

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 Appropriations

BILL: SB 7030

INTRODUCER: Rules Committee

SUBJECT: Ratification of Agency for Health Care Administration Rules

DATE: March 1, 2018

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Looke</u>	<u>Phelps</u>		RC Submitted as Committee Bill
	<u>Kidd</u>	<u>Hansen</u>	<u>AP</u>	Pre-meeting

I. Summary:

SB 7030 ratifies Agency for Health Care Administration (AHCA) Rule 59A-4.1265, F.A.C., entitled “Emergency Environmental Control for Nursing Homes.” This rule requires, by June 1, 2018, each nursing home to acquire an alternative power source to ensure that temperatures are maintained at 81 degrees Fahrenheit or cooler in a sufficient portion of the facility to accommodate all of the facility’s residents. The rule also requires each facility to implement certain policies and procedures to ensure that resident’s do not suffer complications from heat exposure.

The Statement of Estimated Regulatory Costs (SERC) developed by the AHCA determined that the proposed rule will likely increase regulatory costs in excess of \$1 million in the aggregate within 5 years after implementation of the rule. Accordingly, the rule must be ratified by the Legislature before it may go into effect.

The bill’s provisions take effect upon becoming law.

II. Present Situation:

AHCA Rule for Nursing Home Generators

Rule History

The AHCA filed the rule 59A-4.1265, F.A.C., for adoption with the Department of State on February 2, 2018.¹ The AHCA 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, 2017. Leading Age Florida challenged the validity of the AHCA’s proposed rules for nursing homes but the challenge was withdrawn on January 26, 2018.

¹ See rule package filed with the Department of State for Rule 59A-4.1265. On file with Senate Health Policy Committee staff.

Alternate Power Source Plan

Rule 59A-4.1265, F.A.C., requires each nursing home to prepare a detailed plan, as a supplement to the facility's comprehensive emergency management plan, to address emergency power in the event of the loss of primary electrical power to the facility. The plan is required to include the following:

- The acquisition of a sufficient alternate power source maintained at the nursing home to ensure the protection of resident health, safety, welfare, and comfort for a minimum of 96 hours in the event of the loss of primary electrical power.
 - Each facility must determine a safe indoor air temperature required to meet the needs of residents that cannot be higher than 81 degrees Fahrenheit. The required temperature must be maintained in an area determined by the facility to be sufficient to maintain resident safety at all times, but not less than 30 square feet per resident.
 - The rule allows a facility to provide emergency power through its essential electrical system required by the Florida Building Code and allows flexibility for each nursing home to determine the best method for achieving the requirement for an alternative power source.
 - The rule specifies that a facility in an evacuation zone may use portable generators if an evacuation is necessary; that a facility on a campus with other licensed facilities under common ownership may share power sources, fuel, and space with the other licensed facilities; and that a multistory facility that plans on moving residents to a higher floor during a flood or surge event must also place its alternative power source in an area protected from flooding or storm surge.
- The acquisition of sufficient fuel to run the alternate power source and to maintain safe air temperatures for at least 96 hours. Of the 96 hours of required fuel, 72 hours must be stored onsite at the facility and the remaining 24 hours' worth of fuel must be obtained if the facility is located within an area in a declared state of emergency. If local ordinances or other regulations limit the amount of fuel that may be stored onsite, the nursing home must store the maximum amount of fuel allowed and must have a plan to obtain the remaining required amount of fuel within 24 hours prior to depleting its onsite supply. The rule specifies that piped natural gas is an allowed fuel source.
- The acquisition of services necessary to install, maintain, and test the equipment and to ensure the safe and sufficient operation of the alternate power source.

Submission of the Plan

Each existing nursing home is required to submit its plan to the local emergency management agency within 30 days of the effective date of the rule. Each newly licensed nursing home must submit its plan prior to obtaining a license. If any additions, modifications, alterations, refurbishments, reconstructions, or renovations of a nursing home affect the nursing home's compliance with the rule, the nursing home must amend its plan and resubmit it to the local emergency management agency for review and approval.

Review and Approval of the Plan

The local emergency management agency must review each plan and the AHCA's Office of Plans and Construction must review any related architectural and engineering plans. If the plan is

deficient, the local emergency management agency must report such deficiencies to the nursing home for resubmission of a corrected plan within ten business days. If the plan is approved or denied the local emergency management agency must report the approval or denial to the AHCA. The nursing home must also submit proof of approval of the plan to the AHCA within two business days of the plan's approval. Each nursing home must maintain a copy of its plan in a form that is readily available for review and must submit a consumer friendly summary of the plan to the AHCA. The AHCA must post the summary and notice of approval within ten business days on its website.

Plan Implementation

Each existing nursing home must have implemented its plan no later than June 1, 2018, and a new nursing home must have the plan implemented prior to obtaining a license. The AHCA may grant an extension of time up to January 1, 2019, if the implementation is delayed due to necessary construction, delivery of ordered equipment, or zoning or other regulatory processes. If a nursing home is granted an extension of time, the facility must update the AHCA on implementation progress monthly. If a nursing home is granted an extension of time, it must also make arrangements to ensure that the residents are housed in an area that meets the safe indoor air temperature requirement for a minimum of 96 hours during that time.

