

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCB HHS 18-03 Ratification of an Agency for Health Care Administration Rule
SPONSOR(S): Health & Human Services Committee
TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Health & Human Services Committee		Royal	Calamas

SUMMARY ANALYSIS

PCB HHS 18-03 ratifies Rule 59A-4.1265, F.A.C., so that the rule may go into effect.

Under ch. 120, F.S., the Administrative Procedures Act, the formal rulemaking process begins by an agency giving notice of the proposed rule. The notice is published by the Department of State in the Florida Administrative Register and must provide certain information, including the text of the proposed rule, a summary of the agency's statement of estimated regulatory costs (SERC), if one is prepared, and how a party may request a public hearing on the proposed rule. Section 120.541, F.S. requires that any rule with an adverse economic impact exceeding \$1 million over the first 5 years the rule is in effect must be ratified by the legislature to be effective.

Rule 59A-4.1265, F.A.C., requires, by July 1, 2018, currently licensed nursing homes to maintain an alternative power source, such as a generator, that can air-condition an area of no less than 30 net sq. ft. per resident at a temperature of 81 degrees Fahrenheit or lower for at least 96 hours. The rule requires the nursing home to keep 72 hours of fuel on-site. The rule allows facilities under common control that are located on a single campus to share fuel, alternative power sources, and resident space. The rule also allows the Agency for Health Care Administration to grant an extension to comply with the requirements until January 1, 2019 for nursing homes that can show delays caused by necessary construction, delivery of order equipment, zoning or other regulatory approval processes.

The SERC developed for Rule 59A-4.1265, F.A.C., shows that the rule will create an adverse economic impact of \$121,380,545 over the first 5 years the rule is in effect. Because the rule has an adverse economic impact on the nursing home industry exceeding \$1 million over the first 5 years it is in effect, it must be ratified by the Legislature to be effective.

The bill will have a negative fiscal impact on nursing homes that need to acquire an alternative power source to meet the requirements of the rule. The bill has a negative fiscal impact on state government and no fiscal impact on local governments.

The scope of the bill is limited to this rulemaking procedure and does not adopt the substance of the rule into statute.

The bill is effective upon coming law.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Present Situation

Rulemaking Authority and Legislative Ratification

Rulemaking authority is delegated by the Legislature¹ through statute and authorizes an agency to “adopt, develop, establish, or otherwise create”² a rule.³ To adopt a rule an agency must have a general or specific grant of authority from the Legislature to implement a specific law through rulemaking.⁴ The grant of rulemaking authority itself need not be detailed.⁵ The specific statute being interpreted or implemented through rulemaking must provide specific standards and guidelines to preclude the administrative agency from exercising unbridled discretion in creating policy or applying the law.⁶

The Florida Administrative Procedures Act, Ch. 120, F.S., governs the rulemaking process. The formal rulemaking process begins by an agency giving notice of the proposed rule.⁷ The notice is published by the Department of State in the Florida Administrative Register⁸ and must provide certain information, including the text of the proposed rule, a summary of the agency’s statement of estimated regulatory costs (SERC), if one is prepared, and how a party may request a public hearing on the proposed rule.

A SERC must be prepared if the proposed rule will have a negative impact on small business or if the proposed rule is likely to directly or indirectly increase the total regulatory costs by more than \$200,000, within one year of the rule’s implementation.⁹ The SERC must include an economic analysis projecting a proposed rule’s adverse effect on specified aspects of the state’s economy or increase in regulatory costs.¹⁰ The SERC must analyze a rule’s potential impact over the 5 year period from when the rule goes into effect. The economic analysis should show whether the rule, directly or indirectly is:

- Likely to have an adverse impact on economic growth, private-sector job creation or employment, or private-sector investment;¹¹
- Likely to have an adverse impact on business competitiveness,¹² productivity, or innovation;¹³
- Likely to increase regulatory costs, including any transactional costs.¹⁴

The law distinguishes between a rule being “adopted” and becoming enforceable or “effective.”¹⁵ A rule must be filed for adoption before it may go into effect¹⁶ and cannot be filed for adoption until completion

¹ *Southwest Florida Water Management District v. Save the Manatee Club, Inc.*, 773 So. 2d 594 (Fla. 1st DCA 2000).

