

IPPS. An analysis of the effects of this change is included in the Appendix A of this final rule.

## 2. Paid Hours

It has been the longstanding policy of CMS to calculate the wage index using paid hours rather than hours worked (see the September 1, 1993 **Federal Register**, 58 FR 46299). This policy reflects our belief that paid hours more appropriately reflect a hospital's total wage costs, which include amounts paid for actual time worked and for covered leave periods (for example, annual, sick, and holiday leave). Therefore, the inclusion of paid lunch hours in the wage index is consistent with our inclusion of other paid nonworking hours.

Several hospitals have requested that we exclude paid lunch or meal break hours from the wage index calculation. At these hospitals, the typical workday is 7½ working hours, plus a ½ hour paid meal break, for a total of 8 paid hours. These hospitals, some of which are municipal-owned and required by their overarching union contracts to provide paid lunch hours, believe they are disadvantaged by a wage index policy that requires paid lunch hours to be included in calculating the wage index.

The hospitals argue that their practice of paying employees for meal breaks is not substantially different, in practice, from other hospitals whose employees do not receive paid lunch hours but who are on call during their lunch periods. These hospitals further argue that this policy causes them, in some cases due to union contracts beyond their control, to be the only hospitals with this category of nonproductive hours included in their wage index.

In the May 19, 2003 proposed rule, we solicited comments on our policy that paid lunch hours should be excluded from the wage index. Specifically, we were interested in a broader understanding of the issue of whether some hospitals may, in fact, be truly disadvantaged by this policy through no fault of their own. We indicated that any change in our policy would not be implemented until, at the earliest, the FY 2005 wage index.

Some hospitals and associations have also recommended that we exclude the paid hours associated with military and jury duty leave from the wage index calculation. They state that, unlike other paid leave categories for which workers are usually paid at their full hourly rates (for example, annual, sick, and holiday), hospitals typically pay employees on military or jury duty only a fraction of their normal pay. The amount that the

hospital pays is intended to only supplement the earnings that the employee receives from the government so that, while performing military or civic duties, the employee can continue to be paid the same salary level, as if he or she were still working at the hospital.

The hospitals and associations believe that including lower pay rates associated with employees' military and jury duty leave unfairly decreases a hospital's average hourly wage and, therefore, its wage index value. Therefore, we proposed to exclude from the wage index the paid hours associated with military and jury duty leave, beginning with the FY 2005 wage index. We also proposed that the associated salaries would continue to be reported on Worksheet S-3, Part II, Line 1 of the Medicare cost report.

*Comment:* A few commenters agreed that paid lunch hours and hours associated with military and jury duty leave should be removed from the wage index. Many more commenters, including some national and state hospital associations and Medicare fiscal intermediaries, opposed or expressed concern about whether excluding paid lunch hours and hours associated with military and jury duty leave would result in a more accurate wage index.

Those commenters who opposed the proposal to exclude paid lunch hours and hours associated with military and jury duty leave expressed concern that these changes would further complicate the wage index and that the additional data collection effort for providers might outweigh any benefits achieved through these changes. Further, the commenters believed that paid lunch hours, military, and jury leave affect all providers in the same way, so the changes would likely be immaterial. One commenter also expressed concern that excluding paid hours could cause hospitals to rewrite existing contracts to raise their wage index. In addition, some commenters cautioned that excluding these paid hours would be difficult for intermediaries to apply consistently; excluding these hours would require estimations because most payroll systems do not capture this data. Many commenters indicated that CMS had not published data to provide support that these changes are warranted.

One commenter suggested that, if CMS excludes paid lunch hours, CMS should set a standard for hospitals to qualify for excluding the hours, such as the Fair Labor Standards Act requirements for payment. Another suggested that the determination of excluding paid lunch hours should be based on whether lunch is included for

the purpose of computing the hourly wage rate used to pay for overtime. If paid lunch hours are included in the overtime payment computation, and excluding them would result in an hourly rate that is higher than what is usually used for overtime, the paid lunch hours should be excluded. If the paid lunch hours are not included in computing the hourly wage for overtime, and excluding them would result in the correct hourly wage rate that should be used for overtime, the lunch hours should be excluded. Two commenters recommended that the wage index should also exclude time associated with paid breaks from the wage index, but acknowledged that paid breaks are not usually tracked in payroll systems. One commenter recommended that CMS allow all hospitals in an area to include paid hours on a standard basis in order to eliminate differences that are more a matter of how hours are reported rather than actual difference in wages.

Those commenters who opposed the exclusion of paid lunch hours were generally concerned that hospitals do not currently track paid lunch hours. They indicated that it would be a major burden for hospitals to change their systems to accommodate reporting the hours and the benefits are likely to be minimum.

A few commenters suggested that, if a hospital pays its employees at the full rate for military and jury duty leave, the full associated hours should be included. However, they added that if a hospital pays its employees at a reduced rate for these leave categories, the hospital should exclude hours based on the fraction of the salary that is not paid. If the hospital does not pay for any military or jury duty leave, all of the associated hours should be excluded. The commenters believed that this treatment would be consistent with our longstanding policy to include hours associated with paid time off, while a hospital's average hourly rate would not be negatively impacted by the reduced rates that some hospitals pay for military and jury duty leave. One commenter recommended that CMS permit hospitals to exclude the hours, but not require such reporting.

Several commenters opposed excluding paid hours associated with military and jury duty because they believe that military and jury duty leave affect all providers in the same way. Therefore, they believed that any changes in the wage index would likely be immaterial. Two commenters expressed concern that, if paid hours are excluded and wages are not, the wage index would be overstated. The