



February 16, 2016

SENT: Via E-mail and US Post Office

Mr. Andrew Slavitt  
Acting Administrator  
Centers for Medicare and Medicaid Services  
Department of Health and Human Services  
PO Box 8016  
Baltimore, MD 21244-8016

**Attention: CMS-3317-P**

Dear Administrator Slavitt:

I am writing on behalf of LeadingAge regarding CMS' implementation of the Payroll-Based Journal (PBJ). We would like to take this opportunity to address our concerns about the methodology being adopted by CMS to collect and calculate skilled nursing facility and nursing facility (SNF/NF) staffing levels.

LeadingAge has long supported the transition to collection of payroll data as the basis for reporting and calculating accurate staffing in nursing homes. We concur with the studies that have examined the relationship between staffing and quality in nursing homes and demonstrated that staffing has a direct bearing on the quality of care received by residents. However, as a factor significant to evaluating both quality of care and nursing homes' quality improvement efforts, it is critical that the collected and reported staffing information be accurate, reliable, and consistent. Based on our own evaluation and feedback from our nursing care members as they plan for and begin the PBJ registration and submission process, LeadingAge retains serious misgivings about the potential for inaccuracies based on CMS' current approach.

The information collected and interpreted under the PBJ process will have broad implications for nursing home providers and beneficiaries. Not only will this data be subject to survey and enforcement in accordance with the federal oversight process applicable to all of the Long Term Care Facility Requirements of Participation (RoPs), it will be key to nursing homes' staffing and overall rankings within the CMS Nursing Home Five Star Rating System. The staffing data and accompanying rankings as arrayed on Nursing Home Compare contribute to consumer decision-making in selecting a nursing home. These results also play a significant role in other current and emerging applications of the 5-star system, including payment and quality models such as the Comprehensive Care for Joint Replacement (CCJR) that requires participating nursing homes to have at least a 3-star rating. It is essential that the data and subsequent analyses be accurate and reliable from the outset to avoid the consequence of conclusions and determinations based on misleading and/or misrepresented information.

We have outlined our key concerns and recommendations below. Implementation prior to resolution of these issues would be premature and inequitable to all relevant parties - beneficiaries and consumers, providers, and CMS.

### **Hours Worked Vs. Hours Paid**

CMS is requiring that nursing homes (SNFs/NFs) report hours paid vs. actual hours worked by staff providing care to residents. This approach is extremely problematic as it relates to exempt, salaried personnel, e.g., nurses, and in some cases, those in administrative positions who may also be licensed or certified to provide direct care. For these employees, hours worked will be calculated against the assigned work week for their respective job titles, i.e., 35 - 40 hours, regardless of how many actual onsite hours they have contributed during a given pay period.

Nursing homes are 24/7 operations and must maintain adequate staffing levels around the clock regardless of 'call-outs' for sickness or circumstances such as inclement weather. Exempt employees may stay late or for an extra shift in such situations or, as likely occurred most recently in this area and in Boston last year, remain overnight as needed during e.g., snow emergencies, when scheduled staff are unable to get to work. Similarly, employees in administrative positions who are licensed health care professionals or are 'cross-trained' and certified to provide direct care may also assist when staff are out sick and/or during emergency situations. While these individuals may be otherwise compensated for their extra hours, accurate staffing levels during these periods will not be reflected based on payroll data. Therefore, only accounting for hours paid vs. hours worked for exempt personnel creates the potential for inaccuracies in reported staffing for all nursing facilities.

CMS' current approach regarding hours paid vs. hours worked is not only potentially contradictory to Department of Labor [Fair Labor Standards Act/FLSA] rules regarding compensation for exempt employees, it opens the entire PBJ process to faulty reporting and misrepresentation of staffing levels and hours of resident care. The ultimate result will be to mislead beneficiaries and other users of this information and subject providers to erroneous oversight actions under the federal survey and enforcement system.

- Submission specifications must account for actual hours worked, including those by salaried/exempt staff who work more than the 35-40-hour, full-time basis for which they are paid. The PBJ must credit this time to accurately reflect direct care staffing and hours of care.
- LeadingAge recommends that CMS work with both providers and participating vendors to amend the PBJ process to permit SNFs/NFs to report hours worked for all staff, including exempt employees, using the data from time and attendance records and accounts payable for contract employee billing and invoices.

### **Labor and Job Codes**

Under the current PBJ process, providers will be required to assign hours worked based on designated job categories and classifications. LeadingAge members have raised many questions regarding those exempt and non-exempt staff “who wear multiple hats” and divide their time, and how to assign hours and/or characterize these workers under the PBJ. For example, some providers have adopted universal worker practices, with those employees performing non-nursing or other functions at different points, e.g., staff who might handle some combination of personal care, housekeeping, laundry, food service, or activities on any given day. Again, particularly in smaller and/or rural nursing homes, certain staff, e.g., nursing, may assume dual roles, splitting their time between administrative duties and direct resident care.

