons, commodities, and technical data to entities outside the United States.<sup>6</sup> While U.S. foreign affairs have evolved since the Cold War and advances in technology have led to the rapid dissemination of information across the globe, the United States still recognizes the importance of controlling the transfer of certain items and information.<sup>7</sup> The need to more stringently control such transfers has gained considerable attention as of late from both Congress and the President; largely in response to tensions between the United States and China and findings that China has implemented policies to steal U.S. technology and

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2. See Debra Burke, *At the Intersection of Export Control Regulations and Employment Discrimination Law*, 45 AM. BUS. L.J. 565, 574–76, 583 (2008) (explaining how both ITAR and EAR consider an export to be both an actual shipment outside the United States and a release of information to a foreign person in the United States).

3. *Id.* at 576–77. Some scholars, however, have questioned Congress’ presumption that foreign persons will return to their country of citizenship or permanent residence after their visa expires. See *id.* at 605 (“[A] majority of these foreign nationals seek U.S. citizenship, in which case they would not be returning home . . .”).

4. See LIEBMAN ET AL., *supra* note 1, at v–vi (listing fines, loss of government contracting privileges, and imprisonment as possible penalties).

5. David A. Broniatowski, Nicole C. Jordan, Andrew M. Long, Matthew G. Richards & Roland E. Weibel, *Balancing the Needs for Space Research and National Security in the ITAR*, SPACE, Aug. 30–Sept. 1, 2005, at 1, 2; DORON HINDIN, KIM STROSNIDER & PETER D. TROBOFF, THE ROLE OF EXPORT CONTROLS IN REGULATING DUAL USE RESEARCH OF CONCERN: STRIKING A BALANCE BETWEEN FREEDOM OF FUNDAMENTAL RESEARCH AND NATIONAL SECURITY, 1, 14 (2017), [http://sites.nationalacademies.org/cs/groups/pgasite/documents/webpage/pgs\\_176436.pdf](http://sites.nationalacademies.org/cs/groups/pgasite/documents/webpage/pgs_176436.pdf) [<https://perma.cc/7JTA-V2HM>].

6. See Peter Swan, *A Road Map to Understanding Export Controls: National Security in a Changing Global Environment*, 30 AM. BUS. L.J. 607, 607 (1993).

7. See LIEBMAN ET AL., *supra* note 1, at vi (describing how export-control regulations have changed in response to the internet and new threats such as global terrorism and have become even more relevant today).

intellectual property by means of espionage and purposeful evasion of export-control regulations.<sup>8</sup>

In recognizing the need to more stringently enforce export controls, much of Congress and the President's attention has been on institutions of higher education. Particular attention has been paid to those institutions whose research involves export-controlled information, since it has been found that one way China is stealing U.S. technology is through exploitation of the open-research environment of colleges and universities.<sup>9</sup> As these institutions come under increasing scrutiny, one question they must consider is who they allow to apply for positions that will have access to export-controlled information, since any foreign person who is hired for the position could trigger the deemed export rule and thus the foreign person would need to receive a license before beginning work.<sup>10</sup> Because the licensing process takes time, involves administrative costs, and requires continued compliance even after a license is granted,<sup>11</sup> some institutions may choose to avoid the licensing process altogether by restricting foreign persons from applying for export-controlled positions.<sup>12</sup>

However, restricting foreign persons to avoid the licensing process raises concerns of its own. One concern is that excluding foreign persons from export-controlled positions may violate employment-discrimination statutes such as Title VII and the Immigration Reform and Control Act ("IRCA").<sup>13</sup> A second concern, unique to institutions of higher education, is that excluding foreign persons contradicts the underlying interests of these institutions, including their desires to collaborate with diverse groups of researchers and disseminate information to individuals from around the world.<sup>14</sup> Despite

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8. See *infra* text accompanying notes 93–95 (discussing a 2018 report detailing how China has been attempting to steal U.S. technology and intellectual property).

9. See *infra* note 178 and accompanying text (explaining how China has used students and professors to exploit the open research concept of colleges and universities and steal information).

10. See Sandra F. Sperino, *Complying with Export Laws Without Importing Discrimination Liability: An Attempt to Integrate Employment Discrimination Laws and the Deemed Export Rules*, 52 ST. LOUIS U. L.J. 375, 377 (2008) (explaining how the deemed export rule applies in the hiring context for employers who deal with export-controlled information).

11. *Id.* at 425.

12. See discussion *infra* Sections III.A.1–.2 (categorizing the various approaches employers take when hiring for export-controlled positions, including restricting those individuals who would need to receive a license).

13. See Burke, *supra* note 2, at 594–95 (arguing that such an exclusion constitutes national-origin discrimination under Title VII); Elizabeth Farrington, *Federally Mandated Discrimination: The Irreconcilability of Civil Rights and Export Control*, 2016 U. ILL. L. REV. 251, 254 (arguing that Title VII and the IRCA should preempt export-control regulations in cases where the regulations would otherwise violate the antidiscrimination laws).

14. See discussion *infra* Section II.C.1 (discussing the values that are unique to institutions of higher education, as compared to other employers, and how those values can conflict with export-control regulations).

these concerns, some institutions are currently excluding certain applicants from export-controlled positions.<sup>15</sup>

This Note argues that at least some of the institutions that are currently excluding applicants from export-controlled positions are violating employment-discrimination statutes and otherwise being unnecessarily restrictive. This Note first proposes a new framework that delineates the different approaches institutions are currently taking when hiring for export-controlled positions, and then applies that framework to explain how some institutions are violating employment-discrimination statutes and otherwise being unnecessarily restrictive. This Note then proposes a three-step approach that institutions can use to avoid discriminating against, and otherwise unnecessarily restricting, applicants. Next, Part II describes the main export-control regulations, examines how those regulations intersect with Title VII and the IRCA, and then provides background on the unique role of higher education in the export-control hiring context. Part III then proposes a new framework for categorizing the different approaches institutions and other employers take when hiring for export-controlled positions and discusses the various employment-discrimination claims that may be brought under each category of the framework. Part IV then applies the framework to explain why at least some institutions that fall under the more restrictive categories of the framework are likely violating employment-discrimination statutes and otherwise being unnecessarily restrictive in who they exclude from certain export-controlled positions. Part V proposes a three-step solution that prevents institutions and other employers from discriminating or otherwise being unnecessarily restrictive.

## II. BACKGROUND

To understand why some institutions may be discriminating against applicants and unnecessarily restricting them from export-controlled positions requires first understanding the statutory framework underlying export-control regulations, and how that framework interacts with both different employment-discrimination claims and the field of higher education. Section II.A describes the main statutes that make up export-control regulations. Section II.B explains the potential employment-discrimination claims that may arise in the export-control context. Finally, Section II.C describes the unique interests of higher education in the export-control context.

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15. See *infra* Section IV.A (showing instances where employers are taking more restrictive approaches in their job postings).

### A. EXPORT CONTROLS

The current export-control framework consists primarily of two federal regulations,<sup>16</sup> the International Traffic in Arms Regulations<sup>17</sup> (“ITAR”) and the Export Administration Regulations<sup>18</sup> (“EAR”). Section II.A.1 examines why each regulation was enacted, along with the items and information each Act regulates. Section II.A.2 provides important terms and definitions used under the regulations. Section II.A.3 details the licensing requirements under both regulations. Section II.A.4 then describes the enforcement of the regulations.

#### 1. The Statutory Framework Underlying Export Controls

ITAR and EAR were enacted to protect similar, yet distinct, national interests, and, as a result, each regulates slightly different items and information.<sup>19</sup> The primary purpose of ITAR is to protect the nation’s security interests.<sup>20</sup> Thus, the items and information regulated under ITAR are those that are primarily used as weapons or defense articles.<sup>21</sup> ITAR provides the President, through the Arms Export Control Act,<sup>22</sup> the power “to control the export . . . of defense articles and defense services.”<sup>23</sup> Defense articles and defense services include “weapons, weapons components,” and other technical data with military capabilities.<sup>24</sup> The President specifies what weapons or other information need to be regulated through promulgation of the Munitions List.<sup>25</sup> The Munitions List is comprised of 21 categories and includes items traditionally considered to be weapons, such as firearms, ammunition, and missiles, as well as other items that may not usually be considered weapons, such as spacecraft or rockets.<sup>26</sup>

Similar to ITAR, one of the purposes of EAR is to protect national security.<sup>27</sup> However, unlike ITAR, EAR is also concerned with protecting the

16. The Treasury Department also enforces export controls by overseeing sanctions issued under executive order which block asset transfers and trade with certain countries, organizations, or individuals. LIEBMAN ET AL., *supra* note 1, § 2.01.

17. 22 C.F.R. §§ 120.1–120.45 (2016).

18. 15 C.F.R. §§ 730.1–730.10 (2019).

19. See LIEBMAN ET AL., *supra* note 1, § 4.01 (explaining that the DDTC more strictly enforces export-control regulations under ITAR because the primary goal of ITAR is to protect national security, while national security is only part of the reason as to why EAR was enacted).

20. *Id.*

21. See *id.* (“ITAR prohibits the export of all defense articles and services unless specifically permitted . . .”).

22. Arms Export Control Act, 22 U.S.C. §§ 2751–2799 (2018).

23. 22 C.F.R. § 120.1 (a) (2019).

24. Swan, *supra* note 6, at 615.

25. *Id.*

26. 22 C.F.R. § 121.1.

27. See LIEBMAN ET AL., *supra* note 1, § 4.01(1)(b).

nation's foreign policy and economic short-supply interests.<sup>28</sup> In order to accomplish all of these purposes, EAR regulates items that have civilian or commercial applications in addition to military capabilities. These items are known as "dual-use" items, and are defined as "item[s] . . . that ha[ve] civil applications as well as terrorism and military or weapons of mass destruction (WMD)-related applications."<sup>29</sup> Similar to ITAR's Munition List, EAR provides a list of dual-use items that are controlled under EAR. The list is comprised of ten categories and known as the Commerce Control List.<sup>30</sup> An example of an item that could be included on the list is a medical Dye laser<sup>31</sup> that was developed for use on patients but whose underlying design may have the potential to be strengthened or altered for use in a military capacity.<sup>32</sup>

## 2. Defining Export, Deemed Export, and Foreign Person

ITAR and EAR, in addition to serving distinct purposes, are also distinct in the language they use to describe certain terms. Fortunately, many of these terms share a common meaning despite using slightly different language; including export, deemed export, and foreign person. "Export" is defined under both ITAR and EAR as including "[a]n actual shipment or transmission out of the United States."<sup>33</sup> Both regulations define an export as also including the release of an item or information to a foreign person, even if that foreign person is in the United States at the time of the release.<sup>34</sup> EAR describes this release as a "deemed export," defined as the "release of [information] subject to the EAR to a foreign national."<sup>35</sup> ITAR, while not using the term "deemed export," has a similar provision that defines "export" as including "[a]ny release in the United States of [information] to a foreign person."<sup>36</sup> Hereinafter, "deemed export" will be used to describe a deemed export under EAR and an export to a foreign person under ITAR.

In defining a deemed export, EAR uses the term "foreign national" while ITAR uses the term "foreign person."<sup>37</sup> Despite the different terms, both are

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28. 15 C.F.R. § 730.6 (2019); LIEBMAN ET AL., *supra* note 1, §§ 3.01, 4.01.

29. 15 C.F.R. § 730.3.

30. *Id.* § 774.

31. *Id.* § 774 (Supp. 1 2019) ("Dye and Liquid Lasers controlled by 6A005.c.1, c.2 and c.3 . . .").

32. See generally Philip Perry, *The US Military Will Usher in a Widespread Use of Laser Weapons in the 2020s*, BIG THINK (Mar. 21, 2017), <https://bigthink.com/philip-perry/the-us-military-plans-to-usher-in-widespread-use-of-laser-weapons-by-the-2020s> [<https://perma.cc/KX6K-64R2>] (explaining the potential military applications of lasers in the coming decade).

33. 22 C.F.R. § 120.17(a)(1) (2019); 15 C.F.R. § 734.13(a)(1).

34. 22 C.F.R. § 120.17(a)(2); 15 C.F.R. § 734.13(a)(2).

35. 15 C.F.R. § 734.2 (b)(2)(ii).

36. 22 C.F.R. § 120.17(b).

37. *Id.* § 120.16; 15 C.F.R. § 734.13 (failing to explicitly define the term foreign national under the Act but describing a deemed export as the release of information to a foreign national and further defining a deemed export as excluding a transfer to a person lawfully admitted for permanent residence or a protected individual under 8 U.S.C. § 1324b(a)(3) (2018)).



defined under their respective regulations as including any person who is neither a U.S. citizen or other “Protected Individual” as defined under 8 U.S.C. § 1324b(a)(3).<sup>38</sup> “Protected Individuals” under 8 U.S.C. § 1324b(a)(3) include “lawfully admitted . . . permanent residen[ts],” temporary residents, refugees, or individuals “granted asylum.”<sup>39</sup> Hereinafter, “foreign person” will be used to refer to both a foreign national under EAR and foreign person under ITAR. Thus, a foreign person is defined as one who lacks a certain citizenship status. A common example of an individual who would fall outside the definition of “Protected Individual,” and thus qualify as a foreign person, is an individual on a student or work visa.<sup>40</sup> Another term related to foreign person that can sometimes arise in discussing export controls is the term “alien.” The term is also defined in terms of the absence of a certain citizenship status but refers to “any person [who is] not a citizen or national of the United States.”<sup>41</sup>

### 3. Licensing Requirements

Before an individual or entity can transfer information regulated under ITAR or EAR to a foreign person as a deemed export, they must oftentimes first receive a license.<sup>42</sup> It is the responsibility of the individual or entity exporting the information (“the exporter”) to both ascertain whether a license is needed and apply for one if necessary.<sup>43</sup> An exporter who fails to obtain a license when one is required can be subject to severe penalties; including being barred from future exports, losing current or future government contracts, and facing criminal penalties of up to \$1,000,000 or 20 years imprisonment, as well as civil penalties up to \$500,000 under ITAR or \$300,000 under EAR.<sup>44</sup> The processes for determining whether a license is required, as well as how to apply for a license when one is required, differ under ITAR and EAR.

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38. 8 U.S.C. § 1324b(a)(3); 22 C.F.R. § 120.16.

39. 8 U.S.C. § 1324b(a)(3).

40. A more extensive list of who qualifies as a foreign person includes, “tourists, students, businesspeople, scholars, researchers, technical experts, sailors, airline personnel, salespeople, military personnel, [and] diplomats.” *Deemed Exports FAQs*, U.S. DEP’T COM.: BUREAU INDUS. & SEC., [https://www.bis.doc.gov/index.php/policy-guidance/deemed-exports/deemed-exports-faqs#faq\\_35](https://www.bis.doc.gov/index.php/policy-guidance/deemed-exports/deemed-exports-faqs#faq_35) [<https://perma.cc/KZL6-YLWB>] (click “Deemed Export FAQs”; then click “How do I know if a foreign national would be subject to the deemed export regulations?”).

41. 8 U.S.C. § 1101(a)(3).

42. Sperino, *supra* note 10, at 384, 387.

43. *Id.* at 385, 387–88.

44. IAN F. FERGUSSON & PAUL K. KERR, CONG. RSCH. SERV., R41916, THE U.S. EXPORT CONTROL SYSTEM AND THE EXPORT CONTROL REFORM INITIATIVE 4, 6 (2020), <https://fas.org/sgp/crs/natsec/R41916.pdf> [<https://perma.cc/S7H2-7F86>].

*i. Licensing Requirements Under ITAR*

Under ITAR, the initial process of determining whether a license is required depends almost exclusively on the nature of the information being transferred, as any information that fits into one of the categories on ITAR's Munitions List requires a license before it can be transferred to a foreign person.<sup>45</sup> Notably, there are a limited number of exceptions to this rule that permit an exporter to transfer items and information on the Munitions List to a foreign person without receiving a license; such as the fundamental-research exemption discussed in Section II.C.2.<sup>46</sup> Therefore, an exporter who wants to determine whether they need to receive a license to perform a deemed export must first find out whether the item or information they wish to transfer fits under one of the Munitions List's 21 categories,<sup>47</sup> at which point a license will be required unless the exporter can find one of the few available exceptions.

