

PUBLICATION

Employing Foreign National Can Require Export License

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Many U.S. business may be surprised to find that they are "deemed" to be "exporting" a technology simply by exposing a foreign national employee to the technology in the U.S., even if the business does not sell any products or services abroad.

U.S. law prohibits the export of certain products and technologies. An export of technology is "deemed" to take place even when a foreign national employee is exposed to it within the United States. The justification for the "deemed export" rule is that there is no more effective way of disclosing sensitive technical information (e.g., design know-how) than to work side-by-side in a laboratory or on the production floor of a company. An affected employer can apply for a license, which will involve assurances of company controls to prevent disclosure of the most sensitive types of technologies.

The word "on the street" is that the Bureau of Export Administration (part of Department of Commerce) is planning to get more serious about enforcing this. Criminal penalties do exist, but serious fines and deportability of alien workers more often result from violations.

In general, controlled technologies for export include proprietary technologies originated, in whole or in part, in the U.S., which are also dual-use (i.e., have both civil and military applications) and are subject to one or more control regimes, such as National Security, Nuclear Proliferation, Missile Technology, or Chemical and Biological Warfare. Exclusions include publicly available information (patent applications, published unencrypted software), fundamental research, and educational technology.

To determine whether the product or technology is subject to licensing, a competent export licensing law attorney needs to know: What is the item you intend to export or reexport; Where is it going; Who will receive it; What will they do with it; and, What other activities are they involved in?

On the first step (what is the item), one must consult the Commerce Control List (CCL). A brief review of the alphabetical listing of controlled products provides a sense of the breadth of the controls. Of course, only "technologies" are covered by the deeming rule, and not every technology on the list would require a permit for an alien to be around.

How We Can Help

Baker Donelson's Immigration Team works with the firm's Labor & Employment Law, International, and White Collar Crime Groups to help employer clients and their alien employees determine ahead of time whether export licensing rules will be implicated in a specific setting and to defend employers and workers in proceedings brought by the Commerce Department concerning export licensing violations.