The Testimony of
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OSHA's Informal Rulemaking Hearing for Occupational Exposure to COVID-19 in Healthcare Settings
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Good afternoon. Thank you for giving me the opportunity to speak today. My name is LaShuan Bethea and I am the Executive Director of the National Center for Assisted Living. NCAL, which is part of the American Health Care Association, represents more than 14,500 non-profit and proprietary skilled nursing facilities (SNF), assisted living communities (AL), sub-acute centers, and homes for individuals with intellectual and developmental disabilities (ID/DD). Our mission is to improve lives while delivering solutions for quality care. Over the past two years, we have dedicated ourselves to helping providers navigate the intense challenges presented by COVID-19 while sharing feedback and offering practical but effective solutions to state and federal agencies.

AHCA/NCAL wants to thank OSHA for hosting this hearing and seeking comments on the elements of a permanent standard. We also want to recognize OSHA for the support they have and continue to provide to employers. The June emergency temporary standard, when released, was accompanied by many comprehensive and clear resources aimed at helping employers adopt the standards. This is extremely helpful to employers across the board, and we wholeheartedly thank OSHA for prioritizing this type of support to employers.

I am a registered nurse and an attorney. While I have worked in other settings such as the emergency room and acute care behavioral health, I have over 25 years' experience in long term care beginning my journey as a licensed practical nurse in a skilled nursing facility. I have held many roles in long term care from direct care nurse and unit manager to staff development coordinator and assessment coordinator. Most recently, I served as Chair of the Diversity, Equity and Inclusion Committee and Vice President of Legislative Affairs at Genesis HealthCare. In this role, I had the opportunity to meet with long term care nurses, certified nursing assistants, caregivers and other long term care workers to talk about the impact of the pandemic and saw first-hand the challenges created by rapidly changing state and federal standards.

AHCA/NCAL deeply appreciates the importance of protecting staff in skilled nursing, assisted living communities and other long-term care settings. From the beginning, long term care has been at the forefront of this pandemic. We experienced high profile outbreaks, severe shortages of personal protective equipment, lack of testing and supplies. And despite all of this, long term care staff showed up and put themselves at risk to care for the nation’s most vulnerable. Our residents call these settings their homes and fellow residents and staff are like family. The staff that dedicate their lives to caring for them are truly heroes.

Since the beginning of the pandemic, long term care employers have had to adapt to rapidly evolving guidance or regulation from multiple sources including the Centers for Disease Prevention and Control, the Centers for Medicare and Medicaid, which regulates nursing homes, OSHA, and various state

agencies. Often, this guidance or regulations are duplicative. For example, employers must report COVID-19 cases and deaths to both federal and state agencies, as well as to OSHA. In addition, these agencies have each introduced their own infection control regulation or guidance, which at times, conflicts. This has been a significant source of burden for employees and employers who make good faith efforts to comply with overlapping and at times inconsistent guidance or regulation as they work to protect the health and safety of employees.

Healthcare providers must follow the most up-to-date infection control practices that reflect the nuances of their setting to provide the best care for their residents and patients and to protect their staff from outbreaks. Consistency among all regulatory agencies is critical for optimizing compliance and mitigating confusion, particularly for those employees and employers that are subject to comply with regulation promulgated by multiple agencies. There were conflicts between OSHA's June ETS and CDC guidance in areas such as PPE use, cleaning measures, requirements for aerosol generating procedures, and exemptions for vaccinated employees. We pointed out several of these examples in our initial comments on the June ETS, such as on the guidance for changing source control masks or exemptions for vaccinated workers. Since we submitted those comments, CDC has made several important changes to their infection control guidance for LTC, and CMS has also made changes and new regulation related to COVID-19 practices. These guidance and regulation are all intended to reduce infections, outbreaks and the spread of COVID-19 in the long-term care setting, which ensures the safety of staff and residents alike. For OSHA to introduce their own infection control standards will inevitably lead to variations that are not only confusing for providers but more importantly lead to inconsistent or inappropriate application of the infection control practices and detract from meeting the intent and purpose of these standards, which is to protect the health and safety of employees.

In addition, OSHA intends for this standard to cover a broad range of healthcare settings, including both acute and post-acute providers, while in contrast the CDC infection control guidance may differ based on setting.

For staff, seeing and hearing conflicting and changing guidance between federal agencies erodes their trust. For example, staff may not understand why one federal or state agency requires certain PPE in a specific setting, while another does not. This is particularly true when an employee works in multiple health care settings. And often, the rationale for the difference is not clearly stated so employers may struggle to explain the reasoning as they may not understand it themselves. This causes staff to distrust the guidance coming from federal or state agencies, and more broadly, erode their confidence in the importance of infection control practices. This is even more challenging for facilities actively combating vaccine and booster resistance. It also causes staff to become frustrated, burnt out or discontent which may have negative impact on the well-documented staffing shortage across the country and particularly critical in post-acute care. Our profession cannot afford to lose staff.

Thus, AHCA/NCAL strongly supports OSHA's suggestion to create a safe harbor clause, where providers following a standard set by another agency, such as the CDC or CMS, would be protected from any enforcement action by OSHA. This would allow providers to focus their efforts on following consistent sources of guidance and demonstrate continuity in guidance to their staff.

AHCA/NCAL also supports the idea of tailoring the standards to the amount of COVID present in the community and/or vaccination status of the individual. The CDC has already adopted standards that tie infection control practices to transmission rates in the community. We commonly hear from providers

that their staff are fatigued and frustrated by the burdensome COVID-19 infection control standards, such as use of masks when COVID-19 rates are extremely low in the community. In areas where mask mandates have been dropped, staff often ask why some health care providers must follow higher standards than other healthcare settings, such as doctors' offices. While AHCA/NCAL understands the importance of protecting staff and residents alike from COVID-19 infection, we also see how a high-risk prevention approach can have a detrimental impact on staff wellness.

Similarly, the requirement for physical distancing and physical barriers that were included in the June ETS detract from the home-like environment that providers strive to create, which is also supported by CMS regulation and the CMS HCBS Final Rule which includes assisted living. Thus, adding physical barriers or requiring distancing in common areas, detracts from their quality of life. It's well documented that while infection control measures such as masks, physical distancing and barriers were necessary to prevent hospitalizations and deaths among the elderly, they also took a great toll on their health, happiness and well-being. We must find a way to minimize risk for severe illness, death and outbreaks, while still protecting staff and preserving residents' quality of life.

Finally, AHCA/NCAL expresses concern over the promulgation of this standard along with the airborne infection standard. While we are not privy to the provisions that will be included in the airborne infection standard, we have concern over creating two standards aimed at reducing the spread of infectious diseases. We would encourage OSHA to develop one infectious disease standard that covers COVID-19 and other infectious diseases. This will allow providers to focus their efforts on understanding one standard rather than multiple, increasing their ability to adhere to the standards and effectively protect staff and residents alike.

Again, we express our deep gratitude for OSHA for their tireless efforts protect the staff of our healthcare facilities, and for hosting this hearing to seek input from providers and staff alike. I am happy to answer any questions at this time.