If an exporter determines a deemed export license is required under ITAR, the exporter must apply for the license with the State Department's Directorate of Defense Trade Controls ("DDTC").<sup>48</sup> The first step an exporter must take to apply is to register with the DDTC and pay an annual fee.<sup>49</sup> Assuming an exporter has registered with the DDTC and paid the annual fee, the exporter will then be required to apply for a license for each deemed export—including separate applications for each foreign person the item or information is transferred to.<sup>50</sup> To apply for a license, the exporter must fill out a DSP-5,<sup>51</sup> which requires: the foreign person's name, country or countries of nationality, current address, resume, job description, a detailed description of the ITAR-related information they will have access to, and the reason for the access.<sup>52</sup> Notably, while the guidance documents for filling out a DSP-5 only refer to filling out a foreign person's "country [or] countries of

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45. See *id.* at 5 ("[L]icensing requirements are based on the nature of the article and not the end-use or end-user of the item.")

46. See *infra* Section II.C.2. Limited exceptions are also made for citizens of Canada, the United Kingdom, and Australia. FERGUSSON & KERR, *supra* note 44, at 5.

47. See 22 C.F.R. § 121.1 (2019) (listing out each of the 21 categories).

48. LIEBMAN ET AL., *supra* note 1, § 4.03.

49. The yearly fee must be paid whether the firm applies for a license that year or not. See FERGUSSON & KERR, *supra* note 44, at 5. The annual fee is \$2,250 for first time registrants. *Payment of Registration*, U.S. DEP'T STATE: DIRECTORATE DEF. TRADE CONTROLS, [https://www.pmdtc.state.gov/ddtc\\_public?id=ddtc\\_kb\\_article\\_page&sys\\_id=cf40adedbfo130044f9ff621f9619d2](https://www.pmdtc.state.gov/ddtc_public?id=ddtc_kb_article_page&sys_id=cf40adedbfo130044f9ff621f9619d2) [<https://perma.cc/663D-6TST>].

50. See U.S. DEP'T OF STATE: DIRECTORATE OF DEF. TRADE CONTROLS, LICENSING OF FOREIGN PERSONS EMPLOYED BY A U.S. PERSON—UPDATED, at 1 (2012) [hereinafter ITAR GUIDANCE FORM], [https://www.pmdtc.state.gov/sys\\_attachment.do?sysparm\\_referring\\_url=tear\\_off&view=true&sys\\_id=e455263cdbc59foodoa370131f96190c](https://www.pmdtc.state.gov/sys_attachment.do?sysparm_referring_url=tear_off&view=true&sys_id=e455263cdbc59foodoa370131f96190c) [<https://perma.cc/MKU8-J48R>].

51. 22 C.F.R. § 123.1 (a); ITAR GUIDANCE FORM, *supra* note 50, at 1.

52. ITAR GUIDANCE FORM, *supra* note 50, at 3-5.

nationality,”<sup>53</sup> ITAR defines an export as including a transfer to any country in which that foreign person is currently a citizen or permanent resident as well as any country in which that foreign person was previously a citizen or permanent resident.<sup>54</sup> This definition leads to the assumption that the guidance form is referencing the need to fill out all of a foreign person’s past countries of nationality in addition to their current countries of nationality on the DSP-5. Along with the DSP-5, the exporter must also attach a non-disclosure agreement signed by the foreign person.<sup>55</sup> The DDTC will then have up to 60 days to review the application and make a licensing decision.<sup>56</sup> Whether a license is ultimately granted depends on factors such as whether the foreign person’s country of citizenship is included in any arms embargoes.<sup>57</sup>

### ii. *Licensing Requirements Under EAR*

Under EAR, the initial process of determining whether a deemed export license is required depends on both the nature of the information being transferred and the citizenship or permanent residence of the foreign person.<sup>58</sup> This is distinct from ITAR, which only looks at the nature of the information in deciding if a license is required.<sup>59</sup> The first step an exporter must take in determining whether a license is required is to reference EAR’s Commerce Control List.<sup>60</sup> The Commerce Control List is a list of the different types of information regulated under EAR.<sup>61</sup> Each different type of information on the list is separated into one of the ten categories based on the nature of the information and assigned a unique Export Control Classification Number (“ECCN”).<sup>62</sup> For an exporter to determine if it needs to receive a license, it must compare its information with each of the different ECCNs to see if any correspond to the information it wishes to transfer.<sup>63</sup> If

53. *Id.* at 4.

54. 22 C.F.R. § 120.17(b).

55. ITAR GUIDANCE FORM, *supra* note 50, at 2, 6–7.

56. FERGUSSON & KERR, *supra* note 44, at 6.

57. *See id.* at 5 (“The United States implements a range of prohibitions on munitions exports to countries unilaterally or based on adherence to United Nations (U.N.) arms embargoes.”).

58. *See id.* at 3–5 (describing how EAR licensing regulations apply to dual-use and certain military items and are dependent on which country the items would be sent to); U.S. DEP’T COM., BUREAU INDUS. & SEC. OFF. EXP. SERVS., INTRODUCTION TO COMMERCE DEPARTMENT EXPORT CONTROLS 2–7 (2018) [hereinafter BIS INSTRUCTIONS], <https://www.bis.doc.gov/index.php/documents/regulations-docs/142-eccn-pdf/file> [<https://perma.cc/F8W4-JM2Z>] (explaining the process an exporter must go through to determine if a license is required and how to apply for one if necessary).

59. *See supra* text accompanying notes 45–47 (explaining how whether a license is required under ITAR depends on the nature of the information unless an exception applies).

60. 15 C.F.R. pt. 774 (Supp. 1 2019); BIS INSTRUCTIONS, *supra* note 58, at 2–3.

61. *See* 15 C.F.R. pt. 774.

62. 15 C.F.R. § 738.2(a)–(d); BIS INSTRUCTIONS, *supra* note 58, at 3.

63. BIS INSTRUCTIONS, *supra* note 58, at 3–4.

the information it wishes to transfer corresponds to an ECCN, its information is regulated under EAR.<sup>64</sup> While under ITAR this would be the end of the analysis, as all information that falls under ITAR requires a license,<sup>65</sup> this is not the case for EAR. Instead, the exporter must take additional steps to determine whether a license is required under EAR.

The second step an exporter must take is to reference the ECCN associated with its information and find the “Reasons for Control” assigned to that ECCN.<sup>66</sup> Each ECCN contains at least one “Reason for Control,” which is a designation that explains why the information is regulated under EAR.<sup>67</sup> Examples of Reasons for Control include National Security, Anti-Terrorism, and Crime Control.<sup>68</sup> Once an exporter has found out what Reasons for Control apply to the applicable ECCN, the third step is to apply those Reasons for Control to the Commerce Country Chart (“CCC”).<sup>69</sup> The CCC lists each Reason for Control, along with a list of countries under each Reason for Control.<sup>70</sup> If a country is listed under a particular Reason for Control, then information associated with that Reason for Control can only be exported to a citizen or permanent resident of that country if a license is received.<sup>71</sup> Thus, once an exporter has determined the applicable Reasons for Control and referenced the CCC, it must find out the countries of citizenship of any foreign persons it wishes to transfer information to and compare them with the countries on the CCC to determine if a license is required.

An illustration of the process is a hospital that would like one of its medical residents, who is in the United States on an F-1 Student Visa,<sup>72</sup> to learn to work with a medical laser. To determine whether a license is required, the hospital would first have to find out if the laser falls under any of the ECCN categories. If the laser falls under an ECCN, such as ECCN 6A005.c.1, the hospital would then look at ECCN 6A005.c.1’s Reasons for Control, which lists National Security.<sup>73</sup> The hospital would then cross-reference the CCC to see what countries listed under the National Security Reason for Control

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64. *Id.*

65. *See supra* text accompanying notes 45–47 (explaining how whether a license is required under ITAR depends on the nature of the information unless an exception applies).

66. BIS INSTRUCTIONS, *supra* note 58, at 4–5.

67. *Id.*; 15 C.F.R. § 738.2(d).

68. BIS INSTRUCTIONS, *supra* note 58, at 5.

69. 15 C.F.R. § 738 (Supp. 1 2019); BIS INSTRUCTIONS, *supra* note 58, at 5–6.

70. 15 C.F.R. § 738.

71. 15 C.F.R. § 738.4 (2020); *Deemed Exports FAQs*, *supra* note 40 (click “Deemed Export FAQs”; then click “When do I need to apply for an export license for technology under the deemed export regulations?”); BIS INSTRUCTIONS, *supra* note 58, at 5–6.

72. *See Students and Employment*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Aug. 13, 2020), <https://www.uscis.gov/working-united-states/students-and-exchange-visitors/students-and-employment> [<https://perma.cc/A28K-TJ3J>] (distinguishing the different types of student and employment visas).

73. 15 C.F.R. pt. 774 (Supp. 1 2020).

require a license.<sup>74</sup> Canada, for example, does not require a license for National Security reasons, while Chile does.<sup>75</sup> If the citizenship or permanent residence of the medical resident were a country listed under the National Security category, a license would be necessary to access the laser.

If an exporter determines a license is required, the process to apply for a license is similar to the process under ITAR. The process begins by the exporter submitting a BIS-748P form to the Bureau of Industry and Security (“BIS”) within the Department of Commerce.<sup>76</sup> The BIS-748P requires similar information to ITAR’s DSP-5 form,<sup>77</sup> such as the foreign person’s name, countries of nationality, current address, resume, job description, and a description of the information they will have access to and why they will need access to the information.<sup>78</sup> Notably, the BIS guidelines require a foreign person’s place of birth in addition to their current countries of citizenship when completing the BIS-748P application.<sup>79</sup> BIS will then review the application, and make a decision within nine days whether to grant, deny, or refer the application for additional review by the Defense, State, or Energy departments.<sup>80</sup> If the application is referred to a different department, that department will have 30 days to approve or deny the application.<sup>81</sup> Thus, the total time it takes to receive a licensing decision can range from a few days to 40 days. BIS notes that its general policy is to approve licensing applications,<sup>82</sup> but before a decision is made, it will consider factors such as the home country of the foreign person, the risk level of the information being further transferred to an unauthorized party, and the applicant’s willingness to comply with the licensing requirements.<sup>83</sup>

#### 4. Enforcement of Export-Control Regulations

How stringently export controls and licensing requirements are enforced depends on whether ITAR or EAR applies,<sup>84</sup> as well as what threats to national

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74. *Id.* pt. 738.

75. *Id.*

76. BUREAU OF INDUS. & SEC., GUIDELINES FOR PREPARING EXPORT LICENSE APPLICATIONS INVOLVING FOREIGN NATIONALS 1 [hereinafter EAR GUIDANCE FORM], <https://www.bis.doc.gov/index.php/documents/deemed-exports/709-guidelines-for-foreign-national-license-applications/file> [<https://perma.cc/SW4A-R5UF>].

77. See *supra* text accompanying note 52 (describing the information required on a DSP-5).

78. EAR GUIDANCE FORM, *supra* note 76, at 2–5.

79. *Id.*

80. FERGUSSON & KERR, *supra* note 44, at 4.

81. *Id.*

82. EAR GUIDANCE FORM, *supra* note 76, at 6.

83. *Id.*

84. See LIEBMAN ET AL., *supra* note 1, § 4.01(1)(b) (contrasting the DDTC’s approach of prohibiting exports under ITAR unless an exception applies, with the Department of Commerce’s approach of allowing exports under EAR unless an exception applies).

security face the nation at that time.<sup>85</sup> Of the two regulations, ITAR is more strictly enforced than EAR.<sup>86</sup> ITAR's stricter enforcement policy makes sense. ITAR's primary purpose is national security, and the items and information regulated under ITAR are primarily weapons-related. EAR, on the other hand, is meant to protect foreign and economic interests along with national security, and the items and information regulated under EAR are dual-use.<sup>87</sup> The less stringent enforcement of EAR may also explain why the BIS states that its general policy is to approve licensing applications,<sup>88</sup> while the DDTC has no such stated policy.

Enforcement of export controls and licensing requirements has also historically varied according to what threats to national security have faced the nation at any given time.<sup>89</sup> Following the terrorist attacks of September 11, 2001, for example, the United States emphasized the need for stricter export-control compliance<sup>90</sup> and scrutinized export-control regulations more closely.<sup>91</sup> Subsequent domestic attacks and international terror threats have also led to calls for stricter enforcement of export-control regulations.<sup>92</sup> One of the most prominent national-security threats related to export controls currently facing the United States is the comprehensive and aggressive taking of U.S. technology and intellectual property by China.<sup>93</sup> A 2018 report by the White House Office of Trade and Manufacturing Policy found that China is

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85. See Broniatowski et al., *supra* note 5, at 3 (“Although terrorism had struck the United States before, 9/11 increased the consequences of the threat by several orders of magnitude. This event fundamentally changed the risk preferences of decision makers in government and, in doing so, the enforcement of U.S. export control policy.”).

86. See *supra* note 84 and accompanying text.

87. See *supra* Section II.A.1 (describing the different purposes of the two regulations and the different information each regulates).

88. EAR GUIDANCE FORM, *supra* note 76, at 6.

89. Broniatowski et al., *supra* note 5, at 3. But see James Templin, Comment, *University Research Under Siege: How the War on Terror Has Placed Academic Freedom Under Fire*, 26 J. MARSHALL J. COMPUT. & INFO. L. 547, 548–49 (2009) (arguing that export-control regulations have not adequately changed to address today's global concerns).

90. See *Summary of Export Control Laws*, RICE UNIV. RSCH. COMPLIANCE: OFF. RSCH., <https://research.rice.edu/compliance/export-control/export-control-laws> [<https://perma.cc/QBL9-P4VY>] (“Since the events of September 11, 2001, the federal government has increasingly focused on . . . compliance . . . with these [export control] laws and regulations . . .”).

91. See *Export Controls Laws and Regulations*, MICH. TECH. UNIV., <https://www.mtu.edu/research/administration/research-integrity/export-control> [<https://perma.cc/HU2L-45LD>] (“Following the events of September 11, compliance with export regulations has come under greater scrutiny.”).

92. See Templin, *supra* note 89, at 548–49 (arguing that the federal government can no longer afford to follow a Cold War-era deemed export scheme).

93. See generally WHITE HOUSE OFF. TRADE & MFG. POL'Y, HOW CHINA'S ECONOMIC AGGRESSION THREATENS THE TECHNOLOGIES AND INTELLECTUAL PROPERTY OF THE UNITED STATES AND THE WORLD (2018) [hereinafter CHINA TECHNOLOGY REPORT], <https://permanent.access.gpo.gov/gpo110561/FINAL-China-Technology-Report-6.18.18-PDF.pdf> [<https://perma.cc/AX7M-6PTW>] (detailing the aggressive actions China is using to steal technology from other nations, including the United States).

implementing policies to take technology and intellectual property from nations around the world and is carrying out those policies in the United States through, among other means, espionage and purposeful evasion of export-control regulations.<sup>94</sup> In response to such threats, both the Departments of State and Commerce have recently announced plans to more stringently enforce export controls and licensing requirements.<sup>95</sup>

### B. EXPORT CONTROLS IN THE HIRING CONTEXT

One context in which the export-control licensing requirements can arise is when an employer is hiring for a position that will have access to export-controlled information.<sup>96</sup> Since any foreign person who is hired for the position would lead to a deemed export, the employer would need to: (1) determine whether that foreign person needs to receive a license and (2) apply for one if necessary.<sup>97</sup> However, since the licensing process can take up to 60 days in some instances, and there is no guarantee a license will be granted,<sup>98</sup> some employers may wish to exclude from applying any foreign persons who would have to receive a license.

Scholars have debated whether employers can exclude foreign persons from applying for a position to avoid the licensing requirements without violating employment-discrimination statutes.<sup>99</sup> The two employment-discrimination provisions relevant to the debate are Title VII of the Civil Rights Act of 1964<sup>100</sup> and the Unfair Immigration-Related Employment Practices provision of the IRCA.<sup>101</sup> To understand the debate, it is once again important to first understand the statutory schemes at play. To that end, Section II.B.1 first lays out the claims available under Title VII. Section II.B.2

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94. See *id.* at 2. (“Chinese industrial policy seeks to ‘introduce, digest, absorb, and re-innovate’ technologies and intellectual property (IP) from around the world. This policy is carried out through . . . evasion of U.S. export control laws . . .” (footnotes omitted)).

