

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Health Policy

BILL: SB 1874

INTRODUCER: Senators Passidomo and Stargel

SUBJECT: Emergency Power for Nursing Home and Assisted Living Facilities

DATE: January 29, 2018

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Looke	Stovall	HP	Pre-meeting
2.			AHS	
3.			AP	
4.			RC	

I. Summary:

SB 1874 amends two sections of law regulating nursing homes and assisted living facilities (ALF) to require, by June 1, 2018, that each facility have an operational emergency power source and fuel to sustain an air temperature set in rule¹ for at least 96 hours. The bill also requires that each facility have a plan to monitor residents to ensure that they do not suffer from complications from heat exposure and a plan to safely transport residents to an appropriate facility if the facility's management knows it will be unable to sustain safe temperatures.

The bill's provisions take effect upon becoming law.

II. Present Situation:

Hurricane Irma

Between September 10 and September 16, 2017, Hurricane Irma swept across Florida causing heavy damage and widespread loss of power. In the aftermath of the hurricane, the nursing home Rehabilitation Center at Hollywood Hills (Center) was left without power and air conditioning for multiple days. As a consequence of the uncontrolled heat in the Center and because the Center's staff neglected to evacuate its residents, 12 Center residents died from heat exposure.²

On September 16, 2017, (after eight of the 12 resident deaths had occurred) Governor Scott issued a press release announcing emergency action for nursing homes and ALFs. In the press

¹ By the Agency for Health Care Administration for nursing homes and by the Department of Elder Affairs for ALFs.

² Eight residents died before the Center evacuated the facility and six more died in the following weeks. Two of the 14 deaths were found not to be related to heat exposure. See *12 of 14 Nursing Home Deaths After Irma Ruled Homicides*, WUSF News, available at <http://wusfnews.wusf.usf.edu/post/12-14-nursing-home-deaths-after-irma-ruled-homicides>, (last visited on Jan. 26, 2018).

release, the Governor stated that “[a]ssisted living facilities and nursing homes serve our elderly and Florida’s most vulnerable residents, and so many families rely on the health care professionals at these facilities to care for their loved ones... During emergencies, health care facilities must be fully prepared to ensure the health, safety and wellbeing of those in their care and there is absolutely no excuse not to protect life. The inability for this nursing home in Broward County to protect life has shined the light on the need for emergency action.”³

Emergency Rules for Nursing Home and ALF Generators

Complying with the Governor’s order, the AHCA and the DOEA published emergency rules requiring that all nursing homes⁴ and ALFs⁵ install emergency generators. These emergency rules took effect on September 18, 2017; were renewed on December 15, 2017;⁶ and established:

- The requirement that each facility provide a detailed plan within 45 days of the effective date of the rule for the acquisition and installation of an emergency generator and sufficient fuel to power the generator for 96 hours. The generator must be sufficiently large to cool the facility to 80 degrees Fahrenheit or below for the required time period;
- The requirement that each facility implement its plan within 60 days of the effective date of the rule; and
- Penalties for violating the emergency rule including possible license revocation and monetary penalties of up to \$1,000 per day for continuing violations.

Both emergency rules were challenged at the Division of Administrative Hearings (DOAH) and were ruled invalid on October 27, 2017. The DOAH judge ruled that there was no emergency that required the rules and that the rules were invalid exercises of delegated legislative authority. The judge ruled that the rules:

- Were arbitrary and capricious in that complying with the rules in the timeframes allowed was impossible;
- Vested unbridled discretion in the AHCA and the DOEA in that the rules were so vague as to require agency discretion to implement them; and
- Contravened the implementing statute in that the penalties made no effect to classify noncompliance in a manner consistent with statute.⁷

These cases have been appealed to the Florida First District Court of Appeal⁸ (DCA). The DCA denied a motion to stay the effect of the rules on November 11, 2017, and consequently, both emergency rules continue to be in effect pending appeal.

³ See <https://www.flgov.com/2017/09/16/gov-scott-i-am-aggressively-fighting-to-keep-vulnerable-floridians-safe-during-emergencies/>, (last visited on Jan. 26, 2018).

⁴ Rule 59AER17-1, F.A.R.

⁵ Rule 58AER17-1, F.A.R.

⁶ Generally, emergency rules expire after 90 days and are not renewable. See s. 120.54(c), F.S. However, s. 120.54(4)(c)2., F.S., allows an agency to extend the period of time that emergency rules are effective if the agency has initiated the rulemaking process on the same subject and the proposed rules are awaiting legislative ratification. Currently, the AHCA and the DOEA have initiated rulemaking to adopt rules on the same subject (see section below) and the agencies’ have submitted the proposed rules to the Legislature for ratification.

