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Consequences of Unlawful Employment on Foreign National (F-1) Students:

Introduction:

Throughout the United States, the months of May and June usually mark the completion of the Spring semester for college and university students and the beginning of summer vacation. It is a time when many students seek employment opportunities to gain additional funding for the school year as well as experience in the real-world. Unfortunately, such opportunities can also present significant legal challenges for F-1 students who are not authorized to work in the United States.

The priorities of the agencies involved in administering and managing immigration benefits (U.S. Citizenship & Immigration Services (USCIS), U.S. Immigration & Customs Enforcement (ICE), U.S. Customs & Border Protection (CBP), and U.S. Department of State (DHS)) have changed and there is heightened emphasis on enforcement. An issue gaining increased attention and enforcement is unauthorized employment, where a foreign national is lawfully admitted in a nonimmigrant classification, but violates the terms of his or her status by working. One of the visa classifications we see experiencing this issue most often are individuals admitted in F-1 (student) status with a grant of optional practical training (OPT) or curricular practical training (CPT).

What is employment?

The USCIS defines employment as “any service or labor performed by an employee for an employer within the United States.”¹ An employee is defined as “an individual who provides services or labor for an employer for wages or other remuneration,” while an employer is defined as “a person or entity, including an agent or anyone acting directly or indirectly in the interest thereof, who engages the services or labor of an employee to be performed in the United States for wages or other remuneration.”²

Moreover, the USCIS defines unauthorized employment as “any service or labor performed for an employer within the United States by a foreign national who is not authorized by the INA or USCIS to accept employment or who exceeds the scope or period of the foreign national’s employment authorization.”³

¹ 8 CFR §274a.1(h)

² 8 CFR §274a.1(f) and (g)

³ USCIS Policy Manual; <https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume7-PartB-Chapter6.html>

Although the definition of “employment” may vary by State, generally, where an individual provides services or labor (which includes both physical labor and creative labor) and a wage or other remuneration (e.g., housing, food, or clothing) would normally be paid, employment is deemed to have occurred.

What is unauthorized employment?

Unauthorized employment occurs when F-1 students: commence employment before or continue employment after the periods authorized by USCIS in their employment authorization documents (EAD) or listed on their on I-20s; work for organizations not listed on the I-20 or in positions not related to their course of study; work at a “qualifying on-campus job” for more than 20 hours per week while school is in session; and work off campus during their first academic year.

Unauthorized employment may also include self-employment and “unpaid internships” or volunteer works if the position is one where the employer would normally pay a person for their services. For example, owning a franchise restaurant would not be unauthorized employment, however, managing the restaurant’s daily operations or “helping out when needed” to take orders, bus tables, etc., would be. Another example is having an intern “shadow” a manager, which is permissible until the manager has the intern prepare a report or conduct research.

Working in the United States, even on behalf of a foreign employer where the employee is paid through a foreign bank, would still constitute unauthorized employment because the services are being performed in the United States.

“Accrual of Unlawful Presence and F, J, and M Nonimmigrants”

On August 9, 2018, USCIS published a policy memorandum, “Accrual of Unlawful Presences and F, J and M Nonimmigrants”⁴, wherein the agency adopted a retroactive approach to unlawful presence that specifically applied in relevant part to F-1 students. As of August 9, 2018, F-1 students who fail to maintain their status are deemed to start accruing unlawful presence on the earliest of:

- The day after they no longer pursue the course of study or authorized activity, ***or the day they engage in an unauthorized activity***;

Working without authorization would be deemed to be engagement in an “unauthorized activity”, resulting in the F-1 student failing to maintain his/her status and begin accruing unlawful presence.

Immigration Consequences

There are many serious consequences when a foreign national has worked without lawful authorization and these include, but are not limited to:

- Three- and Ten-Year Bars on Admission.⁵ A person who accrues more than 180 days of unlawful presence, who then departs the United States is generally barred from returning

⁴ <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-08-09-PM-602-1060.1-Accrual-of-Unlawful-Presence-and-F-J-and-M-Nonimmigrants.pdf>

⁵ INA §212(a)(9)(B)(i) and (ii)

to the U.S. for 3 years. A person who departs after accruing 1 year or more of unlawful presence is barred from returning for 10 years.

- Ineligibility for an extension and/or change of nonimmigrant status. In order to be eligible to change nonimmigrant status or extend nonimmigrant status in the United States, the foreign national must maintain his or her status or otherwise abide by the terms of that status. Unauthorized employment is considered a *per se* failure to maintain status. Working without authorization makes a foreign national ineligible from changing or extending his or her status in the United States.⁶
- Ineligibility for a nonimmigrant visa – A consular officer at a U.S. Embassy or Consulate abroad can deny a nonimmigrant visa application where a foreign national failed to maintain his or her nonimmigrant status by, for example, engaging in unauthorized employment or for misrepresentation on the nonimmigrant visa application by failing to disclose violations of previous nonimmigrant status.⁷
- Ineligibility for adjustment of status. With limited exceptions, an individual who has ever engaged in unauthorized employment before or after filing an application for adjustment of status to lawful permanent resident is barred from adjusting status.⁸

HR Tip

While the immigration consequences of unlawful employment are clear, the line between what constitutes permissible activities versus unlawful employment is not. It is better to plan ahead and consult with an attorney before commencing such activities rather than suffer the wrath of the immigration service, which tends to be unforgiving. Accordingly, we would recommend that foreign nationals speak with an attorney in advance of engaging in any activities to identify whether the proposed activities would lead to a finding of unlawful employment and a status violation.

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⁶ 8 CFR §214.1(e)

⁷ INA §212(A)(6)(C)(I); See also 9 FAM 302.9-4 Misrepresentation and interpretation of misrepresentation under INA §212(A)(6)(C)(I)

⁸ INA §245(c)(2) and (c)(8)