

What Employers Need to Know About the New STEM OPT Program

April 7, 2016

A substantially revised [STEM optional practical training \(OPT\) program](#) will take effect on May 10, 2016. The new program expands OPT to 36 months for F-1 students with a qualifying U.S. STEM degree – 12 months of initial OPT plus a 24-month extension of OPT – but imposes significant new obligations on students, employers and schools. The new requirements will apply only to those working in or seeking a grant of STEM OPT under the new regulations. The standard 12-month OPT program will remain unchanged. F-1 students granted a 17-month STEM OPT extension before May 10, 2016 will remain subject to the prior STEM rules unless they file for an additional seven months of OPT under the new rules.

The following are Fragomen's preliminary answers to employers' frequently asked questions about the new STEM OPT program and its transitional rules. In the weeks leading up to May 10, we expect the Department of Homeland Security to issue guidance on how the new program will be implemented. These FAQs will be updated as DHS provides further clarification about the new rule.

BASICS AND TRANSITIONAL RULES

1. How will the STEM OPT program change for employers?

Under the new regulations, F-1 students with a qualifying STEM degree can hold OPT work authorization for up to 36 months – 12 months of initial OPT and 24 months of STEM OPT. Some F-1 students who already have a 17-month STEM OPT will be eligible to apply for an additional seven months.

During an F-1's STEM OPT period, employers will be subject to increased obligations, including:

- Completing a training plan for each F-1 on a STEM extension, and updating the plan if there are changes to the F-1's training program (see Questions 13-15);
- Conducting regular evaluations of the F-1 through the STEM extension period and submitting evaluations to the student's designated school official (DSO) (see Questions 18-19);
- Making required reports to the F-1's DSO (see Questions 24-25);
- Ensuring that the F-1's compensation and other working conditions are commensurate with those of similarly situated U.S. employees (see Question 14);
- Attesting that the employer will not replace a U.S. worker with an F-1 on STEM OPT (see Question 15); and
- Undergoing compliance inspections conducted by U.S. Immigration and Customs Enforcement (ICE) (see Question 26).

These obligations will apply only to employers of F-1s working on a STEM OPT approved under the new regulations. They do not apply during the F-1's initial 12 months of regular OPT or during a 17-month STEM OPT that was approved before May 10, 2016 and will not be further extended under the new regulation.

2. How does the new rule affect F-1 employees who must file for a STEM OPT extension before May 10 (the effective date of the new rule)? Will employers be subject to the new requirements for these individuals?

It depends. If the F-1's application for a STEM extension of OPT is approved on or before May 9, the employment authorization document (EAD) will be valid for 17 months. The employer and the student will not be subject to the requirements of the new rule; they will be required to comply with earlier program requirements, discussed in Questions 4 and 21 below.

If, however, the F-1's application for STEM OPT is filed prior to and remains pending on May 10, the student and the employer will become subject to the new requirements. USCIS will issue a request for evidence (RFE) asking the F-1 and employer to prepare a training plan and submit it to the DSO so that the DSO can issue a new I-20 form with a new STEM OPT endorsement. These requirements are discussed further below.

3. Can F-1 students with a 17-month OPT now request more OPT time under the new rule?

Yes, certain F-1 students will be eligible to apply for an additional 7 months of STEM OPT, provided that they meet the requirements of the new rule:

- The F-1's qualifying degree must meet the new requirements of the regulation (see Question 6).
- The F-1 must have at least 150 days remaining on the 17-month STEM OPT EAD on the day USCIS receives the application for a 7-month extension.
- The employer and the F-1 must comply with the new rules, including having an approved training plan (see Questions 13-15) and a new I-20 endorsed for a STEM OPT extension by the student's DSO.
- The F-1 must file for a 7-month extension on Form I-765 between May 10, 2016 and August 8, 2016. Applications for a 7-month extension will not be accepted after August 8.

Because applications for 7-month extensions are especially time-sensitive, contact your designated Fragomen professional as soon as possible to determine eligibility and next steps.

