PUBLICATION

Third-Party Contracting for HR Managers Complicated by Export Certification Requirement

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Employers who use staffing companies to provide them with foreign workers face more complications than ever. These employers must now certify that none of their workers, third party or otherwise, are given unlicensed access to certain controlled technology or technical data.

Background

Since February 2011, the U.S. Citizenship and Immigration Services (USCIS) has required employers that sponsor foreign workers in the most commonly used visa classifications to certify in Part 6 of Form I-129 that the employer has read the Export Administration Regulations (EAR) and the International Traffic in Arms Regulations (ITAR) and determined that: 1) a license is not required from either the U.S. Department of Commerce (Commerce) or the U.S. Department of State (State) to release certain controlled technology or technical data to the foreign worker; or 2) that a license is required from Commerce or State and the employer will prevent the foreign worker's access to the controlled technology or technical data until such a license is obtained.

Part 6 of Form I-129 stems from the "deemed export rule" under the EAR and ITAR, which holds that the transfer, release, or disclosure of technology or technical data to a foreign national (other than a permanent resident), even in the United States, is deemed to be an export to that foreign national's home country. To further complicate matters, the EAR covers dual use products for both commercial and defense purposes, while the ITAR covers products specifically designed for military use.

What This Means for Employers and Contractors

Prior to February, the human resources managers who typically sign the immigration sponsorship forms under oath did not need to worry about unwittingly violating these export regulations. Thanks to the new rules, HR managers must now ensure that their technical managers specifically determine which technologies their foreign workers are given access to. This is tricky enough, both practically and "politically," when the technical managers are in other parts of the same institution.

These certifications become even more complex when one company is contracted to staff another's project. The staffing company cannot be sure which technology or technical data the third party may share with its foreign employees. Thus, both companies must work together in order to ensure full compliance with both immigration and export laws. While the owner of the controlled technology and technical data (considered the exporter) is responsible for obtaining any required licenses from Commerce or State, it is the staffing company that has control over the foreign worker – meaning they are generally responsible for certifying the Form I-129 on behalf of the foreign worker.

Thus, it is critical that the staffing company confirm with the third-party contractor whether any controlled technology or technical data will be released to the foreign worker and whether this release has been licensed. It is only appropriate for the staffing company to certify compliance in Part 6 of Form I-129 after all the proper inquiries have been made, and it may become common for staffing companies to seek contractual obligations

by their customers to stay compliant with export licensing programs that involve contracted staff. Since institutional components using staffing companies often do not involve their own HR departments in managing contracted staffing arrangements, the required cooperation is between the staffing companies' HR departments and the customers' technical and business components.

The situation is analogous to the regime for compliance with H-1B "labor condition" rules, in which the contracted employer signs the sworn certifications about postings and layoffs involving the customer's workplace and employees. But even if the contractor fails to perform the necessary inquiries and actions, the government may try to enforce obligations directly against the customer's company using various theories. In the deemed export licensing scenario, those theories are readily available.

Where Do You Go From Here?

Companies need to review their export compliance programs. Someone must understand what the controlled technologies and technical data are, whether they are used or available in the company, and whether any foreign worker has access to them, whether as employees or contracted staff.

Fortunately, only a small percentage of companies actually handle controlled technology or technical data. But, for those companies using controlled technology and technical data, the consequences of noncompliance are significant. Penalties include civil fines of up to $500,000 per violation, criminal penalties of up to $1 million per violation and up to 10 years in prison, a denial of export privileges and debarment from U.S. government contracts.

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