

NEWS UPDATE

January 28, 2010

Subject: OPT Extension for Employees Employed by E-Verify Employer

STEM OPT Extension

F-1 students who work for a U.S. employer based on what is known as post-completion optional practical training (“OPT”) may be eligible to continue to work for an additional seventeen (17) months **if his/her employer is enrolled in E-Verify** (please see below). USCIS refers to this 17 month OPT extension as a “STEM extension” because a F-1 student must receive a degree in **Science, Technology, Engineering, or Mathematics (STEM)** based on an approved STEM List to qualify for the extension.

The STEM extension benefits your company by increasing your ability to employ and retain valuable F-1 students. The seventeen (17) month STEM extension allows F-1 students to work in the U.S. for twenty-nine (29) months in total, allowing your company sufficient time to secure a cap-subject H-1B for the F-1 student to continue his or her authorized employment. The H-1B category has been over-subscribed in past years, resulting in companies losing valuable F-1 students who may not be able to continue their U.S. employment. The STEM extension allows the F-1 student to continue working in the U.S. an additional seventeen months, effectively bridging the gap until the next H-1B cap opens on April 1st of the following year.

E-Verify

E-Verify is an employment verification system implemented by DHS, which requires an administrator to provide I-9 information to DHS **online** to ascertain the work eligibility of all new employees. **E-Verify is in addition to the Form I-9 requirements**--companies must continue to execute Form I-9s for all new hires.

Increasingly, DHS is conditioning immigration benefits, and access to immigration benefits, on a company’s enrollment in the E-Verify system. We believe that E-Verify could become mandatory for all companies that seek employment authorization and employment visas for their employees. Attached is the Memorandum of Understanding (“MOU”) for the E-Verify Program which must be executed to enroll in E-Verify. Please read the MOU carefully if your company is considering the E-Verify Program.

For companies interested in enrolling in E-Verify, please be aware of the following:

1. Companies must select an administrator(s) who will be required to submit all new hires through E-Verify within three business days of hire;

2. Under most circumstances, the employee will be located in the DHS and Social Security Administration (“SSA”) databases, and a confirmation of the employee’s work eligibility will be generated within seconds;
3. Companies must attach E-Verify results to Form I-9 for all new hires to show compliance. Companies will then be entitled to a rebuttable presumption that they did not knowingly hire an unauthorized individual;
4. On some occasions, an employee will not be confirmed through E-Verify because of a DHS or SSA non-match, and an electronic “tentative non-confirmation” message will be generated. Under these circumstances, the administrator must follow specific steps identified in Article III of the MOU, including providing the employee with a copy of the “tentative non-confirmation” and the opportunity to rebut the system’s findings;
5. Companies cannot use E-Verify for pre-screening applicants and cannot terminate an employee due to a “tentative non-confirmation” until the employee is given an opportunity to rebut the system’s findings and/or a “final non-confirmation” has been issued; and,
6. Once the company is enrolled in E-Verify, there are fines and penalties for failure to submit new hires through the system and for continuing to employ individuals who are subject to a “final non-confirmation” of their employment eligibility. Continuing to employ an individual after a final non-confirmation has been issued creates a rebuttable presumption that the company is knowingly employing an unauthorized individual.

If your company is interested in enrolling in E-Verify, we will guide you through the enrollment process, and assist with filing for your employee’s employment authorization document.

These updates are published periodically by The Rudnick Spector Firm to provide current news and events to our clients and friends. It is intended only to inform, not to provide legal advice, and readers should seek professional advice for all legal questions.