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Compliance with Export Controls and Employment Laws: A View from the Private Sector

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Overview:

- A. Any Release of Technology or Source Code to a Foreign National is Deemed to be an Export of that Technology or Source Code to the Foreign National's Home Country

- B. Implications:
 - 1. An Export License Will be Required for the Deemed Export of Technology or Source Code if an Export License Would be Required for the Export of the Technology or Source Code to the Foreign National's Home Country

Overview:

2. ITAR: An Export License Will be Required for the Deemed Export of Technical Data, as Defined in Section 120.10 of the International Traffic in Arms Regulations and Listed on the United States Munitions List to a Foreign National of Any Country Except Canada.

Note: Employees who are dual citizens require a license, Technology Assistant Agreement, or Manufacturing License Agreement for both countries of citizenship. In the Matter of General Motors/General Dynamics.

Overview:

3. EAR: A Letter of Assurance from the Foreign National Will be Required if a Letter of Assurance Would be Required for the Export of the Technology or Source Code to the Foreign National's Home Country under License Exception TSR.

Exceptions:

The Deemed Export Rules in the EAR and in the ITAR Do Not Apply if:

1. The Foreign National Has Been Granted Permanent Resident Alien Status (i.e., a "Green Card") in the United States
2. The Foreign National Has Been Granted "Protected Individual" Status (e.g., Refugee or Political Asylum) in the United States

The Release of Technology or Source Code:

1. Visual Inspection of Technology and its Applications
2. Access to Technology or Physical Media Embodying Technology (i.e., blueprints, designs, specification sheets, databases, etc.)
3. Technical Training and Technical Assistance

The Release of Technology or Source Code:

4. Oral or Electronic Exchanges of Information
5. Application to Situations Abroad of Technical Knowledge or Experience Acquired in the United States
6. DDTC's interpretation of ITAR: Release = mere access by an employee to technology posted on a company's intranet. In the Matter of General Motors/General Dynamics.

Fundamental Research: Proposed Qualification on “Use” of Technology

Current Version of Part 734, Supp. No. 1, Section D:
Research, Correspondence, and Informal Scientific Exchanges

“Question D(1): Do I need a license in order for a foreign graduate student to work in my laboratory?”

Answer: Not if the research on which the foreign student is working qualifies as “fundamental research under section 734.8 of this part. In that case, the research is not subject to the EAR.”

Proposed Qualification on “Use” of Technology in Conducting Fundamental Research

Add a qualification to Question D(1) from Supp. No. 1 to Part 734, stating that

“whereas no license is required for the transfer of technology to conduct ‘fundamental research,’ a license may be required if, in conducting fundamental research, the foreign graduate student needs access to technology to ‘use’ equipment if the export of the equipment to the student would require a license under the EAR.”

Employment Law Considerations

- A. Section 1324b of the Immigration Reform Control Act prohibits discrimination on the basis of citizenship against:
 - 1. U.S. Citizens
 - 2. Permanent Resident Aliens
 - 3. Refugees
 - 4. Asylum Holders
- B. Title VII of the Civil Rights Act of 1964 Prohibits Discrimination in Employment on the basis of:
 - 1. National Origin
 - 2. Race

Employment Law Defenses

- A. Section 1324b of the IRCA Allows Hiring Criteria **Required** by Law, Regulation, Executive Order or Government Contract
- B. Title VII of the Civil Rights Act Provides Exceptions based on:
 - 1. Bona Fide Occupational Qualifications (BFOQ)
 - 2. National Security Requirements
 - a. These Exceptions Are Very Narrowly Applied
- C. The National Security Legal Requirements Exception May Apply Where Statutory or Regulatory Provisions Prohibit Technology Transfers
 - 1. Section 126.1(a) of the ITAR Which Sets Forth Policies:
 - a. Prohibiting the Export of Munitions List Items (including Technical Data) to Countries Subject to a U.S. Arms Embargo (i.e., Burma, China, Haiti, Liberia, Somalia, Sudan)

Employment Law Defenses (cont.)

