

Compliance Tips in Light of Tightened Enforcement against IP Leaks by U.S. Government 美国知识产权保护执法趋紧环境下的合规建议

by Catherine X. Pan-Giordano

It was reported recently that certain universities and medical research centers in the U.S. made adverse employment decisions against several Chinese-American scientists who were suspected of disclosing confidential information regarding federal funded research to China. Around the same time, it was also reported that the U.S. authorities had charged a Chinese-American engineer at a multinational company in the New York State and a Chinese businessman in Liaoning province with economic espionage.

据报道，近期数位美籍华裔科学家因被怀疑向中国不当披露关于联邦政府所资助研究项目的保密信息，而遭到美国某些大学及医疗研究中心的解雇或劝退。另有报道称，美国执法部门近期对一名曾在纽约州某跨国公司任职的美籍华裔工程师及一名辽宁省的中国籍商人提起了“经济间谍罪”的刑事指控。

These news reports triggered significant concerns among Chinese and Chinese-American scientists, engineers and researchers working in the U.S. It is a lose-lose situation for both employers and employees as the employers lost valuable talents and the employees lost their jobs and exposed themselves to potential civil and criminal charges.

上述新闻报道引发了广大在美中国籍与美籍华裔科学家、工程师及研究人员的忧虑。上述情形对于雇主和雇员来说是一种双输的局面，一方面雇主失去了宝贵的人才，另一方面雇员不但丢了工作还可能面临民事乃至刑事诉讼。

This article sets out to provide practical tips without engaging in a discussion on broader principles such as racial profiling and academic freedom. For a discussion of these principles, please see the recent dialog between Chinese-American scientists and Francis S. Collins, Director of the National Institutes of Health (“NIH”), on *Science*.¹ The article is structured as a Q&A to address some of the most common questions that concern scientists, engineers and researchers with regard to the confidentiality and ethical requirements under agreements, employment policies and U.S. law.

本文旨在为工程、科研人员提供实务建议，并未对种族归纳（racial profiling）和学术自由等更广泛的原则进行讨论。对于该等原则的讨论，详见《科学（Science）》期刊中刊登的美籍华裔科学家与美国全国卫生研究院（NIH）院长 Francis S. Collins 的近期对话。本

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文将通过问答的形式，对部分科学家、工程师和研究人员所关注的，在协议、雇主政策和美国法律项下、关于保密和道德规范要求最为常见的问题进行讨论。

Question 1. What information falls under the scope of “confidential information”?

问题 1：哪些信息属于“保密信息”？

Answer: The term “confidential information” has a broad meaning and should be distinguished from “trade secrets.” The term “trade secrets” is defined by state law. Most of the states in the U.S. have defined trade secrets under some version of the Uniform Trade Secrets Act (“**UTSA**”). The definition of “trade secrets” under the UTSA can be summarized as: any information that is (a) not known or available to the public; (b) of economic value; and (c) the subject of reasonable efforts to maintain its secrecy or confidentiality.

回答：“保密信息”的含义较为广泛，应与“商业秘密”相区分。美国州法律中规定了“商业秘密”的定义。美国大部分州在《统一商业秘密法》（**UTSA**）的基础上，对“商业秘密”作出定义。UTSA 项下关于“商业秘密”的定义可以概括为：（a）不为公众所知或公众无法获得；（b）具有经济价值；且（c）信息所有人作出合理努力以维持其保密性的任何信息。

While the definition of “trade secrets” under UTSA is already very broad, the scope of “confidential information” can be even broader. As the law does not clearly provide what information constitutes “confidential information,” parties are free to provide the definition of such term in a non-disclosure agreement (“**NDA**”). Even if a certain type of information has no economic value, as long as it is not publicly available, the owner of such information may have such information protected by contract. As a rule of thumb, if a certain type of information is not open to the public, such information may fall under the scope of “confidential information” as long as it is captured by the definition clause in an NDA.

尽管 UTSA 项下“商业秘密”的含义已经非常广泛，但“保密信息”的范围往往更广。由于美国法律并未明确规定何种信息属于“保密信息”，当事人可以在保密协议中自由约定保密信息的定义。只要某类信息无法通过公共渠道获得，即便该信息不具备经济价值，信息所有人仍可通过合同对该信息予以保护。简言之，如果某类信息未被公开，只要各方在保密协议的定义条款中加入该类信息，该信息就可能成为“保密信息”。

Question 2. Why am I subject to confidentiality obligations?