² Section 120.52(17), F.S.

³ A rule is an agency statement of general applicability interpreting, implementing, or prescribing law or policy, including the procedure and practice requirements of an agency as well as certain types of forms. See s. 120.52(16), F.S., and *Florida Department of Financial Services v. Capital Collateral Regional Counsel-Middle Region*, 969 So. 2d 527, 530 (Fla. 1st DCA 2007).

⁴ Section 120.52(8), F.S., and s. 120.536(1), F.S.

⁵ *Save the Manatee Club, Inc.*, *supra* note 1 at 599.

⁶ *Sloban v. Florida Board of Pharmacy*, 982 So. 2d 26, 29-30 (Fla. 1st DCA 2008); *Board of Trustees of the Internal Improvement Trust Fund v. Day Cruise Association, Inc.*, 794 So. 2d 696, 704 (Fla. 1st DCA 2001).

⁷ Section 120.54(3)(a)1, F.S..

⁸ Sections 120.54(3)(a)2., 120.55(1)(b)2, F.S.

⁹ Section 120.54(1)(b), F.S.

¹⁰ Section 120.541(2)(a), F.S.

¹¹ Section 120.541(2)(a)1., F.S.

¹² Including the ability of those doing business in Florida to compete with those doing business in other states or domestic markets.

¹³ Section 120.541(2)(a) 2., F.S.

¹⁴ Section 120.541(2)(a) 3., F.S.

¹⁵ Section 120.54(3)(e)6. Before a rule becomes enforceable, thus “effective,” the agency first must complete the rulemaking process and file the rule for adoption with the Department of State.

¹⁶ Section 120.54(3)(e)6., F.S.

of the rulemaking process.¹⁷ A rule may be adopted but cannot go into effect if the analysis shows the projected impact of the proposed rule in any one of these areas will exceed \$1 million in the aggregate for the 5 year period.¹⁸ Such a rule must be ratified by the Legislature before it may go into effect.¹⁹ Ratification is accomplished through passage of a bill that ratifies the rule.

Regulation of Nursing Homes

Nursing homes are regulated by the Agency for Health Care Administration (AHCA) under the Health Care Licensing Procedures Act (Act) in part II of chapter 408, F.S., which contains uniform licensing standards for 29 provider types, including nursing homes. In addition, nursing homes must comply with the requirements contained in the individual authorizing statutes of part II of chapter 400, F.S., which includes unique provisions for licensure beyond the uniform criteria. There are currently 685 licensed nursing homes in Florida with 83,853 total beds across all facilities.²⁰

Section 400.23, F.S. requires rules adopted by AHCA for the regulation of nursing homes include criteria by which a reasonable and consistent quality of resident care may be ensured. Section 400.23, F.S. requires AHCA to adopt rules for housing conditions that will ensure the health, safety, and comfort of residents and the equipment essential to the health and welfare of the residents in nursing homes.

Nursing Home Medicaid Reimbursement

Medicaid is the health care safety net for low-income Floridians. Medicaid is a partnership of the federal and state governments established to provide coverage for health services for eligible persons. The program is administered by the Agency for Health Care Administration (AHCA) and financed by federal and state funds. AHCA delegates certain functions to other state agencies, including the Department of Children and Families (DCF), the Department of Health, the Agency for Persons with Disabilities, and the Department of Elderly Affairs (DOEA).

Currently, Florida Medicaid reimbursement for nursing home services uses a cost-based methodology. Each nursing home has its reimbursement rate per diem established based upon allowable nursing home costs as reported in an annual cost report. The nursing homes are reimbursed their per diem for each day a Medicaid resident is in the nursing home. The nursing home rates are based on unaudited, historical cost reports submitted prior to services being rendered. The reimbursement rates are adjusted post-payment for some facilities each year based on audited cost reports. The cost report audit and rate adjustment processes can take several years for full reconciliation and finalization of payment.

During the 2017 Legislative Session, the Legislature required the AHCA to implement a prospective payment system for nursing homes effective October 1, 2018. A prospective payment system is a reimbursement system in which rates are determined in advance of payment and considered final upon payment. A fully prospective payment system will eliminate the need for retroactive rate adjustments, allowing nursing facilities and AHCA to record final reimbursement amounts in a more expedient manner. In addition, a payment method in which rates are more uniform across facilities will provide more incentives for nursing facilities to control costs.

