additional attestation requirements. (The time required for an estimated 50 H–1B employers to make the mathematical calculation to determine if they must make the additional attestations required of an H–1B employer is separately set out in C. of this section, below.) Since it was estimated that only 50 H–1B employers will find it necessary to make this calculation, out of a total of 50,000 H–1B employers, the estimate of time necessary to complete the form remained at25 our. Ttotalannutalburdens asn estimated at249,5000 ourts.

believes the public should know which workers are not covered by the new attestation elements so they can challenge a determination of exempt status where they believe the basis for the exemption is invalid. Therefore, under the interim final rule employers will be required to include in their public access file a list of the H–1B nonimmigrants supported by any LCA attesting that it will be used only for exempt workers, or in the alternative, a statement that the employer employs only exempt H–1B workers. DOL estimates that each list or statement will take approximately 15 minutes and that 200 H–1B employers will prepare one such list or statement annually for a total burden of 50 hours.

E. Record of Assurance of Non-displacement of U.S. Workers at Second Employer's Worksite (§ 655.738(e))

paid on a salary basis, or the actual wage is stated as an hourly wage. For H–1B workers, such records must also be kept if the prevailing wage is expressed as an hourly rate. The statute requires that the employer pay H–1B nonimmigrants the higher of the actual or prevailing wage. The Department explained that in order to determine if the employer is paying the required wage, it must be able to ascertain the system an employer uses to determine the wages of non-H–1B workers. The Department also stated that it is essential to require the employer to maintain payroll records for the employer's employees in the specific employment in question at the place of employment to ensure that H–1B nonimmigrants are being paid at least the actual wage being paid to non-H–1B workers or the prevailing wage, whichever is higher. The Department estimated that approximately 50,000 employers employ H–1B nonimmigrants. The documentation would have to be done only one time for each employer. Hourly pay records

recordkeeping functions required by this regulation may range from several hundred dollars to several hundred thousand dollars where the corporate executive office of a large company performs some or all of these functions themselves. Absent specific wage data regarding such employers and employees, respondent costs were estimated in the proposed rule at $25 an hour. Total annual respondent hour costs for all information collections were estimated to be $8,105,887.50 ($25.00 × 324,235.5 hours).

Some commenters questioned the $25 per hour estimate for respondent costs, indicating that in order to comply with the information requirements, H–1B employers must employ high-level compensation professionals and human resource professionals. The Department recognizes that some employers may employ highly-paid professionals to advise them on how to comply with the H–1B program requirements. However, it is believed that such a need will be short-lived and that once a system is in place, compliance can be maintained without this highly paid professional assistance. The $25 an hour respondent cost is an average cost, which recognizes higher initial cost to effect compliance, as well as the low cost of performing the clerical filing functions. Further, as

also required employers to offer H–1B workers fringe benefits on the same basis and in accordance with the same criteria as U.S. workers.

The ACWIA specified new civil money penalties ranging from $1,000 to $35,000 lbviogulati, alogine wito

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provisions that were actually enacted by Congress.

Keeping in mind the difficulty with

employer for ACWIA purposes unless regulations are issued by the Department of the Treasury during the period the H–1B-dependency provisions of the ACWIA are effective.

Section 414(b) of the IRC provides that all employees within a ''controlled group of corporations'' (within the meaning of section 1563(a) of the Code, determined without regard to sections 1563(a)(4) and (e)(3)(C)) are treated as employed by a single employer. Under section 1563(a) and the related Treasury regulations, a controlled group of corporations is a parent-subsidiary-controlled group, a brother-sister-controlled group, or a combined group.

status during a certain period after enactment of the Act (*i.e.*, six months from the date of enactment (thus, until April 21, 1999), or until the date of the Department's final rule on this provision is issued (thus, the date of this Interim Final Rule)).

that it is not necessary for the employer to do a detailed analysis of application of the common law test to every worker in order to identify ''employees'' for purposes of FTE determinations. Instead, as indicated in the NPRM and supported by the commenters, the employer's existing identifications of workers as ''employees'' (as opposed to consultants or contractor personnel) will ordinarily be sufficient for this purpose and no addiyees w 45 i this

than 20 hours per week would equal one FTE; part-time workers who work fewer than 20 hours per week and are not FLSA-exempt would be aggregated through an average of hours as proposed in the NPRM.

