

## New STEM Extension Rule Guidance for Employers

The following is intended to provide employers with more specific guidance regarding each of the provisions of the STEM OPT Extension rule effective May 10, 2016. This guidance is subject, however, to additional government interpretation over time. As one of the Department of Homeland Security officials who authored the new rule pointed out, the STEM OPT extension rule going effect May 10, 2016 “is a living document” with “some good, basic guidance up there right away, but as we get more questions - as we hear from our stakeholder community that they're confused about certain pieces - we plan to develop more guidance in there.” Employers and STEM extension applicants (“Student”) should therefore expect to experience inconsistent adjudications and questions from U.S. Citizenship and Immigration Services (“USCIS”) adjudicators during at least the initial implementation of the new rule.

Although the new rule adds new eligibility requirements and employer obligations, it allows eligible F-1 students that have elected to pursue 12 months of OPT in the U.S. to extend their OPT period by 24 months. Other key provisions include STEM OPT eligibility for certain Students whose most recent degree is not in a STEM field, providing an additional 60 days of unemployment (for an aggregate of 150 days) for individuals who obtain a 24-month STEM OPT extension, retaining the “cap-gap” relief that was initially introduced in 2008 for any F-1 student with a timely filed, cap-subject H-1B petition and request for change of status. H-1B cap-gap relief permits such students to automatically extend the duration of their OPT until September 30 of the fiscal year for which the H-1B is being requested.

However, the added value of the expanded F-1 STEM OPT extension to employers is not achieved without some measure of cost. The new rule increases the oversight of the STEM OPT extensions in several ways. STEM OPT extensions will be granted only to Students with degrees from accredited (vs. just [SEVP Certified](#)) schools. The STEM OPT extension applicant’s Field of Study must be included in the specific [field of study](#) listing included in the STEM Designated Degree Program List. Additionally, the rule continues to limit STEM OPT extensions only for individuals employed by companies enrolled in the USCIS E-Verify employment eligibility verification program.

Perhaps the most drastic change for employers and Students is the required completion and submission of a formal mentoring and training plan (“Training Plan”). STEM OPT extension applications filed or adjudicated after May 10, 2016 must include a Training Plan (to be submitted with other required information in [Form I-983](#)). The Student and his or her prospective employer develop this plan together to demonstrate how the potential STEM extension beneficiary’s academic learning will be benefited through practical experience. This Training Plan is a new, and probably the most burdensome, requirement for employers who previously only had to ensure the Student would be

receiving on-the-job experience in a role that was aligned to his or her relevant STEM Degree, typically accomplished via the submission of an employment verification letter with the relevant Designated School Official (“DSO”).

Ultimately, STEM extension beneficiaries and employers are being asked to document the role the Student will be perform in the format of a training curriculum, which may be accomplished by describing how the completion of specific tasks and assignments require the Student to learn and employ the knowledge, skills, and techniques that will result in the successful performance of the essential duties of the job function.

Specifically, the Form I-983 Training Plan must include:

- **Student Name:** The Student’s name must be listed exactly as it appears on the student’s SEVIS-issued Form I-20.
- **Employer Name:** The employer’s legal entity name must be listed exactly as it appears in Section 3 of Form I-983.
- **Site Name:** This information may be the same as the Employer Name, but if the Student is working at a branch or subsidiary that uses a different name, then the specific site name must be included.
- **Site Address:** The exact street address where the Student will be working must be listed.
- **Name of Official:** The name of the employee who will be managing the Student on a day-to day basis and who would typically complete performance evaluations (“Manager”) must be listed.
- **Official’s Title:** The Manager’s title must be listed.
- **Official’s Email:** The Manager’s email must be listed.
- **Official’s Phone Number:** The Manager’s phone number must be listed.
- **Student Role and the Training Program’s Direct Relationship to the Student’s Qualifying STEM Degree:** A description of the tasks and assignments that will be performed by the Student, the knowledge skills and techniques used to complete those tasks and assignments, the duration of the task/assignment, and the resulting training goals and objectives as they relate to the Student’s STEM degree must be listed.
- **Employer Certification:** The certification must be executed by an employee who is familiar with the Student’s goals and performance, and who is also authorized to sign on behalf of the employer in such matters. This individual may or may not be the same person as the Manager.
- **Goals and Objectives:** This section will be the most complex area to complete in the training plan as it must encompass the training goals and objectives (of the training plan) and which task and assignments the Student will perform, as well as what specific skills, knowledge and techniques he or she will apply and/or learn and a timeline for these activities.

