



3 Ways To Prepare For The New Foreign Student Work Rule

By **Allissa Wickham**

Law360, New York (May 9, 2016, 7:23 PM ET) -- A new rule going into effect Tuesday will give some foreign students an extra seven months of work authorization, but certain students and employers will have only a short window to capitalize on the rule, so they'll need to work fast to create required training plans. Here, attorneys share advice on how employers can prepare for the new optional practical training regulation.

Under a highly anticipated **new regulation** that takes effect May 10, certain foreign students with science and technology degrees will be able to extend their work authorization by several months under a program known as optional practical training, or OPT.

Specifically, foreign students and graduates with degrees in science, technology, engineering or math will be able to extend their initial 12-month work period by 24 months, for a total of 36 months. STEM students were previously able to extend their work period by just 17 months.

But students who are already on a work extension and want the additional seven months are going to have to hustle, attorneys say, since they only have from May 10 to Aug. 8 to apply. This means they'll need to create a training plan, run it by a school official and submit paperwork to the government, all before the deadline.

"They're eligible for it, but they need to get their act together pretty quickly," said A. James Vazquez-Azpiri of Morgan Lewis & Bockius LLP.

First, students will need to check with the designated school officials to make sure they're eligible, according to Gregory Wald of Squire Patton Boggs. After that comes a series of key steps both employers and students will need to follow.

Here, attorneys share tips on how employers can prepare for the new STEM OPT rule when it takes effect Tuesday.

Create a Training Plan Immediately

Since the regulation comes with fresh training requirements, employers and students will need to complete a training plan before seeking the work extension, attorneys say. If they don't already have a training program, they should start working to create one immediately, according to Jang Im of Epstein Becker & Green PC.

The training plan form, listed as the Form I-983, requires employers to describe the student's role at the company and how the student's position is linked to furthering the knowledge gained through a STEM degree. The form also asks for a description of how

assignments will help the student meet his or her goals for “work-based learning.”

Im suggested that the employer sit down with the student to go over what the training plan should be before it's written. Once the training plan is complete, it needs to be submitted to the student's designated school official, who will then issue a form known as an I-20, which will allow the student to apply for the work authorization, he said.

However, if a student is applying for the extension before the Aug. 8 deadline, the student must have at least 150 days remaining on their current work permit, Im warns.

“If they're at 149 or 140, then they're out of luck,” Im said.

Back Up Training Claims With Evidence

Along with the training plan, an employer will also need to certify that it has enough resources and staff to actually provide the training, that the student on the OPT extension won't replace a U.S. worker and that the terms of the training opportunity are similar to those for comparable U.S. employees, including pay and hours.

Double-checking to see if the conditions of OPT workers and U.S. employees are similar would likely involve a simple trip to the employer's human resources department, according to Vazquez-Azpiri.

“Any reasonably well-organized employer should have no difficulty in doing that,” he said.

But while larger employers may have an easier time determining if a position is commensurate with similarly situated U.S. workers, Im says, smaller employers may need to perform a wider industry analysis.

“With smaller startups, how do you determine that?” he said, noting that a company with few employees would need to look into the industry as a whole to confirm it's providing commensurate hours and pay.

Small organizations may face other hurdles, as well. These companies “may not be able to demonstrate that they have the resources to really provide the training that they say they're going to be giving to the person,” said Susan Cohen of Mintz Levin Cohn Ferris Glovsky and Popeo PC.

It's therefore crucial to stress to smaller companies that they may face scrutiny, Cohen says.

Be Prepared for Site Visits

Finally, employers should be ready for site visits from the U.S. Department of Homeland Security, attorneys say.

“The purpose of the visit is to make sure that all the information contained in the [training form] is accurate,” Vazquez-Azpiri said. “And so, the employer would have to make [sure] that it has documentation to prove everything that was asserted in that form.”

For instance, Cohen says, compensation issues analysis should be documented in a file in case of a site visit.

However, because other kinds of site visits, like H-1B visa visits, are part of a better-funded program, it may be less likely, for now, that OPT site visits even take place, Vazquez-Azpiri says.

"I think it's unlikely that the F-1 STEM OPT site visits are going to occur quite as frequently as the H-1B site visits," he said. "But [employers] should certainly be be be prepared because ... the notice they'll be given is only 48 hours. So employers need to be ready to have all of their ducks in a row before the Immigration and Customs Enforcement investigator appears at their doorstep."

--Editing by Rebecca Flanagan and Kat Laskowski.

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