Submitted electronically via email
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CC: PA:LPD:PR (REG-138006-12)
Room 5203
P.O. Box 7604
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Washington, D.C. 20044

Re: REG-138006-12; RIN 1545-BL33; Shared Responsibility for Employers Regarding Health Coverage; Notice of Proposed Rulemaking, 78 Fed. Reg. 218 (Jan. 2, 2013)

Dear Mr. Wilkins:

The American Hospital Association (AHA), on behalf of its nearly 5,000 member hospitals, health systems, and other health care organizations, and its 43,000 individual members, and the American Society for Healthcare Human Resources Administration (ASHHRA), on behalf of its 3,500 member human resource managers in hospitals and other health care facilities nationwide, appreciate the opportunity to provide comments to the Internal Revenue Service (IRS) regarding the proposed regulations under Section 4980H of the Internal Revenue Code (Code). This section of the Code authorizes the Secretary of Treasury, in consultation with the Secretary of Labor, to define the term "hour of service" for purposes of determining an employee's full-time status.

The IRS, in regulations proposed in January 2013, would define "hour of service" as "each hour for which an employee is paid, or entitled to payment, for the performance of duties for the employer; and each hour for which an employee is paid, or entitled to payment by the employer for a period of time during which no duties are performed due to vacation, holiday, illness, incapacity (including disability), layoff, jury duty, military duty or leave of absence (as defined in 29 CFR 2530.200b–2(a))."[1] The proposed regulations treat certain hours during which no duties are performed as hours of service, but specifically limits this category to vacation, holiday,

[1] Prop. Treas. Reg. § 54.4980H-1(a)(21)(i).

illness, incapacity (including disability), layoff, jury duty, military duty and leave of absence. The proposed regulations treat these explicitly identified paid non-work hours as time away from work that, if not counted within hours of service, could result in anomalous results, such as a full-time employee being treated as not full-time during a month in which she takes two weeks of vacation or recovers from surgery. Therefore, the inclusion of these paid non-work hours within the definition of hours of service protects the full-time status of employees who may not be working their regular schedule.

On-call hours are not included in this list and, the AHA and ASHHRA suggest, are not similar to these other specifically identified categories of paid non-work hours included in the proposed regulation as hours of service. For health care provider organizations, employees who are on-call are able to engage in other activities, unless and until they actually are called in to work. Thus, including on-call hours as hours of service could result in an individual being treated as a full-time employee under Code Section 4980H, even though that employee is never expected to work a regular full-time schedule and, indeed, is never even actually called in to work. Moreover, including on-call hours does not enhance protections for the full-time status of employees; it would, in fact, have the opposite effect. Therefore, **we recommend that the final rule treat on-call hours, until the employee is actually called in to work, as hours of service only if they are considered "hours worked" under the *Fair Labor Standards Act* (FLSA), regardless of the compensation structure actually used with respect to those on-call hours. We agree, of course, that when on-call employees are called in, the hours that they actually work should be treated as hours of service for purposes of Code Section 4980H.**

HEALTH CARE EMPLOYERS USE OF ON-CALL HOURS

Given the commitment of health care providers to provide high-quality and consistent patient care, employees work a wide variety of work hours. Many employees work regular hours that would certainly meet the definition of "full-time" employee under Code Section 4980H. Other employees, either by their own choice or the needs of patient care, have regular work hours that do not meet the hour of service threshold to be treated as full-time employees for these purposes. Some of these part-time employees, however, are at times also placed on call (also known as "standby") and may be separately paid for such time. As in certain other areas in which responsiveness is essential, on-call hours are required in health care to ensure adequate staffing levels to meet the needs of patient care. In the health care field, an employee may be on call to: (a) replace another employee who is unexpectedly absent from work; (b) provide additional coverage in the event of an unanticipated increase in patient census, including due to a disaster or other emergency situation; or (c) provide coverage for nights and weekends. This last category may be especially prevalent in rural areas that lack multiple employees with the same technical skills.

