

# PUBLICATION

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## Florida's Emergency Generator Rules Invalidated

Authors: Amy Wilmot Schrader  
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Earlier today, Judge Garnett W. Chisenhall, a duly-designated administrative law judge of the Florida Division of Administrative Hearings, issued a ruling invalidating emergency rules requiring all Florida nursing homes and assisted living facilities (ALFs) to install generators capable of powering air conditioning systems for 96 hours with sufficient on-site fuel by November 15, 2017. The emergency rules were adopted on September 15, 2017, at Governor Rick Scott's direction in response to a tragedy at a Hollywood Hills nursing home where 14 seniors have now died from heat-related causes after Hurricane Irma caused the facility's air conditioning system to cease functioning. Under the rules, facilities that failed to meet the 60-day deadline would be subject to mandatory \$1,000 per day fines and possible license revocation.

While members of the senior living industry have been generally supportive of measures to install emergency generators, the extremely short 60-day timeframe provided under the rules has caused much concern. Agency representatives were unable to provide clear guidance to facilities on compliance issues, such as how much square footage per resident must be kept cool in the event of power loss. In addition, industry experts estimated that installation of a commercial generator could take five to eight months – well beyond the 60 days allocated by the state.

Based on its members' concerns, Florida Argentum, LeadingAge and the Florida Assisted Living Association each filed challenges to the rules, chiefly asserting that the timeframe for compliance was impracticable. After hearing testimony from the former chief of the Agency for Health Care Administration's (AHCA) Office of Plans and Construction, an electrical engineer and ALF operators as to the unreasonableness of the 60-day timeframe, Judge Chisenhall deemed the emergency rules invalid, given that the agencies had failed to properly assess an appropriate timeframe for compliance. The Florida agencies may now choose to appeal, but there is no automatic stay of today's ruling. Two Florida agencies (AHCA and the Department of Elder Affairs) are now drafting non-emergency rules to address the issue of providing emergency power in senior living facilities and will seek public input at a rule workshop scheduled for 3:00 p.m. EDT on Friday, November 3, 2017. The workshop will be held at AHCA's headquarters in Tallahassee. Individuals wanting to participate in the workshop, but that cannot attend in person may join by phone at 1.877.218.3540 with participant passcode 307 665 72#.

For more information on this ruling or similar matters, please contact Amy W. Schrader or any of the members of Baker Donelson's Long Term Care Team.