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VIA EMAIL
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Val Hoyle, Commissioner
Bureau of Labor and Industries
800 NE Oregon St., Ste. 1045
Portland, OR 97232

Re: Petition of Legacy Health, a Public Benefit Corporation and All Affiliated Entities, Petitioners

Dear Commissioner Hoyle:

Pursuant to ORS 183.390 and OAR 137-001-0070, Petitioners hereby request the amendment of OAR Chapter 839, Division 20 (the "Proposed Amendments"). This petition is supported as follows.

Identification of Petitioners

Legacy Health System and all affiliated entities in Oregon.

Statement of Petitioners' Interest

Petitioners are interested persons eligible to seek the Proposed Amendments. They include the following entities, each of which is a Public Benefit Corporation as defined by Oregon law including, but not limited to, ORS Chapter 65 and the Internal Revenue Code.

OAR Chapter 839, Division 20 establishes or purports to establish regulations that impose operational restrictions on Petitioners' day-to-day employment of employees necessary for Petitioners to carry out their public and/or charitable purposes, interfere with licensure obligations of necessary employees, contribute to employee fatigue and discomfort in the performance of their duties, increase operational expense, cause confusion for employees who regularly work for Legacy and also for unionized employers who are not required to comply with the same rule, and expose Petitioners to penalties in spite of good faith efforts to comply. Such restrictions are not imposed on similar public benefit corporations whose operations are distinguished only by their having employees working under collective bargaining agreements.

Proposed Amendments

839-020-0050
Meal and Rest Periods

(1) The purpose of this rule is to prescribe minimum meal periods and rest periods for the preservation of the health of employees.

(2)(a) Except as otherwise provided in this rule, every employer shall provide to each employee, for each work period of not less than six or more than eight hours, a meal period of not less than 30 continuous minutes during which the employee is relieved of all duties.

(b) Except as otherwise provided in this rule, if an employee is not relieved of all duties for 30 continuous minutes during the meal period, the employer must pay the employee for the entire 30-minute meal period.

(c) An employer is not required to provide a meal period to an employee for a work period of less than six hours. When an employee's work period is more than eight hours, the employer shall provide the employee the number of meal periods listed in Appendix A of this rule.

(d) Timing of the meal period: If the work period is seven hours or less, the meal period is to be taken after the conclusion of the second hour worked and completed prior to the commencement of the fifth hour worked. If the work period is more than seven hours, the meal period is to be taken after the conclusion of the third hour worked and completed prior to the commencement of the sixth hour worked.

(3) If an employer does not provide a meal period to an employee under section (2) of this rule, the employer has the burden to show that:

(a) To do so would impose an undue hardship on the operation of the employer's business as provided in section (4), and that the employer has complied with section (5) of this rule;

(b) Industry practice or custom has established a paid meal period of less than 30 minutes (but no less than 20 minutes) during which employees are relieved of all duty; or

(c) The failure to provide a meal period was caused by unforeseeable equipment failures, acts of nature or other exceptional and unanticipated circumstances that only rarely and temporarily preclude the provision of a meal period required under section (2) of this rule. If an employee is not relieved of all duties for 30 continuous

minutes during the meal period, the employer must pay the employee for the entire 30-minute meal period.

(4) As used in section (3)(a) of this rule, "undue hardship" means significant difficulty or expense when considered in relation to the size, financial resources, nature or structure of the employer's business. For the purpose of determining whether providing a meal period requires significant difficulty or expense, the following factors may be considered:

(a) The employer's cost of complying with the requirement to provide a meal period under section (2) of this rule.

(b) The overall financial resources of the employer.

(c) The number of persons employed at the particular worksite and their qualifications to relieve the employee; the total number of persons employed by the employer; and the number, type and geographic separateness of the employer's worksites.

(d) The effect of providing the meal period required under section (2) of this rule on worksite operations involving: the startup or shutdown of machinery in continuous-operation industrial processes; intermittent and unpredictable workflow not in the control of the employer or employee; the perishable nature of materials used on the job; and the safety and health of other employees, patients, clients or the public.