95. See Lindsay Ellis & Nell Gluckman, *How University Research Landed on the Front Lines of the Fight with China*, CHRON. HIGHER EDUC. (May 31, 2019), <https://www.chronicle.com/article/how-university-research-landed-on-the-front-lines-of-the-fight-with-china> [https://perma.cc/3XVY-736K] (describing how these agencies plan to pare back research in other countries and tighten export controls).

96. See Sperino, *supra* note 10, at 377 (explaining that an employer can be subject to the export-control regulations “simply by allowing certain foreign [persons] to work with or gain information about the restricted items”).

97. See *supra* Sections II.A.3.i–ii (explaining how an employer determines: (1) whether an export control license is necessary and (2) how to apply for one, under both ITAR and EAR).

98. See *supra* text accompanying notes 56–57, 82–83 (describing the factors that the DDTC and BIS consider when making a decision whether to grant a license, as well as how long it takes for an employer to receive a licensing decision).

99. Compare Burke, *supra* note 2, at 595 (arguing such an exception constitutes national-origin discrimination), with Sperino, *supra* note 10, at 404 (arguing such an exclusion is discrimination based on citizenship, which is not actionable under Title VII).

100. 42 U.S.C. § 2000e–2(a) (2018).

101. 8 U.S.C. § 1324b.

then examines the claims that may be brought under the IRCA. Finally, Section II.B.3 applies both statutes to the export control context and presents the different arguments as to whether employers may legally exclude foreign persons.

### 1. Title VII of the Civil Rights Act of 1964

Title VII makes it “an unlawful employment practice for an employer—[] to fail or refuse to hire . . . any individual . . . because of such individual’s race, color, religion, sex, or national origin.”<sup>102</sup> An individual who believes they have been discriminated against because of their national origin or other protected traits can bring two types of claims under Title VII. The first type of claim, known as a disparate-treatment claim, covers instances in which an employer has intentionally discriminated against an individual because of their protected trait.<sup>103</sup> The second type of claim, known as a disparate-impact claim, covers instances in which an employer’s practices, while not intentionally discriminatory, nevertheless have had a discriminatory impact on the individual because of their protected trait.<sup>104</sup>

#### *i. Disparate-Treatment Claim*

A plaintiff who brings a disparate-treatment claim must prove the employer intentionally discriminated against the plaintiff because of one or more of the plaintiff’s protected traits.<sup>105</sup> Intentional discrimination “was the most obvious evil Congress had in mind when it enacted Title VII.”<sup>106</sup> The framework for proving intentional discrimination usually consists of three burden-shifting stages originally laid out in *McDonnell Douglas Corp. v. Green*.<sup>107</sup> At the first stage, the plaintiff has the burden of establishing a prima facie case of disparate treatment by proving: (1) they are a member of a protected group; (2) they applied<sup>108</sup> and were qualified for the position; (3) they were rejected for the position; and (4) a causal connection exists between the failure to hire the plaintiff and the plaintiff’s membership in a protected class.<sup>109</sup>

102. 42 U.S.C. § 2000e-2(a).

103. BARBARA T. LINDEMANN, PAUL GROSSMAN & C. GEOFFREY WEIRICH, *EMPLOYMENT DISCRIMINATION LAW* § 2.1 (Laurie E. Leader et al. eds., 5th ed. 2012 & Supp. 2017).

104. *Id.* § 3.I.

105. *Id.* § 2.I.

106. *Int’l Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977).

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

108. A plaintiff is not required to have actually applied for a position to establish a prima facie case if defendant’s discrimination was gross or pervasive enough to deter applicant from applying at all. *See Int’l Brotherhood of Teamsters*, 431 U.S. at 365–67 (“When a person’s desire for a job is not translated into a formal application solely because of his unwillingness to engage in a futile gesture he is as much a victim of discrimination as is he who goes through the motions of submitting an application.”).

109. *See* LINDEMANN ET AL., *supra* note 103, § 2.II.A.2.



Once a plaintiff has established a prima facie case of discrimination, the second stage of the analysis shifts the burden to the defendant to introduce evidence of a “legitimate, nondiscriminatory reason” for the failure to hire.<sup>110</sup> If the defendant provides a nondiscriminatory reason to refute the inference of discrimination, the analysis shifts to the final stage, at which point the plaintiff must show that the nondiscriminatory reason put forth by the defendant was pretext for discrimination.<sup>111</sup> At the final stage, if the jury finds the nondiscriminatory reason put forth by the defendant was pretext, the defendant is liable under a disparate-treatment claim.<sup>112</sup>

The three-step framework originally laid out in *McDonnell-Douglas* applies to single-motive cases, in which there is one plaintiff and that plaintiff is arguing the defendant employer had one discriminatory motive.<sup>113</sup> In addition to single-motive cases, there are two other types of disparate-treatment cases, known as mixed-motive and pattern-or-practice cases.<sup>114</sup> Under a mixed-motive claim, an employer is liable if the plaintiff can prove that “at the moment of the decision” “an impermissible [discriminatory] motive played a motivating part in an adverse employment decision.”<sup>115</sup> However, an employer can limit its liability and avoid monetary damages by proving it would have made the same adverse employment decision absent the impermissible motive.<sup>116</sup> In a pattern-or-practice case, a class of plaintiffs bring a claim and must prove by a preponderance of the evidence that the employer’s discriminatory conduct was not merely an isolated incident, but rather was part of the employer’s “standard operating procedure.”<sup>117</sup> Plaintiffs in pattern-or-practice cases generally use statistical evidence to support their claims, although defendants can also refute the claims by discrediting plaintiffs’ statistical evidence or providing their own alternative statistics.<sup>118</sup>

### ii. *Disparate-Impact Claim*

While disparate-treatment claims are concerned with intentional discrimination, disparate-impact claims are concerned with whether an employer’s practices have a discriminatory impact on a protected trait,

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110. *Id.* § 2.II.B.

111. *Id.*

112. *Id.*

113. See SUSAN GROVER, SANDRA F. SPERINO & JAROD S. GONZALEZ, *EMPLOYMENT DISCRIMINATION: A CONTEXT AND PRACTICE CASEBOOK* 74–75 (2d ed. 2013) (discussing how the *McDonnell-Douglas* framework envisioned a single-motive paradigm but did not discuss the possibility of a defendant having more than one motive).

114. See LINDEMANN ET AL., *supra* note 103, § 2.III (explaining the framework for bringing a mixed-motive or pattern-or-practice case).

115. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989).

116. See LINDEMANN ET AL., *supra* note 103, § 2.II.G (describing how the Civil Rights Act of 1991 clarified an employer’s defenses and liability under a mixed-motive claim).

117. *Int’l Brotherhood of Teamsters v. United States*, 431 U.S. 324, 336 (1977).

118. LINDEMANN ET AL., *supra* note 103, § 2.III.

regardless of the employer's intentions.<sup>119</sup> Similar to the burden-shifting framework for a disparate treatment case, proving a disparate-impact claim generally requires progressing through three stages of proof.<sup>120</sup> At the first stage, a plaintiff must develop a prima facie case that the employer's practice or procedure "has a significantly disproportionate exclusionary impact on the plaintiff's protected [trait]."<sup>121</sup> One way plaintiffs establish a prima facie case is through statistical evidence that shows an employer's practice had a significantly disproportionate exclusionary impact.<sup>122</sup> A defendant can then defend their practice or procedure at the second stage by establishing that, despite the discriminatory effect of the practice or procedure, the "practice is job related for the position in question and consistent with business necessity."<sup>123</sup> Once the defendant has established its practice is both job related and consistent with business necessity, the plaintiff can still prevail at the third stage by proving there is an alternative practice by the defendant that would have had a less discriminatory impact.<sup>124</sup>

*iii. National Origin as a Protected Trait*

Of the protected traits listed under Title VII, the one that is most applicable to the export-control context is national origin. A plaintiff who believes they have been discriminated against because of their national origin can bring a disparate-treatment claim, disparate-impact claim, or both, using the frameworks discussed above.<sup>125</sup> Critical to national-origin discrimination cases is the distinction between national-origin discrimination and citizenship discrimination.<sup>126</sup> One way to understand the distinction is to look at the different definitions of national origin and citizenship. Black's Law Dictionary defines "citizenship" as "[t]he status of being a citizen" and further defines "citizen" as "[s]omeone who, by either birth or naturalization, is a member of a political community."<sup>127</sup> In contrast, Black's Law Dictionary defines "national origin" as "[t]he country in which a person was born, or from which the

119. See *id.* § 3.I ("Under the disparate impact theory of liability, an employer's facially neutral policy or practice may be unlawful—even absent a showing of discriminatory intent . . .").

120. See *id.* § 3.II.A (describing the three stages as: (1) the prima facie case, (2) the business necessity defense, and (3) a plaintiff's opportunity to show there is an alternative, less discriminatory option); 42 U.S.C. § 2000e-2 (k)(1)(A)(i) (2018).

121. LINDEMANN ET AL., *supra* note 103, § 3.III.A.1.

122. See *Dothard v. Rawlinson*, 433 U.S. 321, 330 (1977) (finding that statistical evidence could be used even if it was not based on the characteristics of actual applicants).

123. 42 U.S.C. § 2000e-2 (k)(1)(A)(i).

124. *Id.* § 2000e-2 (k)(1)(A)(ii); LINDEMANN ET AL., *supra* note 103, § 3.III.C.

125. LINDEMANN ET AL., *supra* note 103, § 7.I.

126. See *supra* note 99 and accompanying text (comparing the arguments between Professors Burke and Sperino as to whether excluding foreign persons because of licensing requirements constitutes national-origin discrimination or citizenship discrimination).

127. *Citizenship*, BLACK'S LAW DICTIONARY (11th ed. 2019); *Citizen*, BLACK'S LAW DICTIONARY (11th ed. 2019).

person's ancestors came."<sup>128</sup> Alternative explanations of the terms describe citizenship as "refer[ing] to the country to which a person has a presumptive political allegiance" and "national origin" as "pertain[ing] to the geographic birthplace of the person (or his ancestors)."<sup>129</sup>

The Supreme Court discussed the distinction between national origin and citizenship discrimination in *Espinoza v. Farah Manufacturing Co.*<sup>130</sup> The plaintiff in *Espinoza* was a Mexican citizen who was in the United States as "a lawfully admitted . . . alien."<sup>131</sup> The plaintiff brought a national-origin claim against the defendant after she was denied employment because of the defendant's policy of excluding all lawfully admitted aliens from employment.<sup>132</sup> The Supreme Court held that the employer's policy was allowed under Title VII because it constituted citizenship discrimination, as opposed to national-origin discrimination.<sup>133</sup> In reaching its conclusion, the Court defined national origin as "the country where a person was born, or, more broadly, the country from which his or her ancestors came."<sup>134</sup> The Court pointed to statistics showing the defendant employed a large number of U.S. citizens who had been born in Mexico to show the employer was not discriminating against the plaintiff because she was born in Mexico but rather because her current citizenship status was that of an alien.<sup>135</sup> The Court did note, however, that discrimination on the basis of citizenship could still have the effect of discriminating on the basis of national origin, in which case a disparate-impact claim could potentially be brought.<sup>136</sup>

#### *iv. National-Security Exemption*

Employers who would otherwise be liable under a Title VII disparate treatment or disparate-impact claim can try to avoid liability by using one of Title VII's exemptions.<sup>137</sup> An exemption that is relevant to the export-control context is the national-security exemption, which allows an employer to refuse to hire someone when "the occupancy of such position . . . is subject to any

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128. *National Origin*, BLACK'S LAW DICTIONARY (11th ed. 2019).

129. LINDEMANN ET AL., *supra* note 103, § 7.I.

130. *See generally* *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86 (1973) (deciding a national-origin discrimination case in which the plaintiff had been excluded from consideration because she was an alien and the employer had a policy of excluding all aliens).

131. *Id.* at 87.

132. *Id.*

133. *See id.* at 87–88. "She was denied employment, not because of the country of her origin, but because she had not yet achieved United States citizenship." *Id.* at 93.

134. *Id.* at 88.

135. *See id.* at 93 (noting that the district court had found that persons of Mexican ancestry made up 97 percent of the people who worked in the position the plaintiff applied for).

136. *Id.* at 92.

137. *See* Sperino, *supra* note 10, at 392–400 (describing the two exemptions that could apply in the export-control context, namely the national security and bona fide occupational qualifications exemptions).

requirement imposed in the interest of the national security . . . under any security program in effect.”<sup>138</sup> An example of a hiring requirement that would fall under the exemption is the need to obtain a federal security clearance.<sup>139</sup> Failure by the employee or applicant to receive this clearance is grounds for the employer to refuse to hire the employee or applicant, even if the clearance was denied because of the employee or applicant’s association with a foreign country.<sup>140</sup>

## 2. The Immigration Reform and Control Act

In addition to Title VII’s claims and defenses, the Immigration Reform and Control Act also contains a provision with employment-discrimination claims and defenses relevant to the export-control context.<sup>141</sup> While one of Congress’ main purposes in enacting the IRCA was to make it unlawful for an employer to hire any individual who is neither a U.S. citizen or U.S. national without first verifying their right to work in the United States,<sup>142</sup> Congress also included an employment-discrimination provision to deter employers from refusing to hire noncitizens with the right to work in the United States.<sup>143</sup> The relevant provision contains two different employment-discrimination causes of action.<sup>144</sup> The first claim makes it “an unfair . . . employment practice for [an employer] to discriminate against any individual . . . because of such individual’s national origin.”<sup>145</sup> The claim is almost identical to the national-origin discrimination claim under Title VII, with the only difference being that the Title VII claim applies to employers who have 15 or more employees while the IRCA claim applies to employers who have between four and 14 employees.<sup>146</sup>

The second employment-discrimination claim available under the IRCA makes it “an unfair . . . employment practice for [an employer] to discriminate against any individual . . . because of such individual’s citizenship status” when that individual is a “Protected Individual.”<sup>147</sup> A “Protected Individual” is

138. 42 U.S.C. § 2000e-2(g) (2018).

139. See Sperino, *supra* note 10, at 393–94 (citing both EEOC guidance documentation and *Molerio v. FBI*, 749 F.2d 815 (D.C. Cir. 1984) to show that the national-security exemption applies to national security clearance requirements).

140. See *id.* (noting that the denial of a security clearance is not reviewable).

141. See 8 U.S.C. § 1324b (defining what constitutes an unfair immigration-related employment practice and the exemptions that may apply).

142. See *id.* § 1324a (making it unlawful to hire or retain an alien knowing that alien is unauthorized to work); LINDEMANN ET AL., *supra* note 103, § 7.II.D.

143. LINDEMANN ET AL., *supra* note 103, § 7.II.A.2.A.

144. See 8 U.S.C. § 1324b(a)(1) (making it “an unfair . . . employment practice for [an employer] to discriminate against any individual . . . because of such individual’s national origin, or . . . in the case of protected individual[s] . . . because of such individual’s citizenship status”).

145. 8 U.S.C. § 1324b(a)(1)(A).

146. LINDEMANN ET AL., *supra* note 103, § 7.II.D.1.

147. 8 U.S.C. § 1324b(a)(1)(B).

defined under the Act as someone “who . . . is a citizen or national of the United States,” a “lawfully admitted . . . permanent residen[t],” a “lawfully admitted . . . temporary residen[t],” “a refugee,” or “an individual who . . . [has been] granted asylum.”<sup>148</sup> The IRCA’s definition of Protected Individual matches the definition ITAR and EAR use when defining a foreign person.<sup>149</sup> As such, any individual who is considered a foreign person under ITAR and EAR would be unable to bring a citizenship status claim under the IRCA.

Along with providing potential employment-discrimination claims, the IRCA’s employment-discrimination provision also contains exceptions to those claims that can prevent employer liability.<sup>150</sup> One such exception is the preferential-treatment exception, which allows employers to hire a U.S. citizen or national over another Protected Individual if the two individuals are otherwise equally qualified.<sup>151</sup> A second exception, known as the public-function exception,<sup>152</sup> allows citizenship discrimination against Protected Individuals in situations where it is necessary to discriminate “in order to comply with law, regulation, or executive order . . . or [because] the Attorney General determines [it] to be essential for an employer to do business with an agency or department.”<sup>153</sup> This exception, however, has been limited by the courts. For example, the Ninth Circuit, in a case involving the U.S. Postal Service, stated that while the public-function exception gives broad latitude to public employers, the exception rarely applies to private employers.<sup>154</sup>

### 3. Debating Employment-Discrimination in the Export-Control Context

As discussed previously, the additional burdens that accompany the export-control licensing process may cause some employers to avoid the licensing process altogether by excluding any applicant who would need to receive a license. Scholars have debated whether excluding applicants in this way violates either Title VII or the IRCA.<sup>155</sup> Much of the debate stems from the fact that, in order for an employer to avoid the licensing process, they must take into account the applicant’s status as a foreign person and, in instances where EAR applies, the foreign person’s current countries of

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148. *Id.* § 1324b(a)(3).

