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Immigration

Ready, Set, Train: Preparing for Regulations On Training for International STEM Students

On May 10, new Department of Homeland Security regulations take effect that allow an extended post-graduate training and employment period for international students with science, technology, engineering and mathematics degrees. But will employers be ready?

The regulations, released March 9, allow international students on F-1 visas who have earned STEM degrees to work an additional 24 months over and above the 12-month optional practical training period for students with any degree (46 DLR A-6, 3/9/16).

Current regulations, issued in 2008, only provide for an additional 17 months of OPT for STEM students.

But the extension comes with some contingencies, including a requirement that employers of international students develop a training plan and have the student's designated school official sign off on it. A DSO assists and oversees international students at a U.S. college or university approved under the DHS's Student and Exchange Visitor Program.

Prior Rule Invalidated. "We're happy that there is still a STEM OPT rule," Justin Storch, manager of agency liaison for the Council for Global Immigration, told Bloomberg BNA April 15.

A prior version of the rule was invalidated by a federal judge in Washington, D.C., for failure to follow the proper procedures, but she allowed that rule to remain in place while the DHS developed a new one (*Wash. Alliance of Tech. Workers v. DHS*, 2015 BL 258791, D.D.C., No. 1:14-cv-00529, 8/12/15) (155 DLR A-1, 8/12/15).

However, the new rule "does definitely add some new burdens and create some new requirements," according to Storch, whose organization advocates for immigration changes on behalf of large businesses.

"I'm not convinced that employers are going to be astutely monitoring or implementing the training element," immigration attorney Robert Aronson of Fredrikson & Byron in Minneapolis told Bloomberg BNA April 5.

Aronson expressed concern that Immigration and Customs Enforcement, a division of the DHS, might pursue "a few high-profile cases" against employers that don't comply with the requirement. That would create a "major disincentive" for employers to take advantage of the STEM extension, he said.

Holding employers accountable for implementing a training program, especially smaller employers that "may not have the infrastructure" to develop one, could be a "recipe for disaster," Aronson said.

New Training Plan Requirements. According to the new regulations, the training plan must: "identify goals for the STEM practical training opportunity, including specific knowledge, skills, or techniques that will be imparted to the student, and explain how those goals will be achieved through the work-based learning opportunity with the employer; describe a performance evaluation process; and describe methods of oversight and supervision."

Employers can rely on existing training programs or policies that they use for performance evaluations and employee oversight and supervision, the regulations state.

The training plan must explain how it is directly related to the STEM degree that is the basis for the OPT extension, the regulations state.

"Material changes" to the training plan require a modification of the Form I-983 or completion of a new form, the regulations provide. They also contain a non-exhaustive list of what the DHS considers to be material changes.

Concern about enforcement isn't unfounded—the regulations allow for discretionary site visits by the DHS. The regulations say the department will provide employers with 48 hours' notice before arriving, except where there has been a complaint or other evidence of noncompliance.

OPT Site Visits Called 'New Animal.' Employers have gotten somewhat used to site visits, Storch told Bloomberg BNA. ICE has conducted audits of employers' I-9 employment eligibility verification forms for years, and U.S. Citizenship and Immigration Services conducts site visits of employers that hire foreign workers on H-1B temporary work visas.

However, an ICE site visit to check out a STEM OPT student is a "new animal," and "it's something that employers definitely need to be aware of," Storch said.

Rebecca Peters, the CFGI's director of government affairs, added that there was a concern in the past regarding contractors rather than agency employees conducting the site visits. Storch said the contractors—who contracted with the USCIS—weren't always up to speed on how to conduct the site visits.

"The proof will kind of be in the pudding when the site visits actually begin" under the new STEM OPT rule, Storch said. But we "hope that these will be narrow" and thus "relatively manageable for employers," he said.

The required training plan and self-evaluation by the OPT student “should be fairly consistent with the annual review process that employers already have in place,” Storch said. The CFGI, in comments on the proposed rule, recommended greater simplification of the process, which occurred in the final regulations, he and Peters said.

Most employers already have “formal onboarding processes” for employees that include a training component, Storch added. So in essence they will do what they always have with respect to STEM OPT students—but now they have to spell it out on a piece of paper, he said.

Transition Period Critical. Timing is a big issue that employers need to keep in mind, Storch and Peters told Bloomberg BNA. Because the old regulations remain in effect through May 9, the DHS has developed a transition plan for handling pending STEM OPT applications and requests for a further OPT extension by international students currently on a 17-month extension.

According to the transition plan, the DHS will adjudicate applications for the 17-month extension through May 9, and any 17-month employment authorization document issued before May 10 will remain valid until it expires or is terminated or revoked. Any applications for a 24-month extension that are filed before May 10 will be treated as 17-month extension requests, the plan says.

That means a student who mistakenly requested a 24-month extension before the new regulations go into ef-

fect will get an EAD that is valid for 17 months, the DHS said.

There is a “limited window” for students currently on a 17-month extension to apply for an additional seven months of OPT under the new regulations, the DHS said. Such students only can apply from May 10 through Aug. 8, and only if they have at least 150 days remaining before the end of their 17-month extensions. They also must meet the requirements for the new 24-month extension.

That presents a “very tight time frame” for filing applications, Storch told Bloomberg BNA. In fact, he said, ICE is telling students and employers to start the process now of completing the application form so that the DSO can sign off on it in time for it to be filed with the DHS.

That is particularly true for students who will have 150 days left on their 17-month extensions as of May 10 or a few days afterward, he said.

The application for the additional seven months also must be filed within 60 days of the DSO signing off on the training plan, Peters said.

Because of that strict time frame, employers “really need to be doing their homework right now,” she said.

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