(5) When an employer does not provide a meal period to an employee under section (2) of this rule, and is able to make the required showing under section (3)(a) of this rule:

(a) The employer shall instead provide the employee adequate paid periods in which to rest, consume a meal, and use the restroom; and

(b) The employer shall first provide to each employee a notice provided by the commissioner of the Bureau of Labor and Industries regarding rest and meal periods in the language used by the employer to communicate with the employee. The employer shall retain and keep available to the commissioner a copy of the notice for the duration of the employee's employment and for no less than six months after the termination date of the employee. Notices that comply with this subsection are available upon request from the bureau. This subsection takes effect on March 16, 2009.

(6)(a) Except as provided in subsection (b) of this section, every employer shall provide to each employee, for each segment of four hours or major part thereof

worked in a work period, a rest period of not less than ten continuous minutes during which the employee is relieved of all duties, without deduction from the employee's pay.

(A) As the nature of the work allows, the employer shall provide the rest period approximately in the middle of each segment of four hours or major part thereof worked in a work period. When the employee's work period is more than eight hours, the employer shall provide the employee the number of rest periods listed in Appendix A of this rule.

(B) The employer shall provide rest periods in addition to and taken separately from the time provided for a meal period. An employer may not require or allow an employee to add the rest period to a meal period or deduct the rest period from the beginning or end of the employee's work period to reduce the overall length of the work period.

(C) An employer has the burden to show that the employer provided the rest periods required under this section.

(b) An employer is not required to provide a rest period to an employee when all of the following conditions are met:

(A) The employee is 18 years of age or older;

(B) The employee works less than five hours in any period of 16 continuous hours;

(C) The employee is working alone;

(D) The employee is employed in a retail or service establishment, i.e., a place where goods and services are sold to the general public, not for resale; and

(E) The employee is allowed to leave the employee's assigned station when the employee must use the restroom facilities.

(7) The provisions of this rule regarding meal periods and rest periods may be modified by the terms of a collective bargaining agreement if the provisions of the collective bargaining agreement entered into by the employees specifically prescribe rules concerning meal periods and rest periods.

(8) The provisions of this rule regarding meal periods and rest periods may be modified by the policies of a nonprofit health care medical center or hospital which provides patient care.

(9) The provisions of this rule are subject to the requirements of any licensing, standard of care, or patient care obligations or responsibilities of a nonprofit health care medical center or hospital which provides patient care.

(8~~1~~10)(a) Pursuant to the provisions of ORS 653.261(5), if an employer agrees, an employee may waive a meal period if all of the following conditions are met:

(A) The employee is employed to serve food or beverages, receives tips, and reports the tips to the employee's employer;

(B) The employee is at least 18 years of age;

(C) The employee voluntarily requests to waive the employee's meal periods no less than seven calendar days after beginning employment;

(D) The employee's request to waive the employee's meal periods is in writing in the language used by the employer to communicate with the employee, on a form provided by the commissioner, and is signed and dated by both the employee and employer;

(E) The employer retains and keeps available to the commissioner a copy of the employee's request to waive the employee's meal period during the duration of the employee's employment and for no less than six months after the termination date of the employee;

(F) The employee is provided with a reasonable opportunity to consume food during any work period of six hours or more while continuing to work;

(G) The employee is paid for any and all meal periods during which the employee is not completely relieved of all duties;

(H) The employee is not required to work longer than eight hours without receiving a 30-minute meal period during which the employee is relieved of all duties;

(I) The employer makes and keeps available to the commissioner accurate records of hours worked by each employee that clearly indicate whether or not the employee has received meal periods; and

(J) The employer posts a notice provided by the commissioner regarding rest and meal periods in a conspicuous and accessible place where all employees can view it.

(b) Either the employer or employee may revoke the agreement for the employee to waive the employee's meal periods by providing at least seven (7) calendar days written notice to the other.

(c) Notwithstanding subsection (b) of this section, an employee who has requested to waive meal periods under this section may request to take a meal period without revoking the agreement to waive such periods. The request to take a meal period must be submitted in writing to the employer no less than 24 hours prior to the meal period requested.

(d) An employer may not coerce an employee into waiving a meal period.

(e) An employer will be considered to have coerced an employee into waiving the employee's meal period under the following circumstances:

(A) The employer requests or requires an employee to sign a request to waive meal periods;

(B) An employee is required to waive meal periods as a condition of employment at the time of hire or at any time while employed;

(C) The employer requests or requires any person, including another employee, to request or require an employee to waive meal periods; or

(D) The employee signs a form requesting to waive meal periods prior to being employed for seven calendar days.