问题 2：我为什么负有保密义务？

Answer: An individual's confidentiality obligation may originate from his/her NDA with the data-owner, such as his/her employer or a research program sponsor. In addition, the individual also needs to comply with any confidentiality requirements set forth in the internal policies and regulations of his/her employer. Moreover, applicable state and federal laws also provide protections to certain types of confidential information, which the individual must abide by. For example, most states have statutes or common law prohibiting misappropriation of trade secrets; the Economic Espionage Act (“**EEA**”) outlaws intentional theft or misappropriation of trade secrets to benefit foreign countries or a party other than the owner; the Export Administration Regulations (“**EAR**”) and International Traffic in Arms Regulations (“**ITAR**”) impose strict control over export of

information that has military (or civil-military dual use) applications.

回答：个人的保密义务可能源于其与数据所有人（如其雇主或研究项目的资助方）所签署的保密协议。此外，个人不仅需遵守雇主内部规章制度中的保密要求，还需遵从适用的州法律及联邦法律关于保护特定类型保密信息的规定。例如，多数州的成文法或普通法禁止盗用商业秘密；美国《经济间谍法》（**EEA**）禁止为他国或信息所有人以外第三方的利益窃取或盗用商业秘密；美国《出口管理条例》（**EAR**）及美国《国际武器贸易条例》（**ITAR**）对于军用（或军民两用）信息的出口实施严格控制。

Question 3. What will be my liabilities if I violate applicable confidentiality requirements?

问题 3：如违反适用的保密义务，我需要承担何种法律责任？

Answer: The liability could be multifold depending on the circumstances. The owner of the confidential information may file a civil lawsuit against you for remedies. In addition, such violation may be regarded as a material misconduct under the employment policies, which might entitle the employer to unilaterally terminate your employment. If you participate in a research program funded by a federal government agency (such as NIH, Department of Health and Human Services, Department of Defense, and Department of Agriculture), your non-compliance of the confidentiality (and other) requirements under such program may result in, among others, withholding of a continuation award, suspension or termination of the grant in whole or in part, or debarment by the federal agency.

回答：根据具体情形，您可能面临多重法律责任。保密信息的所有人可能对您提起民事诉讼以寻求救济。此外，您违反保密义务的行为可能构成雇主政策项下的重大不当行为，雇主有权据此单方解除您的劳动关系。如您参与一项联邦政府机构（如 NIH、卫生与公共服务部、国防部、农业部等）资助的研究项目，您违反该项目下保密（及其他）要求的行为可能导致一项持续性研究经费被停发，部分或全部暂停或终止资助，或禁止参与联邦政府项目等不利后果。

Under certain circumstances, you may also be subject to criminal liabilities. For example, according to Section 1831 of the EEA and its amendment in 2013, the theft or misappropriation of a trade secret with the intent or knowledge that such offence will benefit a foreign government, foreign instrumentality or foreign agent constitutes economic espionage, which could subject the individual offender to a maximum sentence of 15 years in prison and/or a fine of up to USD 5 million. A person who discloses controlled technical data to a foreign country in violation of the EAR and ITAR may also be subject to a fine and/or imprisonment depending on the circumstances. There might be further penalties if the offender destroys evidence or lies to an investigator.

在特定情形下，您可能还需承担刑事责任。例如，根据 EEA 第 1831 条及其 2013 年修正案，明知窃取或盗用商业秘密将使外国政府、组织或代理获益而从事该行为或故意从事该行为的，构成经济间谍罪，相关犯罪人可能面临最高 15 年的刑期和/或最高 500 万美元的罚款。违反 EAR 及 ITAR 向他国披露受管控技术数据的个人，根据情形可能被处以罚款和/或监禁。如果相关违法者毁灭证据或欺骗调查人员，可能还将受到其他处罚。

Question 4. Can I engage in research, business or other activities unrelated to my

employment if I keep the confidential information of the employer in strict confidence?

