

Alert | Florida Health Care & FDA Practice



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Florida ALFs and Nursing Homes Must Obtain Power Generators by Nov. 15 or File Waiver Petition by Oct. 16

On Sept. 16, 2017, the Agency for Health Care administration (AHCA) and the Department of Elder Affairs (DOEA) each issued **emergency rules** that require nursing homes and assisted living facilities (ALFs) located in Florida to obtain generators and fuel to power air conditioning sufficient to cool the facilities to not more than 80 degrees for up to 96 hours following a power outage by Nov. 15, 2017. Such acquisition and installation must be pursuant to a plan submitted to either AHCA (for nursing homes) or DOEA (for ALFs) and the applicable local emergency management agency by Oct. 31, 2017. A copy of the AHCA rule can be found [here](#) and a copy of the DOEA rule can be found [here](#).

Basis for Granting a Variance or Waiver

Chapter 120.542, Florida Statutes, authorizes agencies to grant a variance or waiver with respect to a rule when the petitioner files an application demonstrating that:

- the purpose of the underlying rule will be or has been achieved by other means and
- application of the rule would create a substantial hardship or would violate principles of fairness. Substantial hardship is defined as an economic, technological, legal, or other type of hardship to the petitioner requesting the variance or waiver. Violation of principles of fairness for purposes of an application for variance or waiver means that when the literal application of a rule affects a particular person in a manner significantly different from the way it affects other similarly situated persons subject to the rule.

Emergency Petition for Variance or Waiver

Chapter 28-104, Florida Administrative Code, creates a procedure for a petition for emergency variance or waiver. In addition to those matters that must be set forth in a non-emergency petition for a variance or waiver, the rule requires an emergency petition for a variance or waiver set forth:

- specific facts that make the situation an emergency and
- specific facts that show that the petitioner will suffer immediate adverse effect if the variance or waiver is not issued more expeditiously than the statutory time frames. If the agency determines that the situation is not an emergency, the petition will then be reviewed on a non-emergency basis under the timeframes set forth in the statute, which is discussed below.

The agency is required to grant or deny an emergency variance or waiver, or determine that the request is not an emergency, within 30 days of its receipt by the agency. An emergency petition which is not granted or denied within 30 days shall be deemed approved unless the 30 day time limit is waived by the petitioner.

Non-Emergency Petition for Variance or Waiver

Section 120.542 sets forth the time frames for non-emergency petitions for variance or waiver. Within 15 days after receipt of a petition for a variance or waiver, the agency is required to provide notice to the Department of State which shall publish notice of the petition and allow for interested persons to provide comments.

Within 30 days from receipt of a petition for a variance or waiver, the agency shall review the petition and request any additional information needed. Within 30 days after receipt of any additional information, the agency shall review such information and may request additional information needed based on the additional information provided.

The agency shall grant or deny a petition for a waiver or variance within 90 days from receipt of the original petition, the last item of requested additional information, or a request by the petitioner to finish processing the petition. A petition not granted or denied within 90 days shall be deemed approved.

Takeaways for Nursing Homes and ALFs in Florida

- Florida ALFs and nursing homes must take action needed to obtain a generator and sufficient fuel capable of powering air conditioning necessary to cool facilities to not greater than 80 degrees for 96 hours following a power outage by Nov. 15, 2017.
- Any ALF or nursing home that does not believe it will be able to meet this requirement by Nov. 15 should consider filing an emergency petition for a variance or waiver from this requirement by not later than Oct. 16, 2017.
- The emergency rules require that any facility that does not meet the generator requirement, or has not obtained a variance or waiver by that date, shall be fined \$1,000 per day.

The filing of a petition for a variance or waiver is governed by Florida Statutes and the Florida Administrative Code. Whether any petition for variance or waiver will be granted is unknown. For more information on the emergency rules or filing variances or waivers please contact your Greenberg Traurig attorney.

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