149. *See supra* notes 37–39 and accompanying text.

150. *See* 8 U.S.C. § 1324b(a)(4) (excepting from liability any employer who prefers to hire a U.S. citizen or national over an alien); *id.* § 1324b(a)(2)(C) (excepting from liability any employer who discriminates on the basis of citizenship status to comply with a federal law or regulation).

151. *Id.* § 1324b(a)(4).

152. LINDEMANN ET AL., *supra* note 103, § 7.II.D.1.

153. 8 U.S.C. § 1324b(a)(2)(C).

154. LINDEMANN ET AL., *supra* note 103, § 7.II.D.1.

155. *Compare* Burke, *supra* note 2, at 595 (arguing such an exception constitutes national origin discrimination), *with* Sperino, *supra* note 10, at 404 (arguing such an exclusion is discrimination based on citizenship, which is not actionable under Title VII).

citizenship as well.<sup>156</sup> Some scholars argue that making a decision based off the applicant's status as a foreign person and countries of citizenship constitutes national-origin discrimination and violates Title VII, while other scholars argue that such a decision constitutes citizenship discrimination and thus does not violate Title VII. This debate can be seen in the opposing arguments put forth by Professors Debra Burke and Sandra Sperino in their articles published back in 2008.<sup>157</sup>

Professor Burke argues that an employer that excludes a foreign person because the employer would need to apply for a license is engaging in national-origin discrimination and has violated Title VII under either a disparate treatment or disparate-impact theory.<sup>158</sup> To support her argument, Professor Burke refers to the U.S. Equal Employment Opportunity Commission's position at the time that foreign nationals outside the United States are protected from national-origin discrimination when applying for a position in the United States.<sup>159</sup>

Professor Sperino takes an opposing position, arguing that an employer that excludes a foreign person from a position to avoid licensing requirements does not violate Title VII under a disparate treatment or disparate-impact theory.<sup>160</sup> According to Professor Sperino, disparate treatment would not apply because disparate treatment claims require that an employer has intentionally discriminated against an individual because of a protected trait. Moreover,

[a]t heart, decisions based on deemed export rules are not technically based on a protected [trait], but rather a determination regarding whether to become involved in a complex regulatory scheme. [In addition], employers who want to avoid deemed export concerns related to their employees will be making decisions based on citizenship [as opposed to national origin].<sup>161</sup>

Likewise, Professor Sperino argues disparate-impact would not apply for several reasons. First, she argues that the plaintiff would likely not be able to establish a prima facie case, since it is unlikely enough people would even be affected to create a statistical disparity that shows a significant disproportionate

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156. See discussion *supra* Sections II.A.3.i–ii (explaining the licensing requirements for ITAR and EAR, which apply to all foreign persons and, under EAR, require looking at the current countries of citizenship or permanent residence of any foreign person who will access the information).

157. See *supra* note 155 (explaining the opposing views of Professors Burke and Sperino).

158. Burke, *supra* note 2, at 595.

159. *Id.*

160. See Sperino, *supra* note 10, at 404–08 (arguing that a disparate treatment would not apply because employers are discriminating based on citizenship as opposed to national origin, while a disparate-impact claim would not apply because not enough individuals would be affected).

161. *Id.* at 404.

impact on the plaintiff.<sup>162</sup> Second, she argues that even if the plaintiff were able to establish a prima facie case, a defendant may be able to successfully raise the defense that excluding foreign persons from being hired if a license would be required is job related and a business necessity.<sup>163</sup> Finally, she argues that even if a plaintiff were able to establish a disparate-impact claim, the national security exception would likely override any employer liability, particularly if the reason for its seeking the export-control license was related to national security.<sup>164</sup>

### C. EXPORT CONTROLS AND HIGHER EDUCATION

Institutions of higher education are one type of employer that often hire for positions with access to export-controlled information. Like other employers who hire for export-controlled positions, educational institutions must decide whether they are willing to go through the licensing process for any foreign persons who may need to apply for a license or, alternatively, whether they want to avoid the licensing process altogether by excluding any such applicants. Unlike other employers, however, these institutions must take into account additional factors that are unique to such institutions.<sup>165</sup> Historically, these additional factors have led institutions of higher education to protest against the promulgation and enforcement of export control regulations, both in the hiring context, and as a statutory scheme as a whole.<sup>166</sup>

Congress and the President, in response to these protests, created the fundamental-research exemption which exempted educational institutions from having to obtain a license for foreign persons in some cases.<sup>167</sup> However, the exemption does not apply in all cases,<sup>168</sup> and, as such, institutions are still required to apply for a license when hiring a foreign person in certain situations. For those situations where the exemption does not apply, educational institutions have recently been facing increased pressure from

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162. *Id.* at 408.

163. *See id.* at 408–11 (“[T]he 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.”).

164. *See id.* at 412–16 (“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.”).

165. *See infra* notes 170–72 and accompanying text (describing such additional factors as disseminating information and collaborating with individuals from diverse backgrounds).

166. *See infra* note 173 and accompanying text (describing the pushback from institutions of higher education extending as far back as the 1940s as well as when current export-control regulations were first enacted during the Cold War era).

167. *See infra* Section II.C.2 (explaining the fundamental-research exemption and its limitations).

168. *See infra* note 176 and accompanying text (explaining how the fundamental-research exemption does not apply to dual-use items or applied research).

Congress and the Executive to more stringently enforce export-control regulations.<sup>169</sup> Section II.C.1 begins by describing the additional factors that are unique to institutions of higher education within the export-control context. Section II.C.2 then describes the fundamental-research exemption. Finally, Section II.C.3 describes the increased pressure institutions are facing to comply with export controls in instances where the exemption does not apply.

### 1. Higher Education's Unique Place Within the Export-Control Context

Institutions of higher education, when deciding who to hire for export-controlled positions, must consider several additional factors that do not apply to other employers. Many of these additional factors relate to the missions and underlying values of these institutions. For example, a number of institutions prioritize the dissemination of knowledge and information to individuals from across the world.<sup>170</sup> Many institutions also recognize the importance of collaboration among individuals from diverse background in advancing research.<sup>171</sup> Finally, many institutions promote the growth of diverse and inclusive communities.<sup>172</sup> Each of these institutional interests can, at times, conflict with export control regulations and the attempt to restrict the transfer of information to certain foreign individuals, as doing so not only prevents the dissemination of knowledge, but also hampers collaboration with

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169. See *infra* notes 179–81 and accompanying text (referencing recent statements by members of Congress and the Executive regarding the need for institutions to better enforce export-control regulations and the penalties institutions may face for failing to do so).

170. See, e.g., *Mission & Values*, UCLA, <http://www.ucla.edu/about/mission-and-values> [<https://perma.cc/F84E-HYAN>] (“UCLA’s primary purpose . . . is the creation, dissemination, preservation and application of knowledge for the betterment of our global society.”); *University Mission*, CORNELL UNIV., <https://www.cornell.edu/about/mission.cfm> [<https://perma.cc/2XC4-GTXD>] (“Cornell’s mission is to discover, preserve and disseminate knowledge, to educate the next generation of global citizens . . . .”); *Mission Statement*, VILL. UNIV.: OFF. PRESIDENT, [https://www1.villanova.edu/villanova/president/about\\_university/mission.html](https://www1.villanova.edu/villanova/president/about_university/mission.html) [<https://perma.cc/M6Sg-4HS8>] (“Villanova University is . . . committed to excellence and distinction in the discovery, dissemination and application of knowledge.”).

171. See, e.g., *Export Controls*, STAN. UNIV.: DORESEARCH, <https://doresearch.stanford.edu/research-scholarship/export-controls> [<https://perma.cc/5WAS-KPZ7>] (“At the core of what Stanford University holds most dear [is] the ability for its faculty and students to engage in research in an open environment . . . . Stanford is committed to the principle of freedom of access by all interested parties . . . .”); *Mission & Values*, *supra* note 170 (acknowledging “openness and inclusion produce true quality”); *Mission, Vision, Values and Goals*, OHIO STATE UNIV.: OFF. ACAD. AFFS., <https://oaa.osu.edu/mission-vision-values-and-core-goals> [<https://perma.cc/7CPM-8SE3>] (stating part of their mission is “[t]o advance . . . the exchange of knowledge and resources in a context of reciprocity with the citizens and institutions of Ohio, the nation, and the world”).

172. See, e.g., *Mission, Vision, Values and Goals*, *supra* note 171 (stating “that diversity and inclusion are essential components of our excellence”); *Mission & Values*, *supra* note 170 (“We believe that diversity is critical to maintaining excellence in all of our endeavors.”); *Mission, Vision and Values*, UNIV. SAN DIEGO, <https://www.sandiego.edu/about/mission-vision-values.php> [<https://perma.cc/8285-SKEN>] (“The University of San Diego is . . . committed to . . . creating a diverse and inclusive community . . .”).



foreign entities and excludes certain communities from the research process. This conflict, in turn, has historically led to tensions between institutions of higher education and the federal government.<sup>173</sup>

## 2. The Fundamental-Research Exemption

President Reagan, recognizing the conflict between institutions of higher education and the federal government regarding export controls, created the fundamental-research exemption.<sup>174</sup> Today, Congress has codified the exemption and defined the exemption similarly in both EAR and ITAR. In each case, it is defined as: (a) basic or applied research at accredited institutions of higher learning; (b) where the resulting information is ordinarily published and shared broadly; and (c) not restricted from publication for proprietary reasons or other national security reasons.<sup>175</sup> While the exemption excepts certain fundamental research from export-control regulations, there is still institutional research and work, including dual-use application projects, that do not meet the requirements for the exemption.<sup>176</sup> In addition, there can be confusion among institutional researchers and administrators about whether a research project meets the exemption.<sup>177</sup>

## 3. Increased Emphasis on Institutional Compliance

For those instances where the fundamental-research exemption does not apply, institutions are facing increasing pressure from Congress and the Executive to properly enforce export-control regulations and licensing requirements. Much of this increased pressure can be traced to the tensions between the United States and China. For example, a 2018 White House report found that China had been implementing policies to steal technology

173. When export controls were initially enacted, a professor at Stanford University as well as the President at the University of Minnesota both openly defied the controls with the backing of their institutions. See Robert C. Cowen, *Police State for Scientists?*, RECORD-JOURNAL, Jan. 13, 1982, at 6.

174. HINDIN ET AL., *supra* note 5, at 1, 14.

175. See 15 C.F.R. § 734.8 (2019); 22 C.F.R. § 120.11 (a) (8); *Fundamental Research Definitions Compared*, MIT OFF.: VICE PRESIDENT FOR RSCH., <https://research.mit.edu/integrity-and-compliance/export-control/information-documents/fundamental-research-definitions> [<https://perma.cc/44UF-CFXK>] (differentiating EAR and ITAR in that EAR's pre-publication standards are not as strict, meaning information covered under EAR can undergo initial review by the sponsoring party before it is released for publication).

176. See Rodolfo H. Torres, *New Challenges and Opportunities for International Research Collaborations on a More Level Playing Field*, in RE-THINKING AND RE-ENGINEERING INCENTIVES FOR SCHOLARLY ACTIVITIES ACROSS THE RESEARCH ENTERPRISE IN AN OPEN ACCESS ENVIRONMENT 28, 36 (Mabel L. Rice & Suzanne Scales eds., 2018) (describing how fundamental research remains unrestricted in many ways but there are applied research and dual-use items that are restricted by the regulations).

177. See Erin N. Grubbs, *Academic Espionage: Striking the Balance Between Open and Collaborative Universities and Protecting National Security*, 20 N.C. J.L. & TECH. ONLINE 235, 248 (2019) (“[C]onfusion around what constitutes fundamental research can get universities in trouble.”).

and intellectual property from the United States. In particular, the FBI and other federal agencies had discovered China had been stealing technology and intellectual property by using Chinese students and professors to exploit the open-research environment of U.S. colleges and universities, thereby gaining access to information otherwise regulated under ITAR or EAR.<sup>178</sup> As a result, members of Congress stated that if institutions do not take action to prevent academic espionage by China, by more strictly enforcing export controls, Congress will take matters into its own hands.<sup>179</sup> The executive branch, through the National Institutes of Health, has expressed similar sentiments, including by announcing that it is currently reviewing suspicious conduct related to academic espionage at approximately 55 institutions across the country.<sup>180</sup> In September 2020, the White House went so far as to announce that the Office of Science and Technology Policy will be visiting campuses to better inform researchers and administrators on how to comply with export-control regulations.<sup>181</sup>

These pressures from Congress and the Executive only serve to compound already-existing concerns from institutional researchers and administrators about potential criminal and civil penalties for failure to comply with export controls.<sup>182</sup> One example of the penalties institutional researchers and administrators can face for failure to comply with export controls can be found in *United States v. Roth*, which involved an electrical-engineering professor at the University of Tennessee at Knoxville who was found guilty of violating ITAR.<sup>183</sup> The professor had taken information related to plasma technology used in military aircraft, which was included on the ITAR Munitions List, out of the country on an international flight without first receiving a license.<sup>184</sup> He also allowed two of his research assistants, both foreign persons, to access the plasma-technology information without first receiving a license.<sup>185</sup> The professor was found guilty of violating both the

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178. See CHINA TECHNOLOGY REPORT, *supra* note 93, at 14 (“[T]he FBI has observed ‘the use of nontraditional collectors, especially in the academic setting, whether it’s professors, scientists, students...in almost every...field office that the FBI has around the country. It is not just in major cities, it’s in small ones as well.’” (quoting FBI Director Christopher Ray during a February 2018 U.S. Senate Intelligence Committee hearing)).

179. See Ellis & Gluckman, *supra* note 95 (“[Robert] Daly’s warnings join a chorus of messages to university leaders that they need to protect their work before the power is taken out of their hands. . . . Roy Blunt, Republican of Missouri, wanted to know how the agency was holding university leaders’ feet to the fire.”).

180. *Id.*

181. Nell Gluckman, *White House Officials Will Visit Campuses to Discuss Foreign Threats to Research*, CHRON. HIGHER EDUC. (Sept. 17, 2019), [https://www.chronicle.com/article/White-House-Officials-Will/247147?cid=wcontentlist\\_hp\\_latest](https://www.chronicle.com/article/White-House-Officials-Will/247147?cid=wcontentlist_hp_latest) [<https://perma.cc/Y2H3-CLH3>].

182. See LIEBMAN ET AL., *supra* note 1, at v–vi (listing fines, loss of government contracting privileges, and imprisonment as possible penalties).

183. *United States v. Roth*, 628 F.3d 827, 829–31 (6th Cir. 2011).

184. *Id.* at 829.

185. *Id.* at 829–30.

export and deemed export regulations, and sentenced to four years of prison and two years of supervised release thereafter.<sup>186</sup>

### III. A FRAMEWORK FOR CATEGORIZING EMPLOYER APPROACHES TO HIRING FOR EXPORT-CONTROLLED POSITIONS AND EXPLAINING EMPLOYMENT-DISCRIMINATION CLAIMS

The institutions of higher education that face these pressures from Congress and the Executive take different approaches as to whether they exclude foreign persons from applying for export-controlled positions. The different approaches range from institutions who exclude all non-U.S. citizens from applying<sup>187</sup> to institutions who place no restrictions on who may apply. At least some of the approaches raise the question of whether institutions are violating Title VII or the IRCA by so doing. As discussed above, Professors Burke and Sperino would come to different conclusions on this question.<sup>188</sup> Each professor's argument, however, assumes that institutions and other employers take one of two approaches: either the institution is willing to go through the licensing process and will accept foreign persons that would need to receive a license, or the institution is not willing to go through the process and will reject foreign persons that would need to receive a license.<sup>189</sup>

This Note, however, argues that this dichotomy does not adequately capture the different approaches employers take when hiring for export-controlled positions, which in turn prevents a complete discussion of whether institutions may exclude foreign persons from export-controlled positions. This Note instead proposes a more detailed framework that divides the different approaches institutions take into five categories, allowing for a more comprehensive discussion of possible employment-discrimination claims. Section III.A outlines the proposed framework. Section III.B then describes how various employment-discrimination claims fit within the framework.

