

Date of Hearing: August 4, 2020

ASSEMBLY COMMITTEE ON HEALTH
Jim Wood, Chair
SB 1207 (Jackson) – As Amended May 19, 2020

SENATE VOTE: 36-0

SUBJECT: Skilled nursing facilities: backup power system.

SUMMARY: Requires a skilled nursing (SNF) facility to have an alternative source of power to protect resident health and safety for no less than 96 hours during any type of power outage; requires the alternative source of power to comply with federal requirements for long-term care facilities; and, specifies that those requirements include maintaining a safe temperature for residents and staff.

EXISTING LAW:

- 1) Establishes the Department of Public Health (DPH) which licenses and regulates long term care (LTC) facilities by DPH. Includes as LTC facilities, skilled nursing facilities (SNFs), intermediate care facilities (ICFs), ICF/developmentally disabled (ICF/DD), ICF/DD-habilitative, ICF/DD-nursing, and congregate living health facilities.
- 2) Defines a “SNF” as a health facility that provides skilled nursing care and supportive care to patients whose primary need is for availability of skilled nursing care on an extended basis.
- 3) Requires DPH, in addition to any inspections conducted pursuant to complaints, to conduct inspections annually for LTC facilities that have specified violations within the past 12 months. Requires LTC facilities with no violations within the past 12 months to be inspected at least once every two years.
- 4) Requires inspections and investigation of LTC facilities that are certified by the Centers for Medicare and Medicaid Services (CMS) to determine compliance with federal standards and California statutes and regulations to the extent that California statutes and regulations provide greater protection to residents, or are more precise than federal standards.
- 5) Requires a LTC facility, pursuant to state regulations, to provide and maintain an emergency electrical system in safe operating condition, which is required to serve all lighting, signals, alarms, and equipment required to permit continued operation of all necessary functions of the facility for a minimum of six hours.
- 6) Requires a LTC facility, pursuant to federal regulations, to develop and maintain an emergency preparedness plan, updated every two years, that must meet the following standards;
 - a) Be based on and include a documented, facility-based and community-based risk assessment utilizing an all-hazards approach;
 - b) Include strategies for addressing emergency events identified by the risk assessment;

- c) Address patient population, including, but not limited to, persons at-risk; the type of services the facility has the ability to provide in an emergency; and continuity of operations, including delegations of authority and succession plans; and,
 - d) Include a process for cooperation and collaboration with local, tribal, regional, state and federal emergency preparedness officials' efforts to maintain an integrated response during a disaster or emergency situation.
- 7) Requires a LTC facility, pursuant to the plan described in 6) above, to implement emergency and standby power systems, and requires a LTC facility that maintains an onsite fuel source to power emergency generators to have a plan for how it will keep emergency power systems operational during the emergency, unless it evacuates.

FISCAL EFFECT: According to the Senate Appropriations Committee, pursuant to Rule 28.8, minor and negligible state costs.

COMMENTS:

1) PURPOSE OF THIS BILL. According to the author, this bill is needed to help save the lives of SNF residents during power outages that may result from public safety power shutoffs (PSPS), emergencies, natural disasters and other causes. The author states that California's SNF residents have always faced serious risks from disaster-related emergencies. Today, however, the dangers they face have magnified exponentially due to massive blackouts triggered by Pacific Gas & Electric (PG&E) and other utility companies to prevent wildfires during periods of extreme weather. In 2019, dozens of California nursing homes lost power – sometimes for days – due to PSPS. Public officials are warning that the dangerous blackouts are likely to continue for a decade or more. The author notes that most residents are extraordinarily vulnerable, many are completely dependent on their caregivers due to poor health and some rely on electrical-powered life support systems to stay alive. Unsafe temperatures, unrefrigerated medications, and medical devices without power can have deadly consequences for facility residents. The author states that California law is silent on backup power requirements for SNFs, the state's regulations are weak and outdated, and key federal requirements are misunderstood and not enforced by DPH. The author concludes that this bill will set a meaningful statewide standard for California to help keep residents safe.

