

New Department of Homeland Security Regulation Aims to Preserve and Enhance STEM OPT Program for Nonimmigrant Students and U.S. Employers

On October 19, 2015, the U.S. Department of Homeland Security (DHS) published a notice of proposed rulemaking in the Federal Register regarding optional practical training (OPT) extensions for F-1 students with U.S. degrees in science, technology, engineering or mathematics (STEM). The proposed rule is essentially a response to an August 2015 decision of the U.S. District Court for the District of Columbia to vacate the present STEM OPT extension regulation for procedural deficiencies in its promulgation, effective February 12, 2016. Under the proposed rule, the length of STEM OPT extension would be increased from 17 months to 24 months. In addition, the rule requires employers to develop and implement mentoring and training programs to bolster students' learning through practical experience and provides safeguards for U.S. workers seeking employment in related fields. DHS is accepting comments on the proposed rule through November 18, 2015 and is making every effort to have the final rule take effect prior to the February 12, 2016 sunset of the present STEM OPT extension regulation.

STEM OPT Extensions. Under the proposed rule, the length of STEM OPT extensions would increase from 17 months to 24 months and F-1 students would be limited to two 24-month STEM OPT extensions (for example, one after earning U.S. master's STEM degree and another after earning U.S. doctoral STEM degree). The proposed rule extends the maximum period of unemployment for F-1 students to 150 days – 90 days during the initial 12-month period of post-completion OPT and 60 days during the 24-month STEM OPT extension. If the DHS rule is implemented as proposed, the STEM OPT extension will be a benefit to F-1 students and U.S. employers alike, as students will be able to work in the U.S. for three full years before additional work authorization (e.g., H-1B, O-1, etc.) would be necessary, and employers will have a generous amount of time in which to assess F-1 employees' performance before undertaking sponsorship for additional work authorization. As with the present STEM OPT extension regulation, under the proposed rule, STEM OPT extensions are only available if the employer participates in the U.S. Citizenship and Immigration Services' E-Verify employment eligibility verification program.

New Employer Responsibilities. The proposed rule establishes a couple of new responsibilities for employers seeking to employ F-1 nonimmigrants on the STEM OPT extension. First, employers would be required to implement formal mentoring and training programs for STEM OPT students to enhance their practical skills. The student would be required to prepare a Mentoring and Training Plan – including the training goals and a description of how those goals will be met – with the employer and to submit the plan to the student's designated school official (DSO) at his/her institution before the DSO could recommend and authorize a STEM OPT extension for the student. Second, employers would be required to attest and provide assurances on a number of items including that they will not terminate, layoff or furlough a U.S. worker as a result of hiring an F-1 student on STEM OPT and that the duties, hours and compensation for the F-1 student employee are commensurate with similarly situated U.S. workers. If an employer fails to comply with the new requirements, DSOs will be prohibited from recommending students for a STEM OPT extension.

We will continue to monitor this proposed rule as the February 12, 2016 deadline approaches and provide updates so F-1 student employees and their employers can plan accordingly.

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