4. What about STEM F-1s who are not eligible for additional time or do not wish to apply for a 7-month extension?

An F-1 who holds a valid 17-month STEM OPT EAD issued and valid before May 10, 2016 can continue to work through the EAD expiration, unless the EAD is withdrawn or revoked. The F-1 and the employer will remain subject to the earlier STEM OPT program rules. No training plan or evaluations are required, but your organization must be sure to comply with reporting requirements and the F-1 student must not exceed the limit on unemployment (see Question 12).

5. Can an F-1 student whose non-STEM OPT will expire before May 10, 2016 request a STEM extension under the new rules?

No, once an F-1 student is in the 60-day grace period following the completion of OPT, he or she is ineligible to apply for a STEM extension of OPT. F-1 STEM graduates completing an initial 12-month

OPT period before May 10 should be strongly encouraged to file for a 17-month extension before their 12-month EAD expires.

QUALIFYING STEM EDUCATION

6. Which degrees will qualify an F-1 student for a STEM OPT extension?

In order to qualify for a STEM OPT extension, an F-1 must have earned a degree or completed all requirements towards a degree (other than a thesis or similar requirement) in a field that appears on the STEM Designated Program List issued by Immigration and Customs Enforcement. Eligible degree fields are listed by their Classification of Instructional Programs (CIP) code. The current [list](#) will be in effect through May 9, 2016, after which [a revised list](#) will take effect. The qualifying degree must be from an accredited U.S. institution and must be directly related to the STEM OPT employment opportunity.

As has long been the case, not every STEM degree will qualify for an OPT extension. The revised STEM-designated degree list covers four broad degree classifications: Engineering (CIP code 14), Biological and Biomedical Sciences (CIP code 26), Mathematics and Statistics (CIP code 27), and Physical Sciences (CIP code 40). Degrees falling under these broad groups will automatically qualify for a STEM extension under the new rule.

A number of degree fields outside these four broad groups will also qualify for STEM OPT extensions. These are listed individually by their individual six-digit CIP code. Among these are degrees in computer and information science; intelligence, air and military sciences; management science; business statistics; actuarial science; econometrics; and quantitative economics.

7. Can an F-1 qualify for a STEM OPT extension based on a prior degree, if his or her most recent degree was not in a STEM field?

Under the new rule, an F-1 may be eligible for a STEM extension if he or she holds a prior U.S. degree in a qualifying STEM field, provided that:

- The previously obtained STEM degree is directly related to the OPT opportunity;
- The previously obtained STEM degree was conferred within 10 years of the STEM extension application date; an F-1 cannot qualify merely on the basis of having met degree requirements;
- The prior STEM degree was earned at a U.S. institution that was accredited and certified by the Student and Exchange Visitor Program (SEVP) to sponsor F-1 students at the time the DSO endorses the I-20 for the 24-month STEM OPT extension;
- The prior STEM degree is in a field listed on [the revised STEM designated program list](#) as of the date the DSO endorses the I-20 for a 24-month STEM OPT extension; and
- The F-1 is currently in a period of 12-month OPT based on his or her most recent U.S. degree.

8. *Is there a limit on the number of STEM OPT extensions an F-1 can obtain? Can an F-1 qualify for a second 24-month STEM OPT extension if he or she obtains a second STEM degree?*

An F-1 student may be eligible for an additional 12 months of regular OPT plus a second 24-month STEM extension if the student earns another qualifying STEM degree that is at a higher level than the first STEM degree.

The second STEM extension may not immediately follow the first STEM extension. That is, a course of study and an initial 12 months of OPT must occur between the two STEM OPT periods.

An F-1 student may not be authorized for more than two lifetime STEM OPT extensions, regardless of whether they were 17- or 24-month extensions.

QUALIFYING EMPLOYMENT

9. *Does the new rule make any changes to the E-Verify requirement for STEM OPT employers?*

As has long been the case, an employer must be registered and participating in E-Verify at the worksite where the F-1 will work during the STEM OPT period. The new regulation makes no changes to this requirement.

