

November 2, 2018

U.S. Department of Labor
Division of Regulations, Legislation, and Interpretation
Wage and Hour Division
200 Constitution Avenue NW
Washington, DC 20210

Re: RIN 1235-AA22; Federal Register, Vol. 83, No. 188 (Sept. 27, 2018).

Submitted electronically to: <http://www.regulations.gov>.

The Long Term Care Community Coalition (LTCCC) is a non-profit organization dedicated to improving care, quality of life, and dignity for residents in nursing homes and other long-term residential care settings. For over 25 years, we have conducted policy studies and analyses of nursing home laws, standards and their implementation. In addition to our work on systemic long term care issues, we work closely with residents, families, and advocates to improve care.

The Center for Medicare Advocacy (Center) is a national, private, non-profit law organization, founded in 1986, that provides education, analysis, advocacy, and legal assistance to people nationwide, primarily the elderly and people with disabilities, to obtain necessary health care, therapy, and Medicare. The Center focuses on the needs of Medicare beneficiaries, people with chronic conditions, and those in need of long-term care and provides training regarding Medicare and health care rights throughout the country. It advocates on behalf of beneficiaries in administrative and legislative forums, and serves as legal counsel in litigation of importance to Medicare beneficiaries and others seeking health coverage.

Overview of Comments

The Department of Labor (Department) has issued a notice of proposed rulemaking (NPRM) to allow sixteen and seventeen year olds to perform patient/resident lifts using power-driven apparatuses.¹ This proposed rule would reverse the current policy of only allowing trained teenagers to provide assistance to a qualified adult caregiver under certain limitations.² While the proposed rule focuses on the impact that it would have on teenagers, LTCCC and the Center have written the comments below with a focus on long-term care residents, specifically nursing home residents. Our organizations believe that allowing sixteen and seventeen year olds to independently operate resident lifts or hoists would place residents at an even greater risk of harm during an already dangerous process. We respectfully urge the Department to not finalize the proposed rule.

¹ Expanding Employment, Training, and Apprenticeship Opportunities for 16- and 17-Year-Olds in Health Care Occupations Under the Fair Labor Standards Act, 83 Fed. Reg. 48,737 (Sept. 27, 2018), available at <https://www.gpo.gov/fdsys/pkg/FR-2018-09-27/pdf/2018-20996.pdf>.

² *Id.* at 48,739.

Background

Under Hazardous Occupations Order No. 7 (HO 7), sixteen and seventeen year olds are prohibited from working in occupations that involve the operation of a power-driven hoisting apparatus.³ Before July 2010, HO 7 permitted children to operate electric and air-operated hoists as long as the devices did not exceed a one-ton capacity.⁴ However, the Department amended HO 7 in 2010 to remove that exemption.⁵ On July 2013, the Department issued a field assistance bulletin that established a nonenforcement policy only when trained sixteen and seventeen year olds assist trained adult caregivers in the operation of power-driven patient hoists and lifts.⁶ Under the nonenforcement policy currently in place, the Department will not assert child labor violations when the teenage worker meets “specific training requirements, was not injured in the process, did not make ‘hands on’ physical contact with the patient during the lifting or transferring process, and . . . received necessary documentation in advance.”⁷

On September 27, 2018, the Department issued a NPRM which would exclude power-driven patient lifts from HO 7 and allow teenagers to operate these devices without the supervision of a trained adult.⁸ The Department pointed to several reasons for the proposed rule change, including lower worker fatality and injury rates for these devices when compared to the other items prohibited by HO 7. While the proposed rule focuses on the impact to teenagers, our comments focus on the impact to long-term care residents, specifically nursing home residents.

