

# PUBLICATION

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## Immigration Update: Student Workers in Changing Times – What Employers Need to Know

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July 20, 2018

On May 10, 2018, the U.S. Customs and Immigration Service (USCIS) published a Policy Memorandum offering guidance in the calculation of unlawful presence for those in student (F), vocational student (M), or exchange visitor status (J) and their dependents. This guidance, which is effective August 9, 2018, significantly changes the prior policy governing calculation and accrual of unlawful presence (which can result in bars to future admission to the United States) for students and exchange workers; reflects a conflation of the distinct principles of "unlawful presence" and "violation of immigration status"; and imposes strict liability for students (and their dependent family members) who are not in full compliance with their respective, accredited programs as of August 9. While the impacts of this policy change and resulting immigration consequences from noncompliance are born by the students and their families, employers of students and exchange visitors working in Curricular Practical Training (CPT), Optional Practical Training (OPT), and especially STEM OPT status need to be aware of their reporting obligations under these forms of work authorization to avoid inadvertently triggering the start of an unlawful presence clock for their student workers. Employers can also help avoid the "traps for the unwary" person in F, J, or M status posed by the new USCIS policy.

### What is Unlawful Presence and Its Consequences?

Unlawful presence is defined as presence in the United States after expiration of the period of stay authorized by the Department of Homeland Security or by the Attorney General ("overstay") or presence in the United States without being admitted or paroled (those who "sneaked in"). A person who is unlawfully present for more than 180 days but less than a year and leaves the U.S. is barred from returning for three years. A person who departs after a one-year period of aggregated, unlawful presence is barred from returning for ten years. It is fairly straightforward to calculate a period of unlawful presence if you entered without inspection and were never admitted or paroled from the outset. For those foreign nationals who were admitted or paroled, most can rely on the period of admission indicated on their I-94 records (either a card attached to the passport or available electronically at <https://i94.cbp.dhs.gov/i94/#/home>).

For those in F or J status, the period of authorized admission (and expiration date) is less obvious. Individuals in F-1 student and J-1 exchange visitor categories are generally admitted with validity of "D/S" (duration of status) on their I-94 records rather than a specific expiration date. This practice is in recognition of the fluid nature of coursework, enrollment, and terms for various academic programs. The "D/S" expiration means that individuals in F or J classifications can remain in the U.S. as long as they maintain or do not violate their nonimmigrant status (e.g., generally maintain their full course of study, remain in the exchange program, do not engage in unauthorized employment, complete the program in a timely manner, etc.)

Up until now, USCIS (and legacy INS) has interpreted the unlawful presence provisions to require *notice* of a status violation to a foreign national admitted for "D/S" before the unlawful presence "clock" would start for the affected individual.

### What the Change in Policy Says

The new policy announces that USCIS will consider a period of unlawful presence to have started for those in F, M, and J status as of the date that any status violation occurred, even if no officer or system of the government gave notice to the student of the violation. USCIS requirements for F, M, and J status are quite complicated and nuanced, and violations can occur without intent and without the foreign national or a school or employer even realizing it, and the government could surprisingly impose the consequences of retroactively assessed unlawful presence long after the alleged violation has occurred, such as when the foreign national or derivative family member is later applying for another status, for a visa abroad, or even for permanent residence.

For those who failed to maintain their status *before* August 9, 2018, without notice from the government, the unlawful presence clock will begin to run as of *August 9*.

Going forward, individuals in F, M, and J status who fail to maintain their status *on or after* August 9, 2018, will begin accruing unlawful presence on the earliest of any of the following:

- The day after they no longer pursue the course of study or the authorized activity, or the day after they engage in an unauthorized activity (e.g., unauthorized employment);
- The day after completing the course of study or program, including any authorized practical training plus any authorized grace period;
- The day after the I-94 expires; or
- The day after an immigration judge, or in certain cases, the Board of Immigration Appeals (BIA), orders them excluded, deported, or removed, whether or not the decision is appealed.

To assess whether a status violation has occurred, USCIS adjudicators are to consider: (1) information contained in systems available to USCIS (particularly Student Exchange Visitor Information System (SEVIS) that tracks foreign nationals in F and J status); (2) information contained in the individual's Alien file; or (3) information obtained through a Request for Evidence or Notice of Intent to Deny. Derivative spouses and children of applicants have periods of stay contingent on the principal nonimmigrant but can also violate status and trigger unlawful presence individually due to their own conduct or circumstances.

A person in F or J status can apply for "reinstatement of status" after a violation, particularly when showing circumstances beyond the student's control. It is unclear whether approval of a reinstatement request will erase the violation from accumulation of unlawful presence under the new policy.

### **Types of Work Authorization for Individuals in F, M, or J Status**

As a quick refresher, students and exchange visitors have different paths to off-campus work authorization, and these are briefly summarized below:

- *Curricular Practical Training (F-1)*: This is offered through a cooperative agreement or a similar employer arrangement with a school. It can be work/study or an internship, but the work/study or internship must be integral to the program of study, and it is only available when it is part of established curriculum within school. It can be full time, and evidence of work authorization is an endorsement on Form I-20 (which does not require a separate Employment Authorization Document), but using 12 months or more of full-time CPT prevents the student from future OPT work authorization at the current level of study.
- *Optional Practical Training (OPT)(F-1)*: This can be available pre- and post-completion of a degree program. It is limited to up to 20 hours per week while school is in session, and it can be full time during vacation and when school is not in session. Post-completion OPT provides up to 12 months of full-time employment authorization (which may be reduced by periods of pre-completion OPT). Both pre- and post-completion OPT require approval of a Form I-765 and issuance of Employment

Authorization Document before work can begin. Students must avoid accruing more than 90 days of unemployment while in OPT or their status will be terminated.

