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Overview: Deemed Exports – Hiring “Foreign” Employees

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Chuck McFadden



Deputy
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Chuck McFadden serves as Deputy General Counsel for Michelin North America, Inc. in Greenville, South Carolina. He assumed this position in December 2022 after serving as the company's Associate General Counsel and Director of Litigation. Since joining Michelin in 2005, Chuck has served in several positions within the company's Law Department, including a three-year expatriation to Clermont-Ferrand, France, Group Michelin's global headquarters. Prior to his employment with Michelin, he worked in private practice at Haynsworth Sinkler Boyd, P.A. Chuck received a Bachelor of Science in Business from Wake Forest University, and a Juris Doctor and M.B.A. from the University of South Carolina.

Cecilia Ehresman

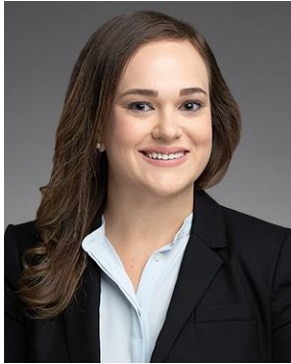


Associate Charleston

Cecilia Ehresman is an associate in the firm's Charleston office. She is a member of the Labor, Employment, and Workplace Safety practice group. Cecilia represents clients in federal and state courts and before administrative agencies in a wide range of complex employment disputes, including claims arising under Title VII of the Civil Rights Act of 1964, the Occupational Safety and Health Act, including but not limited to allegations concerning COVID-19, the Fair Labor Standards Act, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the Family Medical Leave Act, and disputes involving restrictive covenants.

Cecilia also regularly counsels employers on all aspects of the employment relationship, including sensitive terminations, discrimination, harassment, retaliation, leave and disability issues, and compliance with various state and federal employment laws, including wage and hour compliance. Within this compliance role, Cecilia also assists clients with the drafting of various employment materials, including employment contracts, policies and procedures, employee handbooks, severance agreements, and non-compete agreements.

Claire Healy



Associate Charleston

Claire Healy is an associate at the firm's Raleigh and Charleston offices where she is a member of the Labor, Employment, and Workplace safety practice group. Her practice focuses on defending companies in a wide range of employment disputes, including discrimination and retaliation lawsuits, wage and hour claims, and restrictive covenant and trade secret misappropriation actions. Claire represents clients in state and federal courts and before administrative agencies, as well as in mediation, in a range of employment disputes, including claims arising under Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the Family and Medical Leave Act, the Fair Labor Standards Act and the South Carolina Payment of Wages Act.

Claire also regularly counsels employers on all aspects of the employment relationship, including sensitive terminations, discrimination, harassment, leave and disability issues, and compliance with various state and federal employment laws. Within this compliance role, Claire also assists clients with the drafting of various employment materials, including employment contracts, employee handbooks, anti-discrimination and anti-harassment trainings, severance agreements, and nondisclosure and restrictive covenant agreements. In addition, Claire has experience conducting internal employment investigations, including investigations involving sexual harassment allegations, discrimination, retaliation, workplace bullying and defamation.

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Overview: Deemed Exports

Export Control Laws

The Export Administration Regulations (EAR)

- Governs the export of “dual-use” items
- Administered by the Commerce Department’s Bureau of Industry and Security (BIS).

The International Traffic and Arms Regulations (ITAR)

- Governs the export of “defense articles” and “defense services”
- Administered by the State Department’s Directorate of Defense Trade Controls.

Dual-Use Items?

“Dual-use” items are items that have civil applications as well as terrorism and military or weapons of mass destruction-related applications.

This definition covers a very broad array of everyday technologies, which include, but are not limited to:

- Software
- Various automotive, flight, and marine equipment
- Turbines and engines
- Biomaterials, chemicals, bacteria, pathogens, etc.
- Nuclear devices
- Alloys
- Certain types of batteries
- Cameras
- Communication systems and devices
- Computers and computer systems
- Detection equipment
- Telecommunication equipment
- Xray technology
- Windows
- Water systems
- Electronic assemblies
- Electromagnets
- Fingerprint equipment
- Firearms
- Frequency devices
- Turbines
- Lasers
- Certain machine tools
- Masks
- Navigation systems
- Optical equipment
- Propulsion systems
- Protective gear
- Radar/sensors

The “Deemed Export” Rule

The release of covered technology or software to a “foreign national” (EAR) or “foreign person” (ITAR) working in the United States **is deemed an export to that individual’s home country.**



A “foreign national” or “foreign person” includes persons who are **not**:

- US citizens;
- Granted permanent residency (e.g., through a green card); or
- Granted “protected person” status (e.g., political refugees or political asylum holders).

