

Notice of Emergency Rule

**DEPARTMENT OF ELDER AFFAIRS**

**Federal Aging Programs**

Rule No.: Rule Title

58AER17-2: Variances from Emergency Rule 58AER17-1 - Procedures Regarding Emergency Environmental Control for Assisted Living Facilities.

**SPECIFIC REASONS FOR FINDING AN IMMEDIATE DANGER TO THE PUBLIC HEALTH, SAFETY OR WELFARE:** The specific reasons are as set forth in the Notice of Emergency Rule 58AER17-1, published in the Florida Administrative Register on Monday, September 18, 2017, 43 Florida Administrative Register, No. 180. As a result of the vulnerabilities and risks to the elderly population residing in Florida's assisted living facilities that was evidenced by the impacts of Hurricane Irma, the Department has promulgated Rule 58AER17-1 Procedures Regarding Emergency Environmental Control for Assisted Living Facilities ("Emergency Rule") to set forth the requirements for each assisted living facility to develop a plan to ensure the safety and health of residents in the event of the loss of electrical power. In the aftermath of the devastation left by Hurricane Irma, including the loss of life at a licensed nursing home facility due to an incompetent emergency response coupled with the loss of power to cooling systems, and facing the threat of two more potential hurricanes on a similar track toward Florida, the Department took immediate steps to require assisted living facilities to develop and implement plans to ensure that each facility would be able to maintain temperatures at an appropriate level for a minimum of 96 hours in the event of the loss of electrical power. The experience of Hurricane Irma revealed that additional protections for the elderly were needed beyond reliance on evacuation plans, transfer agreements for evacuation of residents to other facilities, or third-party suppliers of emergency power in times of emergency, and staffing issues arise when facilities are without air conditioning, potentially immediately endangering the health, safety and welfare of the residents. Accordingly, the Emergency Rule was promulgated to direct licensed assisted living facilities to implement emergency power plans for a minimum of 96 hours to protect residents during the immediate aftermath of a major power outage and infrastructure disruption, not just during a hurricane. This Supplement does not repeal or modify the requirements of the Emergency Rule. Instead, this supplement to Emergency Rule 58AER17-1 is adopted to provide guidance and direction on the submission of variance requests under current Florida law. Assisted living facilities must focus their efforts on ensuring their residents will be protected during the immediate 96 hours following a community-wide disruption of operation of environmental controls.

**REASONS FOR CONCLUDING THAT THE PROCEDURE IS FAIR UNDER THE CIRCUMSTANCES:** To facilitate the expeditious implementation of the Emergency Rule requirements, this Supplement to Emergency Rule 58AER17-1 regarding the variance process already available under existing law is adopted to provide guidance and direction to the assisted living facilities that, for reasons outside their control, are unable to fully implement an Emergency Power Plan within the sixty (60) days specified in the Emergency Rule. This Supplement does not repeal or modify the requirements of the Emergency Rule. This Supplement will enable the Department to accurately track the steps taken by assisted living facilities around the state to address the important goal of ensuring that all assisted living facilities have the ability to protect the safety of the residents in times of emergency. This Supplement provides at least the procedural protections given by other statutes, the Florida Constitution, or the United States Constitution, and takes only that action necessary to clarify the requirements and to protect the public interest under the emergency procedure.

**SUMMARY:** This Supplement to Emergency Rule 58ARE17-1 sets forth the criteria and information that should be provided by assisted living facilities seeking an emergency variance on the grounds that, for reasons outside their control, full implementation of the Emergency Power Plan is not feasible within the sixty (60) day timeframe required by the Emergency Rule. This Supplement does not repeal or modify the requirements of the Emergency Rule. The Department will consider the reasonable efforts undertaken by an assisted living facility to provide the protections required by the Emergency Rule. Administrative action or sanctions for non-compliance with the Emergency Rule will be evaluated based upon the information submitted by the assisted living facility in conjunction with any variance request under existing law (see § 120.542, Florida Statutes) along with such additional information as may be available to the Department.

**THE PERSON TO BE CONTACTED REGARDING THE EMERGENCY RULE IS:** Francis Carbone, Deputy General Counsel, Department of Elder Affairs, Office of the General Counsel, CarboneF@elderaffairs.org, 4040 Esplanade Way, Tallahassee, FL 32399-7000.

**THE FULL TEXT OF THE EMERGENCY RULE IS:**

(1) Rule 58AER17-1 Procedures Regarding Emergency Environmental Control for Assisted Living Facilities (“Emergency Rule”), calls for implementation of a plan within sixty (60) days (the “Sixty-Day Period”) of the effective date of the Emergency Rule. Variances from the Emergency Rule may be granted by the Department pursuant to Section 120.542, Florida Statutes and Rule 28-104.004 - 104.005, F.A.C. To facilitate the timely consideration of requests for variances or waivers, in addition to the requirements of Section 120.542, F.S., and Chapter 28-104, F.A.C., an assisted living facility seeking a variance from any of the requirements of Rule 58AER17-1 may provide a sworn affidavit from the Administrator of the assisted living facility that addresses the following:

(a) Steps the assisted living facility has taken to implement the detailed plan required by Rule 58AER17-1 (the “Detailed Plan”) within the Sixty-Day Period;

(b) Specific circumstances beyond the control of the assisted living facility that have prevented full implementation of the Detailed Plan within the Sixty-Day Period;

(c) Arrangements the assisted living facility has made pending full implementation of the Detailed Plan to ensure that residents of the assisted living facility will not be exposed to ambient temperatures above 80 degrees Fahrenheit in the event of power failure or loss of air conditioning due to loss of electrical power;

(d) A delineation of the steps remaining for full implementation of the Detailed Plan and the assisted living facility’s estimate of the time needed to fully implement the Detailed Plan called for by the Emergency Rule; and,

(e) All steps taken by the assisted living facility to provide notice to each resident and, if applicable, to the resident’s legal guardian or health care surrogate that the assisted living facility has applied for a variance or waiver from Emergency Rule 58AER17-1 and the steps that the assisted living facility is taking to comply with the Emergency Rule.

(2) The assisted living facility’s request for a variance shall be posted on the Department’s website.

(3) Once notice has been provided as required by this Rule and the information related to the assisted living facility’s request has been posted on the Department’s website, the Department will consider the request for variance and the accompanying proof. If the Department determines from the petition and any accompanying proof offered by the assisted living facility:

(a) That the assisted living facility has made all feasible efforts to implement the Detailed Plan within the Sixty-Day Period;

(b) That circumstances beyond the control of the assisted living facility have made full and timely implementation impossible; and

(c) That satisfactory arrangements have been made to ensure the residents will not be exposed to ambient temperature above 80 degrees Fahrenheit in the event the assisted living facility is without electric power, the Department will grant a variance of the Sixty-Day Time Period for implementation of the Detailed Plan under the ‘principles of fairness’ standard in §120.542, F.S., for a period no longer than 180 days as to the assisted living facility, subject to such conditions the Department determines are appropriate under the circumstances.

(4) The Agency for Health Care Administration will not assess a fine during the period of the variance if the Department grants a variance under Florida law.

*Rulemaking Authority 429.21, FS. Law Implemented 429.19, 429.28, 429.41, FS. History – New 10-11-2017.*

THIS RULE TAKES EFFECT UPON BEING FILED WITH THE DEPARTMENT OF STATE UNLESS A LATER DATE IS SPECIFIED IN THE RULE.

EFFECTIVE DATE: \_\_\_\_\_