- *Practical Training for M-1 Students:* Post-completion optional practical training is specific to an M-1 student's course of study and allows a student to get on-the-job training that is not available in their home country. If eligible, students can receive up to six months of practical training after completing the program.
- *J-1 Visitors and Students:* Certain exchange visitors are authorized to work if it is part of their approved program or when an official program sponsor approves the employment. Employment authorization is evidenced by the J-1 visitor's endorsed DS-2019 that lists the type of work the visitor is authorized to perform and the end date of the program, and for J-1 students, the program sponsor provides a letter to evidence employment authorization.
- *STEM OPT:* Eligible F-1 students with qualifying STEM degrees can extend their post-completion OPT for an additional 24-month period by completing a Training Plan with their employer, detailing how training is related to the STEM degree, goals for the student worker, and the evaluation process/oversight. This training plan is reviewed by the Designated School Official, who then updates the student's SEVIS record so that the student can file for an extended Employment Authorization Document. Ongoing reporting obligations are imposed on both the employer and the worker throughout the 24 months as described in more detail below. Students must work at least 20 hours per week at the specific E-verify employer listed on the work authorization application and training plan and must avoid accruing more than an aggregate of 120 days of unemployment during the entire post-completion OPT (combined OPT and STEM OPT) period.

### Employer's Role and Reporting Obligations

The primary burden of reporting and compliance falls on the student, with the Designated School Official (DSO) responsible for monitoring and reporting changes and status developments in the SEVIS system. Employers still play a critical part in their student and exchange workers' ability to maintain status and should be mindful of the following requirements:

- Workers in OPT status (not STEM OPT) are not restricted to a specific position, worksite, or even employer, but the work should be related to their degree/field of study. Consider the degree field of a worker before transferring him or her to a completely different position during a period of OPT.
- An individual's enrollment in a new school or starting a new degree program automatically terminates the practical training period and associated work authorization for OPT, STEM OPT.
- **STEM OPT Employers:** In addition to completing and complying with the detailed Form I-983 training plan, employers of STEM OPT workers certify as part of the training plan that:
  - The STEM OPT worker will not replace a full-time or part-time temporary permanent U.S. worker and that the terms and conditions of employment are commensurate with similarly situated U.S. workers;
  - The student will receive onsite supervision and training, consistent with this Plan, by experienced and knowledgeable staff;

Note: U.S. Immigration and Customs Enforcement has authority to conduct site visits to ensure the STEM OPT employer is meeting program requirements and must have access to the student's worksite. In furtherance of this accessibility requirement, USCIS has recently updated its website to indicate that STEM OPT workers are not permitted to work at third-party locations (client or customer sites), but has indicated in an FAQ on placement agencies that staffing/placement agencies could be used for STEM OPT workers if the staffing/placement agency signs and completes the I-983, is an E-verified employer of the student, and provides and oversees the training as reflected in the plan. If the worker is needed at a third-party site, consult with counsel and make sure the arrangement is detailed and the employer/employee relationship

and the ability to provide training is thoroughly documented in the Form I-983.

- The employer has sufficient resources and personnel to provide the specified training program set forth in this Plan, and the employer is prepared to implement that program, including at the location(s) identified in this Plan; and
- The training conducted pursuant to this Plan complies with all applicable federal and state requirements relating to employment.

**The STEM OPT Employer further certifies that it will:**

- Review the student's annual self-evaluation and attest to its accuracy by signing in this Section of the Form I-983; these evaluations, which are signed by both the employer and the student, must be submitted to the DSO within one year and ten days of the validity period of the Employment Authorization Document;
- Complete and submit to the DSO a final evaluation within ten days of the 24-month period of STEM OPT;
- Report to the DSO any changes to the Employer Identification Number or the employer contact information;
- Report to the DSO any significant decrease in hours per week that a student engages in the STEM training opportunity, and any decrease in hours below the 20 hours per week minimum;
- Report to the DSO as soon as possible any material changes to or deviations from the training plan and work with student to sign and submit a new plan documenting these changes;
- Report termination of the student's practical training within five days;
- Report the student's departure or the student's failure to report for training for five consecutive days (unless it is a scheduled absence); and
- Report noncompliance as soon as possible to the U.S. Department of Homeland Security.

Because violations of status may be deemed to occur without notice to the student and currently there is no distinction between minor technical violations (e.g., a STEM OPT employer signing student's self-evaluation a few days late) and major violations (e.g., a student dropping out of all classes), it is critical that student workers and their employers understand what is expected of them at the outset of any employment arrangements.

The new policy does not become effective until August 9, so these next few weeks are the ideal time for employers to review previously submitted training plans for STEM OPT workers to confirm compliance. Student employees are encouraged to review their current employment authorization status with their DSOs and follow up with their employers if necessary to ensure their previously approved work authorization arrangements under CPT, OPT, STEM OPT, or M-1 OPT remain compliant and won't trigger unlawful presence.

If you have questions about changes to a training plan, work authorization, or other impacts of this new policy, please contact your immigration counsel or a member of our [Immigration Group](#).

### **Additional Resources**

For the USCIS alert regarding changing policy:

- [USCIS Changing Policy on Accrued Unlawful Presence by Nonimmigrant Students and Exchange Visitors](#)

For employers' obligations and responsibilities for STEM OPT employees:

- [USCIS – Eligibility for the STEM OPT Extension](#)

- [USCIS – Optional Practical Training Extension for STEM Students \(STEM OPT\)](#)

Specifically, the reporting requirements under STEM OPT for an employer, a student, and a DSO:

- [STEM OPT Reporting Requirements](#)

For I-9 resources on documenting Exchange Visitor (J) or Student (F or M) status:

- [USCIS – 7.4 Exchange Visitors and Students](#)