10. *What types of employment are permissible during the STEM OPT period?*

The 24-month STEM OPT period is limited to certain employers and employment opportunities, as follows:

- As noted above, a STEM OPT employer must be enrolled in and using the E-Verify program at the STEM OPT worksite.
- A STEM OPT employer must have an Employment Identification Number (EIN).
- The employment opportunity must be directly related to the student's qualifying STEM degree.
- There must be an employer-employee relationship between the employer and the F-1 student. During the STEM OPT period, employment for a staffing agency and other labor-for-hire arrangement will not qualify.
- Volunteer employment does not qualify.
- An F-1 may not work concurrently for multiple employers during the STEM OPT period.

11. *How many hours per week must an F-1 student work during STEM OPT? Is part-time work acceptable?*

F-1s on a STEM OPT extension must work at least 20 hours per week, except when they take leave under their employer's standard leave policy.

12. Must the F-1 be continuously employed in order to maintain lawful status during the STEM OPT period?

No, an F-1 is not required to be continuously employed in order to maintain lawful status, but there are strict limits on unemployment during OPT.

In the initial 12-month period of OPT available to all F-1 graduates, no more than 90 days of unemployment is permitted. STEM graduates who obtain a 17-month extension of OPT will be granted an additional 30 days of unemployment during the STEM extension for an aggregate of 120 days. Under the new rule, STEM graduates who obtain a 24-month extension of OPT will be granted an additional 60 days of unemployment, for an aggregate of 150 days. F-1s who apply for a 7-month extension of 17-month STEM OPT cannot exceed 120 days of unemployment while their EAD is pending; once it is approved, the unemployment limit increases to 150 days.

TRAINING PLAN AND EVALUATIONS

13. What must be included in the STEM OPT training plan?

The new rule requires the F-1 STEM student and the employer to jointly prepare a formal training plan on [Form I-983](#) and submit it to the student's DSO. The DSO cannot recommend the F-1 for a STEM extension of OPT until he or she reviews and approves the plan.

The plan must explain how the STEM employment will provide a work-based learning opportunity and must also describe:

- The specific goals of the training opportunity, including the knowledge, skills or techniques that your organization will impart to the F-1 student;
- How your organization intends to meet these goals;
- How the training is directly related to the student's qualifying STEM degree;
- Your organization's methods for evaluating the success of the training opportunity;
- How your organization will oversee and supervise the student's employment-based training; and
- The student's compensation, which must be commensurate with that paid to similarly situated U.S. employees.

The student and your organization must attest that you will comply with STEM OPT program rules.

The DSO must review the training plan to make sure that it contains all of the required elements and is signed by an authorized representative of your organization and the F-1 student before the DSO can issue the F-1 a new I-20 with a STEM OPT endorsement.

14. What are an employer's obligations with regard to the F-1 student's compensation during the STEM OPT period?

There is no specific wage requirement for F-1s during the STEM OPT period. However, the STEM OPT employer must attest that the F-1's compensation is commensurate with that provided to U.S.

employees who perform similar duties and responsibilities, and whose educational background, experience, and skill set are similar to that of the STEM OPT student.

15. What are a STEM OPT employer's obligations under the new "non-replacement" attestation?

The employer must attest that it will not replace a part-time, full-time, temporary or permanent U.S. worker with an F-1 on STEM OPT. DHS defines "replacement" as the loss of existing or previous employment.

16. What happens if there are changes to the training plan or the STEM OPT job? Must the training plan be amended?

Yes, if there are any material changes to or deviations from the training opportunity described on Form I-983, your organization and the F-1 student must complete a modified plan for the student's DSO. Examples of material changes include, but are not limited to:

- A significant decrease in the F-1's work hours per week;
- Any decrease in the F-1's hours worked below 20 hours per week (other than due to time off pursuant to your organization's leave policy);
- Any reduction in the F-1's compensation (other than due to a reduction in work hours);
- A change in your organization's EIN number due to a corporate restructuring; and
- Any change from the existing plan that would render the training plan or the employer's or F-1's attestations inaccurate.

