

The "Accidental Exporter"

What HR Professionals Need to Know About the Deemed Export Rule

By James F. Chester

HERE'S THE SITUATION: Farmer Brown is a corn farmer in Waco, Texas. He has never sold his corn anywhere except at the Farmer's Market in Waco and has never traveled outside the United States. Seeking some part-time help around the farm, he hires a college student from a local university. The student is a German national attending school in the United States on a student visa.

Most HR professionals will immediately identify the potential immigration and employment questions that may result from Farmer Brown hiring the German student. However, few will grasp a much more insidious and shocking consequence: the possibility that Farmer Brown has just become an exporter.

Thanks to a weird nuance of United States export law called the "Deemed Export Rule," whenever United States technology is released to a foreign national, the release is treated as if the technology were packaged in a box and shipped to the foreigner's home country, even if the disclosure or release occurs on United States soil, and even if the foreigner has no immediate plans to take that information back to his home country. As this article explains, Farmer Brown may have become an exporter when he allowed a German national access to his farming technology.

Who is a "Foreign National"?

Under the Deemed Export Rule, found in the Export Administration Regulations (EAR), a foreign national is anyone other than a United States citizen. Exemptions include permanent residents and certain refugees. All other foreign nationals in the United States on any sort of temporary visa, including student visas, work visas and visiting scholars, are subject

to this rule. This rule covers all transfers of technology subject to the EAR, regardless of whether the foreign national is an employee, partner, shareholder, investor, contract worker or other affiliate.

Hiring foreign nationals is becoming commonplace in the modern American labor market. Many of these workers have skills and training that are in short supply in the United States. However, many companies may



Ideally, a company's deemed export policy will come under the auspices of the legal department, with the input and cooperation of HR personnel, as well as personnel responsible for general export compliance.

not be aware that making American technology available to these foreign nationals – even within the United States – may constitute an export under the Deemed Export Rule.

What Constitutes a "Release of Technology"?

"Technology" is defined very broadly by the EAR as "information necessary for the development, production or use of a

product." Technology may be in such forms as: blueprints, plans, diagrams, models, formulas, tables, engineering designs and specifications, manuals and instructions written or recorded on other media or devices such as diskettes and tapes.

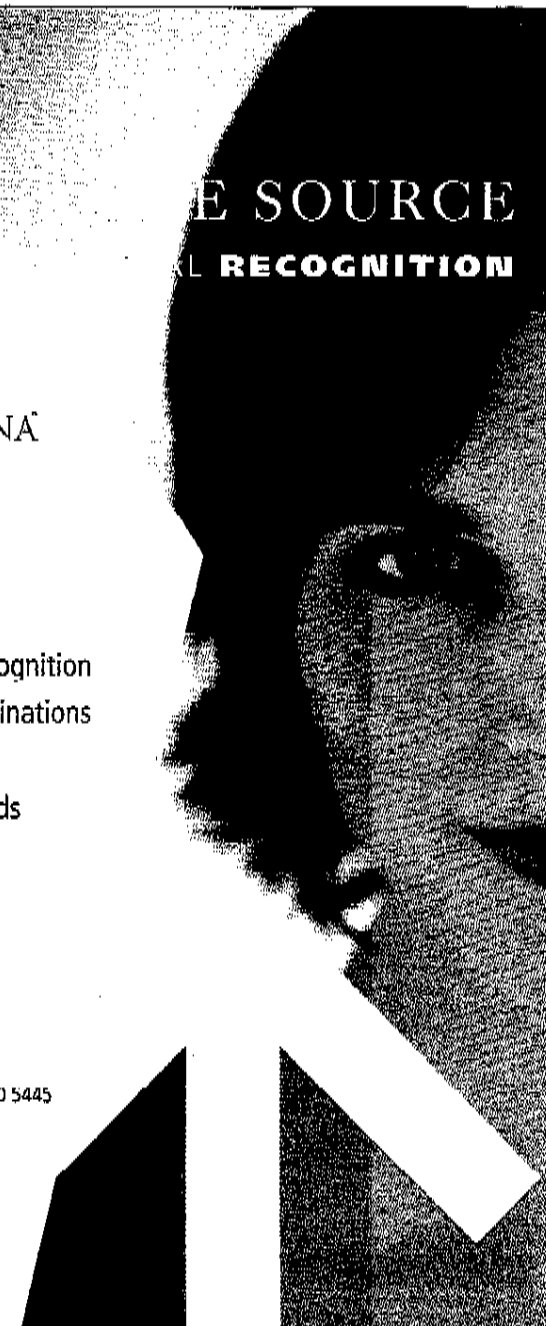
For example, Farmer Brown may be using genetically modified crops, special farming techniques, farming equipment technology, unique fertilizer mixes and/or special feed formulas – all of which could be considered technology under United States export laws.

