

STRATEGIC PERSPECTIVES—What employers need to know about the new Optional Practical Training rule for STEM students

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The Department of Homeland Security's new rule amending F-1 nonimmigrant student visa regulations for the Optional Practical Training (OPT) program for STEM (science, technology, engineering, and mathematics) students imposes new obligations on the employers of those students. The new obligations include a requirement that employers implement a formal training plan for each STEM OPT hire. This article discusses key features of the rule.

History

The U.S. Department of Homeland Security (DHS) first introduced an extension of OPT for STEM graduates in 2008. Previously, F-1 STEM students could elect to pursue 12 months of OPT in the United States after obtaining their degrees from a U.S. institution of higher education. Under the 2008 Rule, they could apply for an additional 17 months of OPT, provided the proposed employer was enrolled in and remained in good standing in the federal Electronic Employment Eligibility Verification Program (E-Verify), as determined by U.S. Citizenship and Immigration Services (USCIS). A federal district court vacated the 2008 OPT STEM Rule on procedural grounds and ordered DHS to issue compliant regulations. The court later stayed its ruling to give DHS the opportunity to issue a new rule through notice-and-comment rulemaking. Following completion of the rulemaking, the new rule was published on March 11, 2016, and took effect on May 10, 2016.

Key Provisions

The new rule:

- Increases STEM OPT employment authorization from 17 months to 24 months.
- Requires each STEM OPT student and employer to prepare and execute a formal training plan (Form I-983) that identifies learning objectives and a plan for achieving those objectives.
- Allows every F-1 student two (rather than one) STEM OPT extensions a lifetime, provided the second extension is based on a higher-level STEM degree obtained than the previous STEM degree (see below).
- Increases the types of qualifying STEM degrees.
- Limits the types of jobs to those directly related to the student's qualifying STEM degree. There must be an employer-employee relationship between the employer and the F-1 student; employment for a staffing agency and other temporary employment agencies do not qualify. Volunteer employment also does not qualify. An F-1 student may not work concurrently for multiple employers during the STEM OPT period.
- Requires that only STEM degrees earned from a domestic campus of an accredited and certified U.S. educational institution are eligible for a STEM OPT extension.
- Provides that an F-1 student may be eligible for an extension if he or she holds a prior U.S. degree in a qualifying STEM field, provided the prior degree was earned within the preceding 10 years. The proposed training must relate directly to the STEM degree earned (the qualifying degree), not be based on a current non-STEM degree, and the F-1 student must currently be in a period of 12-month OPT based on his or her most recent U.S. degree.

- Allows an F-1 student an additional 12 months of regular OPT, plus a second 24-month STEM extension if the student earns another qualifying STEM degree that is at a higher level than the first STEM degree. The second STEM extension may not immediately follow the first STEM extension.
- Permits travel during "cap-gap" if: (1) the student still has a valid F-1 visa stamp at the time of reentry; (2) the student has a Form I-20 that reflects the cap-gap benefit that has been endorsed by his or her school with a valid travel signature; and (3) the H-1B petition filed on behalf of the F-1 student has been approved before the student travels. A student who departs the U.S. while the change-of-status application is pending abandons the application by such travel, and the "cap-gap" benefit would similarly end.
- Provides for DHS employer site visits, with notice or unannounced, where the STEM OPT student is employed. To guard against adverse impacts on U.S. workers, the rule requires the terms and conditions of a STEM job (i.e., duties, hours, and compensation) to be commensurate with those applicable to similarly situated U.S. workers.
- Creates the following reporting requirements: (1) validation every six months where the student verifies his or her legal name, address, and employer information; (2) annual self-evaluation signed by the student and the employer; (3) any material changes to the school, such as termination.
- Retains the 90-day maximum period of unemployment during the initial period of post-completion OPT, but allows an additional 60 days (for a total of 150 days) for a student who obtains a 24-month STEM OPT extension.

