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Interim rule would provide substantial OPT-related benefits to F-1 student beneficiaries of employer-sponsored H-1B petitions.

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The U.S. Department of Homeland Security Announces New Optional Practical Training Interim Rule for F-1 Students

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On April 4, 2008, U.S. Department of Homeland Security (DHS) issued a press release describing an interim rule that extends the period of Optional Practical Training (OPT) from 12 months to 29 months for foreign students in F-1 status who are able to meet certain requirements. This interim rule is expected to be published in the Federal Register in the next 48 hours and will take immediate effect.

Many companies hoping to sponsor such students for H-1B status will see this interim rule as a valuable concession by DHS, especially considering that the regular cap of 65,000 H-1B numbers was exhausted on the very first day cases were accepted both last year and this year. The additional 1 year and 5 months beyond the initial 1-year OPT period is significant. This extended OPT period gives a graduating F-1 student at least 2 chances at having an employer-sponsored H-1B petition selected in the lottery while maintaining work authorization. It also removes the “cap-gap” problem for those who are selected in the H-1B lottery but whose OPT time does not extend to the H-1B start date of October 1. Those extra 5 months permit students graduating in the spring the opportunity to cover the potential 5-month gap period from May to October.

This rule also allows F-1 students to wait up to 60 days after completion of their academic program to apply for OPT, instead of requiring them to apply at least 30 days before completion.

To qualify for extension of OPT time, an F-1 student must:

1. Be participating in an approved post-graduation OPT program in a position related to the F-1 student’s major area of study;
2. Have successfully completed a science, technology, engineering, or mathematics (STEM) degree from a college or university certified by the U.S. Immigration and Customs Enforcement’s Student and Exchange Visitor Program;
3. Have an offer of employment with an employer participating in the U.S. Citizenship and Immigration Service’s E-Verify program; and
4. Properly maintain F-1 status.

Note that these requirements only apply to the OPT extension of time. The “cap-gap” relief for beneficiaries of approved H-1B petitions applies to all F-1 students.

To apply for a 17-month extension, F-1 students must request that their Designated School Official (DSO) recommend the extension in the Student and Exchange Visitor Information System (SEVIS), and then file an application for extended EAD work authorization with USCIS. A timely filed application for extended EAD work authorization automatically grants the F-1 student up to 180 days of continuous employment authorization while the application is pending adjudication. Employers of F-1 students who qualify for the 17-month

OPT extension must report to the student's DSO if employment terminates before the student's authorized OPT period expires.

The most significant requirement for employers is the mandatory E-Verify enrollment. E-Verify is an internet-based system managed by DHS, in partnership with the Social Security Administration, that electronically compares information contained in a number of government databases to verify an individual's authorization to work in the United States. By having this requirement, the DHS is making a benefit for foreign nationals conditioned upon employer enrollment in E-Verify. This clearly demonstrates DHS's intent to increase the number of employers participating in the E-Verify program, as well as its desire to intensify immigration law compliance and enforcement initiatives on employers. There are reportedly 60,000 employers enrolled in E-Verify at present, of which 22,000 are located in Arizona. Many employers have avoided enrolling in E-Verify, unless compelled to do so by state law, due to concerns about E-Verify's accuracy, as well as fears that participation in the program will open them up to government audit.

While this interim rule provides valuable benefits, it is hoped that Congress will legislate for additional H-1B numbers, effectively removing the need for this extended OPT time.

Should you have any questions concerning the interim rule and E-Verify enrollment, please contact your Littler Mendelson representative immediately.

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