July 10, 2014

Mary Ziegler, Director
Division of Regulations, Legislation, and Interpretation
Wage and Hour Division
U.S. Department of Labor, Room S-3510
200 Constitution Avenue, NW
Washington, DC 20210

Re: RIN 1235-AA10 - Proposed Rule – Establishing a Minimum Wage for Contractors

Dear Ms. Ziegler:

The American Health Care Association (AHCA) is the nation’s largest association of long term and post-acute care providers. Our members provide essential care to millions of individuals – including our nation’s veterans – in more than 12,000 not for profit and for profit member facilities.

We are writing in regards to the Department of Labor’s (DoL’s) notice of proposed rulemaking, RIN 1235-AA10: Establishing a Minimum Wage for Contractors, 79 Federal Register 34568 (June 17, 2014), on establishing a minimum wage for contractors. Specifically, we are seeking clarification that the Veterans Administration (VA) provider agreements are exempted from the requirements of the DoL proposed rule. We are also asking that if the VA provider agreement proposed rule, RIN 2900-AO15: Use of Medicare Procedures to Enter Into Provider Agreements for Extended Care Services, 78 Federal Register 10117 (February 13, 2013), is not finalized and released before the end of this year, that DoL consider exempting nursing facilities (NFs) from the Department’s proposed rule until such time that the VA proposed rule is finalized. This would thereby exempt NFs with VA contracts from the DoL requirements on establishing a minimum wage for contractors.

We understand that AHCA members that currently have VA contracts with the federal government to furnish health care services to VA beneficiaries are considered federal contractors under the Service Contract Act (SCA). Federal contractors must comply with the DoL’s Office of Federal Contract Compliance Programs (OFCCP) rules. Several of AHCA’s members throughout the years have unfortunately had to drop their federal contracts due to these OFCCP requirements.
Over the last many years, AHCA has worked diligently with the VA to develop and implement NF “agreements” with the Department that would exempt NFs from the SCA; and subsequently from the OFCCP regulations. In 2013, AHCA was pleased when VA released a proposed VA/NF agreement regulation, and encouraged VA to proceed. Further, AHCA was pleased when VA began implementing VA/NF agreements through a pilot program before the proposed rule was finalized to determine if there would be any significant issues.

To date, the proposed VA rule has not been finalized; but AHCA staff and members have been heavily advocating on the Hill and with the VA that the Department finalize the VA/NF agreement regulation as soon as possible. It is important to note that the VA shortened the comment period on its proposed rule from the traditional 60 days to 30 days, because they weren’t anticipating receiving a large number of comments, particularly comments that were negative or that opposed the rule as the proposed rule would increase the opportunity for veterans to obtain non-VA extended care services from local providers that furnish vital and often life-sustaining medical services.

Under the proposed DoL rule, RIN 1235-AA10, AHCA members that currently have VA contracts would have to pay their employees $10.10/hour as they fall under the SCA. This will unfortunately result in many of AHCA’s members being unable to continue their VA contracts as NFs operate on razor-thin margins. Some NFs, particularly those in rural areas, will not be able to afford to pay all of their staff the wage increase. In fact, MedPAC estimated 2012 overall operating margins at 1.8 percent. This number reflects Medicare, Medicaid and private pay, but it does not take into consideration the two percent sequestration cut. Such thin operating margins are not sustainable, particularly for the skilled nursing profession – which is the nation’s 10th largest employer and supports more than 5.4 million jobs. If the VA proposed rule is not finalized by the end of this year, and if NFs have to comply with the DoL proposed rule, it will result in a health care access issue for our nation’s veterans because a number of NFs will no longer be able to provide VA services.

Under the VA/NF Agreement proposed rule, NFs would not fall under the SCA and accordingly would be exempt from the DoL federal contractor minimum wage proposed rule. As noted above, we are specifically asking DoL to clarify that VA provider agreements are exempted from the requirements of the DoL proposed rule. We are also asking that if the VA provider agreement proposed rule is not finalized and released before the end of this year, that DoL consider exempting NFs from the Department’s proposed rule until such time that the VA proposed rule is finalized. This would thereby exempt NFs with VA contracts from the DoL requirements on establishing a minimum wage for contractors.

AHCA looks forward to continuing to work with DoL on issues impacting quality of care for those who have served and continue to serve our nation so bravely. If you have further questions on this matter or would like additional information, please contact me at dhalvorson@ahca.org or 202-898-2822.

Sincerely,

Dana Halvorson
Senior Director of Not for Profit & Constituent Services
American Health Care Association