The PBJ manual and accompanying FAQ state: “Reporting should be based on the employee’s primary role and their official categorical title (for example, as indicated in a Human Resources system)... Facilities should still report just the total hours of that employee based on their primary role.” These instructions notwithstanding, LeadingAge members continue to find it difficult to determine which job category should apply. Categorizing staff under an administrative classification negates the hours dedicated to resident care. Conversely, if the individual is classified within resident care, the non-resident care hours will be wrongfully attributed. Either characterization is ultimately incorrect and/or misleading.

- The PBJ process must be able to acknowledge and reconcile the hours of care provided by these split and/or multiple-role employees and accept the direct care hours worked as reported via homes’ time and attendance systems. While many SNFs/NFs as well as CMS will have to modify their systems to accurately capture the data for these individuals, it is essential that accuracy and accountability be common to both sides of the staffing collection and reporting equation.

### **Accounting for Contract Staff**

LeadingAge members working toward compliance with the PBJ requirements, are finding the mandate to account for and track individual contract staff to be particularly challenging. Contract staff may include, e.g., therapists or dietary consultants or agency nurses as needed if/when the nursing home is faced with a shortage of available permanent employees. While the invoices from contractors and/or contract agencies do include a detailed accounting of hours worked, not all providers receive billing statements from these entities delineating each contract/agency staff person who has worked in the nursing home by individual name, date and daily hours. Recognizing the inherent expectation in this requirement that providers work with their vendors to obtain this information for each day of each quarter, this is proving to be no simple task. Providers contract locally so these are by nature ‘individual conversations.’ If it is new to the contractor’s billing system, there is likely to be both time needed for

accommodation and additional cost. If the vendor is unable to offer an electronic alternative, it will fall to the provider to manually input the daily data and hours paid for each contract employee - a charge that is both time and labor-intensive.

Virtually all nursing homes' accounting and time and attendance systems will also require modification to comply with the provisions of the final rule, including maintaining the necessary respective individual data for each contract and/or agency staff personnel. In the ideal, the nursing home and contractor systems would capture the required information in the same format as a check and balance against accuracy.

- LeadingAge recommends that CMS work collaboratively with providers and vendors to establish parameters allowing for the collection and submission of aggregate data auditable back to the contractor/billing invoice for contract and agency staff job categories and classifications.
- If the individual data requirements for contract and agency personnel are to be retained, CMS should develop a common template for providers and contractors to integrate and use within their systems to assure accurate accounting and tracking of this information.

### **Reporting Resident Census**

Included in PBJ specifications is the collection of census data based on the resident population as of the last date of each month of each quarter. LeadingAge members have expressed strong objection and concern with this approach as misrepresentative and unreliable in depicting the hours of direct care provided per resident per day. Resident census can vary over the course of a month based on such factors as the number of short-stay rehabilitation and longer stay residents admitted and discharged. The collection of census information must be compared to and consistent with the data collected for hours worked during the same submission period.

- LeadingAge recommends amendment to the PBJ process for collection of census data to use of the average daily census for each month in each quarterly submission cycle.

### **Voluntary Submission and Testing**

LeadingAge has supported the concept of a testing phase to enable provider understanding, familiarity, and evaluation of the PBJ against their respective payroll and time and attendance processes. The current voluntary submission period is first and only testing opportunity for the PBJ process prior to the mandatory submission date of July 1.

Providers and vendors are mutually dependent for testing their systems and must work together to confirm the ability to successfully submit the required data. It is our understanding, however, that not all vendors are currently prepared to offer

viable submission processes to their provider clients – that some vendors are still determining the viability or modifying their systems to meet the PBJ requirements.

All nursing homes should have opportunity and be able to test their respective payroll and time and attendance systems against the PBJ requirements. The testing period should allow the broad spectrum of providers to gain understanding and familiarity with the process prior to final implementation, and information regarding the cost and burden associated with meeting the submission requirements, e.g., implementation of required, but unanticipated system modifications and the potential investment of additional staff and/or documentation time.

- All nursing home providers should have opportunity to test their respective payroll and time and attendance processes and gain familiarity with the CMS submission requirements.
- Contingent on the outcomes and/or results of the voluntary submission period, CMS should consider postponement or a phase-in of mandatory submission date to resolve any identified problems or glitches.

LeadingAge continues to support the collection of payroll-based staffing data. We believe there is great potential in this concept for assuring an accurate reflection of the staffing levels and hours of care actually provided to nursing home residents. However, implementation of this program based on a system that is flawed from the outset can only serve as a disservice to consumers and beneficiaries, providers, and to CMS.

- As currently directed, effective July 1, 2016, SNFs/NFs will be required to submit payroll-based staffing and facility census data to comply with the PBJ mandate. LeadingAge respectfully requests that implementation of PBJ be deferred as necessary pending resolution of the above-detailed issues and concerns.

Thank you for your consideration and attention.

Sincerely,

A handwritten signature in black ink, appearing to read "Katrinka Smith Sloan". The signature is fluid and cursive, with the first name being the most prominent.

Katrinka Smith Sloan  
President and CEO

cc: Thomas Hamilton