Emergency Rule 59AER 17-1, F.A.C.: Nursing Home Emergency Power Plan

Agencies may adopt emergency rules if they find that an immediate danger to the public health, safety, or welfare requires emergency action.²¹ Emergency rules are effective as of the date they are filed for

¹⁷ Section 120.54(3)(e), F.S.

¹⁸ Section 120.541(3), F.S.

¹⁹ Section 120.541(3), F.S.

²⁰ Agency for Health Care Administration, Revised Statement of Estimated Regulatory Costs for Proposed Rule 59A-4.1265, F.A.C., on file with the Health and Human Services Committee.

²¹ Section 120.54(4), F.S.

adoption.²² Emergency rules expire 90 days after their effective date, but may be renewed if the agency has initiated rulemaking to adopt the rule and either a proposed rule challenge is pending or the proposed rule is awaiting ratification by the legislature.²³

On September 16, 2017, AHCA filed Emergency Rule 59AER 17-1, F.A.C. to require nursing homes to acquire a generator and sufficient amount of fuel to ensure that temperatures in the facility could be maintained at 80 degrees or less for at least 96 hours in the event of a power outage. The rule required nursing homes to comply within 60 days of the effective date of the rule. The rule authorized AHCA to revoke the license of a nursing home that failed to comply with rule and to levy a fine of \$1000 per day for a violation of the rule. As of January 5, 2018, 108 nursing homes have indicated they are in compliance with the emergency rule.²⁴

Permanent Rule 59A-4.1265, F.A.C.: Emergency Environmental Control for Nursing Homes

Notice of Proposed Rule

On November 14, 2017, AHCA filed a Notice of Proposed Rule that required nursing homes to secure alternative power sources. The proposed rule required nursing homes to install and maintain an alternative power source, such as a generator, that can air-condition an area of no less than 50 net sq. ft. per resident at a temperature of 81 degrees Fahrenheit or lower for at least 96 hours. The proposed rule required the nursing home to keep sufficient fuel on site to maintain the required temperature for at least 96 hours. The proposed rule allowed piped gas as a fuel source. The proposed rule also stated that local ordinances that conflicted with the fuel requirement preempted the proposed rule. The proposed rule required currently licensed nursing homes to comply with its terms by July 1, 2018.

Statement of Estimated Regulatory Costs

AHCA prepared a SERC that estimated a total new one-time cost of \$186,001,674.58 for nursing homes to comply with the proposed rule.²⁵ AHCA based its estimate on a nursing home trade association's estimated cost of \$315,000 for a 120-bed facility to comply with the proposed rule.²⁶ As of November 2, 2017, 102 nursing homes had complied with the emergency rule.²⁷ AHCA excluded the nursing homes that reported compliance with the emergency rule requirements from its estimate.²⁸

AHCA divided the \$315,000 estimate by 120 beds to determine the cost per bed for a facility to comply with proposed rule, which resulted in an estimated cost of \$2,626.66 per bed. To determine the total one-cost for all nursing homes, AHCA multiplied the estimated cost per bed of \$2,626.66 by the number of beds in the remaining nursing homes not in compliance with the emergency rule (70,813).

Number of Beds in Nursing Homes Not in Compliance with Emergency Rule	Cost per Nursing Home Bed	Total Cost
70,813	\$2,626.66	\$186,001,674.58

²² Id.

²³ Id.

²⁴ Supra, FN 20.

²⁵ Id.

²⁶ Id.

²⁷ Id.

²⁸ Id.

Rule Challenge

On December 15, 2017, LeadingAge Florida²⁹ filed petition challenging the proposed rule at the Division of Administrative Hearings.³⁰ In response, AHCA filed a Notice of Change to the proposed rule on January 19, 2017. LeadingAge Florida voluntarily withdrew its challenge and the case was dismissed on January 23, 2018.³¹

Notice of Change

Changes made to the proposed rule require facilities to store 72 hours of fuel on-site rather than 96 hours of fuel. However, the facilities must still be able to maintain the required temperature of 81 degrees Fahrenheit or lower for at least 96 hours. The changes to the proposed rule also require facilities to air-condition an area of no less than 30 net sq. ft. per resident rather than 50 net sq. ft. per resident.