Release occurs through: (1) visual inspection by foreign nationals of United States-origin equipment and facilities, (2) oral exchanges of information in the United States or abroad, or (3) applying personal knowledge or technical experience acquired in the United States to situations abroad. For example, a release could occur through providing technical assistance such as instruction, skills training, working knowledge or consulting services.

What If You Don't Obtain an Export License?

Not all exports require a license. Whether an export license is required depends on what is being exported, to whom, where and for what purpose. In addition, there are specific exceptions to the Deemed Export Rule listed in EAR. These exceptions include "fundamental research" and "public" information.

If an export license is required, the potential penalties for violating the Deemed Export Rule by releasing controlled technology to a foreign national without a license are identical to the penalties levied against those who actually export goods in violation of the EAR. Thus, a violator may be subject to substantial civil fines, the loss of export privileges (including exports of the company's other products) and even criminal prosecution.



THE SOURCE
L RECOGNITION

MICHAEL C. FINA

- Service Awards
- Performance Recognition
- Peer to Peer Nominations
- Safety Awards
- Retirement Awards
- Business Gifts

545 5th Avenue New York, NY
10017 U.S.A 800.400.1327

The Granary Ryehurst Lane
Binfield Berkshire
RG42 5QZ UK 011 44 870 770 5445

www.mcfawards.com
lifestyles@mcfina.com

ISO 9001 Certified

Is Your Company a "Deemed" Exporter?

Most American companies use a great deal of technology, including proprietary enterprise software, patents and trade secrets, or licenses to use someone else's patents or trade secrets. At the same time, many of these companies employ foreign nationals or deal with independent contractors, shareholders, partners and affiliates who are foreign nationals.

If Farmer Brown can accidentally become an exporter, then it is very likely that larger, more technology-driven companies are also exporting technology when they make their technology available to foreign nationals. Unless these companies implement and adhere to a deemed export compliance policy, they may be at risk of substantial government penalties.

Who is Responsible for Deemed Export Compliance?

Perhaps the most difficult element of this issue is trying to figure out which department within a company is responsible for compliance with the Deemed Export Rule. Even if companies frequently export products, those exports are handled by the company's shipping and logistics personnel. Shipping and logistics personnel are not generally involved with HR matters. At the same time, HR managers are not generally focused on export compliance procedures. As the result, many companies overlook the deemed export element of their operations, and are thus risking potentially devastating penalties from the United States government for illegal exports.

Ideally, a company's deemed export policy will come under the auspices of the legal department, with the input and cooperation of HR personnel, as well as personnel responsible for general export compliance. Because this subject bridges several areas within a company, it is imperative that all these departments understand the requirements of the Deemed Export Rule and are trained to spot issues and comply with federal law regarding deemed exports.



Conclusion

Most American companies frequently deal with foreign nationals and are heavily invested in some form of technology, even if technology is not their core business product. While HR professionals within these companies often address the more obvious issues related to dealing with foreign nationals, they often overlook the Deemed Export Rule. As a result, companies risk substantial penalties for violating export laws.

HR professionals may request a free checklist for developing a Deemed Export Rule compliance program by sending an e-mail to jchester@davismunck.com. Because of the importance and sensitivity of this issue, companies should consider engaging outside legal counsel experienced in export compliance to assist in developing, implementing, and auditing a Deemed Export Rule compliance program. ➔

Jim Chester chairs the international business and trade practice at Davis Munck, P.C., a Dallas-based law firm focused on delivering comprehensive legal services to companies driven by innovation. Chester is an adjunct professor at Baylor University Law School and the University of Dallas. He holds a Master of Laws degree in International Economic Law, is a licensed customs broker, and is licensed to practice law in Texas and Washington, D.C. You may contact him at jchester@davismunck.com.

TIME & ATTENDANCE SOLUTIONS

Meeting the Needs of Any Size Company

Timekeeping Systems

- Stop Buddy Punching
- Control Overtime
- Flexible Pay Rules
- Benefits Accruals
- Points Management
- Labor Tracking
- Lockout
- Standard Timeclocks
- Biometric Timeclocks
- Palm Key-In
- Desktop and Web Browser Timekeeping
- Bar Code Readers
- Access Control



Employee ID Systems

- Photo ID Software
- PVC Card Printers, Ribbons & Cards
- Lanyards, Card Holders and Badge Reels
- Custom Employee ID Cards
- Laminating Equipment & Supplies

Automated Timekeeping

281-855-8926

automatedtimekeeping.com



800-338-7941
aphotoid.com