

Foreign Employees: The Deemed Export Issue

Law360, New York (June 03, 2010) -- It may come as a surprise that U.S. export control regulations apply to the employment of a non-U.S. citizen employee in the U.S. as well as abroad. A license may be required for the employee to have access to export controlled items, information, technology or software. If that is a surprise, then it may be a shock to learn that a license may also be required to share information with a foreign parent company, subsidiary, contractor or customer.

Unfortunately, it is not uncommon for a U.S. business to first learn of the requirement to license a foreign national's access to a controlled item, information, technology or software as a result of an investigation by the federal authorities. With the shortage of engineers, chemists, software writers

researchers and scientists who are U.S. citizens, the already significant impact of these regulations is likely to continue to be an issue for years to come.

In brief, U.S. export regulations control the export of certain items, information, technologies and software. If something is export-controlled, then allowing the unlicensed access to it by a person who is not a U.S. citizen, or lawful permanent resident ("green card" holder), could be a violation of the regulations with the potential for very large fines and penalties. Extreme cases can also result in criminal prosecution. Under the regulations, exposure to an export controlled item, technology, information or software, is "deemed" to be an export to the country of citizenship or nationality of the foreign person who has been allowed access.

For instance, making a technical presentation in the U.S. to a foreign national customer representative, hiring a foreign national employee or consultant, working with foreign nationals abroad in concurrent engineering (whether in person or via telephone and e-mail), even allowing a foreign national to have access to a computer server where controlled information resides, are all instances where deemed exports may occur.

Even among U.S. employers who are aware of the deemed export issue, confusion often exists concerning the difference between lawful permanent residence and a work visa such as an I-9. A work visa is not a green card. A lawful permanent resident will have a valid green card.



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So what does the law require? It depends on whether the item, technology, information, or software is controlled by the Department of Commerce's Bureau of Industry and Security ("BIS") or by the State Department's Directorate of Defense Trade Controls ("DDTC"). If the item is a commercial item it is probably controlled by the BIS. The question as to whether a license is required will depend on the level of control applicable to the item as well as the country of citizenship of the foreign person. If the item is for the military, then the DDTC's regulations probably apply. Military items almost always require that the foreign national have a license. Foreign nationals from certain countries — notably China — cannot be licensed for military items.

Effective compliance efforts start with identifying what, if any, controlled items, technology, information, or software a company has. From that starting point, a company can then begin to assess whether a license will be required for foreign national access — whether by employees, consultants, foreign affiliates or customers.

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