

# Settlement Highlights Need for Compliance with U.S. Export Control Rules When Sponsoring Foreign Workers

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The U.S. Department of Commerce's Bureau of Industry and Security recently reached a \$115,000 civil settlement agreement with a California-based global technology company on the basis that it violated several export control regulations by allowing non-U.S. employees to have access to export-controlled technology. The settlement highlights for employers the importance of understanding and complying with U.S. export control rules.

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The company in question was alleged to have violated the Export Administration Regulations (EAR) by providing a Russian national, who was employed at the company's California headquarters, with access to export-controlled drawings, blueprints, and identification numbers for parts and production technology without first obtaining an export license for the release of such information. It was further alleged that the company, in violation of the EAR, allowed a Chinese national working at the company's subsidiary in Shenzhen, China to access EAR-controlled technology that was stored on the company's server based in Santa Clara.

## *U.S. Export Control Laws*

The U.S. federal government has adopted a comprehensive set of regulations that control and restrict the release of sensitive technologies, technical data, software code, equipment, chemical and biological materials,

and other materials, information, and services to foreign nationals or foreign countries for reasons of national security and foreign policy. The primary federal regulations governing exports that may impact employers sponsoring foreign workers in the United States are the EAR and the International Traffic in Arms Regulations (ITAR). The EAR regulates the export of “dual-use” goods, software, and technologies. These are items that are designed for commercial purposes but could have military applications, such as computers, chemical and biological substances, aircraft, and software codes. The ITAR controls the export of defense articles and defense services. It also applies to items that could have military applications, even when those are not explicitly planned.

An “export” is defined very broadly by the EAR and the ITAR to include oral or written disclosure of technical data or information, visual inspection, or actual shipment outside the United States of technology, software, code, or equipment to a foreign national. Under the EAR, an export is also deemed to have taken place when there is a transfer, release, or disclosure of U.S. export-controlled technical information to a foreign national inside the United States. Referred to as the “deemed export” rule, such a transfer, release, or disclosure to a foreign national in the United States is deemed to be an export to the foreign national’s home country.

A license may be required for a foreign national to access technology or information regulated under the EAR and the ITAR, depending on the reasons for the control applicable to the particular items and the purposes for which the items will be used. Under the deemed export rule, a license must be obtained to transfer export-controlled technology to a foreign national in the United States if the transfer of the same technology to the foreign national’s home country would require an export license.

### *Certification Requirements for Employers That Sponsor Foreign Workers in the United States*

Employers sponsoring foreign workers in the United States for certain nonimmigrant visas, such as H-1, L-1, and O-1A visas, must certify to the U.S. federal government on Form I-129, Petition for Nonimmigrant Worker, that the employer has reviewed the EAR and the ITAR and has determined whether a license is required from the U.S. Department of Commerce or the U.S. Department of State to release or otherwise provide the foreign worker with access to such controlled technology or technical data. If a license is required, the employer must further certify on Form I-129 that it will prevent the individual’s access to the controlled technology or technical data until the required license has been obtained.

### *Ensuring Compliance with U.S. Export Control Regulations*

Violations of the U.S. export control regulations can result in substantial penalties, both civil and criminal. In particular, failure to comply with the ITAR can result in civil fines of up to \$500,000 per violation, while criminal penalties can include fines of up to \$1,000,000 and 10 years’ imprisonment per violation. Under the EAR, civil fines can be as high as \$250,000 per violation, while criminal penalties can result in fines of up to \$1,000,000 and 20 years’ imprisonment per violation.

In light of the severe civil and criminal penalties to which an employer may be subject for violations of the EAR and the ITAR, it is crucial that employers fully understand and comply with U.S. export control regulations. When sponsoring foreign workers, companies should carefully determine whether an export license is required and, if that is the case, should prevent foreign workers from gaining access to export-controlled technology or technical data until the required license has been obtained. Employers should also develop and implement an export control compliance program to mitigate the risk of deemed or actual export violations.

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