

Management Alert



DHS Publishes STEM OPT Rule - Potential New Benefits and Requirements

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On Monday, October 19, 2015, the Department of Homeland Security (“DHS”) published its eagerly anticipated STEM Optional Practical Training (“OPT”) rule in the Federal Register for a 30-day comment period ending on November 18, 2015. The proposed rule offers potentially significant benefits to STEM OPT beneficiaries, including in particular a 24-month extension of work authorization. However, the rule as currently written imposes additional requirements on U.S. employers.

BACKGROUND

The STEM OPT program allows recent university graduates who majored in a STEM field (Science, Technology, Engineering, or Mathematics) to receive an additional 17 months of work authorization beyond the initial 12 months of OPT that they receive upon completion of their academic program. Due to the increased demand for H-1B visas the past few years, the STEM OPT program significantly benefits employers wishing to hire and retain talented foreign student graduates who do not secure an H-1B through the H-1B cap lottery as it allows for a longer period of OPT employment and multiple chances at the lottery. A recent federal district court ruling in *Washington Alliance of Technology Workers v. DHS* vacated the STEM OPT program due to procedural issues regarding its creation. However, the Judge stayed her ruling keeping the STEM OPT program in place until February 12, 2016.

PROPOSED STEM OPT RULE

In addition to re-authorizing the STEM OPT program and the Cap-Gap Extension provisions, the proposed rule titled, [Improving and Expanding Training Opportunities for F-1 Nonimmigrant Students with STEM Degrees and Cap-Gap Relief for All Eligible F-1 Students](#), includes potential benefits to eligible F-1 students.

New Benefits

Extension of Work Authorization

The proposed rule would increase the current 17-month STEM OPT extension available to F-1 students to 24 months. As with the previous STEM rule, the F-1 student will only be authorized to work for employers who are enrolled in USCIS’s E-Verify employment eligibility verification program.

Additional STEM Degrees

The proposed rule would allow F-1 students who have already used a first grant of STEM OPT work authorization to enroll in another STEM-eligible academic program and apply for an additional 24-month STEM OPT extension.

Previously Obtained STEM Degrees

Under the proposed rule, F-1 students who graduate from a non-STEM degree program and only receive a 12-month grant of OPT work authorization would be eligible to use a previously granted STEM degree as a basis to apply for a 24-month STEM extension. To take advantage of this provision, the employment opportunity would need to directly relate to the previously obtained STEM degree.

Increase in Number of Days an F-1 Student May Remain Unemployed

The current rule allowing F-1 students to accrue 90 days of unemployment during an initial 12-month grant of OPT would remain unchanged. However, for F-1 students granted STEM OPT, the proposed rule would increase the number of unemployment days from 30 to 60 during the 24-month period.

However, DHS's proposed rule also includes added requirements on U.S. employers and restrictions on eligibility.

New Requirements and Restrictions

Mentoring and Training Plan and Safeguards for U.S. Workers in Related Fields

Under the proposed rule, U.S. employers would be required to implement formal Mentoring and Training Programs for F-1 students applying for STEM OPT benefits. These F-1 students would be required to provide evidence of such programs to their Designated School Officials ("DSOs"), which would then permit DSOs to recommend STEM OPT in the students' SEVIS records.

As part of this Mentoring and Training Program, the proposed rule would require U.S. employers to verify and attest to certain statements including: (1) the employer has sufficient resources and trained personnel available to provide appropriate mentoring and training in connection with the specified opportunity; (2) the employer will not terminate, lay off, or furlough any full- or part-time, temporary or permanent U.S. workers as a result of providing the STEM OPT to the student; and (3) the student's opportunity assists the student in attaining his or her training objectives.

Terms of Employment

The proposed rule requires that the duties, hours, and compensation for an F-1 student working pursuant to STEM OPT be commensurate with those provided to similarly situated U.S. workers. In addition, the proposed rule requires STEM OPT workers to work at least 20 hours per week.

Employer Site Visits

The proposed rule clarifies DHS's discretion to conduct employer on-site reviews to verify whether employers meet program requirements.

School Accreditation

The proposed rule would limit STEM OPT eligibility to students with degrees from schools that are accredited by an accrediting agency recognized by the Department of Education.

Public comments on the proposed rule can be made through November 18, 2015. Seyfarth Shaw LLP continues to monitor this development closely and will publish new information as it becomes available. Please contact your Seyfarth Shaw attorney or account manager with any questions.

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