



# THE WORKPLACE WORD

www.swlaw.com

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## IS YOUR HUMAN RESOURCES DEPARTMENT IN THE EXPORT BUSINESS?

### FOREIGN NATIONAL EMPLOYEES AND THE DEEMED EXPORT RULES

Most companies understand that the export of high tech and military items may be subject to regulation by the federal government. However, companies are often very surprised to learn that the release of company technology to a foreign national employee, *wholly within the United States*, is considered an "export" to that foreign national's home country. This so-called "deemed export" is subject to the same federal export controls that an overseas shipment would trigger.

**What are export controls?** The U.S. government restricts the transfer abroad of certain U.S.-produced merchandise, information, software and services. These restrictions depend, in large measure, on the nature of the item(s) being exported and the country to which they are being sent. The primary laws and regulations governing the control of exports are:

- The Export Administration Act, ("EAR") which controls exports of products, technology and software with commercial or military applications (not subject to the exclusive control of the Department of State).
- The Arms Export Controls Act, ("ITAR") which controls exports of military and defense articles, including technical data and assistance.
- The multiple U.S. government agencies' denied and debarred persons lists.

**What is a "deemed" export?** A deemed export occurs when a foreign national is given controlled information, access to controlled technology or technical assistance inside the U.S. Because foreign nationals are considered to have primary loyalty to their home nations, the U.S. government considers the transfer of controlled items to these individuals to be essentially the same as sending these items abroad. Thus, the government applies the export licensing regulations although nothing tangible ever leaves the country.



**Who qualifies as a foreign national?** A foreign national is any person who is not:

- A U.S. citizen or national,
- A U.S. lawful permanent resident (e.g., “green card” holder), or
- An otherwise “protected person” (e.g., refugee, asylee, legal temporary agricultural worker) as defined under U.S. law.

Typically, foreign nationals are temporary residents, entering the U.S. under H-1B or J visas, F-1 student visas or foreigners visiting the U.S. for specialized training or sales presentations.

**How do deemed exports occur?** Deemed exports may occur when a foreign national employee or visitor sees blueprints, specifications, other documents, computer programming, software development, or simply by visual inspection of equipment and facilities in the U.S. In fact, deemed exports are very likely to occur whenever a foreign national employee has access to any item covered by U.S. export controls for the employee’s home country.

**How do we know if our company’s technology is covered by the export control regulations?** The EAR and the ITAR provide detailed classifications systems, lists and descriptions of controlled items. The government will also issue rulings concerning classification and jurisdiction of specific technology. These rulings are legally binding and may be relied upon by a company to insure its compliance.

**How can government authorization for deemed exports be obtained?** An employer can obtain a “deemed export license” for a foreign national employee from the Department of Commerce covering technology and software under its control. The application process usually takes about 45 days and the license is valid for two years or for the period remaining on the employee’s visa. For ITAR-controlled items, an employer can obtain a deemed export license or obtain approval of a technical assistance agreement from the Department of State. These licenses

and approvals take longer, generally from 60 days to over one year.

It is the policy of the Commerce Department to deny deemed export license applications for nationals of Cuba, Iran and other embargoed countries. The Department of State will not issue deemed export licenses for nationals of China, Cuba, Iran, Syria, Venezuela and other countries subject to U.S. and United Nations arms embargoes.

**How do we screen our foreign national applicants and employees?** A company’s Human Resources department will usually have the most detailed information concerning an employee’s (or prospective employee’s) immigration status and nationality. For any company that possesses controlled technology, it is essential that the current export control status of that technology be reviewed with respect to all foreign national employees. Such screening should occur before the foreign national is hired. If it is determined that a license is required, it is important to properly and timely apply for licensing.

It is also recommended that employers prepare and maintain a procedures manual for assuring compliance with the deemed export rules. Doing so provides a useful written framework which makes actual compliance far more likely, and demonstrates the company’s good intentions to the federal government in the event there is a problem in this area in the future.

**What are the penalties for non-compliance?** Penalties can be severe, up to \$250,000 per violation or two times the value of the material involved, including the possible loss of export privileges (civil), and up to \$1,000,000 and ten years imprisonment (criminal). There is a cost of compliance but it is far preferable to the cost of going through a penalty proceeding.

The government’s control of exports, including “deemed” exports, involves a complex regulatory scheme. For more information regarding the content of this newsletter, please contact a Snell & Wilmer attorney.



## Upcoming Event

### FOCUS ON THE WORKPLACE 2008:

#### EMPLOYMENT ISSUES IN A DECLINING ECONOMY - LAS VEGAS

Date: June 4, 2008

Time: 7:00- 7:30 Registration and Breakfast; 7:30- 11:45 Program

Parking Info: Parking available in visitors parking the parking garage adjacent to the building

RSVP's: Kimberly Ferrari at  
kferrari@swlaw.com or 702.784.5200 by June 1, 2008.

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