

Human Resources Guide to Deemed Exports

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Deemed Export Overview

U.S. export laws are not limited to just physical shipment abroad. They also apply to technology transfers involving foreign nationals located inside or outside of the United States. When technology or source code is transferred to a foreign national, it is “deemed” to have been exported to that person’s home country. If export laws prohibit a particular technology transfer, the government provides a process to apply for an export license. Most license applications are approved; however, applications take time to process. Failure to comply with U.S. export laws can lead to civil fines up to \$500,000 per violation, denial of export privileges, criminal fines up to \$1 million per violation and even imprisonment. Therefore, organizations subject to U.S. laws must address the “deemed” export situation when foreign national employees or contractors are present.

Who is a Foreign National?

For purposes of U.S. export laws, a foreign national is generally any person that is not currently a U.S. citizen or permanent resident. In addition, any person considered to be a protected individual under the Immigration and Nationality Act is generally not considered to be a foreign national.

Examples of Foreign Nationals:

- A non-U.S. citizen with an H-1B visa
- A non-U.S. citizen who has applied for a Green Card, but it has not yet been issued

Examples of Persons Not Considered Foreign Nationals:

- A person holding dual citizenship, where the United States is one of the countries
- A non-U.S. citizen who has obtained official U.S. permanent residency (valid Green Card)

What is the Foreign National’s Home Country?

Export laws focus on the foreign national’s citizenship, domicile/permanent residency and/or country of birth. Thus, it is possible that a foreign national may have more than one “home country”. However, as noted above, if the United States is one of those countries, then the person may not be a foreign national.

Nationals of Embargoed Countries

The United States maintains near embargoes on several countries, which are currently Cuba, Iran, North Korea, Sudan and Syria. While some organizations may find that the transfer of technology to nationals of these countries falls within an export license exemption, nationals of these countries should generally trigger additional due diligence to ensure compliance with export laws. Not only is the transfer of most controlled technology prohibited, any form of compensation may also require a license.

What Technology is Export Controlled?

The types of controlled technology include technical information concerning items in which the United States has an interest for national security, nonproliferation, foreign policy, anti-terrorism or other reasons. There is a wide range of technology categories subject to export controls and many are not obvious given their widespread commercial use. Each industry is impacted differently and organizations anywhere within the supply, manufacturing or distribution chains are responsible for export compliance.

Example Categories of Controlled Items:

- Biological Materials
- Chemicals
- Computers
- Electronics
- Information Security & Encryption
- Lasers & Sensors
- Marine
- Material Processing
- Military-Related
- Navigation & Avionics
- Propulsions Systems
- Telecommunications & Networking
- Weapons & Law Enforcement

Controlled technology can include the technical information for the design, development, production, disposal or use of controlled items. Even if these items are merely used in the course of business, this could have deemed export implications. However, most publicly available information is exempt from the license requirements.

How is Technology Transferred?

Controlled technology can take many forms, including technical data, technical assistance and software source code. Such information may be transferred through visual inspection of equipment or facilities, oral exchanges with others, the application of personal knowledge or technical expertise to a particular situation, transfers of electronic or physical documents, review of technical drawings/blueprints or other similar methods. However, if a person is only given information concerning how to operate certain controlled equipment, this is usually not enough to trigger an export license requirement.

Overseas Offices

Overseas offices are not immune from the deemed export issue. Some U.S. export laws treat a foreign subsidiaries the same as their U.S. parent companies. Other export laws apply to transfers world-wide if they involve U.S.-origin technology. Therefore, transfers to foreign nationals located in an overseas office may still be subject to the deemed export regulations, even if a U.S. office does not make the transfer.

License Requirement

The export regulations provide the rules for determining when a license is required to transfer controlled technology to a particular foreign national. This license requirement largely depends on the pairing of the foreign national's home country with the control level of the technology involved. Therefore, organizations should determine whether a license is required on a case-by-case basis.

Other Restricted Persons

The government maintains various lists of persons with whom U.S. companies are generally prohibited from transacting. These prohibitions are separate from those based on specific technology exports. The prohibitions can include virtually any employment activity, such as paying a salary to the person. Designated persons include both foreign nationals and U.S. persons. Companies are encouraged to screen employees and contractors against these lists.

Visas

Since 2011, organizations petitioning the U.S. government for certain foreign nationals to work or be trained in the United States (H-1B, L-1, etc.) must certify whether an export license is required for the release of technology to the individual. This new procedure mandates that petitioners evaluate the deemed export implications for the particular circumstances.

Part 6 of Form I-129 - Petition for a Nonimmigrant Worker

Part 6. Certification Regarding the Release of Controlled Technology or Technical Data to Foreign Persons in the United States

(For H-1B, H-1B1 Chile/Singapore, L-1, and O-1A petitions only. This section of the form is not required for all other classifications. See Page 3 of the Instructions before completing this section.)

Check Box 1 or Box 2 as appropriate:

With respect to the technology or technical data the petitioner will release or otherwise provide access to the beneficiary, the petitioner certifies that it has reviewed the Export Administration Regulations (EAR) and the International Traffic in Arms Regulations (ITAR) and has determined that:

- 1. A license is not required from either U.S. Department of Commerce or the U.S. Department of State to release such technology or technical data to the foreign person; or
- 2. A license is required from the U.S. Department of Commerce and/or the U.S. Department of State to release such technology or technical data to the beneficiary and the petitioner will prevent access to the controlled technology or technical data by the beneficiary until and unless the petitioner has received the required license or other authorization to release it to the beneficiary.

Export License Applications

Once an organization determines that it requires an export license, it should prepare a license application with the relevant government entity. In most cases, this will be the Department of Commerce. However, depending on the circumstances, the organization may need to file with other departments, such as the Department of State or Department of the Treasury.

Applications typically include specific details about the individual's background (previous residences, work history, etc.), the job position and the scope of technology that will be transferred. Standard applications take roughly 45-90 days for the government to process. Applications involving nationals of embargoed countries, restricted persons or highly-controlled technology may take much longer to process. Although organizations may be able to still employ the person while the application is pending, they should take measures to ensure they do not violate export laws before the license issues.

The Role of Human Resources

Organizations take different approaches to export compliance concerning foreign nationals and restricted persons. Human resource departments may maintain deemed export review procedures in coordination with the legal, immigration or trade compliance departments. However, some organizations simply do not have an internal hierarchy that promotes such partnership. In these cases, the responsibility normally rests with human resources and/or the hiring manager's business unit.

Example Basic Compliance Procedures

Identify the Scope of Applicable Export Controls

1. Determine which (if any) controlled technologies are present at the organization
2. Determine which nationalities trigger a possible export license requirement

New Hire Process

1. Screen prospective new hires against the restricted persons lists
2. Condition job offers on a successful export review outcome
3. Identify foreign national applicants that may require an export license
4. Initiate an export review process to determine whether the foreign national's job duties would expose him/her to controlled technology
5. Prepare an export license application or identify procedures to prevent controlled technology from being transferred

Existing Employees

1. Conduct a new export review whenever there is a significant change in job responsibilities or the employee transfers to a new business unit
2. Conduct a new export review whenever there is a change to the types of controlled technologies present at the organization

Routine Audit

1. In coordination with other audit activities, review deemed export compliance procedures and determine whether they are effective and fully implemented

Questions? For More Information:

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