Law Alert

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New SEVP Rule Bars F-1 and M-1 Students from Online Programs in the U.S.

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by Adam S. Mocciolo

UPDATE: On July 14, 2020, as part of a settlement of a lawsuit brought by Harvard University and the Massachusetts Institute of Technology seeking to block the new rule discussed above, the Department of Homeland Security rescinded the rule. As a result, F-1 and M-1 students enrolled in programs that are conducted entirely remotely due to the coronavirus in the fall 2020 term will NOT be out of compliance with their visas. The government has not yet said what the policy will be for the spring term 2021 term.

On July 6, 2020, the U.S. Department of Homeland Security issued a new rule barring foreign-national students from taking an entirely online course load under an F-1 or M-1 visa. As a result:

- The Department of State will not issue new visas for such programs.
- Customs and Border Protection will not permit students with existing visas to enter the U.S. if the students' programs will be conducted online.
- ***Students already present in the U.S. will lose their lawful status, and be required to leave the country, if their programs go entirely online or remain entirely online when the fall terms begins***.

This is largely a reversion to pre-coronavirus policy, under which F-1 students were not permitted to take more than one online course at a time, and M-1 students were not allowed to study online at all. In March of 2020, however, the department relaxed that rule for the spring and summer terms, to allow student visa holders to study entirely online. Before this announcement, many observers had presumed that the relaxed policy would remain in place for the fall term, if not for the duration of the pandemic.

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Universities, Community Colleges, and Secondary Schools All Affected

The new rule applies at all levels of schooling for which visas are offered. It affects F-1 visas for both university and secondary school students, including those in English-language instruction programs rather than degree programs, and M-1 visas for vocational programs.

What Is Allowed and What Is Not?

The rule flatly bars any students, whether F-1 or M-1 holders, from participating in programs that are conducted entirely online.

To the extent that the rule does permit online study, it permits it for F-1 degree-program students only (not F-1 English-language instruction students, nor M-1 students of any kind), in two situations.

First, an F-1 student may take one, and only one, fully online course at a time (up to 3 credit hours), as part of an otherwise in-person program.

Second, an F-1 student may participate in a program where any or all of the individual courses are conducted partly in person and partly online, subject to the school/university certifying to SEVP, via the student's form I-20, that:

- the program is not entirely online;
- the student is not taking an entirely online course load in the term; and
- the student is taking the minimum number of online courses necessary to make normal progress toward his/her degree.

Thus, for example, an instruction plan in which half the students in a course attend in person on a given day and the other half online, alternating days between the halves, would comply with the visa conditions where the school could make the "minimum necessary" representation.

The crucial question that yesterday's announcement does not answer explicitly is whether a program in which the institution plans to conduct part of the term in person, and the remaining part remotely for all of the students simultaneously, would fall into the mixed-instruction allowance for the visa. Many universities have been planning, for example, to hold fully in-person classes, or alternating-day / reduced density in-person classes, from the start of the fall semester until their Thanksgiving breaks, and then switch to fully online instruction for the balance of the semester, with students staying away from campus after the holiday.

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While the rule is vaguely worded, such an arrangement appears **not** to comply with it. The rule requires that schools and universities update their information in the SEVIS system "within 10 days of the change if they begin the fall semester with in-person classes but are later required to switch to only online classes." It pairs this example with one in which "a nonimmigrant student changes their course selections, and as a result, ends up taking an entirely online course load," and notes, after outlining both scenarios, that "[n]onimmigrant students within the United States are not permitted to take a full course of study through online classes," and "[i]f students find themselves in this situation, they must leave the country or take alternative steps to maintain their nonimmigrant status." Even where the pre-/post-Thanksgiving hybrid schedule and similar models are being intentionally planned in advance, rather than being something that schools may be "required" to implement based on conditions that arise during the semester, this does not appear sufficient, on a plain reading, to distinguish them from the situation that rule suggests is noncompliant. Nor is the seemingly drastic consequence of that interpretation out of character with the rest of the rule.

Institutions and visa holders should look carefully for further guidance from the agency on this point, but plan for the more restrictive interpretation in the meantime.

Immigration Consequences for Students

The rule could create a broad array of immigration complications for existing visa holders who are already in the United States, beyond the principal consequence of potentially having to abandon their studies.

Perhaps most obviously, a person who goes out of status is subject to deportation. But even if he or she is not deported at the time, an overstay can create problems with future immigration applications, such as a new F-1 visa application to resume studies later. Among other things, a person who lingers long enough after losing his or her F-1 status will eventually begin to accrue unlawful presence that could subject the person to the 3- or 10-year bar from the United States. (When unlawful presence starts to accrue is a case-by-case determination beyond the scope of this post, but will not necessarily coincide with the end of lawful visa status.) Of course, some who have lost F-1 status may not be able easily to return to their home countries, or depart to a third country, due to coronavirus travel restrictions, limited availability of flights, lack of access to third-country visas, and the like. One way to deal with that problem may be an application for change of status to temporary B-2 visitor based on the coronavirus emergency, but this will have to be individually evaluated in each case.

Spouses and dependents of F-1/M-1 students will also lose their derivative F-2/M-2 visa statuses when the principal visa holders lose their statuses, and will face the same deportation and overstay challenges. It is important to explore all avenues that a dependent may have to obtain a different visa status in his or her own right, and, if the dependent has such an avenue, that the application for it is filed timely, before his or her F-2/M-2 status runs out.

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With enough lead time, an option under which some F-1 students may be able to remain in lawful status under the same visa, even if their instructional programs switch to all online delivery, is curricular practical training, or "CPT." Not to be confused with the optional practical training, or "OPT," authorization that many students use to begin their careers in the United States after completing their degrees, a CPT work authorization allows an F-1 student to work in a for-credit internship or practicum, during the degree program, that provides on-the-job training in his or her academic field. A student able to obtain such a position that provided all of the student's credit load for the semester (or all but a single online course otherwise permitted under the new rule), along with the necessary approval from the university, should be able to remain validly in F-1 status despite not being enrolled in any in-person traditional courses. A long enough CPT internship would allow the visa holder to wait out the pandemic and the university's return to in-person course delivery, without interrupting progress toward the degree and without going out of status. Note, however, that CPT used in this way for long enough can cause the student to lose his or her eligibility for OPT after graduation, a tradeoff that may be worth making but should be made knowingly.

Relatedly, the new rule does not affect F-1 visa holders in post-completion OPT status, as they have no enrollment requirement to fulfill, whether in-person or online. The same does not hold for pre-completion OPT, however, as when a term in in session, pre-completion OPT is to be pursued only part-time, alongside traditional study.

Human Resources Implications for Institutions

Many of the students who are likely to be affected by this rule are also employed by their institutions. Generally, loss of the student visa status will mean loss of the accompanying work permission, even if the student overstays, or timely applies for an alternative status. The fact that the employment is itself part of the delivery of instruction by the institution does not change this conclusion. If an F-1 graduate student loses her lawful visa status because her program goes completely to remote instruction, for example, the university would lose the ability to lawfully employ her as a lecturer to undergraduate students, just as it would lose the ability to employ one of those undergraduates whose program has also gone remote, and who works at the circulation desk of the library.

This post is an initial overview of a fast-changing situation. Follow Pullman & Comley alerts and our Working Together blog for further updates.