An export or release of covered technology or software can occur through verbal or written communications, or visual inspection.

When Will I Encounter Deemed Export Issues?

There are many areas where this comes into play. A few examples include:

- In the hiring process, where you are hiring an individual who is not a “US citizen” who will have access to controlled technology; and
- In the everyday employment context—e.g., if you have a controlled technology, you will need to ensure that any employee who comes into contact with that technology is legally permitted to access it.
 - This may involve implementing screening procedures.
 - It also comes up where a US subsidiary exports a technology to a parent company in another country. Any employee of that parent company who comes into contact with the technology may need to have an export control license, depending on how the technology itself was exported.

Employer Obligations

The employer is responsible for ensuring that any release of technology or software is made in compliance with the EAR and ITAR.

The federal government may discover instances of noncompliance:

1. During the **application process**;
2. Through **voluntary self-disclosure**;
3. Through **government investigations**, initiated either by the government or through a whistleblower; or
4. When an **audit** is conducted by the Committee on Foreign Investment in the United States.



The Committee on Foreign Investment in the United States (CFIUS)

When a “foreign person” is involved in the potential acquisition of or investment in a US business or the purchase of real estate in the United States, the transaction may fall under the jurisdiction of CFIUS, a federal committee tasked with analyzing potential national security implications of foreign investments in US businesses and assets.

As part of its due diligence, CFIUS will inquire about export control compliance.

Penalties for Violations

Administrative Penalties:

- The imposition of administrative fines up to US\$300,000 per violation;
- Denial of export privileges; and
- Placement of individuals and entities on lists that restrict or prohibit their involvement in export and re-export transaction.

Criminal Penalties:

- Criminal penalties can reach up to 20 years of imprisonment and US\$1 million per violation.

Penalties for Violations

In Fiscal Year 2021: BIS investigations led to the criminal conviction of 50 individuals and businesses for export compliance violations, with penalties of:

- US\$2,798,000 in criminal fines;
- US\$2,368,452 in forfeitures;
- US\$3,149,782 in restitution;
- US\$9,822,653 in civil fines; and
- 1,118 months of imprisonment.

The image features a central white rectangular area containing the text "Anti-Discrimination Laws". This central area is flanked by two horizontal bands of a blue abstract pattern, consisting of overlapping, semi-transparent geometric shapes in various shades of blue, creating a dynamic, layered effect.

Anti-Discrimination Laws

Anti-Discrimination Concerns

Employers **cannot** avoid export compliance obligations and liabilities by refusing to hire “foreign nationals” or “foreign persons,” because such practices would run afoul to anti-discrimination laws:

- Title VII of the Civil Rights Act (Title VII)
- The Immigration Reform Control Act (IRCA)
- The Immigration and Nationality Act (INA)
- Various state laws (e.g., the New York State Human Rights Law)
- Various city laws (e.g., the New York City Human Rights Law)

Moreover, employers must be careful not to engage in **document abuse**—i.e., require more or different documents than what is required for employment eligibility verification purposes.

Immigration and Nationality Act

Under the INA, it is generally against the law for employers to:

- Make hiring, firing, or recruiting decisions based on workers' citizenship, immigration status, or national origin; or
- Treat workers differently based on these characteristics when verifying their permission to work, including during the Form I-9 and E-Verify processes.

The General Motors Investigation

This past year, the Department of Justice (DOJ) investigated General Motors (GM)'s hiring process, and determined that GM acted improperly by:

- As part of its export compliance assessment, requiring lawful permanent residents to provide an unexpired foreign passport as a condition of employment; and
- Combining its process for verifying workers' permission to work in the United States with its export compliance assessment.