2) BACKGROUND.

a) PSPS. After two consecutive years of multiple catastrophic wildfires, at least some of which caused by electric utility infrastructure, in the fall of 2019 much of California experienced widespread intentional power outages. Electric utilities proactively “de-energized” millions of customers, sometimes for long periods of time, to reduce the risk of igniting wildfires during periods with projected high winds. According to a September 2019 article in *California Healthline*, nursing home operators were concerned about their ability to keep residents cool and food at safe temperatures during a power outage. The article quoted the disaster preparedness manager for the California Association of Health Facilities as saying that SNFs are required to maintain generators for critical medical needs, but some homes do not have air conditioning or refrigerators connected to backup power. The article stated that in the event of a shutoff, nursing homes have to weigh the risks of staying put versus evacuating their residents, some of whom may be cognitively impaired.

- b) **COVID-19 in SNFs.** COVID-19 is a viral respiratory illness caused by a new coronavirus. Coronaviruses are a large family of viruses that are common in people and many different species of animals, including camels, cattle, cats, and bats. COVID-19 was first reported in Wuhan, Hubei Province, China in November 2019. Over the subsequent few months, the illness spread to almost every country. COVID-19 was declared a pandemic by the World Health Organization on March 11, 2020. COVID-19 can cause mild to severe illness; most severe illness occurs in adults 65 years and older and people of any age with serious underlying medical problems. According to DPH, as of July 23, 2020, 17,452 SNF residents have contracted COVID-19 and 3,039 have died. Additionally, 12,413 health care workers have contracted the disease and 116 have died.
- c) **Transfer trauma.** Relocation can have negative physical and psychological effects on patients in acute care and residents of LTC facilities. According to the U.S Administration on Aging, transfer trauma, as a result of a sudden and unexpected relocation, is associated with depression, increased irritability, serious illness, and elevated mortality risk for the frail elderly.
- d) **Federal standards for emergency power.** In order to participate in the Medicare or Medicaid programs, facilities are required to be certified by CMS as meeting all federal requirements. DPH is the designated agency in California to provide CMS certification of health care facilities. LTC facilities are required to develop and implement emergency preparedness policies and procedures based on a risk assessment and emergency plan. At a minimum, these policies and procedures must address the provision of subsistence needs for staff and residents, whether they evacuate or shelter in place, including food, water, medical and pharmaceutical supplies, and alternative sources of energy to maintain the following:
- i) Temperatures to protect resident health and safety and for the safe and sanitary storage of provisions;
 - ii) Emergency lighting;
 - iii) Fire detection, extinguishing, and alarm systems; and,
 - iv) Sewage and waste disposal.

In addition, the policies and procedures must include plans for the safe evacuation from the LTC facility, and a means to shelter in place for residence, staff, and volunteers who remain in the facility. The regulation also specifies that LTC facilities “must implement emergency and standby power systems based on the emergency plan” they are required to develop. With regard to fuel, the regulation states “LTC facilities that maintain an onsite fuel source to power emergency generators must have a plan for how it will keep emergency power systems operational during the emergency, unless it evacuates.”

- d) **Ninety-six hours.** Federal regulations also require LTC facilities to be designed, constructed, equipped, and maintained to protect the health and safety of residents, personnel, and the public, and as part of this requirement, facilities are required to meet specified applicable provisions of the Life Safety Code of the National Fire Protection Association (NFPA). NFPA life safety standards are cross referenced in regulation, and among them is a requirement for “facilities considering seismic events to maintain a minimum 96 hour fuel supply,” and that where the probability of interruption of off-site sources is high, to maintain onsite storage of an alternative fuel source.