The Department recognizes that, for some employers, the aggregation of part-time workers into FTEs may be somewhat burdensome. However, in light of the clear statutory language, the Department is unable to dispense with the concept of ''full-time equivalent employees,'' which is not a mere head-

worker protection provisions, with the potential effect of nullifying these provisions.

The Department proposed that, by operation of the regulation, any current LCA(s) would become invalid for an employer that is or becomes H–1B-dependent, for purposes of any future H–1B petitions (including extensions). The employer's previously certified LCA(s) would continue to be valid, however, and the obligations under that LCA(s) would continue with respect to any petitions filed before the effective date of these regulations (*i.e.*, pending petitions would not be affected). Thus, the Department proposed that the regulation would require that all H–1B-dependent employers with existing LCAs file new LCAs if they wish to petition for any new H–1B

dependent employers if its status changes.

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''receives wages (including cash bonuses and similar compensation) at an annual rate equal to at least $60,000'' to mean that the worker actually receives at least $60,000 compensation in each year. Therefore, the NPRM provided that an H–1B nonimmigrant who, because of part-time employment, receives less than $60,000 in compensation in a year would not qualify as exempt on the basis of compensation, even if his or her hourly wage, projected to a full-time work schedule, would exceed $60,000 in a year.

Ten commenters responded to the Department's proposals on this issue.

The AFL–CIO stated that exempt workers must receive $60,000 in wages annually as an entitlement. The AEA stated that exempt workers should receive $60,000 or higher without including any benefits or bonuses. APTA and AOTA stated that an exempt worker must receive wages equal to at least $60,000, which must not include other employee benefits, such as health insurance, retirement plans, and life insurance.

Senators Abraham and Graham and ACIP contended that the statutory language ''at an annual rate equal to'' requires the Department to permit part-time workers and workers who work only part of the year to be considered

or less before or after the filing of a petition for an H–1B professional.

''Second, an H–1B dependent company acting as a contractor must attest that it also will not place an H–1B professional in another company to fill the same job held by

suggested that ''[t]he Department's regulation should follow the statute and our intent by using [as a sole factor whether] 'the worker is considered an employee of the firm or the client for tax purposes, *i.e.*, the entity withholds federal, state, and Social Security taxes.''' Similarly, AILA suggested that any worker who is classified as an independent contractor for tax and

language as it did for the relationship between a U.S. worker and his or her employer. That congress chose different language is a strong indication that it had a different intention than suggested by the commenters.

Furthermore, how the employee is treated for IRS purposes is simply not pertinent, and is contrary to the clear intent of the provision. IRS is concerned only with the entity which is paying the worker—in this case necessarily the H–1B employer, not the secondary employer. Thus 26 U.S.C. 3401(d) defines ''employer'' for purposes of payroll deductions as ''the person for whom an individual performs or performed any service, of whatever nature,'' except that if that person does not have control of payment of wages, the person having such control is the employer. Regulations which followed the IRS approach would thus have the result of nullifying the secondary placement protections of the ACWIA.

