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OPT Ruling May Speed New Regs From Obama Administration

By **Allissa Wickham**

Law360, New York (August 13, 2015, 9:18 PM ET) -- In the wake of a court nixing regulations allowing foreign science and math students to work in the U.S. an extra 17 months, attorneys say the Obama administration is likely to finally act on new regulations for the Optional Practical Training program, which has become a major fallback for H-1B employers.

Optional Practical Training allows foreign students on F-1 visas to work while studying or after they've graduated, and the program has become a key way for skilled foreign nationals to be employed in the U.S. in the face of uncertainty created by the H-1 cap, according to immigration lawyers.

But in a move that's sure to put tech companies on edge, U.S. District Judge Ellen Segal Huvelle **vacated** a 2008 rule on Wednesday that extended the OPT period for foreign students with STEM degrees by 17 months for an overall work period of 29 months.

The U.S. Department of Homeland Security hadn't shown it faced a true emergency situation that allowed the agency to issue the rule without notice and comment, the judge said.

But after acknowledging that vacating the rule could harm the tech sector and force many foreign students to leave the U.S., Judge Huvelle stayed her axing of the regulation until Feb. 12, 2016, to give DHS time to put the rule through the proper comment process.

The DHS has yet to release updated OPT regulations after the White House said in November that the program would be extended as part of the president's executive actions on immigration.

"Call me an eternal optimist, but I'm hoping that this will fuel the White House to move forward that aspect of the executive [action] that will benefit the STEM program and expand it," Dyann DeVecchio Hilbern of Seyfarth Shaw LLP said.

Lynden Melmed, who formerly served as chief counsel at U.S. Citizenship and Immigration Services and is now an attorney with Berry Appleman & Leiden LLP, said Judge Huvelle's ruling would "catapult" the OPT regulation to the "top of the regulatory agenda."

"They are already pretty far along in drafting the regulation, but the mechanics of how universities will be involved in the program remain to be worked out," Melmed told Law360 in an email.

And yet, while many are hopeful that new OPT regulations happen by early spring, Judge Huvelle's order is already creating anxiety as attorneys look ahead to next year's H-1B cap season, when some companies will file H-1B petitions on behalf of OPT employees.

"The February date, that's a scary date — that's right in the throes of cap season, when people are having their cap petitions prepared for filing on March 31," Hilbern said. "The idea that this may not get resolved until cap season ... is understandably going to create stress for a lot of parties."

Christl Glier of Ice Miller LLP said that given the shaky ground under OPT extension, it would be wise to prepare to file H-1Bs for all clients currently taking advantage of the OPT program because it's unclear whether there will be future challenges to the program.

"I don't think that we have any other choice but to start preparing for the worst and developing a strategy with our clients, just assuming that things don't get done in the timeframe that we need," Glier said, adding that H-1Bs for eligible candidates should be "pursued full force."

Indeed, Mitchell Wexler of Fragomen, Del Rey, Bernsen & Loewy LLP said he has already received half a dozen emails from worried companies that employ H-1B and F-1 workers, although he's advising them to remain calm for the time being.

"I anticipate USCIS coming out with some affirmative guidance of reassurance on the topic," Wexler said. "But I'm telling my clients to kind of sit tight, and we'll let you know when more is known."

What is clear is that failing to act on new regulations could have major consequences for U.S. companies, who would lose a program that they've come to rely on for skilled employees, according to attorneys.

Judge Huvelle even noted that eliminating the OPT regulation could "impose a costly burden" on the tech sector if "thousands" of young workers were forced to suddenly leave their jobs.

"If we were to have no STEM OPT, combined with the quota for the H-1Bs, so many of these tech companies — so many companies in general in the U.S. — would be so devastated by this," said attorney Aaron Blumberg, who also practices with Fragomen. "So, I'm pretty confident that they're going to promulgate a new regulation that follows all the procedural requirements."

A DHS representative did not return a request for comment on the ruling, or the department's future regulatory plans.

--Editing by Chris Yates and Christine Chun.

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