- **Employer Oversight and Measures and Assessments:** While Form I-983 includes two separate sections to describe how the Student will be managed and how performance will be measured and assessed, DHS guidance which accompanied the final rule allows employers to satisfy assessment and performance questions through existing “internal” policies which address how training (performance management) is normally monitored and assessed. If an employer does not possess such a policy, development of a general policy in this regard would streamline satisfaction of this requirement.

## **Employer Attestations**

Form I-983 also requires the employer to make several attestations, which were not required previously in order for a Student to secure a STEM extension. The employer should take careful note of these attestations, listed in Section 4 of Form I-983, as the signatory will sign the form under penalty of perjury. The attestations are as follows:

**Provision of Adequate Training Resources:** The employer must certify that it has sufficient experienced and knowledgeable personnel available to properly execute the training program for the Student as presented. DHS may require the employer to provide documentation confirming this affirmation, which could include the CVs of the employees who are involved in the Student’s training.

**Commensurate Wage Obligation:** The employer must certify that the Student will receive compensation that is commensurate with similarly situated workers. Relevant compensation includes salary, bonuses and other forms of remuneration such as stipend, housing, tuition waiver and transportation reimbursement. There is no requirement to obtain a prevailing wage determination from the Department of Labor. However, in the event of a DHS audit, we recommend that employers create a file in order to maintain records of the data used to confirm that compensation paid to the Student is commensurate with similarly situated employees. According to the new rule, the documentation should include:

- A record of compensation of other employees in similar positions in the area of intended employment which supports the employer’s certification, or
- A record of compensation from the U.S. Department of Labor’s O\*Net, wage surveys or “other reasonable sources” confirming the average wage in the area of intended employment for positions similar to that to be performed by the Student, if the employer does not employ any similar workers as the Student in the area of intended employment.

**U.S. Worker Non-Displacement:** The employer must certify that no temporary or permanent full-time or part-time U.S. workers will be displaced by the hire of the Student. The employer is not obliged to perform a labor market test to demonstrate the unavailability of U.S. workers. However, the employer must confirm and be prepared to evidence that the hiring of the Student did not directly result in the loss of existing or prior employment of U.S. workers. The new rule does not offer any guidance regarding what evidence would be required to demonstrate satisfaction of this attestation. We would nevertheless recommend that employers create a file, which would include involuntary termination data for U.S. workers (U.S. citizens, U.S. permanent residents, refugees and asylees) in similar roles within the area of intended employment, from 90 days prior to and 90 days following the Student's hire date.

**Notification to the DSO of any Changes to Training Plan:** The new rule requires employers to notify the relevant DSO anytime any "material" changes occur to the Training Plan. Such material changes include the employer adopting a new Employer Identification Number due to a corporate restructuring, a reduction in the Student's pay from the amount reflected in the previously submitted Form I-983 that is not tied to a reduction in hours worked, a significant reduction in the Student's hours of work or any decrease below the 20-hour per week minimum, and changes to the employer's commitment to the Student's learning objectives set forth in the Training Plan. According to the new rule, if a material change should occur, the Student and Employer must sign a modified Training Plan (a new Form I-983) reflecting the change(s) and submit the new form to the relevant DSO "at the earliest available opportunity".

If a Student ceases to participate in the program, whether due to termination of employment or absence from work for five consecutive business days without consent of the employer, the employer must report the occurrence to the relevant DSO within five business days. (The Student must report the departure to the DSO within 10 days.)

A change in employer is still allowed under the new rules for a Student with an approved STEM OPT extension. The new employer must be enrolled in E-Verify and must submit a Form I-983 to the relevant DSO within 10 days of the beginning of the new training period.

### **Additional Requirements**

In addition to the submission of the Form I-983 Training Plan, employers and Students should also take note of several additional post-filing issues.

