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AMERICAN HEALTH CARE ASSOCIATION

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January 13, 2016

Andrew Slavitt, Acting Administrator
Centers for Medicare & Medicaid Services
Department of Health and Human Services
Attention: CMS-3317-P
PO Box 8016
Baltimore, MD 21244-8016

Dear Administrator Slavitt:

I am writing with serious concerns about CMS's implementation of the Payroll-Based Journal (PBJ) and the approach being utilized to collect and calculate staffing in skilled nursing facilities and nursing facilities (SNFs/NFs). Beginning in July 2016, SNFs/NFs must use the PBJ system to submit staffing and census data as this will be a Requirement of Participation, subject to the entire enforcement process applicable to all Requirements of Participation. As many of our members begin to prepare for submitting data using the CMS voluntary submission period, a number of issues have come to light that jeopardize the success of the program. In particular, the American Health Care Association (AHCA) has significant concerns about the methodology and decisions made so far by CMS staff such as the decision to only count "hours paid" for exempt employees (that is, 40 hours per week) rather than actual hours worked. This approach will result in inaccurate and misleading information about hours of care actually provided to residents. Furthermore, CMS's other decisions in a variety of areas will make the system extremely difficult and expensive to implement, such as making data submission a manual process and collecting data for every day worked each quarter. All of these decisions will take additional staff to submit the data and take resources away from resident care.

AHCA staff, members and payroll vendors have all met with CMS staff involved in the design and implementation of the PBJ to detail the concerns listed in the subsequent pages. As more of our members begin to test the data submission process and work with their payroll, time keeping and account payable systems, we anticipate additional issues to come to light. Yet, CMS's response continues to indicate that the PBJ data collection will start in July 2016 and any changes to the methodology or technical specifications to address these concerns cannot occur before the July 2016 start date.

AHCA has been and continues to be a strong supporter of measuring both staffing levels and turnover. We supported the language in the Affordable Care Act (ACA) that authorized CMS to start collecting staffing data from payroll systems. In addition, we were a strong supporter of the IMPACT act and the language added after initial drafting to add funding to support PBJ development and implementation. We have also made measurement of staffing turnover a centerpiece of our Quality Initiative. A number of our members have participated in several past efforts by CMS to develop a payroll-based methodology to collect staffing data in SNFs/NFs that unfortunately never were fully implemented. However, the way CMS staff has chosen to collect the data will result in significant costs both to modify time and attendance systems used to support payroll information and to enter the data on an ongoing quarterly basis. An automated submission system should be pursued.

I respectfully request that you intervene and delay the implementation of this extremely flawed system until these significant issues can be resolved so that consumers and beneficiaries can obtain accurate information about hours of care actually provided to patients/residents in SNFs/NFs. I would be happy to meet to discuss our concerns further.

Sincerely,

Mark Parkinson
President and CEO

cc: Thomas Hamilton

AHCA's Detailed Concerns About CMS Payroll Based Journal

§6106 of the ACA (in the section of the law entitled *Nursing Home Transparency and Improvement: Improving Transparency of Information*) states "...the Secretary shall require a facility to electronically submit to the Secretary direct care staffing information (including information with respect to agency and contract staff) based on payroll and other verifiable and auditable data in a uniform format (according to specifications established by the Secretary in consultation with such programs, groups, and parties [State long-term care ombudsman programs, consumer advocacy groups, provider stakeholder groups, employees and their representatives, and others determined appropriate by the Secretary])." This new quarterly payroll-based system is to replace the annual data collected by CMS during the annual survey inspection for compliance with Medicare and Medicaid Requirements of Participation. In implementing this system, CMS has made several decisions which make the data collection inaccurate and submission of data extremely laborious requiring new staff to manually enter data.

To collect payroll based staffing data that is auditable requires linking of data with time and attendance record keeping (the source data for payroll) and accounts payable for contractor/consultant invoices at an individual personnel level. CMS is requiring individual daily data on hours paid for each employee, contractor or consultant who works in the facility. This not only requires redesigning many payroll, time and attendance and account payable systems but also manual data entry for many positions and frequent manual data uploads, which will require significant new staff to comply. We believe that in CMS's efforts to collect verifiable and auditable data, they have made decisions that are unnecessary, add excessive complexity and cost, which in the end will result in inaccurate data. We have outlined our concerns with recommendations to make the system more workable and accurate.

1. **Reporting hours by job classification.** For many job classifications (both non-exempt but more often for exempt positions), particularly in small facilities, individuals will often split their work between administrative duties and patient care duties. However, CMS plans to assign hours by job category and classification. For those jobs classified as administrative (e.g. non-patient care), the hours reported cannot be calculated when determining the hours of care provided. If SNFs/NFs reclassify a job title into a patient care title, the non-patient care hours that are part of the employee's payroll listed hours will be incorrectly attributed to patient care. Conversely, if the employee's position is classified as non-patient care, all of the reported hours including those related to patient care, will be assigned as non-patient care activities. Either way, the result of the CMS defined system is to produce misleading and inaccurate data.

   AHCA recommendation: CMS should accept hours worked providing patient care as reported on time and attendance systems. This will require many SNFs/NFs to modify and adapt their time and attendance systems to accurately capture the data for these employees who split their time between patient care and administrative duties.