Comments

The majority of nursing home residents depend on staff and devices for mobility. According to a major national study, “[r]esidents commonly have mobility impairments, which range from difficulty walking to inability to get oneself out of bed.”⁹ In fact, research shows that “over six in ten (65%) of residents depend on a wheelchair for mobility or are unable to walk without extensive or constant support from others.”¹⁰ Resident assessment information (minimum data set (MDS)) reported to CMS for the third quarter of 2018 shows the extent to which nursing home residents rely on staff for mobility and transfers: 67.9 percent of residents needed the extensive supervision of, or were totally dependent on, staff for bed mobility; 64.51 percent of residents needed the extensive assistance of, or were totally dependent on, staff for transfers; 83.58 percent of residents needed the assistance of one or more staff members for transfers (excluding to/from baths and toilets).¹¹ The extent to which nursing home residents need the

³ *Id.* at 48,738; *see also* 29 C.F.R. § 570.58.

⁴ Expanding Employment, Training, and Apprenticeship Opportunities for 16- and 17-Year-Olds in Health Care Occupations Under the Fair Labor Standards Act, 83 Fed. Reg. at 48,738.

⁵ *Id.*

⁶ *Id.* at 48,741-48,742.

⁷ *Id.* at 48,742.

⁸ *Id.* at 48,737.

⁹ Charlene Harrington et al., *Nursing Facilities, Staffing, Residents and Facility Deficiencies, 2009 Through 2016*, Kaiser Family Foundation (Apr. 3, 2018), <https://www.kff.org/medicaid/report/nursing-facilities-staffing-residents-and-facility-deficiencies-2009-through-2016/>.

¹⁰ *Id.*

¹¹ *See* MDS 3.0 Frequency Reports, CMS, <https://www.cms.gov/Research-Statistics-Data-and-Systems/Computer-Data-and-Systems/Minimum-Data-Set-3-0-Public-Reports/Minimum-Data-Set-3-0-Frequency-Report.html> (last

assistance of staff and devices underscores the need for the Department to more strongly consider the impact that the proposed rule would have on resident safety, quality of care, and quality of life, which the proposed rule does not address.

Nursing home residents are at risk every time they are hoisted or lifted, regardless of whether trained staff do it manually or through a power-driven apparatus. A 2014 report by the HHS Inspector General found that one-third of Medicare beneficiaries were injured within, on average, 15.5 days of entering a nursing home and that 59 percent of these events were preventable.¹² The Inspector General attributed six percent of adverse events and eight percent of temporary harm events on “falls or other trauma with injury related to resident care.”¹³ Another study in the *International Journal of Nursing Studies* similarly found that “[t]he use of safe patient handling equipment can pose risks for patients. This study found that organizational factors, human factors and technology factors were associated with patient adverse events.”¹⁴ As studies indicate, patient hoists and lifts place residents at risk of experiencing harm every time they are used. Nursing home staff must have the capabilities to ensure residents are not harmed at all times during the hoisting or lifting process, including in cases when the power-driven device fails mid-use.

The National Institute for Occupational Safety and Health (NIOSH) has already determined that sixteen and seventeen year olds do not have the capacity to safely and independently operate resident lifts. In a letter to the Deputy Administrator of the Department’s Wage and Hour Division, the Director of NIOSH stated that sixteen and seventeen year olds “cannot safely operate power-driven patient lifts to lift and transfer patients by themselves”¹⁵ NIOSH’s analysis found the following information:

16- and 17-year-old workers do not have the physical strength required to 1) independently manipulate patients/residents when placing slings under them, and 2) safely push, pull, or rotate a portable hoist on wheels when loaded with a patient/resident. The scientific literature also indicates that working youth greatly underestimate the dangers associated with tasks known to be hazardous. NIOSH has also concluded that specific training alone is not sufficient to protect young workers from patient-lifting related injuries.¹⁶

NIOSH’s analysis demonstrates that sixteen and seventeen year olds will not be able to properly use power-driven resident lifts and that training alone will not be sufficient in

visited 10/31/2018). To access the data, select “Third Quarter 2018” as the report date. Then see the data sets for “G0110A1,” “G0110B1,” and “G011B2.”

¹² Daniel R. Levinson, *Adverse Events in Skilled Nursing Facilities: National Incidence Among Medicare Beneficiaries*, HHS OIG (Feb. 2014), <https://oig.hhs.gov/oei/reports/oei-06-11-00370.pdf>.

