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USCIS Throws HR into the Thicket of Deemed Exports as of Feb 20, 2011

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You are human resources manager who signs the forms for sponsorship of key foreign workers. Up to now, you have been at least vaguely aware of "deemed export" requirements, but it really wasn't your problem. But starting February 20, 2011, USCIS requires you to certify that you have read and the employer is in compliance with the "deemed export" rules. That's actually a mouthful.

Essentially, a U.S. employer must not expose foreign workers in the U.S. to technology having potential harmful use by foreign military or terrorists, any more than it could ship the technology to other countries. This mainly affects institutions designing sophisticated equipment and software. But now every employer sponsoring a temporary professional worker (H-1B, L-1, and O-1 status) must affirmatively make a certification about it, and the onus falls initially on HR, who must push the inquiry to the rest of the institution.

The deemed export concept sounds fairly simple, but the regulations and compliance process are complex. The required certification first says the company has read the regulations. Those are long and full of terms lacking clear definitions. They include lists of types of things, and "technology" for those things would be technical specifications, plans, blueprints, etc. The lists also include technologies such as computer encryption code. Items in these lists are not clearly defined, and they have confusing exceptions. There are exceptions for "publicly available" technologies, but the parameters of that exception are tricky.

An HR manager does not likely know or understand what the technologies are, whether they are used or available in the institution, or whether the foreign national being sponsored will ever have access to them. Even technology of customers and vendors may count if the foreign employee may have access to it. Misclassifications by companies are common, and the safe bet in close cases is to get a formal opinion from the government. Thus, to be able to sign the immigration form, the HR manager needs to rely on the efforts and assurances of others who do not "report" to HR.

The larger the institution, the more elaborate the compliance efforts need to be. In a few companies, the HR manager might quickly confirm that a technical compliance department already has in place a comprehensive export compliance plan and can receive a confirmation from that department concerning which box to check (either the worker will not be exposed to covered technologies at all—whether because the company has none or because the company has effective restrictions to keep the foreign national away from them; or exposure to covered technologies is expected, and the foreign worker's access will be prevented unless and until a license is obtained).

But in real life, few companies have a truly comprehensive plan that integrates the business units, the technology and compliance departments, and HR, and work is required. Deemed export compliance is harder than with goods, Most companies need an expert to do it right.

Happily, only a small percentage of companies actually handle covered technologies, and for others the consequence of lacking a comprehensive compliance process is low. But for those companies using covered technologies, the consequences of noncompliance are big. Penalties include civil fines of up to $500,000 per

violation, criminal penalties of up to $1,000,000 per violation and up to 10 years in prison, a denial of export privileges, and debarment from U.S. government contracts.

Unfortunately, it is not always obvious that an institution uses covered technology. In close cases, the institution might ask the government for a formal "classification." While licenses are more likely to be required if the worker is from Cuba, Iran, North Korea, Sudan, Syria, Russia, and China, some technologies require a license for access by any foreign worker.

Naturally, the government is more likely to pursue serious sanctions when violation has been knowing and intentional. But the government has an interest in forcing all employers of foreign workers to think more carefully and systematically about what technologies they use. If the government discovers that a manager has signed immigration forms without confirming real "deemed export" compliance, the government may choose to make an example of the manager to deter negligence by others, just as it has prosecuted HR managers and higher executives for knowing or even reckless employment of unauthorized aliens. The most obvious prosecution tool is 18 U.S.C. § 1001, which makes it a federal crime to make false or misleading statements to the government, including on Form I-129.

Properly informed and concerned HR managers and counsel are likely to elevate deemed export issues to higher levels in their institutions. Some may push to have higher level managers or compliance managers sign Forms I-129 to sponsor workers. These are the kinds of conversations and actions that USCIS and its friends in the Departments of Commerce, State, Treasury, and Defense hoped to spur by adding the deemed export certification to Form I-129.

How We Can Help

We regularly represent corporate and individual clients who may be subject to requirements for export licensing. We counsel companies prospectively on the development of internal compliance mechanisms that minimize the risk and potential for violation of such laws. We perform preliminary audits of company policies and mechanisms, review sample transactions, and offer recommendations where improvements of changes should be made. We also provide complete compliance manuals, the architecture of a compliance program, for on-going implementation, review and improvement of compliance mechanisms. We believe that such service is an important element in the "best practices" program for any U.S. business entity transacting international business in today's regulatory climate.

Even despite best efforts, government enforcement actions sometimes occur, typically when employees fail to follow procedures. We defend clients who have been charged with the types of violations noted above. We advocated for clients before the Departments of Homeland Security (Customs), Commerce, Treasury, and others, seeking to avoid or mitigate penalties. We also defend criminal investigations and prosecutions in concert with our firm's White Collar Crime Group.

We do not incorporate export/import compliance services into our immigration services unless we have specifically agreed in writing to do so and have charged additional fees for this important service. Immigration clients should not presume that in handling immigration matters we have evaluated their movement or assignment of personnel for export/import compliance. We are happy to discuss integration of immigration and export/import compliance services.

For further information or assistance please contact one of our immigration attorneys.