- e) **Inspector General Report.** A November 2019, Office of Inspector General (OIG) of the United States Health and Human Services Agency report entitled, “California Should Improve Its Oversight of Selected Nursing Homes’ Compliance With Federal Requirements for Life Safety and Emergency Preparedness,” surveyed 20 of the 1,202 SNFs in California that were certified by CMS as of June 2018. The OIG selected a non-statistical sample of SNFs based on various factors, including the number of high-risk deficiencies that DPH reported to CMS, and the potential risk of environmental threats such as wildfire, earthquake, and extreme heat. In the fall of 2018 the OIG conducted unannounced site visits at the 20 SNFs, checking for life safety violations and reviewing the facilities’ emergency preparedness. The OIG found that DPH did not ensure that the SNFs complied with CMS requirements for life safety and emergency preparedness, and found 137 instances of noncompliance with life safety requirements related to building exits, smoke barriers, and smoke partitions; fire detection and suppression systems, hazardous storage areas; smoking policies and fire drills; and, electrical equipment testing and maintenance. The OIG additionally found 188 instances of noncompliance with emergency preparedness requirements related to written emergency plans; emergency power; plans for evacuation, sheltering in place, and tracking residents and staff during and after an emergency; emergency communications plans; and, emergency plan training and testing. According to the OIG, the identified deficiencies occurred because SNFs lacked adequate management oversight and had high staff turnover. In addition, DPH did not adequately follow up on deficiencies previously cited, or ensure that surveyors were consistently enforcing CMS requirements.

With regard to emergency power, the OIG report pointed out that nursing homes located in certain seismic zones must maintain a 96-hour fuel supply. Of the SNFs visited, nine had one or more deficiencies related to emergency power, including eight that had not properly inspected, tested, and maintained their generators. Two SNFs located in certain seismic zones did not have sufficient generator fuel on hand to last 96 hours. With regard to emergency plans, 12 SNFs had one or more deficiencies related to their emergency plans for evacuations, sheltering in place, or tracking residents and staff during and after emergencies.

- f) **Confusion regarding requirements and enforcement?** According to CMS, since the release of the Interpretive Guidelines for Emergency Preparedness in 2017, stakeholders and providers have asked for additional clarifications related to portable/mobile generators. CMS has added guidance under Tag E0015- Alternate Source Power as well as clarifications under Tag E0042- Emergency Standby Power Systems. The guidance states that facilities should use the most appropriate energy source or electrical system based on their review of their individual facility’s all-hazards risks assessment and as required by existing regulations or state requirements. Regardless of the alternate sources of energy a facility chooses to utilize, it must be in accordance with local and state laws, manufacturer requirements, as well as applicable Life Safety Code (LSC) requirements.

The guidance also states that, if a facility risk assessment determines the best way to maintain temperatures, emergency lighting, fire detection and extinguishing systems, and sewage and waste disposal would be through the use of a portable and mobile generator, rather than a permanent generator, then the LSC provisions such as generator testing, maintenance, etc. outlined under the NFPA guidelines requirements would not be applicable, except for NFPA 70 - National Electrical Code.

CMS specifically notes that the revisions, as the provisions under emergency preparedness themselves, do not take away existing requirements under LSC, physical environment or any other Conditions of Participation that a provider type is subject to (for example to maintain safe and comfortable temperatures).

According to DPH, with CMS oversight, DPH has been enforcing the federal Life and Safety code, which does not require the 96 hour standard. Since introduction of this bill, DPH has been seeking clarity from CMS on what standard should be applied to which facilities. DPH states that clarity has been elusive because the references, the placement in the regulation, and the wording of the federal regulations all make it difficult to come to a definitive conclusion. DPH continues to seek clarity from CMS and hopes to get a definitive answer from CMS soon.

