



Special Alert:

DHS Releases New F-1 STEM OPT Regulations

On March 11, 2016, the Department of Homeland Security (“DHS”) issued its long-awaited final rule (the “2016 Rule”) allowing F-1 graduates to extend their Optional Practical Training (“OPT”) period if they have a degree in science, technology, engineering, or mathematics (“STEM”) from an accredited U.S. university and their prospective employer is registered in and using the federal government’s E-Verify program to assess the identity and employment authorization of new hires.

Background

Each year, foreign student graduates of U.S. universities in F-1 status are allowed up to one year of OPT employment in fields related to their course of study after graduation. Since 2008, DHS regulations (the “2008 Rule”) allowed eligible F-1 graduates to obtain an additional 17 months of OPT as long as they had a STEM degree from an accredited U.S. university and their prospective employer was enrolled in and using E-Verify. This extended the total OPT period of authorized work authorization to 29 months.

On August 12, 2015, however, the STEM OPT program received a grave blow when a U.S. district court in *Washington Alliance of Technology Workers v. U.S. Department of Homeland Security*, ___ F. Supp. 3d ___, 2015 WL 9810109 (D.D.C. Aug. 12, 2015) (slip op.) (“*Washington Alliance*”), rendered its decision to vacate the 2008 Rule unless DHS corrected procedural errors that were the basis for the district court’s decision.

The 2016 Rule

Positive Changes. On March 11, 2016, DHS released the 2016 Rule in response to the *Washington Alliance* decision. The 2016 Rule revamped and substantially modified the F-1 STEM OPT program defined by the 2008 Rule. There are numerous positive changes in the 2016 Rule. For example, the 2016 Rule:

1. expands the current STEM OPT work period from 17 months to 24 months;
2. allows F-1 student employees currently working under the 2008 Rule to complete their allotted 17 months of extended OPT period through its expiration date;
3. permits current F-1 students who received a U.S. STEM degree within the past 10 years to

- use that prior degree as the basis for an additional 24 months of OPT;
4. gives future F-1 STEM degree graduates an additional 24 months of OPT work authorization if the foreign student receives a master's degree, completes three total years of regular and STEM OPT, and then returns to school and obtains a doctorate STEM OPT degree;
 5. allows employers of F-1 students who are close to reaching the end of their 17-month STEM OPT period under the 2008 Rule to apply for the additional seven months (or a total of 24 months);
 6. increases the total permissible period of unemployment during the STEM OPT period from 120 to 150 days;
 7. continues "cap gap" protection that extends OPT work authorization by operation of law through September 30, even if the F-1 student's OPT authorization has expired, as long as: (a) the F-1 student was in valid status and had OPT on April 1; (b) the F-1 student's employer files a cap-subject H-1B petition on his or her behalf; and (c) that H-1B petition is accepted under the quota and approved effective October 1; and
 8. in the event that an employer's H-1B petition is not accepted under the cap, extends OPT work authorization for F-1 student STEM graduates until the employer receives notice that the H-1B petition has been rejected.

Onerous Requirements. Along with those positives, the 2016 Rule contains new, more onerous requirements that employers must satisfy. For example, the 2016 Rule:

1. maintains the requirement that the employer must be enrolled in and using E-Verify;
2. requires the employer to execute a special attestation affirming that (a) it has the resources and personnel to provide appropriate training; (b) the F-1 student employee will not replace any U.S. worker; (c) the employer will assist the F-1 student employee in obtaining his or her training goals; and (d) the duties, hours (no less than 20 hours a week), and compensation are commensurate with those of the employer's other similarly situated workers;
3. requires the employer and F-1 student employee to complete Form I-983 ("Training Plan for STEM OPT Students") that defines the training that the F-1 STEM graduate will receive; specifies the hours, wages, and working conditions; describes the supervision and performance evaluation process; and sets forth specific company information, including its name and federal Employer Identification Number ("FEIN");
4. prohibits STEM OPT graduates from working as unpaid volunteers;
5. makes employers subject to the same type of on-site DHS visits that currently are part of the H-1B and L-1 programs to confirm that the employer is complying with the representations contained in its attestations (normally, these site visits are on notice, but the 2016 Rule allows DHS to make unannounced visits if it has received a complaint or otherwise has reason to believe that a violation of the STEM OPT program has occurred or is occurring);
6. requires the employer to notify the Designated School Official ("DSO") at the university that authorized the F-1 student's STEM OPT employment within five business days if the F-1 student resigns or is terminated;
7. compels the employer to prepare a new training plan and secure approval of that plan from the DSO if the employer wants to make any material change to the prior training plan, including a change in FEIN resulting from a corporate restructuring or other transaction; and
8. requires a new employer to prepare and submit a training plan to an F-1 student's DSO within 10 days after the student joins the company if the employer hires the F-1 student midway through the 24-month STEM OPT extension period.