The changes to the proposed rule allows facilities under common control that are located on a single campus to share fuel, alternative power sources, and resident space.

The proposed rule still requires nursing homes to comply by July 1, 2018 but changes to the proposed rule allow AHCA to grant an extension to comply with the requirements until January 1, 2019 for nursing homes that can show delays caused by necessary construction, delivery of order equipment, zoning or other regulatory approval processes.

Revised Statement of Estimated Regulatory Costs

Based on the Notice of Change, AHCA prepared a revised SERC that estimated a new one-time cost of \$108,224,945 for nursing homes to comply with the proposed rule.³² AHCA used an average of estimates provided by the nursing home industry, a national generator supplier, and nursing homes that submitted petitions for variance from the emergency rule. As of January 5, 2018, 108 nursing homes were in compliance with the emergency rule. AHCA excluded those nursing homes from its estimate.

Nursing Home Industry Estimate

Using estimates provided by the nursing home trade association, AHCA estimated a new one-time cost of \$125,205,935 for nursing homes to comply with the proposed rule.

The nursing home trade association surveyed 177 of its 550 members. Of the 177 members surveyed, 107 provided an estimate of \$315,000 for a 120-bed facility to fully install a generator to maintain the required temperature throughout the entire facility. The remaining 70 members surveyed provided estimates of \$60,000 to \$80,000 for smaller generators or supplementary cooling units.

AHCA divided the \$315,000 estimate by 120 beds to determine the cost per bed for a facility to comply with proposed rule, which resulted in an estimated cost of \$2,626.66 per bed. To determine the total one-cost for all nursing homes, AHCA multiplied the estimated cost per bed of \$2,626.66 by the number of beds in the remaining nursing homes not in compliance with the emergency rule (70,229), which resulted in an estimated cost of \$184,467,705.14.

²⁹ LeadingAge Florida is a not-for-profit corporation comprised of approximately 250 elder care organizations operating in Florida, including more than 100 nursing homes and assisted living facilities. Petition for Determination of Invalidity of Proposed Rule, *Florida Association of Homes and Services for the Aging, Inc., D/B/A LeadingAge Florida v. Agency for Health Care Administration*, Case No. 17-6832RP (Fla. DOAH 2017).

³⁰ *Florida Association of Homes and Services for the Aging, Inc., D/B/A LeadingAge Florida v. Agency for Health Care Administration*, Case No. 17-6832RP (Fla. DOAH 2017).

³¹ *Id.*

³² Agency for Health Care Administration, Revised Statement of Estimated Regulatory Costs for Proposed Rule 59A-4.1265, F.A.C., January 11, 2018, on file with the Health and Human Services Committee.

AHCA then multiplied the \$60,000 estimate by the number of facilities not in compliance, which resulted in an estimated cost of \$34,620,000.

AHCA then used a proportional average of both estimates to determine the estimated costs for nursing homes to comply with the proposed rule. AHCA multiplied the estimated cost of \$184,467,705.14 by the percentage of nursing homes that provided the \$315,000 estimate (60.452%), which resulted in an estimated cost of \$11,514,417. AHCA then multiplied the estimated cost of \$34,620,000 by the percentage of nursing homes that provided the \$60,000 to \$80,000 estimate (39.548%), which resulted in an estimated cost of \$13,691,518. AHCA then added the two estimated costs together, which resulted in a new one-time estimated cost of \$125,205,935.

Generator Supplier Estimate

A national generator supplier provided an estimated cost of \$145,000 for a 350KW stationary generator to power a 120-bed nursing home. AHCA multiplied the estimated cost by the number of nursing homes not in compliance with the emergency rule (577), which resulted in a new one-time estimated cost of \$84,068,900 for nursing homes to comply with the proposed rule.

