

On October 19, 2015 the Department of Homeland Security (DHS) published a [notice of proposed rulemaking](#) (Proposal) that would expand the optional practical training (OPT) regulations for F-1 students with science, technology, engineering or mathematics degrees (STEM) from US institutions of higher education. The Proposal aims to improve the integrity and value of the STEM OPT program, and enhance the academic benefit through increased oversight. Ultimately, the Proposal provides several benefits and protections for F-1 students and US workers, and additional requirements for employers and educational institutions.

Background

In 2008, DHS introduced an extension of OPT for STEM graduates in an interim final rule (IFR). Under the IFR, F-1 students with a STEM degree from a US institution of higher education would be eligible for a 17-month extension of OPT, provided the F-1 student's employer was enrolled in the USCIS's E-Verify program. In August 2015, the IFR was vacated on procedural grounds by the US District Court for the District of Columbia. According to DHS, the Proposal is designed to reinstate the STEM OPT extension, with changes to improve and enhance the program's benefits.

Benefits and Protections for Students and US Workers

The Proposal provides for some substantial benefits to F-1 STEM students. DHS originally limited OPT extensions to 12 months per educational level in a position directly related to the F-1 student's field of study. The Proposal would extend the OPT period by an additional 24 months, for a total of 36 months per educational level, in a position related to the student's field of study. If a student has timely filed a H-1B petition and has requested a change of status, the Proposal provides a "Cap-Gap" provision extending the student's OPT period until October 1 of the fiscal year for which the H-1B visa is being requested. Fields of study that qualify for these STEM OPT extensions are clearly defined in the Proposal, and the Proposal additionally establishes a process for public notification in the Federal Register when DHS modifies eligible STEM fields.

Employers will be required to implement formal mentoring and training programs to enhance the student's academic and practical experience. The additional, mandatory program will provide benefits for the student, but will also create challenges for the employer, as described below.

Although the Proposal limits eligibility to students with degrees from schools accredited by an agency recognized by the Department of Education, students may use a prior eligible STEM degree to apply for an extension. Moreover, F-1 students may remain unemployed for up to 150 days after completing an eligible academic program under the Proposal. However, throughout an OPT extension, students are required to report to DHS any changes to their names or addresses, any changes to their employers names or addresses, and to periodically verify this information with DHS.

US workers are protected by further provisions that require employers to provide duties, hours, and compensation in a STEM OPT program commensurate with similarly situated US workers. Further, the employer may not layoff or terminate any US worker as a result of providing an OPT position to a student.

Employer and Educational Institution Requirements

Despite the benefits for students, the Proposal creates a number of requirements for employers and educational institutions. Perhaps the most onerous requirement is the mandatory mentoring and training plan. DHS estimates the cost of the standards proposed in this rule to exceed US\$500 million between 2016 and 2025, at a cost to employers of more than US\$700 per student, per year. Educational institutions will be on the hook for more than US\$40 per student, per year, and the Proposal would cost students approximately US\$179 for the first year and US\$43 the second year.

The above estimate includes the cost to employers to enroll and utilize the USCIS E-Verify program, which is required to take on STEM OPT students. Additionally, employers will be subject to discretionary on-site reviews of the employers worksite to verify program requirements are being satisfied.

Employers will be required to report changes in the student's employment and must attest that: (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, layoff, or furlough any full- or part-time, temporary or permanent US 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.

In sum, the Proposal creates significant opportunities for STEM students, while creating additional requirements for employers. DHS will consider public comments received by November 18, 2015. Proposed rules frequently differ from final rules, and we will continue to monitor developments as they become available. If you have any questions regarding the Proposal, please contact your designated Squire Patton Boggs lawyer or office.

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