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186. *Id.* at 831; Press Release, U.S. Dep't of Just., Retired University Professor Sentenced to Four Years in Prison for Arms Export Violations Involving Citizen of China (July 1, 2009), <https://www.justice.gov/opa/pr/retired-university-professor-sentenced-four-years-prison-arms-export-violations-involving> [<https://perma.cc/4U44-TNHB>].

187. *See Software Engineer for Satellite Operations*, HIGHEREDJOBS [hereinafter *Software Engineer Posting*], <https://www.higheredjobs.com/search/details.cfm?JobCode=177093504&Title=Software%20Engineer%20for%20Satellite%20Operations> (last visited Feb. 1, 2021) ("Due to U.S. Export Control Restrictions only U.S. Citizens and Permanent Residents may apply.").

188. *See supra* Section II.B.3 (contrasting Professor Burke's argument that excluding foreign persons constitutes national-origin discrimination with Professor Sperino's argument that excluding foreign persons constitutes citizenship discrimination).

189. *See Sperino, supra* note 10, at 404, 422 ("[E]mployers 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."); Burke, *supra* note 2, at 595 ("[E]mployers may choose not to hire potential employees for whom a license would be required . . .").

A. *THE STRUCTURE OF THE FRAMEWORK*

The proposed framework consists of five categories that place employer approaches to hiring for export-controlled positions on a spectrum according to how restrictive the employer is in excluding persons from applying for the positions. The categories range from the most restrictive category (in which all non-U.S. citizens are excluded) to the least restrictive category (in which no persons are excluded from applying). Each category is also associated with a level of risk, which measures how likely it is that the employer will violate export-control regulations. The level of risk is inversely related to how restrictive the employer is in excluding persons from consideration. For example, the most restrictive category, which excludes all non-U.S. citizens from applying, also carries the lowest risk that the employer will violate export-control regulations. The dichotomy discussed by Professors Burke and Sperino<sup>190</sup> can also fit within this framework. Employers who exclude foreign persons to avoid licensing requirements fall within one of the first three categories, while employers who are willing to apply for a license fall within one of the last two categories. Each of the categories is described below in terms of both who is excluded from applying and the employer's level of risk of violating the licensing requirements.

1. Category I: U.S. Citizens

The first, and most restrictive, category in the framework involves employers who restrict applicants to only U.S. citizens or, in some instances, only U.S. citizens or lawfully-admitted permanent residents.<sup>191</sup> Employers who adopt this approach fall within the most restrictive category because this approach automatically excludes the largest group of people from applying, including all foreign persons, individuals granted asylum, refugees, lawfully admitted temporary residents, and, in most instances, lawfully admitted permanent residents. While it is the most restrictive approach, this category also ensures the lowest risk of violating the export-control licensing requirements. Because only foreign persons are required to receive a license,<sup>192</sup> the employer can only be liable for violating export-control licensing requirements if a foreign person were to gain access to the export-controlled information involved in the position. By excluding all foreign persons from applying, the employer eliminates that risk.

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190. See *supra* note 189 and accompanying text.

191. See *Software Engineer Posting*, *supra* note 187 (excluding all applicants except U.S. citizens or lawfully admitted permanent residents).

192. See *supra* text accompanying notes 33–42 (defining the terms deemed export and foreign person to determine what individuals are required to receive a license under the regulations).

## 2. Category II: U.S. Citizens and Protected Individuals

The second category encompasses employers who require applicants to be U.S. citizens or other Protected Individuals.<sup>193</sup> This second category is less restrictive than the first category because the Protected Individuals that were excluded from applying under the first category are now allowed to apply—including any lawfully admitted temporary residents, individuals granted asylum, and refugees. Thus, the only group of individuals that are automatically excluded under the second category are foreign persons, since they fall outside the definition of Protected Individuals.<sup>194</sup> While this second category is less restrictive than the first, employers in this category are at no greater risk of violating export-control licensing requirements than an employer in the first category. As was the case with the first category,<sup>195</sup> all foreign persons are excluded from applying, and an employer is only liable for violating export-control licensing requirements if a foreign person gains access to the information. Notably, this is the only category in the framework in which employers are at no greater risk of violating export-control regulations than if they had adopted an approach that placed them in a more restrictive category.

## 3. Category III: Work Without Having to Receive a License

The third category concerns employers who only exclude applicants if the applicant would need to receive a license to work in the position.<sup>196</sup> In some instances, this third category is just as restrictive as the second category and excludes the same persons. But in other instances, this category is less restrictive and allows more persons to apply for the position. The category will be just as restrictive as the second category when the information at issue is regulated under ITAR. Employers in this category restrict all applicants that would need to receive a license, and all foreign persons are required to receive

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193. See *OTLIR Traineeship*, HIGHEREDJOBS, <https://www.higheredjobs.com/search/details.cfm?JobCode=177097677&Title=OTLIR%20Traineeship> (last visited Oct. 15, 2020) (“Due to U.S. Export Control laws and regulations, the candidate hired will need to be a U.S. citizen, lawful permanent resident, or other ‘protected individual’ (as defined by 8 U.S.C. Sec. 1324b(a)(3)).”).

194. See *supra* notes 37–41 and accompanying text (defining a foreign person as the absence of being a U.S. citizen, lawfully admitted permanent residents, temporary residents, refugees, or individuals granted asylum).

195. See *supra* Section III.A.1 (explaining why employers who only allow U.S. citizens to apply are not at risk of violating export-control regulations).

196. See *Assistant Research Engineer, Associate Research Engineer, Research Engineer*, HIGHEREDJOBS, <https://www.higheredjobs.com/search/details.cfm?JobCode=177072081&Title=Assistant%20Research%20Engineer%2C%20Associate%20Research%20Engineer%2C%20Research%20Engineer> (last visited Oct. 15, 2020) (“The position must meet export control requirements without additional licensure . . .”).

a license under ITAR.<sup>197</sup> Thus, the same individuals that are excluded under the second category, namely all foreign persons, are also excluded under this third category. However, the third category is less restrictive when the position being hired for is regulated under EAR. Unlike under ITAR, not all foreign persons need to receive a license under EAR.<sup>198</sup> Instead, whether a foreign person needs to receive a license under EAR also depends on that foreign person's country of citizenship.<sup>199</sup> Thus, at least some foreign persons are not excluded from applying for a position under the third category, making it less restrictive than the first two categories.

Whether the information to which the position-holder will have access is regulated under ITAR or EAR matters not only for determining how restrictive employers in this category are, but also for determining the employer's risk of violating export-control regulations. For export-control positions regulated under ITAR, the employer's risk of violating export-control regulations is the same in this category as it is for the first two categories, since all foreign persons are once again excluded from applying. However, for positions regulated under EAR, the employer's risk of violating export-control regulations increases. In that case, the employer, by allowing certain foreign persons to apply if they do not need to receive a license, is creating the possibility that the foreign person will gain access to export-controlled information for which they should have received a license. There are at least three scenarios in which a foreign person could improperly gain access to export-controlled information.

*i. Misinterpreting the Regulations*

First, an employer may misinterpret the licensing requirements and erroneously conclude a foreign person does not need a license when they do. For example, the employer could believe that the information the foreign person will have access to has a certain ECCN, when in reality another ECCN applies. Since whether a foreign person's specific country of citizenship calls for a license requires looking at the Reasons for Control listed on the CCC, which in turn requires looking at the applicable ECCN,<sup>200</sup> the employer's

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197. See *supra* Section II.A.3.i (explaining that all foreign persons are required to receive a license if the information they will have access to is regulated under ITAR, unless an exemption applies).

198. See *supra* Section II.A.3.ii (explaining that whether a foreign person needs to receive a license to access information regulated under EAR depends on both the type of information and the foreign person's countries of citizenship or permanent residence).

199. See *supra* notes 62–71 and accompanying text (laying out the steps an exporter must go through to determine if a license is required under EAR, which looks at both the nature of the information being regulated and the foreign person's countries of citizenship or permanent residence).

200. See *supra* notes 60–71 and accompanying text (describing the steps an employer must take to determine whether a license is required once they have determined their applicable ECCN).

reference to the wrong ECCN could lead them to believe a license is not required when one is. An employer who makes this mistake would be violating EAR and subjecting itself to liability for allowing the foreign person to work in the position and access the information. Under the first two categories of the framework, by contrast, such a mistake would not be possible since all foreign persons are excluded from applying.

*ii. Change in Work Assignment*

A second scenario involves a foreign person being hired for a position in which they do not need a license, but they subsequently change work assignments and begin working with information for which they do need a license. For example, a foreign person could be hired on as an engineer to work on a satellite project that is regulated under EAR and does not require the foreign person to receive a license. However, due to restructuring, completion of the project, or other situations such as loss of funding, the engineer may be switched onto another project involving rockets. Since most rockets are regulated under ITAR,<sup>201</sup> the engineer would likely need to receive a license. In this scenario, if the employer were to allow the engineer to switch projects without first receiving a license, the employer would be in violation of ITAR's licensing requirements.<sup>202</sup> Once again, this risk would not be possible under the first two categories because the foreign person would not be hired onto the first project to begin with.

*iii. Accidental Exposure*

Finally, a third scenario in which a foreign person could gain access to export-controlled information for which they should have received a license is if the foreign person is accidentally exposed to export-controlled information outside the scope of their job duties. For example, a foreign person could be asked to work on a computer that also contains blueprints, code, or other information related to a project they are not working on but that is regulated under ITAR. Even if the foreign person did not intentionally access the blueprints—or even know they were there—accessing the shared drive might be enough to constitute a deemed export and subject the employer to liability. Once again, employers in the first two categories do not face this concern, as all foreign persons would be excluded from the workplace.

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201. See 22 C.F.R. § 121.1 (2020) (listing rockets under Category IV of the Munitions List).

202. See *supra* Section II.A.3.i (explaining that all information regulated under ITAR's Munitions List requires a license unless an exemption applies).

#### 4. Category IV: Able to Receive a License

The fourth category of employers includes those employers who require that applicants be able to obtain an export license if necessary.<sup>203</sup> This fourth category is less restrictive than the first three categories because it, in effect, does not exclude any foreign persons from applying for the position initially. Indeed, an employer will only find out whether an applicant is able to obtain a license after the DDTC or BIS, depending on whether the information is regulated under ITAR or EAR, grants or denies a licensing application.<sup>204</sup> Before the DDTC or BIS will make a licensing decision, however, the employer must submit a DSP-5 or BIS-748p form, and the only way an employer will be able to obtain the information it needs to fill out the applicable form<sup>205</sup> is by allowing the applicant to first apply. After the employer submits the form and the DDTC or BIS returns a decision on whether a license is granted, applicants who are granted a license may begin working while applicants who are denied a license are removed from consideration. Thus, no one is excluded from applying initially, and only those foreign persons not granted a license are eventually excluded from being hired.

Of the categories discussed thus far, the fourth category is the first in which the employer agrees to subject itself to the licensing requirements. By subjecting themselves to these licensing requirements, employers in this category are also increasing their risk of violating export-control regulations. Much of this increased risk can be attributed to similar concerns as the ones that put employers at risk under the third category: namely, that: (1) the employer will misinterpret the regulations or (2) the foreign person's work assignments or job duties will change in a way that results in them gaining access to other export-controlled information that requires a license.<sup>206</sup> While the concerns are similar to those faced by employers under the third category, employers under the fourth category are at an even greater risk of violating export controls, for at least two reasons.

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203. See *Lab Engineer III*, HIGHEREDJOBS, <https://www.higheredjobs.com/search/details.cfm?JobCode=177113169&Title=Lab%20Engineer%20III> (last visited Feb. 1, 2021) ("The successful applicant must be a U.S. Person as defined by 8 USC 1324b(a)(3), or have the ability to obtain the appropriate license to comply with the US Export Control Laws.").

204. See *supra* notes 56–57, 80–83 and accompanying text (explaining that it is the DDTC and BIS that determine whether a license is granted under ITAR and EAR, respectively).

205. See *supra* notes 51–55, 76–79 and accompanying text (listing the information an exporter will need to collect from a foreign person in order to fill out the applicable licensing application, including the foreign person's name, countries of nationality, current address, and resume).

206. See *supra* Sections III.A.3.i–ii (describing two risks that an employer takes on by only excluding foreign persons from applying if they need to receive a license; namely that the employer will misinterpret the export-control regulations or the foreign person's work assignment could change).



*i. Misinterpreting the Regulations*

First, employers in the fourth category have a greater chance of misinterpreting the regulations. By subjecting themselves to the licensing process, these employers are required to go through additional steps and comply with additional parts of the regulations,<sup>207</sup> and the more steps an employer has to go through to comply with the regulations, the greater the risk they will misinterpret the regulations.

This idea is illustrated by comparing the steps employers in the third and fourth categories must take to comply with the regulations. Employers under the third category must interpret and apply portions of the regulations to determine whether a license is needed under ITAR or EAR. Specifically, under ITAR, they must compare the information the position will have access to with the categories on the Munitions List to determine if a license is required.<sup>208</sup> Similarly, under EAR, the employer must compare the information the position will have access to with the Commerce Control List. After doing so, it must then complete the additional steps of locating the ECCN's Reason for Control, cross-referencing the Reason for Control with the CCC, and comparing the countries on the chart with the citizenship of the applicant.<sup>209</sup>

Under the fourth category, additional steps are required. Employers under the fourth category must also go through those same steps depending on whether their information is regulated under ITAR or EAR. However, they must also go through the process of applying for the license, which includes filling out the relevant licensing application forms with the correct information,<sup>210</sup> having the foreign person sign the non-disclosure agreement if necessary,<sup>211</sup> and complying with any restrictions put forth by BIS or the DDTC.<sup>212</sup> It is the employer's responsibility to apply for a license and comply by the terms of the license if one is granted.<sup>213</sup> Failure to comply with any

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207. See *supra* notes 48–55, 76–79 and accompanying text (detailing the additional steps an exporter has to take to apply for a license under ITAR and EAR once the exporter has determined a license is necessary).

208. See *supra* notes 45–47 and accompanying text (explaining the process an exporter must go through to determine whether a license is necessary under ITAR).

209. See *supra* notes 58–71 and accompanying text (explaining the process an exporter must go through to determine whether a license is necessary under EAR).

210. See *supra* notes 50–54, 76–79 and accompanying text (listing what information needs to be provided on a DSP-5 or BIS-748P application).

211. See *supra* text accompanying note 55 (noting that a non-disclosure agreement must be signed by the foreign person and included as part of the application DSP-5 application when the information is regulated under ITAR).

212. See EAR GUIDANCE FORM, *supra* note 76, at 6–7 (explaining that after a license is granted, but prior to the transfer of information to a foreign person, the exporter must inform the foreign person of the conditions accompanying the license and the exporter must also establish procedures to comply with the conditions of the license).

213. See BIS INSTRUCTIONS, *supra* note 58, at 11 (“If [the employer] [is] issued an export license . . . [the employer] [is] responsible for the proper use of that license . . . and for the performance of all of its terms and conditions.”).

provision of ITAR or EAR can result in penalties for the employer.<sup>214</sup> Such penalties are not possible for an employer under any of the first three categories because they do not go through the licensing process.

*ii. Change in Work Assignment or Job Duties*

Second, employers in the fourth category face a higher risk of violating export controls because, when a foreign person is required to receive a license to work in a position, any change in that foreign person's job duties may cause the employer to be in violation of export-control regulations. Notably, this is true even if that foreign person continues working on the same project or assignment. This scenario is distinct from the one discussed under the third category, in which the engineer was reassigned from the satellite project to the rocket project.<sup>215</sup> In that scenario, the change in work assignment only created a potential violation because the engineer began working on a completely different project. In contrast, under the fourth category an employer can be liable even if the employee continues working on the same project and their job duties change only slightly.