**Student Evaluation:** The new rule introduces an additional reporting requirement regarding the completion of Student evaluations. This requirement is shared by both the Student and the employer. The Student must conduct a self-evaluation annually through the completion of the "Evaluation of Student Progress" portion of the Form I-

983, and the employer must review and confirm the accuracy of the evaluation. The Student is responsible for submitting the completed evaluation to his or her DSO. The first annual review is due to the DSO within 10 days of the conclusion of the first year of the STEM OPT opportunity, and the final evaluation is due within 10 days of the conclusion of the STEM OPT period.

**Government Site Visits:** The new rule provides authority to DHS to conduct random site visits to ensure compliance. DHS must provide 48 hours' notice of such visits unless a complaint or other evidence of non-compliance predicated the visit. The site visit could be in the form of an onsite meeting, email request, or a telephone interview. The site visits will be conducted primarily by U.S. Immigration and Customs Enforcement, but may involve the U.S. Department of Labor. In addition, DHS could request updated or corrected information as a result of a site visit. With such relatively short notice, it will be important for employers to be prepared by keeping their evidence of compliance easily accessible by maintaining a file which should contain:

- A copy of the fully-executed Form I-983 Training Plan;
- Supporting compensation information used to ensure that the student is being paid a commensurate wage;
- Student evaluations;
- Manager credentials (resume); and,
- Non-Displacement report for U.S. workers in similar positions in the area of intended employment.

## **TRANSITION TO THE NEW RULE FOR EXISTING F-1 STUDENTS**

**Currently Filed STEM OPT Extensions:** For all applications filed and approved prior to May 10, 2016, USCIS will issue a 17-month EAD. Applications that are adjudicated by USCIS after May 10, 2016 will be issued a Request for Evidence requiring Students and employers to complete a Form I-983 Training Plan. Although Students will thus be required to amend their applications to receive approval of their STEM OPT extensions, if approved they will receive a 24-month extension without incurring additional fees or having to file another EAD extension application.

**Seven-Month STEM OPT Extensions:** DHS is providing a limited window of time during which qualifying Students who hold valid 17-month EADs as of May 10, 2016 may apply for an additional seven months of STEM OPT. Students who do not qualify for the seven-month STEM extension would continue under the old STEM rules. This limited application window begins May 10, 2016 and ends August 8, 2016.

In order to qualify, Students must:

1. Meet all the requirements for the 24-month STEM OPT extension under the new Final Rule as described in 8 CFR 214.2(f)(10)(ii)(C);
2. Submit the Form I-983 Training Plan to the DSO;
3. **Have at least 150 days remaining on their current 17-month STEM OPT statuses as of the date the seven-month STEM OPT extension is filed;** and,
4. Apply for the seven-month STEM OPT extension within 60 days of the date the DSO enters the requisite recommendation for 24-month STEM OPT.

## ADDITIONAL CONSIDERATIONS

The new rules will allow for Students to use two non-consecutive STEM OPT extensions if they earn two STEM degrees. For example, if a Student earns both a bachelor's and a master's degree in a STEM field, they would be eligible for a STEM OPT extension after both degrees, assuming they otherwise qualify for a STEM OPT extension.

In addition, if a Student is currently in an OPT period following the completion of a non-STEM degree, and had previously earned a STEM degree but had not secured a STEM OPT extension, that Student could now apply for and secure a STEM OPT extension on the basis of the previously-earned STEM degree, assuming the Student is otherwise eligible.

Students who receive a 24-month STEM OPT extension are now permitted to have up to 150 days of unemployment under the new rules and not violate their F-1 status. Under the old STEM rules, the maximum period of unemployment could not total more than 120 days. Importantly, volunteering will no longer satisfy the employment requirements under the STEM OPT rules.

Finally, the new rule allows Students in STEM OPT to depart the U.S. during any "cap-gap" period once the relevant H-1B change of status petition has been approved by USCIS. Under the old rule, departing the U.S. during a "cap-gap" period meant that the Student would not be able to reenter the U.S. until after the effective date of the approved H-1B petition.

Should you have any questions regarding this article, please reach out to Maggio + Kattar.