Policies and Procedures

The rule also requires each facility to implement policies and procedures to ensure that it can effectively and immediately activate, operate, and maintain the alternate power source. The policies and procedures must be resident-focused and ensure that the residents do not suffer complications from heat exposure. A contingency plan must also exist to transport residents to a safe facility if required. The policies and procedures must be available for inspection by residents, their representatives, and any other parties authorized in law.

Enforcement

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

History of Nursing Home Generator Rulemaking

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

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).

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 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 Generators

Complying with the Governor’s order, the AHCA published an emergency Rule 59AER17-1, F.A.C., requiring that all nursing homes install emergency generators. This emergency rule took effect on September 18, 2017; was renewed on December 15, 2017;⁴ 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.

The emergency rule was challenged at the Division of Administrative Hearings (DOAH) and was ruled invalid on October 27, 2017. A similar emergency rule for Assisted Living Facilities was also challenged. 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.⁵

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 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.

⁵ *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

The case has been appealed to the Florida First District Court of Appeal⁶ (DCA). The DCA denied a motion to stay the effect of the rules on November 11, 2017, and consequently, the emergency rule continues to be in effect pending appeal.

Federal Regulations for Nursing Home Emergency Power

Federal regulations currently in effect require nursing homes⁷ 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 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.

SERC Requirements

Agencies must prepare a SERC for a rule that has an adverse impact on small businesses or that increases regulatory costs more than \$200,000 in the aggregate within 1 year after implementation of the rule.⁸

A SERC must include estimates of:

- The number of people and entities effected by the proposed rule;
- The cost to the agency and other governmental entities to implement and enforce the proposed rule;
- Transactional costs likely to be incurred by people, entities, and governmental agencies for compliance; and
- An analysis of the proposed rule's impact on small businesses, counties, and cities.⁹

The SERC must also include an economic analysis on the likelihood that the proposed rule will have an adverse impact in excess of \$1 million within the first 5 years of implementation on:

- Economic growth, private-sector job creation or employment, or private-sector investment;
- Business competitiveness,¹⁰ productivity, or innovation; or
- Regulatory costs, including any transactional costs.^{11,12}

⁶ Case no. 1D17-4534.

⁷ While nursing homes are federally regulated, the regulation of ALFs is delegated to the states.

⁸ Sections 120.54(3)(b) and 120.541(1)(b), F.S.

⁹ Section 120.541(2)(b)-(e), F.S. A small city has an unincarcerated population of 10,000 or less. A small county has an unincarcerated population of 75,000 or less. A small business employs less than 200 people, and has a net worth of \$5 million or less. *See* ss. 120.52(18), (19), and 288.703(6), respectively.

¹⁰ Business competitiveness includes the ability of those doing business in Florida to compete with those doing business in other states or domestic markets.

¹¹ Transactional costs are direct costs that are readily ascertainable based upon standard business practices. They include filing fees, the cost of obtaining a license, the cost of equipment required to be installed or used, procedures required to be employed to comply with the rule, additional operating costs, the cost of monitoring and reporting, and any other costs necessary to comply with the rules.

¹² Section 120.541(2)(a), F.S.

If the economic analysis results in an adverse impact or regulatory costs in excess of \$1 million within 5 years after implementation of the rule, then the rule must be ratified by the Legislature in order to take effect.¹³

The AHCA has determined that the likely aggregate cost for nursing homes to comply with this rule will be approximately \$108,224,945.¹⁴

III. Effect of Proposed Changes:

This bill ratifies AHCA Rule 59A-4.1265, F.A.C., entitled “Emergency Environmental Control for Nursing Homes.” This rule requires, by June 1, 2018, each nursing home to acquire an alternative power source to ensure that temperatures are maintained at 81 degrees Fahrenheit or cooler in a sufficient portion of the facility to accommodate all of the facility’s residents. The rule also requires each facility to implement certain policies and procedures to ensure that resident’s do not suffer complications from heat exposure.

The bill also:

- Directs that the act shall not be codified in the Florida Statutes;
- Requires that after the act becomes law, its enactment and effective date shall be noted in the Florida Administrative Code, the F.A.R., or both, as appropriate;
- Provides that the act does not alter rulemaking authority or constitute a legislative preemption of, or exception to, any other provision of law regarding adoption or enforcement of the rule and is intended to preserve the status of the rule; and
- Does not cure any rulemaking defect or preempt any challenge based on a lack of authority or a violation of requirements governing adoption of the rule.

The SERC developed by the AHCA determined that the proposed rule will likely increase regulatory costs in excess of \$1 million in the aggregate within 5 years after implementation of the rule. Accordingly, the rule must be ratified by the Legislature before it may go into effect.

The bill’s provisions take effect upon becoming law and, at that time, the rule becomes effective.¹⁵

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

¹³ Section 120.541(3), F.S. Legislative ratification is not required for adoption of federal standards, amendments to the Florida Building Code, or amendments to the Florida Fire Prevention Code. *See* s. 120.541(4), F.S.

¹⁴ Summary of SERC for Rule 59A-4.1265, published in a notice of correction in the Florida Administrative Register on January 11, 2018.

¹⁵ Section 120.54(3)(e)6., F.S.

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:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill creates one undesignated section of the Florida Statutes.

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.