2. **Calculating hours worked for exempt employees who provide patient care (e.g. unit nurse).** CMS has indicated that exempt employees hours worked will be calculated based on the typical work week hours for the job title (e.g. a 35- or 40- hour work week) regardless of hours worked. This will impact the accuracy of hours for nearly all exempt employee job classifications. Exempt employees who provide patient care (e.g. nurses) will not have any hours over 40 hour work week count. For example, when a nurse stays late, covers for a colleague and works more than

the typical work week (a common occurrence in healthcare settings providing 24 x 7 care) the hours of care provided by the employee will be calculated as 35 or 40 hours – a typical work week for exempt employees which will not reflect any extra hours worked by the nurse providing patient care. This problem also manifests itself for administrative job positions. For example, in many SNFs/NFs, many administrative staff, particularly those who may be a licensed nurse or CNA will frequently provide care to residents. They may help out when care needs are particularly busy on a unit or more often cover shifts when staff calls out sick, or during emergencies. This is more frequent in rural and small SNFs/NFs. These hours are often in addition to their normal work week hours. However, CMS's decision to only consider hours paid for exempt employees in administrative rolls will result in significant inaccurate information for beneficiaries.

This approach will result in significant understatement of hours worked in many facilities. CMS staff has indicated that they will not count these additional hours unless the employee is paid. This recommended approach appears to conflict with Department of Labor rules on the definition of exempt employees and how they are paid.

AHCA recommendation: CMS should allow SNFs/NFs to report hours worked for exempt employees using data from time and attendance record keeping, which are auditable by survey inspectors. §483.30(e) requires all SNFs/NFs to post daily and retain for 18 months, the daily hours worked by registered and licensed nurses and certified nurse aides for every shift. CMS will cite and fine SNFs/NFs that do not comply with this statutory record-keeping requirement. Also, many providers have swipe card time and attendance record keeping that can be used to accurately collect data on hours worked by each exempt employee. Allowing SNFs/NFs to use hours worked from either of these systems will improve the accuracy of the data collected by CMS. Under the proposed system, many SNFs/NFs, particularly smaller ones who don't have automated time and attendance systems, will be using this as their source data to enter into payroll systems. Therefore, CMS is already accepting these postings as auditable data for payroll based systems.

3. **Data collection for non-employees providing care (e.g. contract and consultant staff)**. The system proposed by CMS requires significant modifications to time and attendance and payroll systems as well as SNF/NF staff time to manually enter data into the system for each quarter reporting period. Many staff positions in SNFs/NFs are not employees. For example, therapists, housekeeping, and dietary staff are often employees of contracted organizations, which invoice the SNF/NF for hours worked by the contracted staff. In addition, some SNFs/NFs are required to use agency nurses or CNA's to cover shifts, particularly in rural areas where staffing is frequently a challenge. The invoice has detailed records of hours worked, which is auditable by CMS during their annual inspections. The proposed PBJ requires manual entry of hours worked for each contracted individual for all hours worked each day during the quarter. This is a significant resource-intensive activity. This also requires costly modifications to time and attendance systems and payroll systems to collect information for submission to CMS. We believe this is unnecessary to provide data needed to calculate hours of care provided per resident as required in the statute. Aggregate data for all contract staff by job category would be sufficient to comply with the goal to measure hours of staff care provided per resident.

AHCA recommendation: Rather than collecting data by each non-employee, allow aggregate data to be submitted which is auditable back to the invoice from the contracting organization or consultant.

4. **Hours submitted are by day worked which impacts how exempt employee's hours are collected and reported.** Data collection for exempt employees in payroll is usually posted as working Monday through Friday during normal business hours, even when they work evening or night shift or on the weekends. Thus, without major changes to the payroll systems and time and attendance systems; the CMS method of assigning hours worked for exempt employees by day will result in inaccurate and misleading data on staffing levels during off-hour shifts and weekends for all exempt employees.

   AHCA recommendation: Allow the use of information from auditable time sheets that would support the payroll such as those required to be posted in the facility each day and retained for 18 months.

5. **How hours from corporate staff providing patient care services in multiple SNFs/NFs will be calculated.** This represents a problem for corporate staff that provides patient care services in multiple facilities and applies to both non-exempt but particularly exempt employees. This applies to nurse consultants such as wound specialists, pharmacists, and therapists. Most systems do not track the hours worked broken out by facility or by time and day of week. Some of these staff also will cover individual SNF/NF staff shifts when there are unexpected vacancies. To comply with CMS reporting requirements, entirely new time and attendance and payroll systems need to be developed or significantly modified.

   AHCA recommendation: CMS must work collaboratively with providers and payroll vendors to determine the ideal method to capture this information so it will accurately reflect direct patient care provided by these individuals.

6. **Excluding hours for clinical staff to receive required training.** Many clinical positions in SNFs /NFs are required, as part of their clinical licensure or as part of CMS regulations, to obtain annual ongoing training for specific clinical conditions and situations to perform their jobs effectively and within the most current standards of practice. CMS's plans to exclude training hours from reported hours will result in misleading data on staffing levels in SNFs/NFs and create an incentive to minimize training.

   AHCA recommendation: CMS should continue to count exempt and non-exempt hours for employees who attend required training as CMS does in the current staff data collection. By not counting this information, CMS creates an incentive to minimize professional training that improves patient care and enables employees to provide the most current standards of practice.

7. **CMS is capturing daily direct-care staff hours worked and only one day of patient/resident census per month.** Patient/resident census in a SNF/NF can vary dramatically during the month in some facilities. This is particularly true at certain times of the year and when a facility has a large number of short-stay (or rehabilitation) patients. CMS has determined that "to reduce facility burden" they will only collect one day per month of patient/resident census. The result is clear: the calculation of the "direct care hours per patient/resident" will be inaccurate and misleading. The purpose of this provision of the ACA, in the *Nursing Home Transparency and*

Improvement section of the law is clearly intended to inform beneficiaries of the number of hours of direct care staffing provided per patient. CMS's approach is misleading to beneficiaries and must be changed to better represent what is anticipated by this section of the ACA.

AHCA recommendation: CMS should accept the recommendation by providers (and AHCA) to use an average monthly census to more accurately reflect direct care hours provided to patients.