

Decoding US' rule allowing STEM students on OPT to work for startups

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Synopsis

The process of STEM OPT extensions is relatively straightforward, but the rules for working for startups can be perplexing. Under the STEM OPT program, employers must pay their employees a base salary equal to or greater than those paid to other similarly employed US workers. This salary requirement protects both the US workers and the STEM OPT students.



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For international students on an [F-1 visa](#) in the United States, the [STEM](#) OPT extension program provides an opportunity to gain valuable work experience after graduation while extending their stay in the US for a chance of an H-1B lottery win. Concomitantly, the program is invaluable for US employers in facilitating access to well-qualified workers, most with graduate degrees.

The process of STEM [OPT](#) extensions is relatively straightforward, but the rules for working for [startups](#) can be perplexing. Under the STEM OPT program, employers must pay their employees a base salary equal to or greater than those paid to other similarly employed US workers. This salary requirement protects both the US workers and the STEM OPT students. However, the rules and policies governing legal compensation for employment with startups can be unclear and complex. This lack of clarity exists because startups often use stocks and stock options as a part of their compensation packages, which raises questions about how to

value this type of compensation and how it should be treated under the STEM OPT program.

In 2016, the USCIS mentioned the possibility of an exception to the base salary rule for STEM OPT workers employed by startups. This exception, the USCIS referred to as "alternative compensation," would allow startups to provide compensation that includes stock and stock options, as long as the compensation is commensurate with the compensation provided to other similarly situated US workers. However, the USCIS did not give any further guidance on how to value or treat this type of compensation. According to the USCIS:

"...F-1 students seeking STEM OPT extensions may be employed by new "startup" businesses so long as all regulatory requirements are met, including that the employer adheres to the training plan requirements, remains in good standing with E-Verify, will provide compensation to the STEM OPT student commensurate to that provided to similarly situated U.S. workers, and has the resources to comply with the proposed training plan. For instance, alternative compensation may be allowed during a STEM OPT extension as long as the F-1 student can show that he or she is a bona fide employee and that his or her compensation, including any ownership interest in the employer entity (such as stock options), is commensurate with the compensation provided to other similarly situated U.S. workers."

This is all that the USCIS has said about alternative compensation. The obvious lack of guidance has left many questions unanswered. For example, how should the value of stock options be calculated for a startup still in its formative phases? What is an acceptable method for valuing unvested stock options? What type of documentation must the employer maintain to demonstrate these valuations? None of these questions can be answered clearly and thoroughly.

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Another crucial question that has not been answered is whether a STEM OPT student can create their own startup and be a majority or minority stockholder while also working for the startup as a STEM OPT worker. This is a particularly important question for international students who have entrepreneurial aspirations and want to build their own companies.

Without clear guidance from the USCIS, it is up to STEM OPT students and their startup employers to navigate these issues. To ensure good faith compliance with the OPT program requirements, employers should maintain the best possible commercially feasible documentation. Among other matters, it is essential to carefully evaluate the compensation package and clearly document the value and valuation methodology of the alternative compensation.

On the positive side, several indications and overtures from the Whitehouse and the USCIS recognize the national importance of the STEM fields and an inclination to provide wider opportunities for students, workers, and researchers in these fields. These indications include widening the STEM fields eligible for the STEM OPT extension, Executive Orders specifically acknowledging US interests and urging government agencies to exercise their discretion in favor of STEM professionals, and formally amending policy and regulations to accommodate these professionals.

These indications are encouraging because the US government is apparently inclined to be more accommodating than usually expected when there is a lack of clarity in their own policy. With meticulous planning, the benefits of the STEM OPT program can continue to be harvested without violating any USCIS policies.

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