问题 4：如果我对雇主的保密信息予以严格保密，是否可以从事与我的劳动关系无关的研究、商业或其他行为？

Answer: It depends on the employer's policies and the terms of the employment. Often times, universities and other academic institutions have more lenient policies than private sector employers do. In general, most employers have some level of internal policies prohibiting conflict of interests. Under these policies, employees can be required to make report to and obtain approval from their employer in order to engage in activities outside of their employment, failure of which may constitute a violation of the employer's policies and result in disciplinary actions against the employee, including termination of his/her employment. Therefore, if you participate in a research program or other activities in China or other countries outside of your job without obtaining prior approval from your employer, the U.S. employer may take a disciplinary action against you regardless of whether you breach your confidentiality obligation. Furthermore, if you fail to disclose such outside activities or misrepresent to a federal agency in connection with an application for a federal grant in violation of the grant rules, the program may be terminated, the funds may be withdrawn and you may be subject to civil or even criminal liabilities for grant fraud depending on the circumstances.

回答：这取决于雇主的政策以及您的劳动合同条款。与私营企业雇主的内部政策相比，大学及其他学术机构的内部政策往往较为宽松。通常，大部分雇主的内部政策都会对禁止利益冲突作出一定程度的规定。在该等政策下，员工若想在劳动关系以外从事活动，必须向其雇主进行报告并获得其批准。如未能遵守该等要求，将构成违规，员工可能因此受到纪律处分（包括解除其劳动关系）。因此，如您在工作范围之外在中国或其他国家参与一项研究项目或从事其他活动并且事先未获得美国雇主的批准，您的雇主将有权对您进行纪律处分，不论您是否违反保密义务。此外，在申请联邦资助过程中，如果您未能依据资助规则向联邦政府机构披露您的外部活动或存在虚假陈述，则该项目可能会被终止，项目资金可能会被收回，并且您可能因资助欺诈而面临民事乃至刑事法律责任。

Question 5. What should I do to avoid compliance risks?

问题 5：我如何才能避免合规风险？

Answer: We recommend the following measures to avoid compliance risks:

回答：我们建议采取以下措施以避免合规风险：

1. Carefully review relevant NDA, grant terms and conditions, and employment policies (including any code of conduct and ethical policies) to know your confidentiality and ethical obligations (or have a lawyer go through the requirements under these lengthy documents with you) and comply with such obligations;
仔细审阅相关保密协议、资助条款和条件以及雇主政策（包括任何行为准则和道德规范）以了解您的保密义务和道德规范要求（或聘请律师为您梳理该等冗长文件项下的相关要求）并遵守该等义务；
2. Follow the data owner's guidelines and requirements when dealing with its confidential information;
在使用保密信息时，应遵守数据所有人的指引和要求；
3. Avoid disclosing confidential information outside the employing organization;

避免向雇主以外的第三方披露保密信息；

4. Store confidential information in designated system or device and avoid transferring such information to personal or third-party systems or devices unless approved or required by the data owner;
应将保密信息存储在指定的系统或设备，并且在未经数据所有人批准或要求的情况下，应避免将该等信息转移到个人或第三方系统或设备；
5. Obtain prior approval from the data owner/employer before disclosing confidential information to a third party or engaging in any outside activities; and
在向第三方披露保密信息或在从事任何外部活动前，应从数据所有者/雇主处取得事先批准；并且
6. Consult with a lawyer whenever you have a question regarding your obligation or feel you have been treated unfairly or unlawfully.
当您对你的保密义务产生任何疑问或您认为受到不公正或非法对待时，应及时与律师联系。

Question 6. What should I do when I find myself at risks of a violation?

问题 6：当我发现已经存在违规风险时，应当怎么办？

Answer: Under such circumstances, we recommend that you take the following measures to mitigate compliance risks:

回答：在此种情形下，我们建议您采取以下措施以减小合规风险：

1. DO NOT ignore such risks;
切勿忽视该等风险；
2. Immediately stop any questionable activities;
立即停止任何可能存在问题行为；
3. If any confidential information has been provided to a third party that is not supposed to receive such information, request the third party to immediately return such information;
如任何保密信息已被提供给不应掌握该信息的第三方，应要求该第三方立即归还相关信息；
4. Immediately contact a lawyer for advice; and
立即联系律师以寻求专业意见；并且
5. DO NOT delete or destroy any confidential information before receiving advice from the lawyer, because such actions might result in more serious liabilities.
在获得律师的专业意见前，切勿删除或销毁任何保密信息，因为该行为可能会导致更严重的法律责任。

¹ See “Racial profiling harms science,” *Science* 22 Mar 2019: Vol. 363, Issue 6433, pp. 1290-1292

参见《科学 (Science) 》期刊所载“种族归纳阻碍科学 (Racial profiling harms science) ”一文，2019 年 3 月 22 日第 363 卷，第 6433 期，第 1290-1292 页