The F-1 student must submit the modified plan to the DSO as soon as possible after a material change.

17. Can an F-1 on STEM OPT change employers? Is a new training plan required?

Yes, an F-1 on STEM OPT can change employers provided that the new job meets program requirements and the new employer is registered and participating in E-Verify.

The change of employer requires the submission of a new training plan to the student's DSO within 10 days of starting the new job. This obligation also applies to F-1s working on a 17-month grant of STEM OPT who have filed for a 7-month extension and change employers after filing.

18. Is my organization required to evaluate an F-1's performance under a STEM OPT training plan?

The F-1 worker must complete a self-evaluation on Form I-983, and the employer must review it for accuracy and sign it. Evaluations must be performed within the first 12 months of the STEM OPT employment and again at the conclusion of STEM OPT. Evaluations are due to the DSO within 10 days after the close of the evaluation period.

19. Are evaluations required for F-1 students who have applied for or been approved for a 7-month extension of 17-month STEM OPT?

Yes. Your organization becomes subject to the evaluation requirements upon the filing of an F-1's application for a 7-month extension. If the F-1 has more than one year remaining in OPT from the date of filing, two evaluations will be required. If, however, the F-1 has 12 months or less remaining in STEM OPT as of the date of filing, only one evaluation is required, at the close of the STEM OPT period.

20. Can our organization use its existing performance review process for STEM OPT evaluations?

While your organization can certainly draw from its already existing evaluation processes, the purpose of an internal performance evaluation is different from that of a STEM OPT evaluation. An internal performance evaluation focuses on how well an employee is performing the duties of the job and is often used to determine salary increases and promotions. A STEM OPT evaluation, on the other hand, focuses on the F-1's progress in meeting the goals outlined in the training plan. It is not intended to subjectively evaluate how well the F-1 performs the duties.

FILING PERIODS AND PROCEDURES

21. What is the process for F-1 students in initial OPT who must file a STEM OPT request before May 10, 2016 (the effective date of the new rule)? Are they authorized to work while their STEM OPT extension application is pending?

The F-1 student must apply for a STEM OPT extension before his or her initial OPT EAD expires. If the application will be submitted before May 10, the following steps must be completed:

- The F-1 must request a STEM OPT extension from the DSO, who will confirm eligibility for a 17-month STEM extension.
- The F-1 must obtain a newly endorsed I-20 from the DSO, recommending a 17-month STEM extension.
- The F-1 must file the EAD application on Form I-765 within 30 days of the DSO's endorsement and no more than 120 days before the 12-month EAD expires.

As discussed in Question 2, if the EAD application remains pending after the new regulation takes effect on May 10, additional requirements will apply.

F-1 students benefit from an automatic 180-day extension of work authorization if their initial 12-month OPT EAD expires while the STEM OPT application is pending.

22. What is the process for applying for STEM OPT on or after May 10, 2016? Can an F-1 student continue to work while the STEM OPT extension application is pending?

USCIS will begin accepting applications for 24-month STEM OPT extensions on May 10, 2016. The following steps are required:

- The employer and the F-1 prepare and execute a training plan on Form I-983.

- The F-1 submits the training plan to his or her DSO, who will confirm that the STEM degree, employer and employment opportunity meet the program requirements per the I-983 training plan.
- The F-1 obtains a newly endorsed I-20 from the DSO on or after May 10, recommending a 24-month STEM extension.
- The EAD application is filed on Form I-765 on or after May 10, within 60 days of the DSO's endorsement and no more than 90 days before the 12-month EAD expires.

F-1 students benefit from an automatic 180-day extension of work authorization if their initial 12-month OPT EAD expires while the STEM OPT application is pending.