On-call hours are required across the spectrum of health care and in all geographic locations. Employees who may be on-call include physicians, nurses, emergency care providers and technicians. Their employers run the gamut in health care and include hospital emergency rooms, surgery centers, radiology and imaging services, catheterization laboratories and sleep laboratories. The need for employees to be on call is especially true for trauma centers and critical access hospitals that may be the only source of emergency care in a community. An

employee placed on call generally is not required to remain at work and is free to use the time for his or her own purposes such as visiting with friends, going shopping, sleeping, etc. Nonetheless, the employee is expected to report to work ready for duty within a designated period of time, such as 30 minutes or one hour, if he/she is called.[2]

On-call hours are compensated in a variety of ways, which vary from employer to employer and even within an employer. In some instances, the compensation structure is the subject of a collective bargaining agreement. In other instances, it is based on employer policy or an employment agreement. On-call time is sometimes not separately compensated, but rather is part of the overall employment arrangement. On-call time also may be compensated on an hourly basis. When compensated on an hourly basis, the rate of pay for on-call hours is usually lower than the employee's normal rate of pay.

Regardless of whether the on-call hours are separately compensated, the employee is always compensated when they are actually called in and report to work. The compensation for the period during which the employee is called in also varies depending on the particular employer/employee arrangement. In some instances, the rate of pay is the normal rate of pay (which may be a special rate if the person is called in during a night, weekend or holiday shift). Alternately, the rate of pay may be higher than the individual's normal rate of pay (for example, the employee may be compensated at 150 percent of the normal rate of pay for the hours called in). In addition, the employee may be guaranteed payment for a minimum number of hours if he or she is called in to work from on-call status (generally two or four hours). If guaranteed payment, the employee is paid for the minimum number of hours, even if the employee only actually works during the call in for a shorter period of time. If the employee works longer than the minimum, he or she is paid for the time actually worked. Guaranteed payment structures are more commonly used in on-call situations in which an individual may be called in for a relatively short period of time.

Employees may spend long periods of time on call without being actually called in to work. Despite the fact that on-call time in many instances does not require actual work, the proposed regulation could be interpreted to require these on-call hours to be treated as hours of service, particularly if the hours are paid using an hourly rate of pay.

HOW EXISTING FEDERAL LAW TREATS "HOURS WORKED," INCLUDING ON-CALL HOURS

Hours are subject to the federal minimum wage and overtime rules under the FLSA if they are hours for which an employee is "working" for the employer (hours worked). *See Reimer v. Champion Healthcare Corp.*, 258 F.3d 720, 725 (8th Cir. 2001). While the FLSA does not include a definition of "hours worked," a body of case law has grown up in this context, including case law specific to on-call hours. In addition, the Department of Labor has issued regulatory guidance regarding on-call hours. Specifically, this regulatory guidance provides:

[2] This type of on call is distinguishable from the periods of "call" often taken by medical residents who are generally required to remain at the hospital and available for duty at any time during the call period.

> Whether waiting time is time worked under the Act depends upon particular circumstances. The determination involves "scrutiny and construction of the agreements between particular parties, appraisal of their practical construction of the working agreement by conduct, consideration of the nature of the service, and its relation to the waiting time, and all of the circumstances. Facts may show that the employee was engaged to wait or they may show that he waited to be engaged." (Skidmore v. Swift, 323 U.S. 134 (1944)) Such questions "must be determined in accordance with common sense and the general concept of work or employment." (Central Mo. Tel. Co. v. Conwell, 170 F. 2d 641 (C.A. 8, 1948)).[3] An employee who is required to remain on-call on the employer's premises or so close thereto that he cannot use the time effectively for his own purposes is working while "on call". An employee who is not required to remain on the employer's premises but is merely required to leave word at his home or with company officials where he may be reached is not working while on call. (Armour & Co. v. Wantock, 323 U.S. 126 (1944); Handler v. Thrasher, 191 F. 2d 120 (C.A. 10, 1951); Walling v. Bank of Waynesboro, Georgia, 61 F. Supp. 384 (S.D. Ga. 1945))[4]

As discussed above, compensation for on-call hours for health care employees varies dramatically from no separate compensation to an hourly rate that may be less than minimum wage to incentive pay if actually called in to work. These various compensation structures exist because on-call hours are, in most instances, are not "hours worked" and, thus, not subject to federal minimum wage or overtime.