For the most part, these steps are attributable to the requirement that employers in the fourth category fill out a licensing form. As part of the licensing form—whether it is a DSP-5 or BIS-748p—the employer must include the job description, a description of the information the foreign person will have access to, and an explanation of why they will need access to that information.<sup>216</sup> Once an employer fills out this information, if the employee is granted a license, that license will usually include restrictions that limit the scope of the foreign person's access to the information in accordance with the information that was provided on the licensing application.<sup>217</sup> It is the employer's responsibility to ensure a foreign person complies with those restrictions<sup>218</sup> and, presumably, the employer's fault when those restrictions are not complied with. Thus, while an employer in the third category would likely only be liable if the foreign person's job duties changed significantly, such as by that individual being placed on a new project, an employer in the

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214. See *supra* note 44 and accompanying text (describing some of the penalties that can result from violating ITAR or EAR).

215. See discussion *supra* Section III.A.3.ii (discussing a hypothetical situation in which a foreign person is hired to work on a project regulated under EAR that does not require a license, but then the foreign person is transferred to a project that does require a license under ITAR).

216. See *supra* notes 51–52, 78 and accompanying text (requiring that an exporter include information on the applicant's job description, the information they will have access to, and the reason they will need access to that information).

217. See EAR GUIDANCE FORM, *supra* note 76, at 6–7 (providing an example of standard conditions that attach to a license if one is granted).

218. See *id.* at 7 (“The [exporter] will establish procedures to ensure compliance with the conditions of this license, particularly those regarding limitations on access to technology by foreign nationals.”).

fourth category may be liable even for a slight change in a foreign person's job duties.

#### 5. Category V: No Restriction

The fifth category encompasses employers who place no restrictions on applicants and otherwise make no mention of export-control regulations on their job postings. Theoretically, categories four and five should be equal in terms of not excluding anyone from applying, since all foreign persons are allowed to apply in category four.<sup>219</sup> In reality, however, the fifth category may be slightly less restrictive in who applies for a position. At least some potential applicants who read a job posting that includes language requiring applicants to be able to obtain a license, as is the case for an employer in the fourth category, may not understand export-control licensing requirements and mistakenly believe they are restricted from the position. In comparison, employers under category five do not face this dilemma, as there is no reference to export-control licensing requirements on the posting. As a result, fewer applicants may be excluded from applying under the fifth category.

While employers under the fifth category avoid the dilemma of potentially restricting applicants because of confusion about export-control licensing requirements, these employers may also be increasing their risk of violating export controls. By not mentioning export-control restrictions or licensing requirements in the job posting, applicants are not on notice that export controls apply or that they may be subject to additional licensing. As a result, applicants would not know that they should alert the employer to their status as a foreign person, and the employer would not know that they need to apply for a license for that applicant.

While it is the employer's responsibility to check the applicant's citizenship status to ensure they do not need to obtain a license,<sup>220</sup> and the issue can be avoided by an employer implementing a blanket policy of checking the citizenship status of all applicants, it is unlikely that all employers will check an applicant's status in all instances. Under the other four approaches, foreign persons are on notice either that they are not allowed to apply for the position because of their status as a foreign person or that some sort of export-control licensing requirements may apply. Likewise, while the applicants may not know the specifics of the licensing requirements, they may be more likely to ask about the requirements if they have read them in the job posting. Thus, employers who fail to make any mention of export-control requirements—particularly those who do not have policies in place for

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219. See discussion *supra* note 204 and accompanying text (explaining why the licensing requirements make it so no one is excluded from applying if an employer adopts an approach under the fourth category).

220. See BIS INSTRUCTIONS, *supra* note 58, at 11 (explaining that if an exporter is issued a license or otherwise believes they do not need to receive a license then they are responsible "for the performance of all . . . terms and conditions").

checking the citizenship status of applicants for export-controlled positions—may increase their risk of violating export-control regulations by falling under the fifth category.

*B. EMPLOYMENT-DISCRIMINATION UNDER THE FRAMEWORK*

The framework having now been established, one can more comprehensively evaluate how employment-discrimination claims intersect with export-control regulations in the hiring context. One of the main utilities of the proposed framework is that it allows for a more comprehensive analysis of how employment-discrimination claims intersect with export-control regulations in the hiring context. Each category of the framework, by restricting a different group of individuals and subjecting the employer to different risks, gives rise to different employment-discrimination claims and defenses under Title VII and the IRCA.

1. Category I

Employers in the first category, by requiring applicants to be U.S. citizens or lawfully admitted permanent residents, are in clear violation of the IRCA's provision against citizenship discrimination. The relevant provision, which prohibits discriminating against any Protected Individual "because of such individual's citizenship status,"<sup>221</sup> is violated because, by restricting applicants to U.S. citizens, the employer is excluding the other classes of Protected Individuals from applying because of their citizenship status, including all lawfully admitted temporary residents, refugees, and individuals granted asylum.

Admittedly, employers who fall under this category and exclude Protected Individuals might argue that even if they are discriminating against Protected Individuals, there are exemptions under the IRCA that allow them to do so, including the preferential-treatment and public-function exceptions.<sup>222</sup> However, the preferential-treatment exception, which allows employers to choose U.S. citizens or U.S. nationals over other Protected Individuals if the applicants are equally qualified,<sup>223</sup> would not apply. After all, the employer would not know whether the applicants are equally qualified if the Protected Individuals were never allowed to apply in the first place. The public-function exception, which allows employers to discriminate "in order to comply with law, regulation, or executive order,"<sup>224</sup> also does not apply. The Protected

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221. 8 U.S.C. § 1324b(a)(1)(B) (2018).

222. See *supra* notes 150–54 and accompanying text (describing the preferential treatment and public-function exceptions available under the IRCA's provision against employment-discrimination).

223. 8 U.S.C. § 1324b(a)(4).

224. *Id.* § 1324b(a)(2)(C).

Individuals are never required to receive a license under ITAR or EAR,<sup>225</sup> and, thus, an employer cannot argue that the Protected Individual needs to be excluded to comply with ITAR and EAR.

In addition, the conclusion that an employer that falls under the first category is in violation of the IRCA is supported by a recent settlement between Honda Aircraft Company LLC (“Honda”) and the Department of Justice.<sup>226</sup> Honda, in recruiting for positions that would have access to export-controlled information, limited applicants “to U.S. citizens and in some cases, to U.S. citizens and lawful permanent residents (LPR) . . . based on a misunderstanding of the requirements under the International Traffic in Arms Regulations (ITAR) and the Export Administration Regulations (EAR).”<sup>227</sup> The Department of Justice took the position that “[n]either the ITAR nor the EAR requires or authorizes employers to hire only U.S. citizens and LPRs” and that limiting applicants in that way could violate the IRCA.<sup>228</sup> As a result of the settlement, Honda was assessed a civil penalty of \$44,626 and required to remove citizenship requirements from their job postings.<sup>229</sup> The results of this settlement and the position taken by the Department of Justice further substantiate the claim that employers that fall under the first category are in violation of the IRCA.

## 2. Category II

By contrast, employers in the second category, by excluding all foreign persons from applying, are not in violation of the IRCA’s provision against citizenship discrimination. The IRCA’s provision against citizenship discrimination only extends to Protected Individuals and not foreign persons.<sup>230</sup> Since employers in the second category do not exclude any Protected Individuals,<sup>231</sup> they cannot be liable under this provision. However, these employers may be liable under a national-origin discrimination claim. While an employer in the second category is likely not liable under a disparate-treatment theory, it may be liable under a disparate-impact theory

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225. See *supra* notes 33–42 and accompanying text (explaining how only foreign persons are required to receive a license and foreign persons do not include any Protected Individuals).

226. See Press Release, U.S. Dep’t of Just., Justice Department Settles Immigration-Related Discrimination Claim Against Honda Aircraft Company LLC (Feb. 1, 2019), <https://www.justice.gov/usao-mdnc/pr/justice-department-settles-immigration-related-discrimination-claim-against-honda> [<https://perma.cc/C4F2-KSSC>] (releasing information on a settlement between the Department of Justice and Honda Aircraft Company LLC that resulted from Honda Aircraft limiting certain job postings to only U.S. citizens and lawful permanent residents in violation of the IRCA).

227. *Id.*

228. *Id.*

229. *Id.*

230. 8 U.S.C. § 1324b(a)(1)(B), (a)(3) (2018).

231. See discussion *supra* Section III.A.2 (placing employers in the second category of the framework if they only restrict foreign persons from applying, not any Protected Individuals).

in some instances. In discussing an employer's potential liability under these two theories, the theories will be discussed in reference to Title VII, since: (1) most national-origin discrimination claims are brought under Title VII, as opposed to the IRCA, and (2) the burden-shifting framework is the same for both Title VII and IRCA claims.<sup>232</sup>

*i. Disparate Treatment*

As indicated, a foreign person who brings a national-origin discrimination claim under a disparate-treatment theory would likely not prevail against an employer in the second category. A second-category exclusion of all foreign persons is almost identical to the facts in *Espinoza v. Farah Manufacturing Co.*<sup>233</sup> In *Espinoza*, the employer excluded all aliens from applying, which the Supreme Court determined constituted citizenship discrimination as opposed to national-origin discrimination.<sup>234</sup> Since the terms alien and foreign person are both defined as the absence of having a particular citizenship status,<sup>235</sup> an employer excluding all foreign persons is also likely engaging in citizenship discrimination, as opposed to national-origin discrimination. Thus, since only national-origin discrimination is a cognizable claim under Title VII,<sup>236</sup> an employer would likely not be liable under a disparate-treatment claim. However, as the Court in *Espinoza* pointed out, even if an employer excludes individuals based on citizenship status, such an exclusion could still have the effect of discrimination on the basis of national origin in certain instances, in which case a disparate-impact claim could be brought.<sup>237</sup>

*ii. Disparate Impact*

To that end, a foreign person who brings a national-origin discrimination claim under a disparate-impact theory could prevail against an employer in the second category if the open position is regulated under EAR. As a reminder, disparate-impact claims go through a three-step burden-shifting framework. That framework begins with the plaintiff establishing a prima facie case that the employer's practice has a disproportionate exclusionary impact on the plaintiff's national origin, which is usually done using statistical

232. LINDEMANN ET AL., *supra* note 103, § 7.II.D.1.

233. See generally *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86 (1973) (holding that an employer who excludes all aliens from applying for a position constitutes citizenship discrimination, as opposed to national-origin discrimination, and is thus not a cognizable claim under Title VII).

234. See *supra* notes 131–35 and accompanying text (explaining the Court's rationale for why the employer's actions constituted citizenship discrimination, as opposed to national-origin discrimination).

235. See *supra* notes 37–41 and accompanying text (explaining statutory definitions of the terms "foreign person" and "alien").

236. See *supra* note 133 and accompanying text (explaining that only national-origin discrimination, not citizenship discrimination, violated Title VII).

237. See *Espinoza*, 414 U.S. at 92.

evidence. Next, the defendant offers evidence that the allegedly discriminatory practice is job related and consistent with business necessity. Finally, however, even if the defendant succeeds in so doing, the plaintiff may still prevail by offering an alternative process that is less discriminatory.<sup>238</sup>

In many instances, a foreign person who brings a disparate-impact claim against an employer that excludes all foreign persons would not prevail, even if the foreign person were able to offer statistical evidence that they, and other foreign persons, were disproportionately impacted by the exclusion. The employer could still argue that excluding foreign persons in order to avoid the licensing process is job related and consistent with business necessity, since the employer would otherwise be subject to the licensing requirements and thus incurring the administrative costs, additional time,<sup>239</sup> and increased risks associated with the requirements.<sup>240</sup> Once the employer has made this argument, in most instances a foreign person would not be able to argue that there is a less-restrictive alternative method because under any alternative method the employer would still have to go through the licensing process. Finally, the employer could also raise the national-security exemption by arguing the position “is subject to any requirement imposed in the interest of the national security.”<sup>241</sup>

There are certain circumstances, however, where the defenses and exemptions an employer in the second category would normally be able to use against a disparate-impact claim would not work. The employer would not succeed, for example, if the open position is regulated under EAR and the plaintiff, or plaintiffs, bringing the disparate-impact claim would not need to receive a license because the CCC does not list their country, or countries, of citizenship as requiring a license.<sup>242</sup> In that instance, the employer would not be able to argue that excluding the foreign persons was job related and consistent with business necessity because the employer would not have to go through the licensing process to hire those foreign persons. Instead, the foreign persons could argue that a less-discriminatory alternative practice would be to only restrict those foreign persons who needed a license, which

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238. See *supra* Section II.B.1.ii (explaining the burden-shifting framework of a disparate-impact claim under Title VII).

239. See *supra* notes 49, 56, 80–82 and accompanying text (describing the timeframe for receiving a licensing decision under ITAR and EAR, as well as the administrative costs that accompany ITAR).

240. See *supra* Section III.A.4 (explaining the risks that can accompany an employer choosing to subject themselves to the licensing requirements, including that they may misinterpret the regulations or the foreign person’s job duties may go beyond what is allowed by the licensing restrictions).

241. 42 U.S.C. § 2000e–2(g) (2018).

242. See *supra* notes 60–71 and accompanying text (explaining why not all foreign persons under EAR need to receive a license, particularly if their countries of citizenship or permanent residence are not listed on the Commerce Country Chart as requiring a license).

would effectively place the employer in the third category.<sup>243</sup> The employer would also not be able to raise the national-security exemption, as hiring the foreign persons would not be “subject to any requirement imposed in the interest of the national security.”<sup>244</sup> Thus, if the information the position will have access to is regulated under EAR and the foreign person, or persons, bringing the disparate-impact claim would not require a license, the foreign persons would likely prevail, assuming they were able to show statistical evidence that they were disproportionately impacted because of their national origin.<sup>245</sup> Obtaining this evidence would likely not be difficult, since citizenship and national origin are so intertwined.<sup>246</sup>

Notably, there is still one defense a defendant employer may be able to raise even if the foreign person was not required to obtain a license. That defense stems from the additional risks that an employer would be subject to if they adopted an approach that placed them in the third category instead of the second—including the risks that they will misinterpret the statutes, the foreign person will change work assignments, or the foreign person may mistakenly encounter other export-controlled information beyond their job duties.<sup>247</sup> While an employer may raise any of these risks as a defense, it is less likely to prevail on the first two risks. In response, a foreign person could argue that the risks of misinterpreting the statutes or the foreign person changing assignments are low and can be mitigated by the defendant implementing checks that would not place much of a burden on the employer.<sup>248</sup> However, the third risk—that the foreign person could mistakenly encounter other export-controlled information beyond their job duties—is a stronger defense and may be available in some instances. In

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243. See discussion *supra* Section III.A.3 (explaining how an employer approach that only excludes applicants if they would need to receive a license as falling under the third category).

244. 42 U.S.C. § 2000e-2(g).

245. See *supra* notes 119–22 and accompanying text (describing what evidence a plaintiff has to provide to establish a prima facie case of employment-discrimination under a disparate-impact theory).

246. The Court seemed to recognize the interrelatedness of the two types of discrimination in *Espinosa v. Farah Mfg. Co.*, 414 U.S. 86 (1973) when it said that discriminating on the basis of citizenship could still have the effect of discriminating on the basis of national origin. See *supra* note 136 and accompanying text.

247. See *supra* Section III.A.3 (discussing the additional risks an employer takes by excluding only those applicants who need to receive a license and allowing other foreign persons to apply).

248. For example, to mitigate the possibility of misinterpreting the statutes, the employer could either have two members of their export-control compliance team do independent analyses of whether a license is required, assuming they have multiple export-control compliance personnel, or the employer could request a determination from the BIS about whether export controls apply. BIS INSTRUCTIONS, *supra* note 58, at 4 (“[The employer] may classify the item on [their] own . . . or submit a classification request to have BIS determine the ECCN . . .”). To mitigate the possibility of the foreign person changing work assignments and coming into contact with other export-controlled information, the employer could have a policy of informing both the foreign person and their supervisor that the individual is barred from changing work assignments without prior approval.



particular, it may be available when the employer regularly works with a variety of different export-controlled information and it would be impractical or exceptionally costly to have the employer separate out each of the different parts. For example, if the employer has all of its engineers work in one area where there are multiple export-controlled projects going on simultaneously, it would be impractical to have the employer separate out each of those projects. On that basis, the employer would be able to argue that they cannot hire any foreign persons for the position.

As such, whether a foreign person who is excluded from applying for an export-controlled position regulated under EAR can prevail on a disparate-impact claim depends on a fact-specific inquiry, but it is possible.