General Application Process

The extension application process remains generally the same. A student initiates the STEM OPT extension process by requesting the designated school official (DSO) to issue him or her a new I-20 form (the "Certificate of Eligibility for Nonimmigrant Student Status") containing the OPT STEM endorsement. Under the new rule, the student and employer must complete and sign the new training plan (Form I-983) before the DSO can issue a new I-20.

Upon receipt of the newly endorsed Form I-20 from the SEVIS (Student and Exchange Visitor Information System), the student files Form I-765, Application for Employment Authorization, with USCIS.

Employer Obligations and Attestations

During an F-1 student's STEM OPT period, employers will be subject to increased obligations. These include:

- Registering and participating in E-Verify at the worksite where the F-1 will work.
- Completing and certifying a training plan for each F-1 STEM OPT applicant and updating the plan as required.
- Conducting two evaluations of the student throughout the STEM extension period and submitting the evaluations to the student's school.
- Making required reports to the F-1 student's DSO.
- Ensuring the student's compensation and other working conditions are commensurate with those of similarly situated U.S. employees.
- Attesting the employer will not replace a U.S. worker with an F-1 student on STEM OPT.

- Readiness to undergo random compliance inspections conducted by U.S. Immigration and Customs Enforcement.
- These obligations apply only to employers of F-1 students working on a STEM OPT approved under the new regulations. They do not apply during the F-1 student's initial 12 months of regular OPT or during a 17-month STEM OPT approved before May 10, 2016, and will not be further extended under the new regulation.

Training and Mentoring Plan

Before requesting a new Form I-20 with the STEM OPT extension endorsement from the DSO, both the F-1 student and the employer must complete and sign Form I-983, Training and Mentoring Plan.

The training plan solicits the student's personal information and the employer's information, and requires certification by both the student and the employer. The training plan should be certified by the employee's supervisor who will monitor the student's goals and performance, or by the HR officer with signatory authority. It also seeks information about the student's role and how it is directly related to enhancing the student's knowledge, the goals and objectives of the training, and how the employer will supervise and evaluate the student.

By signing the training plan, the employer certifies:

1. To notify the DSO within 10 days of any material changes to the training plan. These may include changes to work hours or compensation (other than due to a reduction in work hours), the employer's EIN number due to a corporate restructuring, and the training plan that would make it or the employer's or F-1 student's attestations inaccurate.
2. To report the student's termination, resignation, or departure to the DSO within five business days.
3. To review and sign the "Self-Evaluation" completed by the student along with his or her direct supervisor or manager. The Self-Evaluation must be completed twice: (i) at the end of the initial 12 months under the training plan, (ii) at the end of the training plan. The evaluation must be completed, signed, and reviewed within 10 days of the date on which it is due. Failure to submit an evaluation to the DSO promptly will result in automatic violation of F-1 status.
4. To adhere to regulations on nonimmigrants under 8 C.F.R. part 214 as follows:
 - The practical training directly relates to the student's STEM degree and will achieve his or her objectives.
 - The employer will ensure on-site supervision and training.
 - Sufficient resources and training personnel are available to provide appropriate training.
 - The student will not replace a full-time or part-time, temporary, or permanent U.S. worker.
 - The duties, hours, and compensation offered in STEM training to the F-1 student are commensurate with similarly situated U.S. workers.
 - The employer will comply with all federal and state requirements in relation to employment certification.

Open Questions

The new OPT STEM rule leaves employers with many questions. For example, what is the scope of required OPT STEM documentation that must be maintained? What level of detail is required when preparing the training plan to ensure that it accurately reflects proposed activities, skills, and knowledge to be gained by the OPT employee? What potential issues can arise from the newly required self-evaluation prepared by the employee, particularly if the employee is subsequently terminated?

While USCIS likely will clarify some of these issues, employers, schools, and practitioners need to make sure they are familiar with the significant program changes and new obligations.

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