September 21, 2018

DOL Proposed Rule – *Expanding Apprenticeship and Employment Opportunities for 16 and 17-Year-Olds Under the FLSA* (RIN: 1235-AA22) – Would Harm Nursing Home Residents

As advocates for nursing home quality and safety, we are deeply concerned about a proposed regulation, now under OIRA review, that we believe would overturn a DOL requirement that protects not only young nursing home workers but also elderly and disabled residents.

Revoking the 2011 DOL Field Memo that prohibits 16 and 17-year-old nursing assistants from operating patient lifts by themselves would recklessly ignore research and experience and turn over one of the most complicated and hazardous jobs in nursing homes to the least experienced workers – those in the age group the National Institute for Occupational Safety and Health says "lack the ability to recognize the risk associated with performing hazardous tasks, such as handling and transferring patients." [1] The most vulnerable and dependent patients in the healthcare system would be at increased risk of injuries that cause pain, broken bones, medical complications, increased disablement, hospitalization and frequently, death.

Two-thirds of nursing home residents depend on wheelchairs for mobility or are unable to walk without extensive support from others. Twenty-two percent have contractures, which restrict range of motion in joints due to deformity, disuse and pain, and 45 percent have dementia.[2] Given these physical and cognitive limitations, many rely heavily or totally on assistance from staff to transfer between their bed, chair, toilet or bath. A national survey of patient safety and adverse events in the use of safe handling equipment concluded that "lifting and moving patients with patient handling equipment should be considered a high risk process [for patients]." [3]

The injuries to nursing home residents from mechanical lifts are documented primarily in annual state survey reports, complaint investigations, newspaper articles and the FDA's MAUDE database; however, we are also fortunate to have the statement of Dr. Penny Shaw, a 16-year resident of nursing homes, which she presented to OIRA August 28. Dr. Shaw's written statement is attached and provides cogent personal examples of why nursing assistants should have experience that a 16 or 17-year-old cannot have acquired – even if one accepts unsupported claims of nursing home providers that nurse aides always receive sufficient training to lift patients safely.

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The following pages summarize reasons that revoking existing restrictions on teenagers performing mechanical lifts, except when an assisting an adult worker at least 18 years old, would be detrimental both to nursing home residents and teenage nursing assistants.

1. Operating patient lifts is hazardous for young workers. The same factors that make the task risky for them also make it hazardous for their elderly patients, whose frailty and comorbidities make falls a major cause of death.

In 2010, the Wage & Hour Division asked NIOSH to assess the risks to 16 and 17-year-olds operating patient lifting devices. The NIOSH report concluded:

- Many teenage workers lack the physical strength to independently manipulate residents when placing slings under them, or to safely manage devices with residents in them.
- Young workers greatly underestimate the dangers associated with hazardous tasks.
- Specific training alone is not sufficient to protect young workers from patient-lifting injuries.[4]

2. If nursing home residents are dropped or mishandled, severe or fatal injuries can occur because of frailty and health conditions that affect posture, balance and mobility, according to the NIOSH report.

The 2011 report cited other factors, in addition to size and weight, that can contribute to the complexity of lifting, moving or positioning residents:

- Recent surgery,
- Feeding tubes and other medical equipment,
- Fragile skin or bones,
- Limited range of motion or ability to assist with the transfer,
- Inability to understand instructions,
- Vision and hearing limitations,
- Confusion, combativeness, propensity to lose balance or fall, and
- Unexpected changes in behavior, weight-bearing ability or balance.[5]

3. Even if experience were not a critical factor in safe transfers, it is unlikely most teenage nursing assistants receive sufficient initial instruction in resident assessment and correct use of, and safe handling with, different types of mechanical equipment; it is even doubtful adult workers assisting them do. Nursing assistants are among the most poorly trained members of the workforce, with annual turnover rates averaging 70 percent.