### 3. Category III

Employers in the third category, by excluding only foreign persons who are required to receive a license, are not in violation of the IRCA and likely not in violation of Title VII. Employers are not in violation of the IRCA because, similar to employers in the second category, no Protected Individuals are excluded from applying. Whether employers under the third category are in violation of Title VII is where Professors Sperino and Burke disagree—with Professor Sperino arguing employers are not in violation, since any discrimination that is occurring is citizenship discrimination, and Professor Burke arguing employers are in violation, since the discrimination is national-origin discrimination.<sup>249</sup> This Note agrees with the stance taken by Professor Sperino and argues that employers excluding foreign persons because they would need to receive a license does not constitute national-origin discrimination under either a disparate treatment or disparate-impact theory.

#### *i. Disparate Treatment*

An employer in the third category is not liable under a disparate treatment theory because any foreign persons who are excluded by employers in this category are excluded, or discriminated against, because of their citizenship, as opposed to their national origin. For an employer to be liable under a disparate treatment theory the foreign person must establish that the employer intentionally discriminated against them because of their national origin.<sup>250</sup> However, any foreign person that is excluded by an employer in the third category is excluded because they would need to receive a license,<sup>251</sup> and whether a license is required is dependent on an individual's citizenship, not their national origin. To understand why this is the case, it is important to

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249. See *supra* Section II.B.3 (comparing the opposing arguments put forth by both professors).

250. See *supra* Section II.B.1.i (discussing the requirements for an individual to bring an intentional discrimination claim under a disparate-treatment theory).

251. See *supra* Section III.A.3 (placing employers in the third category if they require applicants to be able to work in the position without having to receive a license).

keep separate the processes for determining whether a license is required and whether a license is granted.

In determining whether a license is granted, the BIS and DDTC may look at any of a foreign person's current or past countries of citizenship.<sup>252</sup> Admittedly, this process more closely resembles discrimination based on national origin. However, any such discrimination is done on the part of the BIS and DDTC, not the employer. The employer's role—particularly for employers in the third category—is to determine whether a license is required, and whether a license is required under ITAR or EAR depends on a foreign person's citizenship, as opposed to their national origin. Under ITAR, for example, all foreign persons are required to receive a license unless an exception applies.<sup>253</sup> Thus, if the export-controlled position being hired for is regulated under ITAR, all foreign persons are excluded by employers in the third category. This situation is almost identical to an employer excluding all aliens from applying, which the Court in *Espinoza* held constituted permissible citizenship discrimination.<sup>254</sup>

Similarly, under EAR, whether a foreign person is required to receive a license depends not only on their status as a foreign person but also on their current countries of citizenship.<sup>255</sup> Although the exclusion of foreign persons who are citizens of a certain country is different than excluding all foreign persons because of their citizenship status and thus different than *Espinoza*, the exclusion of citizens of a certain country still constitutes citizenship discrimination. To understand why requires looking at the definitions of citizenship and national origin again. "Citizenship" is defined as "[t]he status of being a citizen," and "citizen" is defined as "[s]omeone who, by either birth or naturalization, is a member of a political community."<sup>256</sup> On the other hand, "national origin" is defined as "[t]he country in which a person was born, or from which the person's ancestors came."<sup>257</sup> While the two terms can often be interrelated, especially since the country where a person was born is also often their country of citizenship, a person's current country of citizenship

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252. See *supra* notes 53–55, 57, 78–79, 83 and accompanying text (discussing what information an employer must provide after they have determined a license is required and how that information is used by the DDTC and BIS to make a licensing decision).

253. See *supra* notes 45–47 and accompanying text (explaining the process for determining whether a license is required under ITAR).

254. See *supra* notes 130–36 and accompanying text (explaining the Court's reasoning for concluding that excluding lawfully admitted aliens constituted citizenship discrimination).

255. See *supra* notes 58–71 and accompanying text (explaining the process for determining whether a license is required under EAR).

256. *Citizenship*, BLACK'S LAW DICTIONARY (11th ed. 2019); *Citizen*, BLACK'S LAW DICTIONARY (11th ed. 2019).

257. *National Origin*, BLACK'S LAW DICTIONARY (11th ed. 2019).

can also be different than their country of birth.<sup>258</sup> Since EAR requires an employer to look at a foreign person's current countries of citizenship, rather than the countries in which they were born when deciding whether a license is needed,<sup>259</sup> the process constitutes citizenship discrimination.

Since only national-origin discrimination, and not citizenship discrimination, is prohibited under Title VII,<sup>260</sup> a foreign person who is excluded by an employer in the third category would not be able to establish a *prima facie* case. In addition, even if the plaintiff were somehow able to establish a *prima facie* case of national-origin discrimination, the employer could argue that, in avoiding licensing requirements, it had a legitimate, nondiscriminatory reason<sup>261</sup> for excluding the plaintiff. The plaintiff would then have the burden of proving the employer's proffered reason was pretext.<sup>262</sup> Assuming an employer's true intent was to avoid export-control licensing requirements, the employer would also avoid liability under this defense. As such, any foreign person excluded because they would have to receive a license would be unable to prevail under a disparate-treatment theory.

*ii. Disparate Impact*

A plaintiff would also not prevail under a disparate-impact theory against an employer in the third category under the same rationale as to why a plaintiff would usually be unable to prevail under a disparate-impact theory against an employer in the second category. Namely, the employer could argue that avoiding the licensing process is job-related and consistent with business necessity.<sup>263</sup> While certain foreign persons who bring disparate-impact claims against employers in the second category could potentially prevail by showing they do not have to receive a license to work in the

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258. For example, an individual may have relocated from their country of birth and gone through the naturalization process of the country they moved to, in which case their country of birth would be different than the country they are a citizen of.

259. See *supra* notes 69–71 and accompanying text (explaining that the regulations only specify that an exporter identify a foreign person's current countries of citizenship when referencing the Commerce Country Chart).

260. See *supra* note 133 and accompanying text (finding that citizenship discrimination is not precluded by Title VII).

261. See *supra* notes 107–10 and accompanying text (describing how after a plaintiff has established a *prima facie* case under a disparate-treatment theory the employer can offer a legitimate, nondiscriminatory reason to refute the claim).

262. See *supra* notes 111–12 and accompanying text (describing the last step in the disparate treatment burden-shifting framework, in which a plaintiff can offer evidence that the employer's purported legitimate, nondiscriminatory reason was pretext in order to prevail on their claim).

263. See discussion *supra* Section III.B.2.ii (discussing why, in many cases, a foreign person would not be able to prevail on a disparate-impact theory against an employer that falls under the second category).

position,<sup>264</sup> no such option is available to foreign persons who bring claims against employers in the third category. In that category, only individuals who are required to receive a license are excluded. Thus, no foreign person could prevail under a disparate-impact theory of national-origin discrimination.

#### 4. Categories IV and V

Finally, employers in the fourth and fifth categories are not in violation of the IRCA or Title VII. The only foreign persons who are excluded under these two categories are those for whom the employer has applied for a license and that license has been denied by the Department of State or Department of Commerce. As discussed above, while the DDTC or BIS may consider an individual's national origin as part of determining whether a license is granted, that decision is made by the applicable governmental organization as opposed to the employer.<sup>265</sup> Once the employer is notified that the foreign person has been denied an application, they have no choice but to exclude the foreign person. Thus, they can easily raise the national-security exemption<sup>266</sup> or offer the denied application as proof of a legitimate, nondiscriminatory reason for excluding the foreign person.<sup>267</sup>

#### IV. APPLICATION OF THE FRAMEWORK TO THE HIGHER EDUCATION CONTEXT TO SHOW SOME INSTITUTIONS ARE DISCRIMINATING AND BEING UNNECESSARILY RESTRICTIVE

The above framework sets out the five approaches employers may take to hiring for export-controlled positions, as well as the risks of violating export-control regulations and possible employment-discrimination claims that might be brought under each category. This Part now applies that framework within the unique context of higher education. It concludes that many institutions of higher education fall under the first two categories of the framework and thus are: (1) in violation of the IRCA and Title VII or (2) otherwise being unnecessarily restrictive in their approaches to hiring for export-controlled positions. Specifically, Section IV.A applies the framework to current job postings by institutions of higher education to show that these institutions are likely in violation of the IRCA and Title VII. Section IV.B explains what it means for an institution to be “unnecessarily restrictive,” and

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<sup>264</sup>. See discussion *supra* Section III.B.2.ii (discussing why, despite the fact that in many cases a foreign person would not prevail on a disparate-impact theory, there are some cases where a foreign person would be able to prevail on such a theory against an employer in the second category).

<sup>265</sup>. See discussion *supra* Section III.B.3.i (discussing why the DDTC or BIS could be considered to be discriminating on the basis of national origin in some instances, but not the employers who are abiding by the regulations).

<sup>266</sup>. 42 U.S.C. § 2000e-2(g) (2018).

<sup>267</sup>. See *supra* notes 107–10 and accompanying text (describing how after a plaintiff has established a prima facie case under a disparate-treatment theory the employer can offer a legitimate, nondiscriminatory reason to refute the claim).

then explains both how many of the institutions in the first two categories of the framework are being unnecessarily restrictive when hiring for export-controlled positions and why that is problematic.

#### A. INSTITUTIONS DISCRIMINATING

All institutions of higher education that currently fall under the first category of the framework, and at least some institutions who fall under the second category, are subjecting themselves to liability under either Title VII or the IRCA. The clearest example of institutions that are subjecting themselves to liability are those that fall under the first category of the framework because, as discussed in Section III.B.1, those institutions are in clear violation of the IRCA.<sup>268</sup> Evidence that at least some institutions currently fall into the first category of the framework can be seen in a recent job posting for a Satellite Systems Engineer at a state university.<sup>269</sup> The job posting included the following language: “Due to U.S. Export Control Restrictions only U.S. Citizens and Permanent Residents may apply.”<sup>270</sup> By limiting the position to only U.S. citizens and lawfully admitted permanent residents, the institution fell into the first category by failing to allow Protected Individuals—such as lawfully admitted temporary residents, refugees, and individuals granted asylum—to apply. By so doing, the institution has subjected itself to a potential citizen-discrimination claim from either a Protected Individual or the Department of Justice.

Institutions who fall under the second category of the framework may also be subjecting themselves to liability. An example of this trend is a recent institutional job posting for a Research Assistant position in the pediatrics department of a state university’s medical school. The posting includes language that reads:

Your work will involve access to export-controlled technology and materials. This offer of employment is contingent upon your ability to work with export controlled technology, as defined by the International Traffic in Arms Regulations (ITAR). Pursuant to ITAR, only U.S. persons (any individual who is a citizen of the United States, a permanent resident alien of the United States, or a protected individual as defined by 8 U.S.C. 1324b(a)(3)) may work with this technology.<sup>271</sup>

The job duties listed on the posting included “translational research, studying the effects of toxic inhaled chemicals, focusing on early drug development

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268. *Supra* Section III.B.1.

269. *Software Engineer Posting*, *supra* note 187.

270. *Id.*

271. *Senior Professional Research Assistant*, HIGHEREDJOBS, <https://www.higheredjobs.com/search/details.cfm?JobCode=177127788&Title=Senior%20Professional%20Research%20Assitant> (last visited Feb. 1, 2021).

studies,” and developing and performing “new ELISA assays.”<sup>272</sup> Notably, while the posting stated that the position is regulated under ITAR, the position might actually be regulated under EAR. While ITAR’s Munitions List does list certain toxicological and chemical agents, the List also contains an exception that says pharmaceutical formulations of the chemical agents are regulated under EAR if the chemical agent “is . . . designed for testing and administration in the treatment of human medical conditions.”<sup>273</sup>

Assuming the position is regulated under EAR as opposed to ITAR, the institution would be subjecting itself to potential liability under Title VII. Specifically, the institution would be subjecting itself to a disparate-impact national-origin claim. While the institution excluded all foreign persons from applying, if the position is actually regulated under EAR, then there are at least some foreign persons who would likely be able to work in the position without having to receive a license. Excluding all foreign persons when some foreign persons would be able to work in the position without a license is identical to the situation discussed in Section III.B.2.ii, where an employer would likely be liable under a disparate-impact theory if the foreign person was able to produce evidence of a statistical disparity.<sup>274</sup> Thus, there is at least some possibility that this institution could be liable under a disparate-impact theory for taking an approach that places them in the second category, particularly if any foreign persons from a country that did not require a license were to apply for the position.

#### B. INSTITUTIONS UNNECESSARILY RESTRICTING APPLICANTS

While the primary issue with institutions adopting hiring approaches that place them in the first two categories of the framework is that these institutions are subjecting themselves to liability under Title VII and the IRCA, there is a second problem as well. The second problem is that institutions who fall under the first two categories are being unnecessarily restrictive in who they exclude from applying for their export-controlled positions. For purposes of this Note, an institution is being “unnecessarily restrictive” if the institution’s rationale for choosing one of the more-restrictive approaches is either flawed or could otherwise be accomplished by a less-restrictive approach and, as a result, the institution is excluding more individuals than it needs to.

To understand how certain institutions are being unnecessarily restrictive requires understanding: (1) why these institutions are adopting the more restrictive approaches, and (2) why those rationales are erroneous or

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272. *Id.*

273. 22 C.F.R. § 121.1 (2019).

274. *See supra* Section III.B.2.ii (discussing how a foreign person may be able to bring a disparate-impact claim if they would not need to receive a license to work in the position being hired for).

otherwise could be carried out using less-restrictive approaches. Section IV.B.1 describes three rationales as to why an institution might adopt a hiring approach that places them in one of the first two categories and how those rationales are flawed or could be carried out using less-restrictive approaches. Section IV.B.2 then explains why adopting an unnecessarily restrictive approach is particularly problematic for institutions of higher education.

### 1. Rationales for Restricting Applicants

Three possible rationales explain why an institution might adopt a hiring approach that places them in one of the first two categories. The institution may: (1) believe it is required by the export-control regulations to take one of the more restrictive approaches; (2) want to avoid the licensing process; or (3) have no other way of guaranteeing the applicant will not mistakenly gain access to other export-controlled information beyond their job duties. Whether institutions are being unnecessarily restrictive depends both on which rationale is used and which category the institution falls under.

#### *i. Required by the Regulations*

One rationale as to why institutions may be taking approaches that place them in one of the first two categories is that they believe they are required to do so to abide by export-control regulations. Evidence that some institutions believe the two more-restrictive categories are required to comply with the regulations can be seen in the language of the Satellite Systems Engineer and Research Assistant job postings from the previous Section.<sup>275</sup> As a reminder, the Satellite Systems Engineer position stated: “Due to U.S. Export Control Restrictions only U.S. Citizens and Permanent Residents may apply.”<sup>276</sup> The institution’s use of the language “[d]ue to U.S. Export Control Restrictions” seems to imply that the institution believes that export controls mandate that it exclude all non-U.S. citizens or permanent residents. Similarly, for the Research Assistant position the language stated: “Pursuant to ITAR, only U.S. persons . . . may work with this technology.”<sup>277</sup> Again, the institution’s use of this language seems to imply that the institution believes export controls require that all non-U.S. persons be excluded from applying. Thus, both of these job postings seem to assume that export controls require them to exclude all foreign persons and, in the case of the Satellite Systems Engineer, some Protected Individuals.

However, both of these assumptions are incorrect because export-control regulations do not require the exclusion of all non-U.S. citizens or Protected Individuals from export-controlled positions. While the regulations may require any foreign person who applies for a position to obtain a license, such

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275. *Software Engineer Posting*, *supra* note 187; *Senior Professional Research Assistant*, *supra* note 271.

276. *Software Engineer Posting*, *supra* note 187.

277. *Senior Professional Research Assistant*, *supra* note 271.

a requirement is distinct from requiring institutions to exclude all foreign persons outright. Instead, the regulations allow institutions to take approaches that fall into any of the five categories. Thus, if an institution's rationale for excluding certain individuals is that it is required to do so under the regulations, its rationale is incorrect and it is being unnecessarily restrictive.

*ii. Avoiding the Licensing Process*

A second rationale for why an institution may adopt an approach that places it in one of the first two categories is that it wants to avoid the licensing process. As discussed previously, an institution may wish to avoid the licensing process for several reasons, such as administrative costs, additional time before an individual can begin working,<sup>278</sup> and increased risks associated with the requirements.<sup>279</sup> While institutions are allowed to exclude individuals to avoid the licensing process,<sup>280</sup> they do not have to fall under one of the first two categories to do so. Instead, they can choose to exclude only those foreign persons who need to receive a license, which would place them in the third category. Since institutions could adopt an approach that places them in the third category, the remaining question is whether the institution would exclude fewer individuals by adopting an approach under category three instead of the first two categories.