(f) Employee waiver forms and notices regarding rest and meal periods that comply with this section are available upon request from the bureau.

(~~9~~11) Notwithstanding sections (2) and (6) of this rule, a public school district, education service district, or public charter school may provide any person substituting for a regular teacher with the same rest and meal periods to which the regular teacher is entitled under any applicable law, employment contract, policy, or collective bargaining agreement.

(~~10~~12) Rest and meal period requirements specific to minors under 18 years of age are **provided in OAR 839-021-0072.**

(~~11~~13) As used in this rule:

(a) "Work period" means the period between the time the employee begins work and the time the employee ends work.

(b) "Work period" includes a rest period as provided in section (6) of this rule, and any period of one hour or less (not designated as a meal period) during which the employee is relieved of all duties.

(c) "Work period" does not include a meal period unless the meal period is paid work time as provided in section (2) or (5) of this rule.

Reasons for and Effects of Adoption, Amendment, or Repeal of the Rule

Petitioners engage in the provision of health care services in the Portland metro area and mid-Willamette Valley, operating five Oregon hospitals, more than 70 primary care, specialty, and urgent care clinics, and hospice care. Its hospitals include emergency, trauma, birthing, neonatal, stroke, and heart care. Randall Children's Hospital is a regional center for the care of infants, children, and teens, including some of the most complex cases as well as advanced medical and surgical care. Legacy hospice offers physical, emotional, social, and spiritual care for terminally ill patients and their families.

The Rigid Demands of OAR 839-020-0050 Impose Unwarranted Burdens That Impinge Upon Patient Care Responsibilities and Are Not "Necessary" for the "Preservation of the Health of Employee"

The sole reason for the requirements of OAR 839-0020-0050 is "the preservation of the health of employees." OAR 839-020-0050(1). However, experience in Oregon health care has shown that these requirements are not necessary for the safety and health of employees. Any employer that provides rules concerning meal and rest periods in a collective bargaining agreement is permitted to make its own modification without any regulatory oversight. OAR 839-020-0050(7); that includes employers who operate the same kinds of health care facilities operated by Petitioners.

The requirements of OAR 839-020-0050 apply only to non-exempt employees, and they exclude from coverage those employees who are paid a salary and are supervisors, administrative employees, or professionals, and who meet the salary threshold. See generally https://www.oregon.gov/boli/employers/Pages/salaried-exempt-employees.aspx (last date visited October 5, 2020). ("Among the more commonly invoked exemptions to these requirements are those provided for so-called 'white collar' employees or 'salaried exempt' employees. Under wage and hour law, these exemptions are also referred to as the 'Executive,' 'Administrative' and 'Professional' exemptions. Minimum wage, overtime and most working conditions requirements do not apply to these 'white collar' workers when they qualify for the exemption. ORS 653.020(3); 29 U.S.C. § 213(a)(1)"). Many of Petitioners' employees would qualify as exempt but for the fact that they have expressed strong preferences to work on an hourly basis because of the scheduling benefits they enjoy from that status.

Petitioners are aware of no data, and the Bureau of Labor and Industries has neither provided nor cited any such data to support the assertion that Petitioners' employees would suffer adverse health effects if the rule were to be modified. Additionally, its employees work in temperature controlled

medical settings, have access to proximate toilet facilities, and frequently have the ability to take short breaks throughout their workdays.

Petitioners are aware of no data, and the Bureau of Labor and Industries has neither provided nor cited any such data, that other health care facilities who are exempted from the rule because their employees work under collective bargaining agreements have in any way suffered any adverse health consequences.

The specific timing of the rule's requirements themselves lead to discomfort among Petitioners' employees. For example, because shifts start early in the workday, some employees are forced to take a lunch in mid-morning, at a time that is inconvenient and uncomfortable for them and which at times leads to physical discomfort and hunger during the latter part of the shift. Employees have attempted, on their own, to request amendments from the Commissioner and have written to legislators on their own, to no avail. Employees who work for multiple health care providers report difficulty in managing their time because some other health care providers are not required to meet these requirements, causing the employees to have to be attentive to the minutiae of the requirements when their work day brings them to a Legacy employer.

