

DDTC Proposes to Make Pandemic-Related Telework Rules Permanent

Key Notes:

- Proposed rule would allow persons working under a long-term contract to be considered “regular employees” under the ITAR even if they work remotely.
- Remote work would be permitted so long as they were not working in Belarus, Burma, China, Cuba, Iran, North Korea, Russia, Syria or Venezuela, or any other country subject to an U.S. arms embargo.
- Persons considered “regular employees” are exempt from various licensing requirements under the ITAR.
- Public comments must be submitted on or before July 26, 2021.

The International Traffic in Arms Regulations (ITAR) generally requires the issuance of an export license to share any technical data covered by the U.S. Munitions List with a foreign person or entity. This includes foreign persons/entities located in the United States, even foreign national employees of a U.S. business, and U.S. persons/entities located abroad. However, the ITAR has certain exceptions for dual-national “regular employees” of foreign entities and governments who are themselves licensed as well as foreign nationals who are “regular employees” of U.S. institutions of higher learning.

As described in detail below, the definition of “regular employee” in the ITAR currently includes permanent and direct employees as well as long-term contractors who are subject to the control of the company and work full-time at a company facility. At the onset of the COVID-19 pandemic, the State Department’s Directorate of Defense Trade Controls (DDTC) announced a temporary suspension of and exception to the ITAR’s requirement that regular employees

or long-term contractual personnel must work on-site at a company’s facilities. The temporary measure allowed individuals to telework during the public health emergency and, thus, allowed for the continuity of operations. Absent this change, long-term contractual personnel working remotely for companies operating under technical assistance agreements, manufacturing license agreements or other ITAR exemptions could have been operating in violation of these agreements, as they were required to work at a company facility in order to be considered regular employees. For additional information on these initial DDTC notices, see our [April 27, 2020](#) and [December 10, 2020](#) SmarTrade blog posts.

On May 27, 2021, DDTC issued a [Federal Register notice](#) of a proposed rule that would amend the ITAR’s definition of “regular employee” to make this change permanent and include (1) persons working under long-term contracts and sufficiently subject to the employer’s control, and (2) contractors not working under a long-term contract but who have an active security clearance and are sufficiently under the employer’s control.

Definition of “Regular Employee”

Currently, Section 120.39 of the ITAR defines a regular employee as:

- (1) an individual permanently and directly employed by the company, or
- (2) an individual in a long-term contractual relationship with the company where the individual works at the company’s facilities, works under the company’s

direction and control, works full-time and exclusively for the company and executes nondisclosure certifications for the company, and where the staffing agency that has seconded the individual has no role in the work the individual performs (other than providing that individual for that work) and the staffing agency would not have access to any controlled technology (other than where specifically authorized by a license).

Under the May 27, 2021 proposed amendment, “regular employee” would be defined as:

- (1) An individual permanently and directly employed by an entity; or
- (2) An individual providing services to an entity:
 - (i) Under a contract with a term of one year or more;
 - (ii) Who works under the entity’s direction and control;
 - (iii) Who works full-time for the entity;
 - (iv) Who is subject to the entity’s compliance policies and procedures; and
 - (v) Who executes a nondisclosure agreement with the entity that provides assurances that the individual will not transfer any defense articles to persons or entities unless specifically authorized by the entity;or
- (3) An individual providing services to an entity:
 - (i) Under a contract with a term of less than one year;
 - (ii) Who maintains an active security clearance approved by the United States or by the government of the entity to which the individual is providing services;
 - (iii) Who works under the entity’s direction and control;
 - (iv) Who works full-time for the entity;
 - (v) Who is subject to the entity’s compliance policies and procedures; and
 - (vi) Who executes a nondisclosure agreement with the entity that provides assurances that the individual will not transfer any defense articles to persons or entities unless specifically authorized by the entity.
- (4) A secondment from one entity to another that meets the definitions described in paragraphs (2) and (3) above.

Impact on Need for Licenses

Two provisions of the ITAR currently allow for less restricted transfer of ITAR-controlled technology to persons who are

“regular employees.” This proposed rule would permit more of them to work remotely.

Foreign End Users

Section 126.18 of the ITAR generally allows foreign business entities, foreign governmental entities and international organizations that are authorized end users or consignees of ITAR-controlled technical data to share it with dual-national “regular employees.” Therefore, by expanding the definition of “regular employee” the proposed rule would allow expanded telework by dual-national contractual employees of foreign entities. Notably, this would apply to foreign affiliates of U.S. companies that are engaged in multijurisdictional research and development.

U.S. Institutions of Higher Learning

Section 125.4(b)(10) of the ITAR grants a license exemption to U.S. institutions of higher learning sharing unclassified ITAR-controlled technical data with regular employees. There are several requirements to this exemption. However, the expanded definition would increase the ability of academics using this exemption to work remotely.

Rationale

In the notice, DDTC states that it “recognizes that the workplace environment is evolving, therefore, the current ‘regular employee’ criterion that an individual must work at a company’s facilities will be removed in the revised definition to allow for remote work.” In addition, DDTC is clarifying that under the term “long-term contractual relationship,” individuals must be providing services to a company under a contract for a term of one year or more. This change is being sought to minimize the risk of diversion of defense articles. Under the proposed rule, DDTC would allow individuals not in a long-term contractual relationship with a regulated company to be treated as regular employees provided that, in addition to the control and nondisclosure considerations, such an individual would also be required to maintain an active security clearance approved by the United States or by the government of the company to which the individual’s services are provided.

Public Comments

The public is invited to submit comments on the proposed rule. Comments must be submitted no later than July 26, 2021, either by email or on the federal rulemaking portal:

- Email: DDTCPublicComments@state.gov, with the subject line "ITAR Amendment: Regular Employee"
- Portal: www.regulations.gov, on Docket DOS-2021-0009

All comments will be made available for public review; thus, commenters should not include any personally identifying information or business proprietary information they do not wish to be made public.

FOR MORE INFORMATION

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