- b. Providing for Denial of Export Licenses for the Export of Munitions List Items (including Technical Data) to Belarus, Cuba, Iran, Libya, North Korea, Syria and Vietnam
- 2. Section 740.7(a)(2) Prohibiting Physical or Computation Access by Nationals of Cuba, Iran, North Korea, Sudan and Syria to Computers Otherwise Eligible for Export under License Exception CTP

Employment Compliance Procedures

- A. Identify the Technology or Software for which Access Will be Required for the Particular Position
- B. Identify the Countries, if any, for which an Export License is Required for the Export of that Technology or Software
- C. Initial Question: Are You:
 - 1. A Citizen or Permanent Resident of the United States; or
 - 2. A “Protected Person” within the Meaning of Section 1324b of the Immigration and Naturalization Act
- D. Response:
 - 1. If “Yes”, No Further Inquiry is Required for Deemed Export Compliance, and No Further Questions about Nationality Should be Asked
 - 2. If “No”, Further Inquiry is Required

Employment Law Compliance

- A. If the Employer's Technology and Software is Classified under EAR 99, the Employer Should be Able to:
 - 1. Ask if the Candidate is a Citizen of any Embargoed Country (Cuba, Iran, Sudan or Syria)
 - 2. If the Candidate is a Citizen of an Embargoed Country, Ask if He/She is a Permanent Resident of any other Country that is Not Included on the List of Embargoed Countries

- B. If the Employer's Technology and Software is Classified under a CCL Entry Subject to "AT" Controls (e.g., ECCN 3E001, ECCN 4E994, ECCN 5E991, etc.), the Employer Should be Able to:
 - 1. As if the Candidate is a Citizen of any Terrorist Supporting Country (Cuba, Iran, Libya, North Korea, Sudan or Syria)
 - 2. If the Candidate is a Citizen of an Embargoed Country, Ask if He/She is a Permanent Resident of any other Country that is Not Included on the List of Terrorist Supporting Countries

Employment Law Compliance (cont.)

- C. If the *Position* Requires Access to Controlled Technology or Software, the Employer Should be Able to Ask:
 - 1. Is the Candidate a Citizen of any of the Countries for which an Export License is Required for Export of that Technology or Software
 - 2. If the Candidate is a Citizen of a Controlled Country, Ask if He/She is a Permanent Resident of Another Country
- D. If the Candidate is a Citizen of a Controlled Country, the Employer Should Advise that any Employment Offer will be Conditioned Upon the Employer Obtaining an Export License for the Candidate
 - 1. Only after Employment Offer Made and Accepted Should the Employer Request Information as to Place of Birth, Nationality, Residence, Family Relationships, etc. Required for the Deemed Export License Application

Employment Law Compliance (cont.)

- E. If the Technology or Software is Controlled, its Export to Other Countries, including “Deemed Export” to Other Country Nationals May be Subject to the Requirements of License Exception TSR
 - 1. Employment Offer can be Made Contingent Upon the Employee Executing a Written Assurance in Conformance with Section 740.6(a) of the EAR

Companies that are aware of the issue have developed reasonably good Compliance Programs. Typical provisions include:

- Procedures for identifying the compliance risk during hiring phase – how and when to ask about Green Card status
- Classification matrix for technology or source code that might be shared with foreign nationals
- Coordination of hiring process with applications for Deemed Export Licenses
- Procedures for withholding controlled technology or source code from foreign nationals until licenses have been approved
- Non-disclosure agreements with employees
- Regular follow-up with supervisors of employees about scope of assigned work

But here comes a new risk to your ability to use the LPR exception!

U.S. v. Sabri Yakou, No. 04-3037 (U.S. Court of Appeals for the District of Columbia), decided January 4, 2005.

The Court held that Yakou, who was a “Lawful Permanent Resident”, i.e., a Green Card holder, had successfully renounced his LPR status.

He accomplished this without notifying the U.S. immigration or export control authorities.