¹³ *Id.*

¹⁴ Christine A. Elnitsky et al., *Implications for patient safety in the use of safe patient handling equipment: A national survey*, 51 *International Journal of Nursing Studies* 1,624 (Dec. 2014), available at <https://www.sciencedirect.com/science/article/pii/S0020748914001084?via%3Dihub>.

¹⁵ Letter from John Howard to Nancy J. Leppink (Mar. 11, 2011), https://www.dol.gov/whd/CL/NIOSH_CoverLetter.pdf.

¹⁶ *Id.*

preparing them to help residents with transfers and mobility in this manner. Allowing teenagers to independently use power-driven lifts, against the advice of NIOSH, would only heighten a task already known to put residents at risk of harm. An increase of risk would necessarily require greater oversight and enforcement of the nursing home standards to ensure the correction of any resulting deficient practice.

Under-enforcement of the Nursing Home Reform Law means that, all too often, cases of resident harm are not properly cited and remedied. Studies indicate that more than 95 percent of all health deficiencies cited during annual and complaint nursing home inspections do not result in a finding of actual harm or immediate jeopardy to resident health or safety.¹⁷ These “no harm” violations do not accurately reflect the pain, suffering, or humiliation that the resident might have experienced. For example, a nursing home was only cited at a “no harm” scope and severity level after a resident broke her femur due to staff not following her care plan.¹⁸ The resident’s care plan instructed staff to use a lifting device only with the assistance of at least two staff members.¹⁹ The certified nursing assistant (CNA) told the state surveyor that she attempted to transfer the resident by herself and the resident slid off her chair.²⁰

Unfortunately, “no harm” deficiencies like this one are rarely remedied through meaningful financial penalties. As a result, nursing homes may have less of an incentive to correct deficient practices when a harmful event is categorized as causing “no harm” to the resident. In light of NIOSH’s analysis, sixteen and seventeen year olds will need greater oversight to ensure appropriate care is being provided and that deficient care is being identified and corrected. The current under-enforcement of the nursing home standards of care means that this oversight will likely either not happen or will be mitigated by “no harm” citations.

Conclusion

Sixteen and seventeen year olds must not be allowed to independently use power-driven hoisting or lifting devices on long-term care residents. The majority of nursing home residents have an impairment in mobility and need the assistance of staff and/or devices for transfers. While power-driven hoisting or lifting apparatuses may decrease work-related injuries, residents still remain at risk every time these devices are used to mobilize or transfer a resident. Given the dangers associated with these devices, only competent and skilled staff should be allowed to

¹⁷ See Nursing Home Data Compendium 2015 Edition, CMS, https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/CertificationandCompliance/Downloads/nursinghomedatacompendium_508-2015.pdf (highlighting that less than four percent of deficiencies were cited as causing the resident actual harm or placing the resident in immediate jeopardy); see also *Elder Justice: What No Harm Really Means for Residents*, LTCCC & Center, <https://nursinghome411.org/news-reports/elder-justice/> (providing an overview of “no harm” deficiencies and recent case studies).

¹⁸ Statement of Deficiencies for Prescott Nursing and Rehabilitation Community, CMS (Nov. 21, 2017), available at <https://www.medicare.gov/nursinghomecompare/InspectionReportDetail.aspx?ID=525398&SURVEYDATE=11/21/2017&INSPTYPE=CMPL&profTab=1&state=WI&lat=0&lng=0&name=PRESCOTT%2520NURSING%2520AND%2520REHAB%2520COMMUNITY&Distn=0.0>.

¹⁹ *Id.*

²⁰ *Id.*

operate resident lifts or hoists. According to the National Institute for Occupational Safety and Health (NIOSH), teenagers are unable to build this competency through training alone and underestimate the risks involved. Ultimately, the proposed rule would place residents at an even greater risk of being harmed, which, due to under-enforcement of the nursing home standards of care, will likely not be properly remedied.

Sincerely,

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