Petitions for Variance Estimate

In response to the emergency rule requirements, 591 nursing homes filed petitions for variance requesting additional time to comply with the requirements. Sixty-five of the petitions included estimates for installation of generators. AHCA excluded 9 petitions that included exceptionally high or low estimates that were inconsistent with the majority of the estimates. Based on the estimates provided in the remaining petitions, the average cost for installation of a generator to comply with the emergency rule was \$200,000. AHCA multiplied the average cost by the number of facilities not in compliance with the emergency rule (577), which resulted in a new one-time estimated cost of \$115,400,000 for nursing homes to comply with the proposed rule.

Final Estimate for New One-time Costs

AHCA then added the three estimated costs together ($\$125,205,935 + \$84,068,900 + \$115,400,000$) and divided by three, which resulted in a final new one-time estimated cost of \$108,224,945 for nursing homes to comply with the proposed rule.

Nursing Home Industry Estimate	Generator Supplier Estimate	Petitions for Variance Estimate	Final New One-Time Cost Estimate
\$125,205,935	\$84,068,900	\$115,400,000	\$108,224,945

Recurring Costs

Based on estimates provided by the national generator supplier, yearly maintenance for a generator would cost \$4,560 per nursing home. Yearly maintenance includes three quarterly inspections and one annual oil and filter change. AHCA multiplied the yearly maintenance cost the number of facilities not in compliance with the emergency rule (577), which resulted in recurring costs of \$2,631,120 per year for nursing homes to comply with proposed rule. Recurring costs for the first five years the rule is in effect would total \$13,155,600.

Adding the new-one time estimated costs of \$108,224,945 plus the recurring costs of \$13,155,600 for the first five years the rule is in effect creates an adverse economic impact of \$121,380,545 over the first 5 years the rule is in effect.

Medicaid Costs

AHCA estimates total Medicaid costs of \$66 million for initial costs for nursing home to comply with the rule.³³ The state's estimated share of these costs would be \$25 million.³⁴ AHCA estimates a total of \$1.5 million in Medicaid costs per year for the recurring costs for nursing homes to comply with the rule.³⁵ The state's estimated share of these costs is \$597,000.³⁶

Adoption

On February 5, 2018, AHCA filed Rule 59A-4.1265, F.A.C. with the Department of State for adoption. However, ratification of the rule by the legislature is required for the rule to be effective.

Effect of Proposed Change

The bill ratifies Rule 59A-4.1265, F.A.C., solely to meet the condition for effectiveness imposed by s. 120.541(3), F.S., and expressly limits ratification to the effectiveness of the rule. The bill directs that the act shall not be codified in the Florida Statutes, but only noted in the historical comments to the rule by the Department of State.

The bill is effective upon becoming law.

B. SECTION DIRECTORY:

Section 1: Ratifies Rule 59A-4.1265, F.A.C.

Section 2: Provides that the act goes into effect upon becoming law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

AHCA will experience an increase in workload due to inspections to ensure compliance by nursing homes with the rule's requirements. AHCA estimates that it needs two FTE positions to handle the increase in workload.³⁷ AHCA has requested a transfer of four FTE positions from its Medicaid unit to the Division of Health Quality Assurance, which licenses and regulates nursing homes.³⁸ Two of the FTE positions will be utilized to handle the increased workload.

AHCA estimates total Medicaid costs of \$66 million for the initial costs for nursing homes to comply with the rule. The state's estimated share of these costs would be \$25 million. AHCA estimates a total of \$1.5 million in Medicaid costs per year for the recurring costs for nursing homes to comply with the rule. The state's estimated share of these costs is \$597,000.

³³ E-mail correspondence with the Agency for Health Care Administration, on file with the Health and Human Services Committee.

³⁴ Id.

³⁵ Id.

³⁶ Id.

³⁷ *Governor's Budget Recommendation for Fiscal Year 2018-19*, on file with the Health and Human Services Committee.

³⁸ Id.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill will have a negative fiscal impact on nursing homes that need to acquire an alternative power source to meet the requirements of the rule. Over the first five years the rule is in effect, nursing homes that need to meet the requirements of the rule will experience an adverse economic impact of \$121,380,545.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to affect county or municipal governments.

2. Other:

B. RULE-MAKING AUTHORITY:

The bill meets the final statutory requirement for the board to exercise its rulemaking authority concerning the standards of care for office surgery. No additional rulemaking authority is required.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES