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The American Society of Nurse Advocates

3 April 2020

CONGRESSMEN & CONGRESSWOMEN
SENATORS OF THE UNITED STATES OF AMERICA
United States Capitol
First Street S.E.,
Washington, DC, 20004

Re: Urgent Changes to Help Nurses & Healthcare Providers
COVID-19 Response

Dear Honorable Senators and Representatives:

In this time of crisis, our healthcare providers are being pressed to the very limits of our medical system and past the foresight and intentions of the laws which govern their safety while they care for those we love. We are proud of our members in this moment, as they step forward into the uncertainty and danger of a virus which ravages the old and seems to strike the young at random. They do so without adequate personal protection equipment, and in spite of the grueling patient ratios and long hours. Our nurses do this work with the added burden of fearing that they could become infected themselves with COVID-19, and pass that to their children, their spouses, their parents and grandparents. The good work that they do, can and has come at great personal cost and sacrifice.

However, the sacrifices made by our front-line nurses and healthcare providers do not need to be so costly. There are a number of common-sense solutions to their problems, each of which can empower nurses without materially rewriting the underpinnings of the laws which govern them. It is our hope in writing you this letter, in pleading with you for help to those who are entrusted to care for the loved ones of millions, that you take our proposals to heart and make a difference in this fight.

Our immediate term proposed actions are intended to be narrowly tailored, permitting existing resources and creativity of nurses to be utilized in hospitals. These solutions will lessen the strain upon medical supplies, and limit the risk of this pandemic

to the safety and economic wellbeing of the nurses' families. Our primary proposals in this area are outlined below, and described in greater detail hereafter:

- ***Access & Use of Personal PPE***: Many nurses and their family members have access to personal protection equipment (PPE) from their homes, or which were donated to them. These include N95 masks and nitrile gloves. However, when nurses bring this equipment to their workplace, a number of hospitals and healthcare facilities confiscate them, and in some extreme cases, will assault the nurse to do so. *Our proposal is to reasonably permit healthcare professionals who bring PPE, to use their PPE in cases of emergency and prohibit employers from preventing them to do so.*

- ***Continuation of Pay / Workman's Comp***: Though Congress has acted in an unprecedented way to cover our country's workforce through unemployment benefits, stimulus and the like, there remain loopholes through which our members suffer. As you are likely aware, infection rates amongst healthcare workers is disproportionately high. Accordingly, healthcare workers who become symptomatic are required to quarantine until test results arrive. In other cases, healthcare professionals are being forced to quarantine, but are not tested for the virus. Due to the lack of testing, the nurses are not technically (or presumptively) positive, but are still held out of work. Accordingly, because nurses and other members of the healthcare team are paid on an hourly basis, they are simply removed from the schedule to sit out their quarantine. If the results are negative, they're placed back into the schedule after missing sometimes a week or more worth of pay. The healthcare facilities refuse sick leave pay because the nurse's test wasn't positive. In other cases where nurses test positive, the healthcare facilities dispute where the nurse caught the virus and refuse to pay the nurse for the time missed. *Our proposal is to require healthcare facilities and travel nurse agencies to continue to pay nurses who are awaiting epidemic or pandemic level infectious disease testing, and to create a rebuttable presumption within the law that a healthcare worker who tests positive for such a disease contracted it from the workplace*.

- ***Hazard Pay for Full Time Healthcare Employees:*** Hazard pay exists in a variety of industries where the inherent danger associated with the work exponentially increases as the result of special circumstances. The military, the federal government, and a variety of other industries use hazard pay calculations.

The healthcare industry also uses an informal hazard pay by way of paying travel nurses to fill the gaps left in their rosters. *Our proposal is to require healthcare facilities to provide hazard pay to all W-2 point-of-care healthcare employees during an emergency, an epidemic or pandemic, or natural disaster.*

After we get through this pandemic, it is our intention to advocate policies that will prevent this disaster from ever playing out to this level again. These policies should be well designed and thought through so as to provide the flexibility necessary to adapt to circumstances that we have not contemplated. In these lines, we ask you to consider some of the following:

- ***Healthcare Provider's Compensation Fund*:** We are uncertain, at the time of this writing, what the long-term effects are of COVID-19. However, it is our belief that there is likely to be some lasting damage to the lungs of those who became moderately or severely ill with COVID-19. A growing number of nurses, first responders, police, and doctors have been intubated across the country over the past few weeks. This number is all but certain to rise exponentially over the course of the next two months, and unfortunately will result in the deaths of many of these providers. Each of these people put our communities first in doing their work, and they and their families deserve our lasting support. Our proposal is similar to the 9/11 Victim Compensation Fund. *We would ask that you support a measure to create a COVID-19 Victim Compensation Fund which would provide families of those nurses, doctors, first responders and police who are impacted by this disease, or who lose their lives to it.*

- ***Epidemic, Pandemic & Disaster Preparedness:*** The supply shortfall at healthcare facilities during this pandemic is documented in the extreme, and accordingly bears no additional mention herein. However, Congress has acted consistently throughout the years to mandate certain standards at hospitals which receive federal funds through Medicare and Medicaid. After these events, it is absolutely necessary that Congress implement new pandemic readiness standards for hospitals and healthcare facilities which participate in Medicare and Medicaid. *Our proposal is that these new standards should require the facility to maintain stockpiled supplies including PPE, medications, equipment, and auxiliary supply chain arrangements that would permit a facility to function for weeks if not months with basic, shelf stable supplies.*

- ***Epidemic, Pandemic & Disaster Mobilization:*** The Federal Emergency Management Agency (FEMA) needs to maintain the resources and stockpiles necessary to support healthcare facilities in extreme cases such as this COVID-19 pandemic. In its second failure in the past decade and a half (the first being Hurricane Katrina), it has come to light that the Agency's stock piles are dated, expired, or otherwise inadequate to provide the bare necessities to our healthcare facilities. We propose that Congress set aside new funding for FEMA which would permit faster response times and more resources for disaster management, including requirements of stockpile updates, better mobilization equipment (shelters and medical facilities), and stronger communication and cooperation with local authorities.

THE FACTS ON THE GROUND

The situations in which nurses and healthcare providers find themselves are frightening and overwhelming. Nurses are accustomed to worrying about their patients and extending themselves in order to provide the best possible outcomes for those entrusted to their care. These are anticipated anxieties that come with the job. However, in the environment we find ourselves today, nurses are facing entirely new concerns. They must worry about protecting themselves and their loved ones while caring for those who are stricken with this virus. Many of our members are concerned about losing their jobs, speaking only under condition of anonymity. This is telling in terms of how nurses are treated when they raise alarms to problems, and the disparate power dynamics between the administrators and the healthcare personnel.

PERSONAL PROTECTIVE EQUIPMENT

Unsurprisingly, our issues begin with the lack of PPE on the frontline of our fight against COVID-19. The lack of personal protective equipment proved to be a significant problem beginning in the first weeks of March, long before the peak of the curve hits the United States. Healthcare professionals are being asked to stretch what little PPE is available to the point of failure. For example, isolation gowns, pre-pandemic, are designed to be disposed of after one use. Currently, nurses are asked to re-use them. One nurse reports

> ***"Last night we had to use the same isolation gowns, repeatedly pulling them over our heads. These are the thin, blue, plastic disposable (gowns).***

They gave me a Sharpie and told me to write my name so I can use it again tomorrow."

Chelsie, a nurse in Utah, states,

"I was given 2 gowns, 2 booties, 2 face masks, and told to reuse as much as possible. We have been denied getting any more supplies."

Brooke, RN, reports an even more dire situation, stating,

"There are no gloves of any size available, and no protective gowns."

Some New England hospitals are requesting that staff stop wearing makeup to work, as it would soil the N95 masks and force the hospitals to discard them. Used masks that are not apparently soiled are to be sterilized with UV lighting, or heated in an attempt to destroy virus particles. UV sterilization of N95 masks has not been widely studied, and some results show that the UV light may decrease the effectiveness of the masks.

We understand that the supply of PPE is short. There's little that can be done to simply conjure this equipment from thin air. However, our members, and healthcare workers across the country have worked innovatively to resolve these issues and are being met with significant (if not outright malicious) resistance. Frequently, employee-owned (and fully compliant PPE) However, this self-reliant tactic has presented even more problems. One Florida nurse notes,

"I just got fired for wearing a mask in the hallway…I even brought my own N-95. It's not like I was wasting supplies for them."

Another nurse reports,

"I was fired because I wanted to wear my own N-95 mask under the surgical masks that we demanded to wear."

The actions of the hospitals and healthcare facilities against their healthcare workers is mind boggling, if not outright negligent. Where the staff takes it upon themselves to acquire adequate equipment, there should be no impediment in utilizing this equipment. It is important to protect the valuable assets that are healthcare professionals. If hospitals are unable to provide adequate protective equipment to their staff, healthcare professionals should not be punished for finding other means to protect themselves while providing the best possible care our society needs. Nurses should not be forced to choose between their own personal safety and their calling.