In the case of the first category, the answer must be yes. Institutions in the first category, by excluding all non-U.S. citizens, always exclude more individuals from applying than employers in the third category, including all Protected Individuals. Thus, those institutions that choose an approach under the first category because they want to avoid licensing requirements are always being unnecessarily restrictive.

Whether institutions who fall in the second category because they want to avoid the licensing requirements are being unnecessarily restrictive depends on which statute, ITAR or EAR, applies. Under ITAR, the same individuals who are excluded by an employer in the second category are also excluded by an employer in the third category, because all foreign persons

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278. See *supra* notes 49, 56, 80-81 and accompanying text (describing the timeframe for receiving a licensing decision under ITAR and EAR, as well as the administrative costs that accompany ITAR).

279. See *supra* Section III.A.4 (explaining the risks that can accompany an employer choosing to subject themselves to the licensing requirements, including that they may misinterpret the regulations or the foreign person's job duties may go beyond what is allowed by the licensing restrictions).

280. See discussion *supra* Section III.B.3.i (arguing that an employer excluding foreign persons who would need to receive a license in order to avoid the licensing requirements does not violate Title VII because it constitutes citizenship discrimination, not national-origin discrimination).



are required to receive a license under ITAR.<sup>281</sup> Thus, an employer who adopts an approach that places them in the second category because they want to avoid the licensing process is not being unnecessarily restrictive when the position is regulated under ITAR. Under EAR, however, not all foreign persons are required to receive a license,<sup>282</sup> which means that at least some individuals who are excluded under the second category would not be excluded under the third category. As such, an institution that adopts an approach that places them in the second category because it wants to avoid the licensing process is likely being unnecessarily restrictive when the position is regulated under EAR. Therefore, all institutions under the first category and most institutions under the second category who are hiring for a position regulated under EAR are being unnecessarily restrictive if their rationale is to avoid the licensing process.

*iii. Access to Other Export-Controlled Information*

A third rationale as to why institutions may be adopting one of the more restrictive approaches is that those institutions cannot guarantee that, even if the foreign person is not required to receive a license to work in the position, the foreign person will not accidentally gain access to other export-controlled information that would require a license. An institution that falls under the second category and excludes all foreign persons because of this rationale is not being unnecessarily restrictive. If the individual hired for the position will likely encounter other export-controlled information beyond their job duties, the only way to guarantee the export control requirements are not violated is to exclude all foreign persons from applying. However, an institution that falls under the first category because of this rationale is still being unnecessarily restrictive. The institution could have instead adopted an approach that placed them in the second category, and as a result would not have excluded all Protected Individuals from applying.

2. Problems with Being Unnecessarily Restrictive

Regardless of which rationale led an institution to be unnecessarily restrictive, it is problematic for an institution to do so. By excluding more applicants than necessary, an educational institution is both reducing the pool of qualified applicants the institution has to choose from and, in many cases, contradicting its fundamental values and mission.

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281. See *supra* notes 45–47 and accompanying text (explaining that all foreign persons are required to receive a license to access information regulated under ITAR unless an exception applies).

282. See *supra* notes 58–71 and accompanying text (explaining that whether a foreign person is required to receive a license to access information regulated under EAR depends on their countries of citizenship or permanent residence).

*i. Shrinking Pool of Applicants*

One problem with institutions being unnecessarily restrictive is that, by excluding more individuals from applying than necessary, the institutions are shrinking the pool of qualified applicants they have to choose from for each position. While the actual number of individuals who are excluded might be small in many cases, some institutional positions are also very specialized and it is likely that only a small number of individuals have the qualifications to apply in the first place. As a result, every applicant that is excluded in such a scenario can be particularly detrimental.

In addition, many institutional positions, especially those involving export-controlled information, are filled by undergraduate and graduate students or fellows.<sup>283</sup> An institution that unnecessarily excludes foreign persons and other Protected Individuals from applying because of their citizenship status may deter prospective students from foreign nations from enrolling in that institution if they know they will not be allowed to apply for positions or fellowships at the institution. Detering these students can be detrimental not only for that individual institution, but for all U.S. institutions and the nation as a whole. For example, “[n]early 1.1 million international students attended American colleges and universities in 2017[,] . . . generat[ing] \$42.4 billion in export revenue” for the United States.<sup>284</sup>

*ii. Conflicting Fundamental Interests*

A second problem with institutions being unnecessarily restrictive is that excluding applicants for positions in academia based on the fact that those applicants have a particular citizen status conflicts with the fundamental values of many institutions. These fundamental values, including disseminating knowledge to individuals across the globe, collaborating with researchers from diverse backgrounds, and fostering communities of inclusivity,<sup>285</sup> are the same interests that have always caused conflict between institutions of higher education and the federal government and led to the creation of the fundamental-research exemption.<sup>286</sup> However, because the fundamental-

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283. See Broniatowski et al., *supra* note 5, at 6 (“International students comprise a significant proportion of the U.S. graduate student population, especially in science and engineering-related fields.”); Torres, *supra* note 176, at 36 (“The U.S. has traditionally opened its doors to the best minds, both students and scientists, from around the world and still relies on foreign students to fill its doctoral programs . . .”).

284. Brook Larmer, *One of America’s Most Vital Exports, Education, Never Goes Abroad, but It Still Faces Threats*, N.Y. TIMES MAG. (Jan. 3, 2019), <https://www.nytimes.com/2019/01/03/magazine/one-of-americas-most-vital-exports-education-never-goes-abroad-but-it-still-faces-threats.html> [<https://perma.cc/Z6YL-2GHW>].

285. See *supra* notes 170–72 and accompanying text (describing some of the fundamental values of institutions that are relevant to the export-control context).

286. See discussion *supra* Section II.C.2 (describing the fundamental-research exemption and its limitations).

research exemption does not apply to all positions in higher education,<sup>287</sup> institutions must balance their fundamental interests with what level of risk they are willing to take on when deciding what approach to take in hiring for export-controlled positions. In some instances, institutions might factor in their fundamental values and still decide to take a more restrictive approach to avoid certain risks. However, when an institution is being unnecessarily restrictive, it is not avoiding any risks by adopting one of the more restrictive approaches. Instead, it is undercutting its fundamental values and potentially increasing its risk in terms of employment-discrimination claims.

## V. THREE-STEP SOLUTION

To prevent institutions from subjecting themselves to potential employment-discrimination liability or otherwise being unnecessarily restrictive in who they exclude from their export-controlled positions, this Note proposes a three-step process for institutions to follow when deciding what approach to take in hiring for an export-controlled position. The process, which prevents employers from discriminating or being unnecessarily restrictive, also allows employers to take into account the factors unique to their organization in deciding what approach to take. Notably, while the process is discussed in terms of institutions of higher education, it can also be used by any employer that is hiring for an export-controlled position. Each of the three steps is discussed below.

### A. STEP 1: ACCEPT LICENSING PROCESS

The first step an institution should take when deciding what approach to adopt when hiring for an export-controlled position is to ask itself whether it is willing to go through the licensing process for any foreign persons that might apply. To outline the question in terms of the framework, the institution must decide whether it is willing to take on the additional risks associated with approaches that fall into Categories IV and V, including risks that the institution might misinterpret the regulations and licensing requirements or that the employee's job duties could expand past the scope of the license. These additional risks must be weighed against all other factors relevant to that institution, such as its fundamental values, how many applicants it expects to apply for the position, whether it has time to wait to go through the licensing process, and any increased pressure from Congress and the Executive. These factors are by no means an exhaustive list. Ultimately, each institution must evaluate the factors particular to it and decide whether enduring the licensing process is likely to be worthwhile.

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<sup>287</sup>. See *supra* note 176 and accompanying text (stating that not all research and information at institutions of higher education are exempted under the fundamental-research exemption).

*B. STEP 2: CHOOSING A CATEGORY*

Once an institution has considered all of the relevant factors and made a decision as to whether it is willing to go through the licensing process, the next step is to determine which specific category of the framework the institution should fall into. The process for determining as much depends on the institution's answer from the first step.

1. Those that Accept the Process

Institutions that decide they are willing to go through the licensing process will fall into either the fourth or fifth category of the framework. Neither category raises concerns that the institution will violate any employment-discrimination statutes or otherwise be unnecessarily restrictive. However, there are still a few considerations an institution should account for when deciding what approach to take. One consideration is that if the institution chose to adopt an approach that falls under the fifth category, it would not be listing any export-control restrictions on its job postings. As a result, the institution would be at risk of the applicant unknowingly failing to alert the institution to the fact that they are a foreign person. This would not pose a problem for an institution that has a blanket policy of checking the citizenship status of all applicants for export-controlled positions, but it is unlikely that every institution takes this approach. On the other hand, an institution must also consider whether, if it were to instead adopt an approach that placed it in the fourth category, it may inadvertently exclude some applicants. Upon seeing that the position may require them to obtain a license with which they are not familiar, for example, an individual may choose not to apply.

As a solution to this dilemma, this Note recommends that any institution that has a blanket policy of asking all individuals who will work in an export-controlled position for proof of citizenship status should make no mention of any export-control restrictions—an approach that aligns with the fifth category. This way, if the applicant does not alert the institution to the fact that they are a foreign person, when the institution reviews the applicant's documentation, the institution will be alerted to the applicant's citizenship status. As a result, the institution will avoid inadvertently excluding any applicants who misinterpret the requirement and do not apply as a result. On the other hand, if the institution does not have a blanket policy of asking for proof of citizenship status, the institution should take an approach that aligns with the fourth category, so as to put applicants on notice of the requirements.

2. Those that Reject the Process

For institutions that decide they are not willing to go through the licensing process, the second step of choosing a specific category is critical for ensuring the institution does not adopt an unnecessarily restrictive approach

or otherwise violate any employment-discrimination statutes. These institutions should, in almost every instance, choose an approach that places them in the third category, as opposed to the first two categories. The third category is recommended whether the position is regulated under ITAR or EAR. Choosing an approach that falls in the third category is important when the position is regulated under EAR because if an institution is hiring for a position regulated under EAR and it chooses an approach that places it in the second category instead of the third, it risks a foreign person who is not required to receive a license bringing a national origin disparate-impact claim against it. In addition, depending on the employer's rationale for choosing the second category, it may be unnecessarily restricting applicants from applying, particularly if its rationale is to avoid the licensing process.

While choosing an approach under the third category is especially important when the position is regulated under EAR, it is also important when the institution believes the position is regulated under ITAR. As the Research Assistant job posting illustrates,<sup>288</sup> an institution might mistakenly believe its position is regulated under ITAR when it is actually regulated under EAR. If an institution in this situation had adopted an approach that accords with the second category, it could be liable under a Title VII disparate-impact claim. However, if the institution had adopted an approach under the third category, it would not be liable because only those individuals who need to receive a license are excluded. In addition, even if the position is actually regulated under ITAR, all that happens, should the institution adopt an approach under the third category, is that the same individuals are excluded as if the institution had adopted an approach under the second category. Thus, in most instances an institution should adopt an approach under the third category if it wishes to avoid the licensing process. This is the case whether the position is regulated under ITAR or EAR.

One exception to this recommendation applies when an institution's rationale for choosing an approach that falls under the second category is that it knows that any foreign person hired for the position, whether they need to receive a license or not, could accidentally come across other export-controlled information beyond the scope of their work that the institution has no way of reasonably preventing. In such an instance, the employer should choose the second category and exclude all foreign persons. By excluding all foreign persons, the institution will avoid the possibility of any foreign person mistakenly coming across export-controlled information. Except for this specific situation, however, employers should choose an approach under the third category.

The one category that institutions should never choose is the first category, which excludes all non-U.S. citizens or non-U.S. citizens and lawfully

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<sup>288</sup>. See discussion *supra* Section IV.A (explaining how the job in the posting might actually have been regulated under EAR, as opposed to ITAR).

admitted permanent residents. Most importantly, this approach clearly violates the IRCA's provision against citizenship discrimination.<sup>289</sup> In addition, institutions under this category, no matter their rationale, are being unnecessarily restrictive. The only difference between adopting an approach under the first category versus an approach under the second category is that certain Protected Individuals are prevented from applying under the first category. However, there is no reason to exclude Protected Individuals. Protected Individuals are not regulated under ITAR or EAR and thus they place an institution at no greater risk of violating export-control regulations than a U.S. citizen.

### C. STEP 3: APPLICABLE LANGUAGE

Once an institution has chosen a specific category, the final step is to develop appropriate language for the job posting. Developing appropriate language ensures that the category an institution chooses in step two is accurately reflected in the job posting. To aid in drafting appropriate language, this Note has provided language below that is recommended for all institutions that fall in the second, third, and fourth categories.

#### 1. Category II Language

First, an example of standard language that could be used to properly exclude all foreign persons from consideration for a job involving export-controlled information under the second category is: **“Due to federal export-control regulations, [Employer] has determined that applicants must be either a U.S. Citizen or other Protected Individual, as defined under 8 U.S.C. § 1324b(a)(3) (including lawfully admitted permanent residents, temporary residents, refugees, or individuals granted asylum), to apply for [Position].”** This language allows institutions and other employers to exclude all foreign persons from consideration for the position, while also preventing the employer from excluding certain Protected Individuals in violation of the IRCA. The language also makes it clear to job applicants what a “Protected Individual” is, which eliminates the risk that some Protected Individuals would be deterred from applying because they are unsure if their citizenship status qualifies. Finally, the language implies it was the employer's decision to exclude all foreign persons instead of the export-control regulations requiring such an exclusion.

#### 2. Category III Language

An example of standard language that could be used to properly exclude all foreign persons who would need to receive a license under the third category is: **“Due to federal export-control regulations, (Employer) has**

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<sup>289</sup>. See discussion *supra* Section III.B.1 (arguing that employers who fall into the first category are in clear violation of the IRCA by excluding Protected Individuals).

determined that applicants must 1) be either a U.S. Citizen or other Protected Individual, as defined under 8 U.S.C. § 1324b(a)(3) (including lawfully admitted permanent residents, temporary residents, refugees, or individuals granted asylum), or 2) otherwise be able to perform the job without needing to receive a license under [ITAR or EAR]. For help determining whether you would need to receive a license under [ITAR or EAR] to perform the job, please contact [Employer Contact].” While this language can be used by an institution that is hiring for a position regulated under ITAR or EAR, it is especially important for instances where the position is regulated under EAR. That is because it allows certain foreign persons to apply if their specific country of citizenship or permanent residence does not require them to receive a license. While any applicant that may wish to apply might not know whether they need to receive a license to work in the position, by including an employer contact, the language prevents any confusion on the part of the applicant and puts them in touch with an individual at that institution who is knowledgeable about both the export-control regulations in general and, hopefully, the specific project.

### 3. Category IV Language

An example of standard language that could be used to properly exclude only foreign persons who would not be able to obtain a license under the fourth category is: “**Applicants of all citizenship statuses are eligible to apply for this position. However, any applicant who is neither a U.S. Citizen or other Protected Individual, as defined under 8 U.S.C. § 1324b(a)(3) (including lawfully admitted permanent residents, temporary residents, refugees, or individuals granted asylum), may need to receive a license to work in this position due to federal export-control regulations. If you are required to receive a license, as determined by the [State Department or Department of Commerce] your offer of employment will be contingent upon first receiving a license under [ITAR or EAR].**” This language makes clear that all foreign persons are allowed to apply for the position. However, it also makes it clear to them that their final offer of employment is contingent on their receiving the pertinent license.

## VI. CONCLUSION

Institutions of higher education, like other employers who work with export-controlled information, are often faced with the difficult decision of how to go about hiring for a position that will interact with that information. While there is no one approach that will work best for all institutions, there are certain approaches that all institutions should avoid. As a result, this Note has laid out a framework to categorize the different approaches institutions have taken in excluding foreign persons from export-controlled positions, with the objective of shedding light on how certain institutions are both discriminating against certain applicants and otherwise being unnecessarily

restrictive. In addition, this Note holds out the framework, in conjunction with the three-step process laid out above, as a way to help institutions choose an approach that works best for them.