Federal law requires only 75 hours of initial training – only 16 hours of which must be in a clinical setting – for nursing assistants to learn *all* the skills they will be required to perform. According to a study reported in The Gerontologist, more than 40 percent of nursing homes are in states that require only the federal minimum of 75 hours of initial training. Only 8.7% of nonprofit and 14.4% of for-profit nursing homes exceeded the mandatory annual minimum of 12 hours of inservice, which is associated with better care.[6] Training is often insufficient or not actually provided to all nursing assistants. In January 2014, Arkansas cited an El Dorado nursing home for immediate jeopardy for failing to provide adequate supervision and training of CNAs after a resident fell from a mechanical lift and sustained a laceration to the back of the head.[7] Minnesota cited a nursing home for lack of proper staff training when a resident died in 2017 from injuries incurred while dangling from a mechanical lift that was attached to the ceiling.[8]

4. New federal nurse staffing data based on daily payroll records and resident census are substantiating that nursing hours in most facilities are below accepted minimums – often critically lower; that day-to-day staffing levels fluctuate significantly, especially on weekends, leaving fewer nurses and nursing assistants to care for the same number of residents, and that on some days, one-quarter of facilities do not have a registered nurse on duty for even the single federally required eight-hour shift.[9]
Allowing understaffed nursing homes to assign inexperienced teenagers to handle hazardous tasks by themselves, and not as a junior member of a two-person team where one of the workers is 18 or over, would be ill-conceived and dangerous and should be proscribed, not sanctioned, by federal regulators.

5. Expanding youth employment opportunities is a weak argument for allowing nursing homes to use inexperienced 16 and 17-year-olds in unsafe, difficult and poorly paid jobs.
Under the proposed rule change, many young workers would find themselves:

- Given responsibility for a difficult and complex task that many mature adults fail at because of insufficient training, lack of supervision, lack of staff support, mechanical failures and administrative negligence.
- Made vulnerable to being held accountable for the injury or death of another person – even if the accident was due to their lack of experience, strength and training and not personal negligence.
- Being fired to mitigate their employer's culpability and left with a blemished record that could render them unemployable in healthcare or other fields. [10]

6. Even when there is convincing evidence that nursing assistants were culpable in an injury – usually, because a worker did not follow the resident's care plan or the manufacturer's instructions for a two-person transfer – administrators and supervisors and even owners were often contributory or at fault.
Failure to provide or maintain equipment, provide training or maintain safe staffing levels or professional supervision were often the ultimate cause of an injury or death. These problems would be exacerbated if federal rules encouraged reliance on inexperienced teen nursing assistants working alone. [11, 12]

7. Nursing homes with lift injuries are often substandard in other care practices.
Failure to ensure safe handling during transfers is often a symptom of negligence in multiple practices within the facility or its absentee owner or management company. [13]

8. Last year, CMS gave nursing homes an 18-month moratorium on enforcement of certain new Requirements of Participation designed to help them improve quality, staffing and care practices and avoid adverse events – such as injuries and unnecessary deaths from mishandling of mechanical lifts. Compliance with the new common-sense requirements would provide administrators, supervisors and direct care staff essential information needed for safe patient handling, and the industry's request for a reprieve from implementing the requirements strongly indicates that its members should not be given the additional leeway to employ youthful workers with no experience to perform hazardous procedures.[14] The new regulations require:

- Conducting a facility assessment to evaluate the care required by their residents and the training, experience and skills needed by their staff.
- Implementing a baseline care plan for all residents within 48 hours of admission.

Footnotes and Lift Injury Cases

[1] NIOSH Assessment of Risks for 16- and 17-Year Old Workers Using Power-Driven Patient Lift Devices, Thomas R. Waters, Ph.D., James Collins, Ph.D. and Dawn Castillo, MPH. The report provided the rationale for the 2011 Field Memo prohibiting 16 and 17-year-olds from handling patient lifts without adult supervision.

[2] Nursing Facilities, Staffing, Residents and Facility Deficiencies, 2009 Through 2016, Charlene Harrington, Helen Carrillo, et al., Kaiser Family Foundation, https://www.kff.org/medicaid/report/nursing-facilities-staffing-residents-and-facility-deficiencies-2009-through-2016/.

[3] Implications for patient safety in the use of safe patient handling equipment: A national survey, Christine A. Elnitsky a,b,*, et al., International Journal of Nursing Studies, December 2014, Pages 1624-1633.