Finally, reading the provision as requiring less than a full employment relationship is congrwts

of this prohibition situations where an employer sought to evade this prohibition by laying off a U.S. worker, making a trivial change in the job responsibilities, and then hiring the H–1B worker for a 'different'' job' * * *. For similar reasons, especially given the nature of the jobs in question, the geographical reach of the prohibition was extended so as potentially to cover other worksites within normal commuting distance of the worksite where the H–1B is employed. This was to cover the eventuality that an employer might try to evade this prohibition by laying off a U.S. worker, hiring an H–1B worker to do that person's job, but assigning the H–1B worker to a different worksite very close by in order to conceal what was going on.''

placement of the H–1B worker is concerned; whether the reason for the departure from the practice was for a reason unrelated to the employment of the H–1B worker; whether there is any evidence to suggest that the employer intended to evade its displacement obligations; and the employer's previous history of compliance with its displacement and other H–1B obligations. This analysis will be used by the Department to determine whether it is the expiration of the contract or grant which has caused the termination of the employee or some other consideration such as the hiring of the H–1B worker.

The Department notes that where an employer has a practice of continuing employees on different projects or grants where work is available, but of laying workers off if there is no work available that fits the worker's skills and later offering the worker work under a new contract when one becomes available, the Department would expect the employer to contact the U.S. worker and offer the position prior to petitioning for an H–1B worker for the position. The Department will closely examine such situations to determine if the U.S. worker has been unlawfully displaced, and if not, if the employer's failure to contact such former employees is a recruiting violation.

5. What Constitutes ''a Similar Employment Opportunity'' for a U.S. Worker, Which—if Offered—Would Not nity'' forituterohibied t''Layffe' fo EDsplacement af the eorker,?Tj1 -1.0467 7D(ESct)on p212(n)(4)(D)(i)(II)af the eINATj-1 -1.1 TD(Es a mnded ty the DACWIA, 8U.S.)C W1182(n)(4)(D)(i)(II),projiden that ,evae

considerad to ehav ofccurad tf the e.S. n an HsaT*(yos fo2heltwas fint OfgressmideSmr)l:(4)(D)(i)(II)''ker est tn 1cru Ofgrad to ehavRec. E2324 (Nov. 12, 1998). Seran'(failure tA

7. What Is Required of an H–1B–Dependent Employer or Willful Violator Which Seeks to Place H–1B Workers at a Secondary Employer's Worksite? (§ 655.738(d))

Section 212(n)(1)(F) of the INA as amended by the ACWIA, 8 U.S.C. 1182(n)(1)(F), requires that H–1B-dependent employers and willful violators not place any H–1B worker at another employer's worksite ''unless the [H–1B] employer has inquired of the other employer as to whether, and has no knowledge that * * * the other employer has displaced or intends to displace a United States worker employed by the other employer'' within the period beginning 90 days before and continuing until 90 days after the H–1B worker's placement at that worksite. This requirement applies where there are ''indicia of an employment relationship'' between the H–1B worker and the customer-client of the dependent employer. section 212(n)(1)(G)(ii) further provides6eat uP(the depenVa(09 0 *m shallcedclude teat uP(tclear sitedemploexkeri begiT*liabilityeat uP(tue d
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proposed that in such circumstances the dependent employer would be expected to recontact its customer and obtain credible assurances that layoffs have not occurred or are planned during the relevant statutory time frame.

Several commenters responded to the Department's proposals on this issue.

One commenter (TCS) generally agreed with the Department's approach, urging the Department to clarify that

ACWIA's displacement requirements, a dependent employer or willful violator is required to preserve the following documents with respect to any U.S. worker(s) (in the same area of employment and occupation as any H–1B nonimmigrants) who left its employ in the period 90 days before or after the employer's petition for the H–1B nonimmigrant(s), and for any U.S. worker(s) with respect to whom the employer took any action during that 180-day period to cause the employee's termination (*e.g.*, a notice of termination): any documentation concerning the employee's experience, qynficulatio), anpdurcipale, a noficulati byom the employe for the employth gardrning t's

that are used by employers competing for the same potential workers, *e.g.*,

through some sources, such as college campuses, can have the unintended effect of discriminating against older workers. The Department also encourages employers to recruit among underrepresented populations (*e.g.*, minorities, persons with disabilities) and in rural areas.

Several comments were received regarding the particular methods of solicitation utilized by employers. Intel,