

Important change to HUBZone regulations with regard to employee definition went into effect May 3, 2010

(May, 2010)

On May 3, 2010, an important change to the HUBZone regulations went into effect concerning the definition of an employee. (*See Pre May 3 and new definitions below.*) The new definition clarifies when a person working for a small business concern (SBC) is considered an employee of that SBC for HUBZone eligibility purposes and simplifies that determination. More specifically, the new definition revises the definition of the term “employee” to: (1) delete the full-time equivalency requirement; (2) specifically allow HUBZone SBCs to count leased or temporary employees or employees obtained through a temporary agency, professional employee organization (PEO) arrangement or union agreement, as employees; (3) specifically state that SBA relies on the totality of circumstances as further defined by Size Policy Statement No. 1 when determining whether individuals are employees of a concern; (4) explain that volunteers are not employees; (5) define volunteers as those persons that receive no compensation; and (6) address the status of individuals that own all or part of the SBC but receive no compensation for work performed.

Note this rule change was published in the Federal Register on November 3, 2009, six months before the change is to go into effect. This six month timeframe was designed to provide certified SBCs adequate time to make necessary changes required to comply with the new definition. After May 3, 2010, all certified firms must be in compliance with Program eligibility requirements using the new definition or face possible decertification action. (The new definition impacts the evaluation of the Principal Office and 35% residency requirements.) Firms that fail to comply with Program eligibility requirements using the new definition are required to notify SBA consistent with 13 CFR Part 126.501. The new definition will apply to all aspects of Program certification, including new applications, recertification actions, protests, and program examinations.

The transition from the use of the Pre May 3 definition to the new definition will be conducted using the philosophy that the definition in place at the time period which is being evaluated will be used, even if it is not be the definition in place at the time the evaluation itself is being conducted. In other words, if SBA is determining on May 15 whether an SBC was eligible on April 15, 2010, the Pre May 3 definition will be used, not the new definition.

To further elaborate, the transition from the use of the Pre May 3 definition to the new definition with regard to the evaluation of initial applications will be conducted as follows:

- Firms which submitted applications prior to May 3, 2010 will be evaluated at the time of application using the employee definition in place at that time, i.e., the Pre May 3 definition. However, if there is reason to evaluate the firm’s eligibility at a time period May 3, 2010 or later (i.e., if there is concern that the firm’s eligibility status changed between the time the application was submitted and it is being reviewed May 3, 2010 or later), the new employee definition will be used for that evaluation
- Firms which submit applications May 3, 2010 or later will be evaluated using the new employee definition

The transition from the use of the Pre May 3 definition to the new definition with regard to the evaluation of the eligibility status of already certified firms will be conducted as follows:

- The new definition will be used to evaluate the eligibility status of certified firms at any point in time May 3 or later
- The Pre May 3 definition will be used to evaluate the eligibility status of certified firms at any point in time prior to May 3

Pre May 3, 2010 definition:

Employee means a person (or persons) employed by a HUBZone SBC on a full-time (or full-time equivalent), permanent basis. Full-time equivalent includes employees who work 30 hours per week or more. Full-time equivalent also includes the aggregate of employees who work less than 30 hours a week, where the work hours of such employees add up to at least a 40 hour work week. The totality of the circumstances, including factors relevant for tax purposes, will determine whether persons are employees of a concern. Temporary employees, independent contractors or leased employees are not employees for these purposes.

New definition (starting May 3, 2010):

Employee means all individuals employed on a full-time, part-time, or other basis, so long as that individual works a minimum of 40 hours per month. This includes employees obtained from a temporary employee agency, leasing concern, or through a union agreement or co-employed pursuant to a professional employer organization agreement. SBA will consider the totality of the circumstances, including criteria used by the IRS for Federal income tax purposes and those set forth in SBA's Size Policy Statement No. 1, in determining whether individuals are employees of a concern. Volunteers (i.e., individuals who receive deferred compensation or no compensation, including no in-kind compensation, for work performed) are not considered employees. However, if an individual has an ownership interest in and works for the HUBZone SBC a minimum of 40 hours per month, that owner is considered an employee regardless of whether or not the individual receives compensation.