

THE NATIONAL LAW REVIEW

A Deep Dive into the New STEM OPT Extension Rule: What Employers, Big and Small, Need to Know

Monday, April 18, 2016

The new rule takes effect on May 10, 2016. Additional guidance can be found at the DHS website [Study in the States](#). Specifically, on the [STEM OPT Hub](#) there are sections geared for students, schools and employers.

Companies hiring and employing STEM OPT graduates should be aware that the Final Rule will impose new employer requirements and compliance obligations. Consistent with the 2008 Final Rule, employers will still need to be enrolled in [E-Verify](#) and remain in good standing with the program. In addition, the Final Rule will require employers to:

- Implement a formal training program to augment the student's academic learning through practical experience;
- Provide an OPT training opportunity that is commensurate with those of similarly situated U.S. workers in duties, hours and compensation;
- Complete the [Form I-983](#), Training Plan for STEM OPT Students. In this form, you must attest that:
 - The employer has enough resources and trained personnel available to appropriately train the student;
 - The student will not replace a full- or part-time, temporary or permanent U.S. worker; and
 - The training program will assist the student attain his or her training objectives. In this regard, the employer must review and sign a student-completed annual self-evaluation on their training progress; and
- Report material changes to the STEM OPT student's employment to the student's Designated Student Officer (DSO) within 5 business days.

The Final Rule defines "similarly situated U.S. workers" to include U.S. workers performing similar duties and with similar educational backgrounds, employment experience, levels of responsibility and skill sets as the STEM OPT student. The Rule further states, if the employer does not employ and has not recently employed more than two similarly situated U.S. workers, the employer must instead ensure that the terms and conditions of the STEM OPT opportunity they offer is commensurate with those similarly situated U.S. workers employed by other companies of analogous size and industry and in the same area of employment.

Moreover, the Final Rule provides U.S. Immigration and Customs Enforcement (ICE) with site visit authority. ICE may visit employer worksite(s) to verify whether they are meeting the STEM OPT program requirements, including whether they are maintaining the ability and resources to provide a structured and guided work-based training experience for the STEM OPT student. ICE will provide notice to the employer at least 48 hours in advance of any site visit, unless the visit is triggered by a complaint or other evidence of noncompliance with the STEM OPT extension regulations. In such cases, ICE may conduct a site visit without notice.

In completing the Form I-983, Training Plan, employers will have to furnish DHS with very specific detailed



Article By
[Gregory A. Wald](#)
[Squire Patton Boggs \(US\) LLP](#)
[Employment Law Worldview](#)
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information, including the employer name, address, website url, number of FTEs in the U.S., [NAICS](#) code, as well as the name, title and contact information of the individual (“official”) providing the training. In addition, employers will have to provide the following details regarding the training program: OPT training hours, start date of employment/training, compensation (salary, stipend, stock options, housing benefits, tuition cost waivers or other), a description of the training tasks and assignment as well as an explanation of how the training relates to the student’s STEM degree and a description of the training plan goals and objectives, employer oversight and measurement/assessments of the trainee. The completed Form I-983 will accompany the F-1 student’s application for extension of their STEM OPT work authorization document (EAD).

What do these changes mean for start-ups and small employers wishing to employ STEM OPT graduates? According to the comments supplementing the Final Rule and the STEM OPT Hub, start-ups and small employers need not worry if they comply with the requirements detailed above. However, that may be easier said than done. With regard to start-up businesses, the comments state, “alternative compensation may be allowed during a STEM OPT extension as long as the F-1 student can show that he or she is a bona fide employee and this his or her compensation, including any ownership interest in the employer entity (such as stock options), is commensurate with the compensation provided to other similarly situated U.S. workers.” However, the comments also state that certain employment situations will not support a STEM OPT extension. Such arrangements include sole proprietorships (where the student is self-employed), employment through temp agencies, multiple employer arrangements, consulting firms providing labor for hire (as opposed to controlling and directly employing the student) or any relationship that is not deemed a “bona fide employer-employee relationship.”

Whether DHS will interpret these new rules expansively will become evident once the rule takes effect and DHS (via the US Citizenship and Immigration Service) starts to evaluate the training plans submitted with STEM OPT extension applications. From a compliance perspective, it will be interesting to see how quickly ICE ramps up its site visit program and what type of employers will be targeted. Stay tuned to this space for more updates and developments related to the new STEM OPT extension Final Rule.

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