CONTINUATION OF PAY / HAZARD PAY

Due to the virulence of COVID-19 and the lack of PPE, it is only logical to see that healthcare professionals will become sick during the course of this pandemic. Most healthcare professionals are paid at an hourly rate, so the mandated 14-day quarantine is responsible for a sizeable loss of income. However, there exists a significant number of hurdles that are depriving our frontline workers of pay.

The first hurdle is that nurses are being denied compensation when they are not testing positive for COVID-19. The protocol for when a nurse needs to quarantine varies from facility to facility. Some hospitals require quarantine for exposure, while others require the nurse to develop symptoms before quarantine. However, this virus exhibits a wide variety of symptoms that can also mimic other illnesses. If the nurse tests negative, the nurse is being denied pay because they were not missing work for COVID-19. Chelsie, a Utah nurse, notes, "I was quarantined and when I asked about my pay…I was literally told 'Sorry, I know it sucks.' I got tested and was negative. I got no pay for 5 days." Furthermore, some facilities are not testing their nurses. This also results in nurses being denied pay.

Another very common problem is that nurses are being denied compensation as they cannot prove that they contracted COVID-19 at work. This is particularly problematic, as many nurses report that they are not being notified if they care for a patient who is later diagnosed with COVID-19. One travel nurse, Jessica, became sick and tested positive for COVID-19. However, her facility continued to deny that any of their healthcare workers had COVID-19. Jessica states, "I provided all necessary proof but they still refused to pay me. At first, (my recruiter) tried to tell me that I would not get paid because the facility continues to say there has not been exposure. After having to fight with them, the agency finally agreed to pay me $15 for 80 hours as bonus pay."

Healthcare professionals are at a higher risk of contracting COVID-19 due to the very nature of their jobs. They are in close contact with very sick patients for hours at a time. They cannot protect themselves with social distancing like the rest of the community can. Additionally, they are physically close to their patients with little or no PPE. It only stands to reason that healthcare professionals are more likely to contract COVID-19 at work. As such, we would like to see that nurses are compensated while awaiting testing results for epidemic or pandemic level infectious processes. We would also like there to be a presumption that healthcare workers likely contracted these illnesses at work. Finally, we would like healthcare professionals to receive hazard pay for working in conditions that are dangerous at a level above and beyond the normal risks that such a professional would typically incur.

OUR SOLUTIONS AND IMPLEMENTATION SUGGESTIONS

There three sets of statutes which we are asking for modifications to: the Occupational Safety and Health Act; the Fair Labor Standards Act; and the Emergency Medical Treatment and Active Labor Act. Each of these laws can be tweaked in small ways to achieve the changes that our members need. These changes can be achieved through the following modifications to statutory and regulatory law. We are asking for your support with the Department of Labor on the regulatory issues, and for your support to change the laws.

OCCUPATIONAL SAFETY AND HEALTH ACT (OSHA)

Found at 29 U.S.C. §655(c), the Emergency Temporary Standards Provision of OSHA permits the Secretary to provide, without the rulemaking requirements, for an emergency temporary standard to take immediate effect upon publication in the Federal Register. We are reaching out to Secretary Scalia contemporaneously with this letter to you, to request that such emergency provisions be issued. However, we would ask that you write Secretary Scalia in support of our proposed changes to 29 CFR §1910.132-1140 pertain to Personal Protective Equipment (PPE):

> ***29 U.S.C. §1910(b).*** *Emergency situation means any occurrence such as, but not limited to, equipment failure, national emergencies resulting in inadequate equipment supplies, the rupture of containers, or failure of control equipment that may or does result in an uncontrolled significant release of an airborne contaminant.*
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> ***29 C.F.R. §1910.134(a)(3)*** *In the event of an emergency situation where the employer cannot source adequate supplies of respirators in compliance with subsection (2) above, an employee shall be permitted to provide and make use of employee owned respirator which is suitable for the purposes intended. The employer may not prevent the employee from utilizing an employee owned respirator provided under this subsection where such use is reasonably necessary to protect the health of such employee.*
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> ***29 C.F.R. §1910.138(c)*** *In the event of an emergency situation where the employer is unable to provide adequate hand protection in compliance with subsections (a) and (b) above, an employee shall be permitted to provide employee owned hand protection so long as such hand protection complies with the selections made by the employer under subsection (b) of this section.*

From a legislative perspective, we believe that the following additional language included in OSHA would be adequate to achieve the protection goals of our members:

> ***29 U.S.C. §652(15)*** *the term "emergency situation" shall mean any occurrence such as, but not limited to, national or state emergencies, disasters, war, terrorist attack, civil or military disturbances, nuclear or natural catastrophes, or the like.*
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> ***29 U.S.C. §654(a)(3)*** *in the event of an emergency situation where an employer is unable to comply with subsection (a)(1) above, an employer shall permit its employees to utilize employee-owned equipment as may be necessary to remediate recognized hazards that are causing or likely to cause death or serious physical harm to his employees.*

These provisions will help protect our nurses and keep them in the fight against the COVID-19 pandemic. Furthermore, these changes need to be made immediately, as we are aware that this problem is growing rapidly as the pandemic spreads.