- 3) **SUPPORT.** California Advocates for Nursing Home Reform (CANHR) is a cosponsor of this bill and states that it is a frightening time to live in a California nursing home. The growing threats from the coronavirus outbreak, severe wildfires and extreme blackouts may affect nearly every Californian, however, these dangers pose life and death risks to SNF residents. CANHR notes that in October 2019, over 100 skilled nursing homes lost power – sometimes for days – during PG&E’s blackouts that were aimed at preventing wildfires. CANHR states that SNFs without power are a grave threat to residents. Most residents are extraordinarily vulnerable, many are completely dependent on their caregivers due to poor health and some rely on electrical-powered life support systems to stay alive. Unsafe temperatures, unrefrigerated medications, and medical devices without power can have deadly consequences for facility residents. CAHNR notes that the state regulation on backup power only requires SNFs to have backup power available for six hours for exceedingly limited functions, and it does not require SNFs to maintain safe temperatures during power outages. CAHNR contends that in March 2019, DPH stopped surveying SNFs for the federal 96-hour fuel supply standard tied to NFPA requirements, claiming the federal standard had been repealed by CMS.
- 4) **OPPOSE UNLESS AMENDED.** The California Association of Health Facilities (CAHF) and LeadingAge California (LA) are opposed to this bill unless it is amended. CAHF and LA contend that the state of California has chronically underfunded SNFs for decades and Medi-Cal reimbursement rates for facilities do not fully cover the cost of care or infrastructure costs for upgraded equipment for facilities. CAHF and LA note that maintaining a “safe temperature” during a power outage will require SNFs to purchase and install a new HVAC system that can connect to back up power, and is a very large cost for facilities. CAHF and LA request an amendment that directs DPH to determine the flexibilities allowed to achieve 96 hours of back-up power and to maintain a safe temperature, and to determine the timeline required for SNFs to install new equipment.
- 5) **CONCERN.** The California Hospital Association (CHA) has written a letter of “Concern” on this bill, and states that if power is interrupted during a heat wave, some alternative strategies that SNFs can use to mitigate risk and ensure their residents’ safety include providing individual fans for residents’ rooms and increasing efforts to keep residents hydrated. CHA states that SNFs can closely monitor their residents’ conditions and, when a resident is identified as high risk or has a deteriorating condition, can get them the treatment they need including, if necessary, transfer to an acute care hospital. CHA asks that DPH provide additional information about the bill’s requirement to maintain a “safe temperature”

and how it will be interpreted and enforced.

- 6) **RELATED LEGISLATION.** AB 2644 (Wood) requires SNFs, during a declared emergency due to a communicable disease, to report each disease-related death to DPH within 24 hours; requires DPH to make the total number of disease-related deaths available on its internet website on a weekly basis. AB 2644 also requires SNFs to have a dedicated infection preventionist, and prohibits a SNF from preventing a Long-Term Care Ombudsman from entering the facility.
- 7) **AMENDMENTS.** Because of the confusion surrounding how to interpret various federal regulations, the Author is proposing to add clarifying language as follows:
- a) To clarify that “alternative sources of power must comply with any applicable federal requirements for long-term care facilities,” and,
 - b) “Consistent with federal standards, facilities shall maintain sufficient fuel onsite to maintain generator operation for no less than 96 hours or make arrangements for fuel delivery for an emergency event. If fuel is to be delivered during an emergency event, the facility shall ensure that fuel will be available with no delays.”

REGISTERED SUPPORT / OPPOSITION:

Support

California Advocates for Nursing Home Reform (cosponsor)
 Long Term Care Ombudsman Services of San Luis Obispo County (cosponsor)
 AARP
 Association of Regional Center Agencies
 California Alliance for Retired Americans
 California Commission on Aging
 California Long-Term Care Ombudsman Association
 California Office of the State Long-Term Care Ombudsman
 California Professional Firefighters
 California Solar & Storage Association
 Capstone Turbine Corporation
 Consumer Attorneys of California
 Consumer Federation of California
 County of Santa Barbara
 Disability Rights California
 National Association of Social Workers, California Chapter

Opposition

None on file

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