

Employment: Sanctions and Discrimination Briefing

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Introduction

This briefing note provides an overview of the interplay between US sanctions against Iran (the “**Sanctions**”) and the UK’s anti-discrimination laws.

There has been a lot of attention from the media relating to how the Sanctions may result in discriminatory behaviour against Iranian nationals. For example, recently a group of Iranians, some of whom are British citizens, have taken RBS, NatWest and Lloyds to court for what they believe is a misreading of the Sanctions against Iran. They allege they have been subjected to racial discrimination and that the banks have breached provisions of the Equality Act 2010, after being told that their bank accounts had to close. The banks strongly deny any racial discrimination and have stated that they are simply complying with legal and regulatory obligations.

Furthermore, claims relating to alleged breaches of the Sanctions against Iran, Sudan and other countries (which forbid banks from processing transactions through the US financial system) may result in the French bank BNP Paribas having to pay more than US\$10bn (£3bn) in fines. This demonstrates the heavy handed and strict approach that the US is taking in relation to breaches of the Sanctions. US\$10bn (£3bn) would be the biggest ever fine for violation of the Sanctions. Two years ago, the British bank Standard Chartered paid US\$327m (US\$132m) in civil penalties to the Department of Treasury, Office of Foreign Assets Control (“OFAC”) and US\$227m in criminal penalties to the Department of Justice to settle allegations of breaking sanctions against Iran, Sudan, Burma and Libya; in 2012, HSBC settled a civil penalty action by OFAC for breaches of the Sanctions by paying US\$375m and ING settled a civil penalty action by OFAC for breaches of the Sanctions by paying US\$619m.

UK Anti-Discrimination Laws and the Sanctions

In the UK the Equality Act 2010 (the “**Act**”) outlaws discrimination and prevents employers and/or prospective employers from subjecting their employees or job candidates to less favourable treatment because of a “protected characteristic”. The protected characteristics are: age;

“The Sanctions against Iran are complex. They are not encapsulated in any single statute or other easily identifiable source...”

disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race (including nationality); religion or belief; sex; and sexual orientation. Examples of less favourable treatment include not offering, or revoking an offer of, employment to an individual because of his/her race or nationality, or terminating an individual’s employment because of his/her race and/or nationality.

The Sanctions against Iran are complex. They are not encapsulated in any single statute or other easily identifiable source, but rather are incorporated into a complex array of statutes, regulations and executive orders, and are subject to change without prior notice. There are, however, a number of provisions that would be applicable to the employment of an Iranian national by a US company and/or companies owned or controlled by a “US Person”. This would include a UK based company which is “owned or controlled” by a US Person if that US Person: “(i) holds a 50 percent or greater equity interest by vote or value in the entity; (ii) holds a majority of seats on the board of directors of the entity; or (iii) otherwise controls the actions, policies, or personnel decisions of the entity.” Although there are some provisions of the sanctions that apply to certain sectors of the Iranian economy (such as oil production and maritime), the Sanctions that relate to employment of Iranian nationals are not limited to sector or type of service provided.

In general, US Persons are prohibited from doing any business with Iran, including importing services from Iran into the US or for the benefit of a US Person. The Sanctions make it unlawful for a US Person (or a Person owned or controlled by a US Person) to hire an Iranian national ordinarily resident in Iran to come to the US solely or for the principal purpose of engaging in employment on behalf of an entity in Iran or as the employee of a US Person, unless authorised. (The full text of the regulations concerning authorised employment can be found [online](#)¹, it refers to applications for immigrant and non-immigrant visas for certain categories of workers.)

There is, however, no definition of what is meant by “resident in Iran” and whether a person should be considered so will depend on the circumstances of each case, having regard to a number of factors. Richard Newcomb, Director of OFAC, has commented on whether an Iranian who is resident in Iran is violating or would violate the Sanctions by going to the US and engaging in employment there. He confirmed that it is unlawful for a US employer (and any US Person) to issue a binding offer of employment to an Iranian resident in Iran or to advance funds for him or her to enter for that purpose, since this would constitute an unlawful importation of Iranian-origin services. He also noted that the Sanctions do not specifically cover any services provided in the US by an Iranian national “resident in the US”. Therefore, it appears that it is not a violation of the Sanctions to offer employment to an Iranian national once that person is resident in the US (or UK). “Resident” according to OFAC, means any Iranian national living in the US, irrespective of whether the Iranian is a US permanent resident or a temporary resident.

Of course, companies bound by the Sanctions will need to ensure that they carry out an adequate due diligence exercise as part of an overall compliance regime. It has been reported that some UK subsidiaries of US companies have been directed to ask certain pre-employment questions of Iranian nationals applying for employment. Questions include asking Iranian nationals how frequently they visit Iran; whether they have family there; whether they have property there; and/or whether they have a bank account there.

The example interview questions listed above are likely to be asked as part of the wider due diligence process to ensure that any company (and prospective employer) which is subject to the Sanctions is not acting in breach of them. The questions are likely to be

1 <http://www.ecfr.gov/cgi-bin/text-idx?SID=4b81b1224d21e43e32bc90bb68fb6913&node=31:3.1.1.1.21.5.1.5&rgn=div8>

asked to address: (i) whether an Iranian national is “ordinarily resident in Iran”; (ii) whether an Iranian national will be exporting goods to Iran; and (iii) whether transactions with an Iranian financial institution will be involved, all of which relate to prohibited actions under the Sanctions. But could the asking of such questions be regarded as discriminatory in the UK?

Potential breach of UK Equality Act 2010

On balance, whilst certain pre-employment questions may be justifiable, care must be taken if, as a result of any answers provided, a job offer is not made or is revoked or the Iranian national is treated in any other way less favourably, as this increases the risk of a potential discrimination claim pursuant to the Equality Act 2010. In defending any such claim, the company would need to demonstrate that any less favourable treatment was not because of the candidate’s nationality, but because of an obligation imposed on the company by virtue of the Sanctions or some other legal obligation or regulation.

The obvious difficulty in defending any discrimination claim relating to the Sanctions is that they are complex and open to interpretation. Therefore, before taking any action that could be regarded as less favourable treatment, companies are well advised to ensure that internal compliance teams are involved and can satisfy themselves that a breach of the Sanctions or other applicable regulations would take place if an individual of a particular nationality is employed. An over-zealous or presumptive approach to the application of the Sanctions runs the risk of liability for race discrimination.

This is clearly a complex area, both politically and legally. An employer who is contemplating employing an Iranian national may also want to seek legal advice to ensure that in the process of complying with the Sanctions they do not inadvertently subject the individuals to discrimination.

Contacts

If you would like to discuss any of the issues raised in this Briefing, please get in touch with a member of our team listed below, or with your regular contact at Watson, Farley & Williams.



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