The Rigid Demands of OAR 839-020-0050 Impinge Upon Patient Care Responsibilities

Petitioners' employees are subject to the regulations which govern their professional licensed activities. Those include the Oregon Nurse Practice Act (ORS Chapter 678) and the administrative rules of the Oregon State Board of Nursing (OAR Chapter 851). **Oregon law prohibits a registered nurse from leaving a patient care assignment if to do so would present a risk of harm** (ORS 441.168). Petitioners' licensed employees have raised concerns about being forced to adhere to a rigid schedule imposed by an agency with no special expertise in health care, when their professional duties impose professional, moral, or ethical obligations. For example, some employees have expressed that they cannot contemplate allowing a patient under their care "to die alone," and others have been legitimately concerned about having to leave grieving family members with a fellow employee who had not been involved in the patient's care. Emergency department employees have been frustrated by the apparent agency assumption that they can just leave a patient in the middle of key health care procedures including a mandatory suicide watch, administration of a "clot-buster" stroke drug, EKG monitoring, difficult or dangerous childbirth, and similar life and death events.

Scheduling meal and rest periods under the current regulations assume that employees function according to an assembly-line process over an 8 hour workday. The regulations are not designed for health care or for the longer (10 hour) shift scheduling common in health care. Considered in connection with a nationwide shortage of nursing processionals, employees are burdened by the meal and rest period requirements than if they worked in non-healthcare positions. They need to do patient hand-offs more frequently, pay unduly close attention to their watches, run to a cafeteria, and race back to a time clock (and be told they are not permitted to clock back in for 60 more seconds), all to meet the time-clock requirements of the regulations when their work involves unpredictable medical emergencies.

Health care practitioners are not fungible and a position typically must be staffed during a worker's break. A licensed health care practitioner may not fill in for another in an area for which he or she has not had the proper training. So, for example, an emergency room employee cannot fill in to provide breaks for an employee in family birthing, or vice versa. An operator cannot be replaced by an employee who does not have proficiency in "coding" (coded messages announced to alert staff to on-site emergencies). These are unlike the sorts of positions for which breaks and meals can be accommodated with signage ("back in 30 minutes") or the shutdown of an assembly (where the break can permit maintenance on the line itself). Instead, Petitioners' employees frequently work in highly skilled operations without readily available replacement employees in jobs that cannot be left vacant.

The Regulation as Drafted and as Enforced Conflicts With Superseding Federal Law

The rule is also in apparent violation of superseding federal law by instituting a preference solely applicable to employers (including in the same industries with the same positions) who have entered into a collective bargaining agreement. This deficiency was known to the agency. Specifically, when the exception for organized labor was considered, the Commissioner of Labor (Jack Roberts) testified that he had sought an Attorney General opinion which had expressed concern about the validity of such an exception. The amendments proposed by Petitioners would rectify the likely violation of law caused by this apparent conflict.

The Regulations Permit the Agency Broad Discretion to Impose Massive Penalties, Which Appear Historically to Have Been Retained by the Agency, and Which Present a Real Threat to the Ability of Public Healthcare Providers to Fulfill Their Obligations to the Public

Petitioners assert that an amendment is also necessary in the case of their public benefit operations because of the nature and scope of the penalties which the agency can award. Pursuant to OAR 839-20-1000 et seq. the agency can impose a per violation penalty of $1,000. OAR 839-20-1010(1)(j),(l). A violation might include a failure to provide a rest or meal period, but it also could include returning from a meal period one minute early or providing a rest or meal period outside of the narrow window permitted by the agency. In a recent proceeding in which some of the Petitioners were involved, but which was dropped by the agency for reasons unrelated to this petition, the agency provided notice of an intent to impose a civil penalty of multiple millions of dollars for alleged violations, many of which were identified as being delays of a few minutes in providing meal periods. This is particularly concerning due to the fact that penalties of this size threaten the existence of Petitioners' operations, limit its ability to provide suitable healthcare including for the indigent, and due to the fact that the agency has not been able to account for past collected penalties but appears to have retained them to enhance its operating budget.

The Proposed Amendment Will Achieve the Existing Rule's Substantive Goals While Reducing the Negative Economic Impact on Business

By allowing an exemption for employers whose employees work under a collective bargaining agreement, the agency has already acknowledged that its rule is not necessary for the preservation of employee health. Petitioners can prepare the same kinds of policies and internal rules that its fellow institutions have included in their collective bargaining agreements. The proposed amendment serves merely to allow Petitioners and other similarly situated institutions the same benefit in the scheduling of their employees.

Very truly yours,

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