23. *What is the process for F-1 students on a 17-month STEM OPT extension who will apply for an additional 7 months of OPT? Are they authorized to work while the request is being adjudicated?*

USCIS will begin accepting applications for 7-month extensions of STEM OPT on May 10, 2016. The following steps must be taken:

- The F-1 and the employer prepare and execute a training plan on Form I-983.
- The F-1 submits the completed training plan to the DSO, who will confirm that the degree and the I-983 training plan meet program requirements.
- On or after May 10, the F-1 obtains a newly endorsed I-20 from the DSO recommending a 7-month STEM extension. DSOs are not authorized to provide a STEM OPT endorsement under the new rule until May 10.
- The EAD application is filed between May 10 and August 8, 2016. The application must be submitted to USCIS within 60 days of the DSO's endorsement. As noted above, the F-1 must have at least 150 days remaining on the current EAD as of the date the application is received by USCIS.

F-1 students seeking an additional 7 months of STEM OPT will not benefit from an automatic 180-day extension of work authorization following the expiration of their current EAD. The new EAD must arrive before the old EAD expires, or else the F-1 will have a gap in work authorization.

REPORTING REQUIREMENTS

24. *What are my organization's reporting requirements for F-1s on STEM OPT?*

The employer is required to report to the DSO after certain events during an F-1's STEM OPT period. These include:

- Material changes to training plan. The F-1 and employer must notify the F-1's DSO when there are material changes to the training plan by filing an amended plan "at the earliest available opportunity." Material changes are described in Question 16 above.

- Onboarding a new employee in F-1 STEM OPT. When an F-1 takes up new employment during the STEM OPT period, the F-1 and the new employer must complete a training plan and submit it to the DSO within 10 days after the employment start date.
- Employment termination: An employer must report to the DSO within five business days if an F-1's employment is terminated during the STEM OPT employment or the F-1 fails to appear for work as expected for more than five days. (Vacations, sick days, and leaves under an employer's normal policies do not trigger this reporting requirement.) If the F-1 remains on a 17-month STEM OPT extension that will not be extended further, termination must be reported to the DSO within 48 hours.

25. How often must an F-1 student report to the DSO?

Every six months during the STEM OPT period, F-1 students must report to their DSO to confirm the accuracy of the information in their SEVIS record. The report is due within 10 business days after each reporting period. F-1 students must also report the following to the DSO:

- Changes in personal and employment information: The F-1 must report changes in name, address, employer's name and address and loss of employment to the DSO within 10 days of the change.
- Material changes to training plan: With your organization, the F-1 must notify the DSO of any material changes to the training plan by filing an amended training plan "at the earliest available opportunity."
- Employment termination. When an F-1's STEM OPT employment is terminated – voluntarily or involuntarily – before the end of the STEM OPT period, the F-1 must report the termination to the DSO within 10 days. This is in addition to the report the employer must make within five business days after termination.
- A change of employer. When an F-1 on STEM OPT joins your organization as a new employee, you and the F-1 must complete a new training plan and submit it to the DSO within 10 days of the start of the new employment.

In addition, an F-1 is obligated to notify the DSO as soon as possible if he or she believes the employer is not meeting its obligations under the new rule and as outlined in the training plan.

An F-1's failure to comply with these requirements could jeopardize his or her F-1 status.

COMPLIANCE AND ENFORCEMENT

26. Should employers of F-1s on STEM OPT expect periodic site visits from the Department of Homeland Security to confirm compliance with the new program? What is the scope of a site visit?

Yes. Under the new rule, the Department of Homeland Security has the authority to conduct on-site reviews to verify whether employers and F-1 students are meeting STEM OPT program requirements and attestations. It is anticipated that site visits will be conducted by officers of U.S. Immigration and Customs Enforcement (ICE). Site visits may be in person, or via email or telephone requests.

Site visits may include interviews with the F-1 student and his or her supervisor, a review of the training plan, and a review of the documentation the employer used to assess the wages of similarly situated U.S. workers. However, if the ICE officer observes violations of other immigration-related rules, such violations may be referred for further action.

In general, ICE is expected to provide the employer with 48 hours' notice in advance of a site visit, but the agency may make unannounced visits if there is a complaint or other evidence of noncompliance with STEM OPT program rules.