Question for the Export Control Administrator: How can you tell whether, or when, an employee who is a Green Card holder has renounced his/her LPR status?

Summary of Yakou case:

Sabri Yakou was arrested by ICE agents in 2003 based on a sealed indictment.

He was charged, as a U.S. person, with brokering activities involving defense articles and defense services without prior authorization by the State Department, in violation of the Arms Export Control Act and ITAR.

He was also charged, in the alternative, as a non-U.S. person, with aiding and abetting the brokering violations committed by his son, Regard Yakou, who was a U.S. person.

The Yakous had brokered the sale of foreign-origin patrol boats to the Government of Iraq.

Their deal making was conducted overseas.

Thus, the only basis for the U.S. to assert jurisdiction over Sabri Yakou was his status as a U.S. person.

Sabri Yakou challenged his indictment, arguing that he had renounced his LPR status and, therefore, was no longer a “U.S. Person” subject to the jurisdiction of the AECA and ITAR.

The court agreed and dismissed the indictment. The court also ruled that, as a non-U.S. Person, he could not be charged with aiding and abetting the crimes of his son, who was a U.S. Person.

Who knew Sabri Yakou had renounced his LPR status?

- Not the immigration authorities
- Not the export control authorities
- Not the U.S. companies dealing with him

The district court and court of appeals made their rulings based on law and refused to have a trial to assess the facts concerning Yakou's LPR status.

They rejected the use of any "bright line" objective test for determining when an individual could voluntarily relinquish his/her LPR status.

This leaves the Export Administrator in a difficult position for managing compliance with the Deemed Export Rule.

Facts supporting Yakou's continued LPR status:

- Born in Iraq, moved to the U.K. in mid-1970's.
- Moved with family to U.S. in 1986, lived and worked there under an L-1 visa.
- Became a naturalized U.K. citizen, received British passport, but maintained Iraqi citizenship (permitted under U.K. law)
- Applied for LPR status and received Green Card in 1989.
- Lived in U.S. until 1993, when he moved to the U.K.

- Periodically visited U.S., entering under his Green Card until 2000, when he lost it (subsequently entered under his British passport).
- Applied for and obtained replacement Green Card in 2002.
- Applied for and received Social Security Card, using address where his family lived in the U.S.
- Used his family's U.S. address on his business cards and correspondence.
- Never submitted to the INS a Form I-407, "Abandonment of LPR Status".

Facts supporting Yakou's renunciation of LPR status:

- Following his arrest, he told the Government he had renounced his LPR status.
- He claimed in court pleadings that he had told his family in 1993 he was leaving the U.S. because he felt "mistreated" by law enforcement authorities, who had recently conducted search warrants at his home and office in California.
- He moved back to the U.K. in 1993 and paid no U.S. taxes since then.
- He only visited the U.S. periodically afterward, staying for short periods with family.

So, Export Administrator, suppose your company has an employee who holds a Green Card, and has transferred controlled technical data to this employee that, but for the Green Card, would have required an export license.

Many companies have assumed their export compliance responsibilities ended when the employee got that Green Card.

How would you determine whether this employee has maintained his/her LPR status, or has successfully renounced it?

Under Iran Air v. Kugelman, 996 F. 2d 1253 (D.C. Cir. 1993), the court held that civil penalties for violating the EAR can be imposed on a “strict liability” basis.

Thus, Commerce does not have to prove that your company intended or knowingly violated the Deemed Export Rule, only that you did it.

Your employee may have caused your company to violate the EAR (which could be a violation by the employee), but the deemed export violation is yours!

Tune up your compliance program by:

- Increasing the documentation of your due diligence
 - include provisions in your employment contracts, new employee orientation information, non-disclosure agreements, and statements required from employees, emphasizing that they have an obligation to notify the company immediately if they should decide to renounce or alter their immigration status, including, specifically, their LPR status.
- Following-up periodically with your Green Card holder employees to confirm that they have maintained their LPR status. Consider requiring an affirmative confirmation of LPR status annually.

Thank you!

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