FAIR LABOR STANDARDS ACT

The provisions of the Fair Labor Standards Act could also provide relief to our nurses and healthcare workers. We would ask that you consider the adding the following provisions to FLSA to help address the problems outlined herein. These provisions are intended to be narrowly tailored to address the circumstances at hand, and not a fundamental re-write of the Act as it pertains to healthcare.

> ***29 U.S.C. §203(z) "Healthcare Employee"*** *means an employee, including a physician, physician's assistant, nurse practitioner, nurse, nurse's assistant, medical technician, who: (1) is medically trained and has the legal authority and responsibility to engage in medical care, and is employed by a hospital, emergency room, doctor's office, healthcare facility or clinic; and (2) is engaged in the treatment and care of patients.*
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> ***29 U.S.C. §207(j) Maximum hours***
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> *(1) No employer engaged in the operation of a hospital or an establishment which is an institution primarily engaged in the care of the sick, the aged, or the mentally ill or defective who reside on the premises shall be deemed to have violated subsection (a) if, pursuant to an agreement or understanding arrived at between the employer and the employee before performance of the work, a work period of fourteen consecutive days is*

accepted in lieu of the workweek of seven consecutive days for purposes of overtime computation and if, for his employment in excess of eight hours in any workday and in excess of eighty hours in such fourteen-day period, the employee receives compensation at a rate not less than one and one-half times the regular rate at which he is employed.

(2) In the event of an epidemic or pandemic, or such other medically related emergency or outbreak which threatens the health and wellbeing of a healthcare employee involved in the care and treatment of so afflicted patients, an employer engaged in the operation of a hospital or an establishment which is an institution primarily engaged in the care of the sick, the aged, or the mentally ill or defective who reside on the premises shall be required to provide:

(A) hazard pay at the same rate as overtime compensation as contemplated by subsection (a) herein;

(B) in the event of the healthcare employees' infection, illness or quarantine related to such epidemic, pandemic or medically related emergency or outbreak, sick pay at the healthcare employee's regular wage, for a number of hours equal to the healthcare employees average number of hours for the four (4) weeks preceding such diagnosis, quarantine, or positive test. Such sick pay shall be made by the employer to the healthcare employee for the duration of the illness, or for no more than four (4) consecutive weeks, whichever is shorter.

The proposed changes to the Fair Labor Standards Act are in line with those made in years past for fire department, law enforcement and emergency response. In hindsight, our healthcare workers probably should have been provided for as well, but we are asking you to make sure that they're covered now. This proposal is narrowly tailored to support our healthcare workers, and to prevent them from falling through the cracks of the existing system.

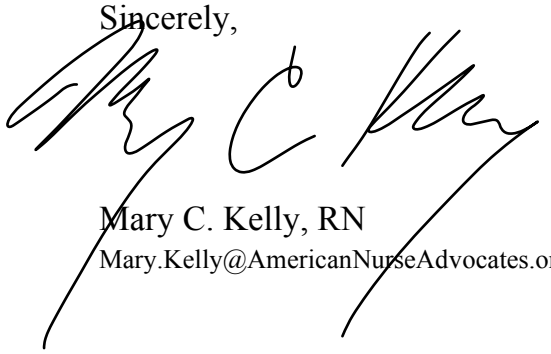
CONCLUSION

Our members, as well as the nation's other nurses, physicians and technicians need your help desperately. We are asking you to help us to implement these changes as we have proposed above to protect them from problems which have common sense solutions. We believe that these changes could be worked into the next stimulus bill, and that their

application would help remedy many of the novel problems that this pandemic has created in our employment and healthcare systems.

Should you have any questions, or in the event you would like discuss the matter further, please don't hesitate to contact me at your earliest convenience. It is my sincere hope that you take our concerns and suggestions to heart and help our first line of defense – those people who are caring for our parents, our grandparents in this desperate time.

Sincerely,



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