

Blog Post

AHCA Sees the Light on Nursing Home Generator Rule, Unplugging Challenge

January 16, 2018

After Hurricane Irma made landfall in Florida, a nursing home in South Florida lost power, and several residents of that nursing home died allegedly as the result of increased temperatures caused by the loss of air conditioning. In the immediate aftermath of this tragic accident, the Agency for Health Care Administration (AHCA) (for nursing homes) and the Department of Elder Affairs (DOEA) (for assisted living facilities (ALFs)) adopted nearly identical emergency rules requiring these facilities to develop and implement emergency management plans addressing the provision of emergency power during power outages.

The emergency rules required the facilities to have the ability to maintain the facilities at 80 degrees or cooler for 96 hours during power outages. As a result, most of the affected nursing homes and ALFs were required to quickly purchase and install large, expensive generators and ensure fuel storage capacity to operate the generators for at least 96 hours. Several parties challenged the emergency rules and an administrative law judge ultimately determined the rules were invalid. The agencies appealed that decision, and the appeal is currently pending. The agencies have since renewed the invalid rules through mid-March 2018.

While the challenge to the emergency rules was pending, the agencies also began the rule-making

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process for permanent rules for nursing homes and ALFs. The Florida Legislature must ratify these rules before they become effective because they impose regulatory costs exceeding \$1 million in the five years after implementation.

Following the agencies' approval of their proposed rules, some of the same parties that successfully challenged the emergency rules also challenged the proposed rules. After the proposed rules were challenged, AHCA published changes to the proposed nursing home rule that address many of the problems raised.

One change is the reduction in the required amount of cooled space per resident from 50 square feet to 30 square feet. The change allows for a corresponding reduction in the generator size and the amount of fuel required to run it, and thus a reduction in the related costs to providers. Additionally, AHCA also reduced the on-site fuel storage requirement from a 96 hours' supply to a 72 hours' supply, so long as the nursing home had previously arranged to obtain the additional 24 hours' supply elsewhere.

Perhaps the most important change logistically is that AHCA will grant extensions to the compliance date from June 1, 2018 to January 1, 2019, provided that certain requirements are met, including that the facility has arranged for an alternative power source or has arranged in advance for transfer of its residents to an area that can maintain temperatures at or below 80 degrees Fahrenheit for 96 hours.

On January 10, 2018, in response to AHCA's improvements to the proposed rule, the party challenging the AHCA nursing home rule withdrew the challenge, allowing AHCA to move forward with its newest rule. This is a good example of an agency responding to the concerns of its stakeholders and finding middle ground that still protects nursing home residents.

The challenge to DOEA's proposed ALF rule is still ongoing, but we hope that DOEA will follow AHCA's lead and reach a similar resolution.

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