### **U.S. Department of Labor**

Wage and Hour Division



# Fact Sheet #62C: Who is an H-1B-dependent employer?

This fact sheet provides general information concerning H-1B-dependent employers under the H-1B program. Special attestations applicable to H-1B-dependent and willful violator employers sunset on October 1, 2003, but were restored effective March 8, 2005 by the H-1B Visa Reform Act of 2004.

#### An employer is considered H-1B-dependent if it has:

- 25 or fewer full-time equivalent employees and at least eight H-1B nonimmigrant workers; or
- 26 50 full-time equivalent employees and at least 13 H-1B nonimmigrant workers; or
- 51 or more full-time equivalent employees of whom15 percent or more are H-1B nonimmigrant workers.

#### When must an employer determine dependency?

The employer must determine dependency when filing either:

- A Labor Condition Application (LCA); or
- A Petition for a Nonimmigrant Worker (Forms I-129/I-129W) based on an LCA; or
- A request for an extension of H-1B status for a nonimmigrant worker based on an LCA.

#### Employers with readily apparent status concerning H-1B-dependency need not calculate that status.

## Is there a simple calculation to determine dependency?

Yes. An employer whose dependency is not readily apparent or is borderline may use the "*snap-shot*" test. The *snap-shot* test requires a comparison of the total number of all H-1B workers to the number of the total workforce (including H-1B workers). If a small employer's *snap-shot* calculation shows that the employer is dependent, the employer must then fully calculate its dependency status. If a large employer's calculation exceeds 15% of its workforce, that employer must fully calculate its dependency status.

#### If an employer must fully calculate dependency, how is this performed?

This full calculation must take into consideration the total number of H-1B workers (a "head count" of <u>both</u> full-time and part-time workers) and the employer's total work force in the United States (including both U.S. workers and H-1B workers) and must be measured according to full-time equivalent employees.

# How should an employer using the Internal Revenue Code (IRC) "single employer" definition determine dependency?

An IRC "single employer" which concludes that it is not H-1B-dependent shall perform the *snap-shot* test (and/or full calculation if appropriate) described above. The Wage and Hour Division, however, will not assess penalties for employers who do not perform the *snap-shot* test where <u>all</u> of the entities that make up the single employer have readily apparent non-dependent status. Note that this enforcement policy will not affect the right of an aggrieved party to challenge the employer's failure to perform the *snap-shot* test.

All requirements listed above can be found in 20 CFR § 655 Subparts H & I and the Immigration and Nationality Act § 212(n).

#### Where to Obtain Additional Information

For additional information, visit our Wage and Hour Division Website: <a href="http://www.wagehour.dol.gov">http://www.wagehour.dol.gov</a> and/or call our toll-free information and helpline, available 8 a.m. to 5 p.m. in your time zone, 1-866-4USWAGE (1-866-487-9243).

This publication is for general information and is not to be considered in the same light as official statements of position contained in the regulations.

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