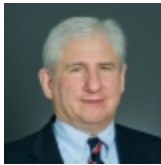
The Transition Period Under the 2016 Rule

Any 17-month STEM OPT extension application still pending on or after May 10, 2016, will receive a “Request for Evidence” from the U.S. Citizenship and Immigration Services (“USCIS”) to provide documentation to prove that the student meets all the requirements for a 24-month STEM OPT under the 2016 Rule.

F-1 students who already have been granted a 17-month STEM OPT extension are eligible to apply for the additional seven months of OPT made available under the 2016 Rule by filing an I-765 application with USCIS between May 10, 2016, and August 8, 2016. This I-765 application must contain an I-20 for the 24-month extension endorsed by the DSO and dated within 60 days of the filing. The F-1 student also must have at least 150 calendar days of his or her 17-month STEM OPT employment authorization document remaining to qualify for the additional seven months of OPT under the 2016 Rule.

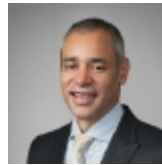
The 2016 Rule consumes more than 300 pages. In this Special Alert, we have provided only a brief summary of the highlights of this regulation. DHS has created a new section on its “Study in the States” website to accommodate questions: <https://studyinthestates.dhs.gov/stem-opt-hub>. Those readers who need additional information should contact their Epstein Becker Green attorney.

For more information or questions regarding the above, please contact:



Robert S. Groban, Jr.

New York
212/351-4689
rgroban@ebglaw.com



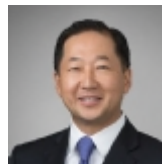
Pierre Georges Bonnefil

New York
212/351-4687
pbonnefil@ebglaw.com



Patrick G. Brady

Newark
973/639-8261
pbrady@ebglaw.com



Jang Hyuk Im

San Francisco
415/399-6067
jim@ebglaw.com

To read more about Epstein Becker Green's Immigration Law Group, click below.
[Read more >](#)

This document has been provided for informational purposes only and is not intended and should not be construed to constitute legal advice. Please consult your attorneys in connection with any fact-specific situation under federal law and the applicable state or local laws that may impose additional obligations on you and your company.

Epstein Becker & Green, P.C., is a national law firm with a primary focus on health care and life sciences; employment, labor, and workforce management; and litigation and business disputes. Founded in 1973 as an industry-focused firm, Epstein Becker Green has decades of experience serving clients in health care, financial services, retail, hospitality, and technology, among other industries, representing entities from startups to Fortune 100 companies. Operating in offices throughout the U.S. and supporting clients in the U.S. and abroad, the firm's attorneys are committed to uncompromising client service and legal excellence. For more information, visit www.ebglaw.com.

CONFIDENTIALITY NOTE: This e-mail is intended only for the person or entity to which it is addressed and may contain information that is privileged, confidential, or otherwise protected from disclosure. Dissemination, distribution, or copying of this e-mail or the information herein by anyone other than the intended recipient, or an employee or agent responsible for delivering the message to the intended recipient, is prohibited. If you have received this e-mail in error, please call the Help Desk of Epstein Becker & Green, P.C., at (212) 351-4701 and destroy the original message and all copies.

To ensure compliance with requirements imposed by the IRS, we inform you that any U.S. federal tax advice contained in this communication (including any attachments) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing, or recommending to another party any transaction or matter addressed herein.

Pursuant to the CAN-SPAM Act, this marketing communication may be considered an advertisement or a solicitation. If you would prefer not to receive future marketing communications from Epstein Becker & Green, P.C., please click the "Manage Subscriptions" link above or submit your request via email to ecomms@ebglaw.com, or via postal mail to Epstein Becker & Green, P.C., Attn: Marketing Department, 250 Park Ave., New York, NY 10177. Please include your email address if submitting your request via postal mail. *Attorney Advertising.*