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H-1B: Homeland Security's ICE develops new unit to probe OPT foreign student work permit

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The U.S. Department of Homeland Security is developing a new unit to probe use of the Optional Practical Training work permit for foreign students, and to recommend investigations of students and employers.

The OPT program, widely used in the Silicon Valley technology industry and often a pathway to the H-1B visa intended for jobs requiring specialized skills, allows foreign students to work in the U.S. for up to three years.

Homeland Security announced the new Immigration and Customs Enforcement unit this week, saying the agency “is currently unable to evaluate the impact OPT has had on U.S. workers and foreign students who have obtained work authorization.”

The “OPT Employment Compliance Unit” will be wholly focused on wages, hours and compensation in the program, Homeland Security said in its announcement. “This unit will also be responsible for recommending investigations of employers and students, as needed, to Homeland Security Investigations to ensure that the OPT programs operate in a lawful manner at U.S. worksites,” the agency said.

“For example, if the unit were to detect evidence that an employer is using OPT in a discriminatory manner (e.g., as a means to hire only foreign nationals, or only individuals of certain nationalities to the exclusion of others), or in a manner that negatively impacts wages, this unit may notify (the U.S. Department of Labor) and the U.S. Department of Justice.

The unit will also seek to ensure companies employing technology workers who are eligible for the three-year permits are adhering to the required promises and training plan, according to Homeland Security.

“The loss of employment many U.S. workers have faced since the beginning of the COVID-19 pandemic as employers lay off significant portions of their workforce (while still, in some cases, seeking to hire more foreign workers), makes this work particularly timely,” the announcement said.

In December, a federal court judge upheld the program against a challenge from a union representing U.S. technology workers who claimed Homeland Security used the OPT program to get around the numerical cap on H-1B visas, and that OPT workers gained an unfair advantage because employers don't have to pay Medicare and Social Security taxes for them. A who's who of Bay Area tech giants, including Google, Apple, Facebook, Uber, Tesla, HP, Oracle and Salesforce joined the case, seeking to protect the program, arguing in a court filing that it expands job opportunities for American workers by spurring economic activity.

The Cato Institute, a libertarian think tank, reported in May that in fiscal year 2019, U.S. Citizenship and Immigration Services approved 223,284 OPT requests, the highest number ever. Annual approvals had nearly tripled from fewer than 80,000 in 2003, Cato reported.

Immigration law firm Berry Appleman & Leiden said in an emailed advisory Friday about the new ICE unit that employers should expect “greater scrutiny and enforcement of all requirements” under the OPT program.

It was unclear what approach the incoming administration of President-elect Joe Biden will take with regard to the new unit.

Berry Appleman & Leiden lawyer and former Homeland Security attorney Kelli Duehning said Friday she believed the unit would survive the transition to the Biden administration. “His immigration platform does make clear that he does want to ensure the immigration system and process does protect U.S. workers,” Duehning said. “However, he is also in favor of ensuring businesses, universities, and agriculture have the workers they need to remain competitive and successful.

“This new unit could be positive if they moved from an enforcement-minded focus to more of a unit that tries to understand the extent of any fraud, why it is happening, and finding solutions to ensure the fraud can be detected more easily, and preventing it from it happening in the first place.”