The GM Settlement

- US\$365,000 in civil penalties;
- Training mandates;
- Revisions to employment policies;
- Subject to DOJ monitoring and reporting;
- Required to bifurcate the verification process from export compliance assessment; and
- Mandated to cease requiring lawful permanent residents to present foreign passports as a condition of employment.

Pre-Hire Process

Step 1: Is the Technology That the New Employee Will Have Access to Subject to Export Control Regulations?

Sub-Step 1: Is the technology covered by the EAR or ITAR?

- Is the technology in the public domain?
- Is the technology covered by a government or private contract that states or suggests that the technology is subject to the EAR or ITAR?
- Is the technology covered by the EAR or ITAR? For example, for the EAR, is the technology described in 15 C.F.R. 734.2 through 734.5?

Sub-Step 2: If the technology is covered, determine its source code.

- Under EAR, look to the Commerce Control List (CCL) to find the technology's ECCN, an alphanumeric code that describes a particular item or type of item and shows the controls placed on that item. If there is no descriptive ECCN, the item may be classified as an EAR99 item.
- Under the ITAR, look to the US Munitions List (USML), which sets forth 21 categories of controlled items.

Step 2: Information on Job Posting and Application

If Step 1 reveals that the individual in the position will have access to covered technology, employers may disclose in the job posting or application that the position may include access to information subject to US export controls and therefore may require an export control license in accordance with applicable federal law.

Employers **cannot** restrict job postings based on the characteristics of the application, such as restricting applications to “US Citizens only,” “Only US Citizens or Green Card Holders,” “US birth certificate required,” etc.

- **Do not state in job advertisements or applications, or otherwise tell job applicants, that export control regulations require applicants to have a specific citizenship, immigration status, or national origin.**

Pre-Hiring Screening Questions

Employers are prohibited from indicating a hiring preference for “US citizens” **unless** specifically required to do so “in order to comply with a law, regulation, executive order or government contract.” **Export control laws cannot be used as a reason to limit job candidates with certain citizenships, immigration statuses, or national origins.**

The US Department of Labor’s Immigrant and Employee Rights Section has confirmed that the following two sets of written pre-hire questions are acceptable:

1. **Are you authorized to work in the United States?; and**
2. **Will you now or in the future require sponsorship for employment visa status (e.g., H-1B visa status)?**

The Hiring Process

Step 3: Conducting the Interview and Extending the Conditional Offer of Employment

The Interview Process:

Avoid discussing export control requirements, as doing such may result in an inadvertent export or release of the technology or software or lead to the inadvertent disclosure by the applicant of his/her citizenship status, which may result in a lawsuit.

Should the interview process involve a visit to the site by the applicant, ensure proper safeguards are in place to prevent the export or release of information through, for example, visual inspection.

The Conditional Offer of Employment:

Include in the offer letter that the employment is contingent upon the employer's ability to obtain an export control license, if required by applicable law.

The Employment Agreement:

The employment agreement should: (i) identify what controlled technology the individual will have access to; (ii) include export compliance representations and covenants; and (iii) include representations and warranties regarding the access to and use of the controlled information following the conclusion of the employment relationship.

Step 4: Verifying the Individual's Citizenship / Permanent Residency Status

Next, the employer must determine whether the employee classifies as a “foreign national” under the EAR, or a “foreign person” under the ITAR. As previously stated, if the individual is a US citizen, permanent resident, refugee, or asylee, no export license will be required.

- Bifurcating the Process
- Dual Citizenship
- Collecting Requisite Documents



Bifurcating the Process

Guidance from the DOJ and Equal Employment Opportunity Commission, and the recent GM investigation, emphasize the importance of bifurcating the I-9 verification process from the export control assessment.

This is because:

- The Form I-9 process requires employers to review documentation to check if someone they have hired has permission to work in the United States. This process is not used to check proof of someone's citizenship or immigration status.
- Often, employees decide to show documentation during this process that does not reveal their citizenship or immigration status.
- If during the Form I-9 process an employer requires the employee to present documents to prove that he/she is a US citizen, this may impermissibly limit the choice of documentation the employee may present to prove work eligibility or result in unnecessary requests for additional documents.

