

PUBLICATION

Update on Florida's Emergency Generator Rules

Authors: Amy Wilmot Schrader
December 12, 2017

On September 15, 2017, Florida Governor Rick Scott directed that by November 15, 2017, all nursing homes and assisted living facilities in the state were to install generators capable of powering air conditioning systems for 96 hours with sufficient on-site fuel. This emergency rule was made in response to the tragedy at a Hollywood Hills, Florida nursing home that lost power during Hurricane Irma, resulting in the death of 14 seniors from heat-related causes. Although on October 27, 2017, an Administrative Law Judge ruled that these emergency rules were invalid, the state has maintained that the rules remain in effect for the duration of their appeal of this ruling or until the emergency rules expire by law on December 15, 2017.

Due to the uncertainty surrounding the effect of the ruling invalidating the emergency rules, a majority of facilities rushed to request variances allowing for additional time to comply. In most cases, the state granted variance requests allowing an additional 180 days to comply with the emergency rules. The state conditioned variances on facilities notifying residents and their legal representatives that they are not currently in compliance. Additionally, a number of operators indicated that the 180-day extension was insufficient, as generator production and installation times continue to increase due to already-high demand by facilities in Southeast Texas and Puerto Rico. For facilities without a variance in place, the state has threatened to impose penalties including \$1,000 per day fines and possible license revocation.

In an effort to make the requirements of the emergency rules permanent, Florida's Agency for Health Care Administration (AHCA) and the Department of Elder Affairs (DOEA) issued Notices of Proposed Rulemaking on November 14, 2017. These proposed rules have been heavily criticized by both the senior living industry and the local emergency management officials charged with reviewing emergency power plans for compliance. Chief concerns that have been raised include (i) the failure to define the amount of space within each facility that must be cooled in the event of power loss, (ii) the lack of specificity as to fuel storage requirements, (iii) the failure to account for facilities with plans to evacuate versus sheltering in place, and (iv) the lack of statutory authority for local emergency management agencies to review emergency power plans required under the new rules. At the rule hearings held on December 5, 2017, industry members again expressed frustration that the agencies were not listening to their concerns and that the agencies have refused to state whether they will consider changes to the rules or simply move forward with adoption.

The Florida Legislature's Joint Administrative Procedures Committee (JAPC) has likewise noted significant issues with the proposed rules. On November 20, 2017, JAPC issued letters to the state agencies (i) requesting legal justification for requiring emergency power plans in addition to the comprehensive emergency management plans currently required by statute, (ii) requesting an explanation of what authority allows the state agencies to direct activities of the State Fire Marshall, and (iii) stating that the proposed rules appear to vest unbridled discretion in AHCA to impose penalties for noncompliance. JAPC further noted that the state agencies failed to provide required information summarizing estimated regulatory costs of compliance.

While the state agencies have yet to provide responses to the concerns raised by JAPC, they have published notices of correction to include estimated costs of compliance. AHCA initially estimated that the average cost of compliance per bed is approximately \$2,626, resulting in a collective total cost of \$186 million for all nursing

home facilities in Florida. The DOEA estimated costs ranging from \$14,000 to \$550,000 per facility, resulting in a collective total cost of approximately \$280 million for the state's assisted living facilities. Any proposed rule that will increase regulatory costs in excess of \$200,000 must first be ratified by the legislature. Therefore, the proposed rules cannot go into effect unless they receive approval during the next legislative session, which is set to begin on January 9, 2018. By law, the agencies must submit the final versions of the proposed rules no later than 30 days prior to the start of session, which means they must be filed no later than December 11, 2017. Given the high level of interest in this issue, and the fact that a number of bills have already been filed to address emergency generator requirements for senior living facilities, it is likely that the Florida Legislature will make further changes to the requirements currently proposed by AHCA and the DOEA. Thus, facilities should not expect emergency generator requirements to be finalized prior to the end of Florida's legislative session on March 9, 2018.

For more information on this ruling or other matters, please contact [Amy Schrader](#) or a member of Baker Donelson's [Long Term Care Team](#).