AHA AND ASHHRA RECOMMENDATION

Borrowing the FLSA standard makes sense in the context of determining whether and when on-call time constitutes hours of service because health care employers must already determine whether on-call time is "hours worked"[5] and, thus, subject to the federal minimum wage and overtime rules in order to properly compensate employees for their time. **Accordingly, until the employee is actually called in to work, on-call hours should be treated as hours of service only if they are considered "hours worked" under the FLSA, regardless of the compensation structure actually used with respect to those on-call hours. Of course, when employees are called in, the hours that they actually work should be treated as hours of service for purposes of Code Section 4980H. In addition, the final rule should be clear to use only the federal standard and not any state or local wage and hour laws, so as to ensure a consistent, national application of the requirements.**

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[3] 29 C.F.R. § 785.14.

[4] 29 C.F.R. §§ 785.17.

[5] On-call hours qualify as "hours worked" when the employee "is required to remain on call on the employer's premises or so close thereto that he cannot use the time effectively for his own purposes." 29 C.F.R. § 785.17

Following federal law wage and hour law serves the policy behind Code Section 4980H because on-call hours that are not subject to federal minimum wage or overtime are not hours for which an employee actually works. During this period of time, the employee has great latitude to engage in other activities. Thus, while the employee must remain available to work within a designated period of time, the employee could engage in recreational activities, run errands, spend time with friends and family, or even sleep. Given that the employee's hours actually working would count as hours of service, there is no opportunity for abuse by not treating on-call hours as hours of service. Rather, when the employee's services are actually needed, the employee will be credited with hours of service.

Following the federal definition of "hours worked" standard also is administratively practical and ensures consistent treatment because on-call time is compensated in a variety of ways, including no hourly rate or an hourly rate that is less than minimum wage. It does not make sense that on-call time that is not required to be paid under the FLSA be treated as an hour of service if the employer elects to provide some compensation (including compensation that is less than federal minimum wage), while on-call time that is not separately compensated is not treated as hours of service. If the treatment of on-call hours differs from treatment under the FLSA, section 4980H may well prompt employers to abandon a compensation model that pays for on-call hours. It would be unfortunate for a statute designed to promote affordable access to health coverage to have such a profound effect on compensation, particularly when the federal statute that governs wages and hours does not have that effect.

In a similar vein, hours compensated based on a guaranteed minimum should not be treated as hours of service to the extent they are not actually worked. If an employee is entitled to a guaranteed minimum when the employee is called in, the hours actually worked should be treated as hours of service. The guaranteed hours for which the employee does not actually work are merely a method of determining the rate of pay for the hours actually worked. Thus, for example, if an employee is entitled to a two hour minimum guarantee but only works for one hour, he or she should be credited with one hour of service for purposes of determining full-time status. The one additional hour paid as the "guarantee" would not be credited as an hour of service.

To ensure coverage to care for patients, health care providers may overestimate the need for an employee's services and pay for on-call coverage when there is a low probability that an employee's services will actually be needed. *The Patient Protection and Affordable Care Act*, including Code Section 4980H, is designed to expand health care coverage to all U.S. residents. That coverage is only effectively delivered when there are health care workers available to provide it. Thus, on-call hours further the policy behind the Act, and health care employers should not be penalized for potentially overestimating the need for coverage – in fact, they should be encouraged to ensure adequate staffing to support expanded coverage.

RECOMMENDED REGULATORY LANGUAGE

For the above-stated reasons, we recommend that the proposed definition of hours of service be revised to add language similar to the following:

"Hours of service shall not include minimum guarantee hours for which an employee is paid but for which no duties are performed. Hours for which an employee is required to be available to perform duties shall only count as hours of service if those hours qualify as 'hours worked' under the Fair Labor Standards Act."

Thank you for your consideration of our views on this important matter. If you have questions about our recommendations, please contact Lawrence Hughes, AHA assistant general counsel, at lhughes@aha.org or (202) 626-2346.

Respectfully submitted,

/s/

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/s/

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