⁷ *Florida Association of Homes and Services for the Aging, Inc., d/b/a, Leadingage Florida v. the Agency for Health Care Administration*, case no. 17-5388RE, and *Florida Assisted Living Association, Inc., a Florida not for Profit Corporation v. the Florida Department of Elder Affairs*, case no. 17-5409RE

⁸ Case no. 1D17-4534.

Permanent Rules for Nursing Home and ALF Generators

Concurrently with the emergency rules, the AHCA and the DOEA have also begun the process for adopting permanent rules related to nursing home and ALF generators.⁹ The AHCA and the DOEA initiated the rulemaking process on October 11, 2017, with rules published on November 14, 2017. The AHCA issued a notice of change published on January 10, 2018, and the DOEA issued a notice of change on January 19, 2018. Leading Age Florida challenged the validity of the AHCA's proposed rules for nursing homes and the Florida Senior Living Association challenged the DOEA's proposed rules for ALFs, but the challenges were withdrawn on January 26, 2018.

The proposed permanent rules would require each nursing home and ALF to have a plan to acquire an alternative power source to ensure that ambient air temperatures are maintained at or below 81 degrees Fahrenheit for at least 96 hours during an emergency. The rules allow each facility to plan to cool a portion of the facility with sufficient space to accommodate the facility's residents.¹⁰ Facilities are also required to plan for the storage or availability of sufficient fuel to power the generator for 96 hours.¹¹ Each facility's plan must be submitted within 30 days of the rule taking effect and will be reviewed by the AHCA and the local emergency management agency in the facility's area. Approved plans must be implemented no later than June 1, 2018, but the AHCA¹² may grant an extension up to January 1, 2019, if the facility's plan implementation is delayed due to necessary construction, delivery of equipment, or zoning or other regulatory approval processes.

The rules also require each facility to implement policies and procedures to ensure that it can effectively and immediately activate, operate, and maintain the emergency power source. The policies and procedures must be resident-focused and ensure that the residents do not suffer complications from heat exposure. The policies and procedures must be available for inspection by residents, their representatives, and any other parties authorized in law.

The rules specify that the AHCA may seek any statutory remedy for noncompliance including, but not limited to, license revocation, license suspension, and administrative fines.

Federal Regulations for Nursing Home Emergency Power

Federal regulations currently in effect require nursing homes¹³ to obtain emergency power in a similar manner to the permanent rules in development by the AHCA. The regulations in 42 CFR 483.73 require each long term care facility, including nursing homes, to develop and implement

⁹ Rule 59A-4.1265, F.A.R., for nursing homes and Rule 58A-5.036, F.A.R., for ALFs.

¹⁰ Nursing homes are required to cool 30 square feet per resident and ALFs are required to cool 20 square feet per resident and may use 80 percent of its bed count to determine the total square footage.

¹¹ Sixteen bed or less ALFs must store 48 hours of fuel onsite and 17 or more bed ALFs and nursing homes must store 72 hours of fuel onsite. Facilities must also have a plan to obtain the remaining 24 or 48 hours of fuel at least 24 hours prior to the depletion of its fuel stores and may use portable fuel containers for the remainder during an emergency. Using piped natural gas as a fuel source is allowed.

¹² Under the provisions of ch. 429, F.S., the DOEA has responsibility for rulemaking for ALFs, but the AHCA is responsible for inspections and licensure activities.

¹³ While nursing homes are federally regulated, the regulation of ALFs is delegated to the states.

emergency preparedness policies and procedures that must include alternative sources of energy to maintain safe air temperatures for residents. Based on the facility's policies and procedures, each facility must implement emergency and standby power systems and maintain on onsite fuel source and a plan to keep the power systems operational, unless the facility evacuates. These regulations took effect on November 16, 2017, and are a requirement for the nursing home to participate in the Medicare or Medicaid programs.

III. Effect of Proposed Changes:

SB 1874 amends ss. 400.23 and 429.41, F.S., regulating nursing homes and ALFs, respectively, to require, by June 1, 2018, that each facility have an operational emergency power source and fuel to sustain an air temperature set in rule¹⁴ for at least 96 hours. The bill also requires that each facility have a plan to monitor residents to ensure that they do not suffer from complications from heat exposure and a plan to safely transport residents to an appropriate facility if the facility's management knows it will be unable to sustain safe temperatures.

The bill's provisions take effect upon becoming law

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

SB 1874 may have an indeterminate negative fiscal impact on nursing homes and ALFs that are required to acquire or upgrade emergency power systems to comply with the requirements in the bill.

¹⁴ Supra note 1.

C. **Government Sector Impact:**

The bill may have an indeterminate fiscal impact on the AHCA related to enforcing the provisions of the bill.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 400.23 and 429.41.

IX. Additional Information:

A. **Committee Substitute – Statement of Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. **Amendments:**

None.