How to Bifurcate

Separate the export control evaluation process from the rest of the hiring process by:

- Implementing a policy and procedure to obtain citizenship and immigration status solely for export control reasons.
- Creating a department separate from HR that handles all export control questions and concerns.
 - A “compliance officer” should be put in charge of requesting and verifying the appropriate documentation.
 - This officer can then report to HR whether an export license is required for that application, without providing HR with any additional information regarding the applicant’s national origin, citizenship, or immigration status.
 - Limit the scope of inquiries regarding citizenship, national origin, and immigration status to only those positions actually involving export-controlled information.

Step 5: Determine Whether an Export Control License Is Required

Just because (i) a technology or software is covered by the EAR or ITAR, and (ii) the new hire is a “foreign national” or “foreign person,” does not necessarily mean that an export license is required. This determination depends on the end user of the export (i.e., the individual’s country of citizenship or permanent residency).

Under the EAR:

- Open the Commerce Control Chart;
- Go to your ECCN (obtained in Step 1);
- Find the reason for control (will set forth columns impacted);
- Open BIS’s Commerce Country Chart;
- Go to the new hire’s most recent place of citizenship or permanent residence (obtained in Step 4);
- Determine whether there is an “X” in any column that your technology or software listed that it has a control; and
- If an “X” is in the relevant column, an export control license is required. If there is no “X” in the relevant columns, no export control license is required (unless required due to the person being listed on an export control list).

Under the ITAR: A license is required for all technology covered by these regulations, unless an exemption applies.

Step 6: Determine Whether an Export License Exception Applies

A license exception is an authorization that permits the exporting party to release the controlled technology or software to the end user without a license, subject to certain stated conditions.

Under the EAR: Section 732.4 and Part 740 set forth various license exceptions that may apply to the transaction at issue, which include, but are not limited to:

- The exceptions in Part 740 for biological items;
- Fundamental research;
- Data released at conferences, lectures, trade shows, or other media open to the public;
- Patents available through the patent office; and
- Information disseminated through course catalogues or through associated course laboratories in post-secondary schools.

Under the ITAR: Exemptions include items in the public domain, fundamental research, and teaching exemptions.

Step 7: Check Whether the Individual Is Listed on an Export Control List

This step applies **REGARDLESS** of whether an exemption applies:

Specially Designated Nationals and Blocked Persons List (SDN List)

(issued by the Treasury Department's Office of Foreign Assets Control (OFAC)):

- It is illegal to deal in any way with an individual listed on the SDN List.

The Denied Persons List (DPL)

(issued by BIS):

- Any transaction with a person listed on the DPL violates the EAR.

The Entity List (issued by BIS):

- Will disclose any additional individualized licensing requirements.

The Unverified List (issued by BIS):

An individual listed on the Unverified List results in:

- Mandate that all export transactions be reported to BIS through the Automated Export System;
- Suspension of license exception eligibility; and
- Requirement that employer obtains a statement from the individual, agreeing to abide by the EAR.

Step 8: Obtain the Required Export Control License

Under the EAR:

- The application process can take at least 90 days. Therefore, the employer must either: (i) delay employment during this time; or (ii) employ the individual in a limited scope.
- Use the application submission portal on BIS's website.

Under the ITAR:

- If a license is required, you must register and submit a license application online with the US Department of State's Directorate of Defense Trade Controls.



If I Can't Obtain a License, Can I Terminate the Employment Relationship?

If the employer is unable to obtain an export license for an applicant or employee, it can either:

- Maintain this individual's employment but ensure that he/she has zero access (even through visual inspection) to any export-controlled technology or software; or
- Terminate the employment relationship.

There are several exceptions to anti-discrimination rules that would allow for the termination of employment:

- Title VII: The National Security Exception;
- The Immigration Reform and Control Act Exception; or
- Title VII & the IRCA: The Bona Fide Occupational Qualification.

Recordkeeping Requirements

Records supporting controlled export transactions **must** be maintained **for at least five years following the issuance date of the license**. These records must be made available to government officials upon request for inspection.

Information that should be maintained includes, but may not be limited to:

- Licensing documents (applications, submissions, the license itself);
- Documents evidencing compliance with the license;
- The employee's employment agreement;
- Records for the handling of any potential red flags;
- Training logs and records;
- The date of any known export, re-export, transshipment, or diversion of such export; and
- The date of any termination of the transaction, whether formally in writing or by other means.

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Questions?

K&L GATES