[4] NIOSH

[5] NIOSH

[6] CNA Training Requirements and Resident Care Outcomes in Nursing Homes, Alison M. Trinkoff, ScD, RN, FAAN Carla L. Storr, ScD Nancy B. Lerner, DNP, RNBo Kyum Yang, MSN, RN Kihye Han, PhD, RN
The Gerontologist, Volume 57, Issue 3, 1 June 2017, Pages 501–508, https://doi.org/10.1093/geront/gnw049

[7] An LPN at the El Dorado, Arkansas, home where a resident fell told surveyors the facility had once provided a training program for new CNAs at the time they were hired and certified their competency to do lift transfers before they began work, but the program had been stopped more than a year before. The LPN was asked if the CNAs who were hired over a year ago or within the past six months were trained in using the mechanical lift, and she replied, “No, I can't say that they were.“ CNAs who had worked in the facility between three and nine months were asked whether they had been trained to use the mechanical lift, and all replied they had not been trained until after the resident fell. From CMS Form 2567, Statement of Deficiencies, 1/24/2014

[8] Minnesota investigators concluded that the nonprofit nursing home where a resident died had not properly trained staff to supervise residents when they were connected to a lift and did not follow manufacturer guidelines not to leave patients unattended in a lifting position. Two staff members, who had positioned the resident in a lift on a toilet and left her alone to give her privacy, heard screams and found her suspended by the ceiling lift with her buttocks touching the floor.

[9] “It’s Almost Like a Ghost Town.” Most Nursing Homes Overstated Staffing for Years, by Jordan Rau, The New York Times and Kaiser Health News, July 7, 2018. https://www.nytimes.com/2018/07/07/health/nursing-homes-staffing-medicare.html

[10] On Christmas 2015, a newly certified, 21-year-old nursing assistant improperly placed a resident into a mechanical lift without assistance. The resident, who was on a blood thinner, fell and broke both legs. The nursing home did not hospitalize her until the next day, and she died on December 27 with internal bleeding and complications of blunt force trauma. The Boston Globe reported the facility had almost twice the national and state average of falls resulting in major injuries – another resident had been injured in a mechanical lift accident a week before – and was “below average” for nurse aide hours and “well below average” for RNs. Moreover, the

Globe said reports of substandard care – pressure sores, medication errors, poor infection control, inadequate training and short-staffing – were mounting against the facility's parent company, Synergy Health Centers. The nursing home fired the nursing assistant, whom her father described as "devastated." See Death at Wilmington nursing home raises new questions by Kay Lazar, Boston Globe, January 19, 2016. https://www.bostonglobe.com/metro/2016/01/18/death-resident-after-nursing-home-accident-raises-new-concerns-about-company/opPd0TMprgB21WN8Wmd6ZI/story.html

[11] In 2015 in Belleville, Illinois, a resident's tracheostomy tube was ripped out while he was being transferred by a single certified nursing assistant (CNA). A resident told investigators workers regularly transferred residents by themselves because there were too few staff; on the night of the incident, there were only three CNAs for two floors of the home. The resident was hospitalized and two weeks later was still unresponsive. https://www.bnd.com/news/local/article209570444.html

[12] In Amarillo, Texas, the state accused a nursing home in 2010 of failing to properly train a nurse aide to operate a stand-up lift with a hydraulic arm that malfunctioned and began climbing. The resident, who had a curved spine and osteoporosis, was left dangling above the floor with her body extended, and she suffered a spinal fracture and paralysis and died two days later. The machine had an emergency valve that the aide could have automatically activated to lower the lift arm, but she released the stop button instead. Facility maintenance records showed that two months previously, staff had documented that the lift was not working. https://www.google.com/search?q=country+club+nursing+and+rehabilitation+amarillo+resident+died+lift+malfunctioned&client=safari&rls=en&ei=-82AW6fyJefB_Qa72764Dg&start=10&sa=N&biw=1440&bih=800

[13] In June 2014, Iowa cited North Lake Manor for failing to protect residents from harm when an 87-year-old woman fell from a mechanical lift and landed headfirst on a concrete floor. She was diagnosed with bleeding in her skull and died in a hospital the next day. Workers told inspectors the part that malfunctioned appeared to belong to a lift made by a different company. During the investigation, several residents complained to inspectors that the facility was often short-staffed and that they did not receive physical rehabilitation, were left to sit or lie in their urine, and went for weeks without baths. Inspectors confirmed residents' reports. file:///Users/janetwells/Desktop/DOL%20Rule%20on%20Teens%20and%20Lifts/DMR%20Storm%20Lake%20nursing%20home%20fined%20$31,500%20for%20resident's%20fatal%20fall.webarchive

[14] Implications for patient safety in the use of safe patient handling equipment, Op. cit. Responders to the authors' survey repeatedly identified critical measures to ensure patient safety as sufficient staff; staff training; continuous resident assessment; assessment of equipment appropriateness, functions, maintenance and potential hazards; teamwork, and recognition of functional, cognitive and health status of residents.

Attachment: Statement of Penelope Ann Shaw, PhD