



Christine L. Owens
Executive Director

December 11, 2018

www.nelp.org

NELP National Office
90 Broad Street
Suite 1100
New York, NY 10004
212-285-3025

Washington DC Office
2040 S Street NW
Lower Level
Washington, DC 20009
202-640-6520

California Office
2030 Addison Street
Suite 420
Berkeley, CA 94704
510-982-5945

Washington State Office
317 17th Avenue South
Seattle, WA 98144
206-324-4000

Submitted via www.regulations.gov
Ms. Melissa Smith
Director of the Division of Regulations, Legislation and Interpretation
Wage and Hour Division
U.S. Department of Labor, Room S-3502
200 Constitution NW
Washington, DC 20210
Re: RIN 1235-AA22

Dear Ms. Smith:

The National Employment Law Project (NELP) submits these comments in strong opposition to the Department of Labor's Wage and Hour Division's proposed rule: Expanding Employment, Training, and Apprenticeship Opportunities for 16- and 17-Year-Olds in Health Care Occupations Under the Fair Labor Standards Act (83 FR 48737-48748). NELP is a non-profit research and policy organization that for more than 45 years has sought to ensure that America upholds the promise of opportunity and economic security for all workers.

This proposed rule would remove the operation of power-driven patient lifts from the list of activities that the Department's Hazardous Order Number 7 prohibits. It would also repeal the current common sense non-enforcement policy implemented by the Department on July 13, 2011, known as the 2011 Field Assistance Bulletin (2011 FAB).¹ The hoisting devices that are the subject of this proposal are complicated pieces of powered equipment that are used to lift and transfer the most vulnerable patients who cannot bear weight.² The Department's current policy, based upon the current and uncontroverted National Institute for Occupational Health and Safety (NIOSH) recommendations, allows trained 16-and 17 year old teens to operate powered patient hoisting devices "only if they are assisting in the use of lifting devices as a junior member of at least a two person team that headed by an employee who is at least 18 years of age. All members of the team must be trained in the safe operation of the lifting device being used."

¹ https://www.dol.gov/whd/FieldBulletins/fab2011_3.htm.

² <https://www.fda.gov/downloads/medicaldevices/productsandmedicalprocedures/homehealthandconsumer/homeusedevices/ucm386178.pdf>.

Despite the fact that 1) nursing homes have the highest worker injury and illness rate of any industry³, 2) all the scientific evidence concerning young workers clearly documents that it is unsafe for them to use this equipment on their own, and 3) there is absolutely no evidence in this proposal that this policy restricts placement of teens in health care occupations, including apprenticeships, this Administration is proposing to repeal the current policy and allow young workers in nursing homes and hospitals to operate these complicated hoisting devices unsupervised and by themselves. Moreover, the Department has failed to consider the harm to nursing home patients that would result from unsupervised use of patient lifts by 16 and 17 year olds.

It is of deep concern to NELP that in proposing this roll-back of a child labor standard, the Labor Department is ignoring the unchanged and uncontroverted recommendations of the government's own scientists at the National Institute for Occupational Safety and Health (NIOSH).⁴ When NIOSH reviewed the scientific evidence regarding young workers and their safety in using patient lifting devices, it concluded that "many 16- and 17- year old employees cannot safely operate power-driven hoists to lift and transfer patients by themselves." Allowing these young teens to operate mechanical lifts by themselves without adult assistance would "place them at increased risk for serious musculoskeletal injuries."⁵ These injuries are debilitating, and potentially disabling, and could completely derail a young worker's life and career. Given the potential danger involved to both workers and patients, and the lack of any scientific, technical or published evidence that this proposal will actually lead to any increase in training, apprenticeship or employment opportunities for young workers, NELP calls upon the Department to withdraw this proposal and continue to use the current common-sense enforcement policy.

This Proposal Will Increase Injuries to Young Workers and Conflicts with All the Scientific Evidence

The Labor Department administers the Fair Labor Standards Act (FLSA) and the child labor provisions of that law. To protect children from hazardous employment, the FLSA mandates a minimum age of 18 years for specified occupations or tasks found and declared by the Secretary of Labor to be particularly hazardous or detrimental to the health or well-being of children 16 and 17 years of age. There are currently 17 Non Agricultural Hazardous Orders⁶ that restrict employment of children under 18. Child Labor Hazardous Order Number 7 restricts young workers, 16 and 17 years old, from using power driven hoists.

In 2010, the Labor Department updated Hazardous Order No. 7 (HO 7), 29 CFR 570.58, based on a comprehensive study and recommendations by NIOSH of all the Hazardous Orders. The Department had commissioned NIOSH to examine how it "could more fully meet its obligation to protect children without preventing them from engaging in positive

³ <https://www.bls.gov/web/osh.supp.toc.htm>.

⁴ https://www.dol.gov/whd/CL/NIOSH_PatientLifts.pdf.

⁵ Ibid.

⁶ <https://www.dol.gov/whd/regs/compliance/whdfs43.htm>.

employment experiences that could be performed safely and without undue risk.”⁷ The NIOSH study concluded that the Department should update HO 7 to include electric and air hoists under one- ton capacity.⁸ When the Labor Department proposed to update HO 7 with this recommendation, it received three comments, all of which were supportive of this change (75 Fed Reg. 28404, 28434). The Department issued a final rule on May 20, 2010 with this recommended change.

Then in late 2010, the Department received a few requests from nursing homes and their Congressional Representatives to revisit HO 7 and the prohibition on young workers operating patient hoisting devices. Recognizing that manual lifting of patients posed its own safety hazard, and in response to these requests, the Department asked NIOSH to study “the particular risks for 16-17- year olds operating and assisting in the operation of patient lifts.”⁹

NIOSH researchers “explored available data, reviewed relevant scientific literature, and conducted a biomechanical analysis” and concluded their review in 2011 with clear findings and recommendations.¹⁰ Contrary to DOL’s assertion in the proposed rule, NIOSH concluded that, “independent use of power –driven hoists by 16-and 17-year olds would put them at increased risk for serious musculoskeletal injuries.” (83 FR 48741 NIOSH). Further, NIOSH found that:

The physical demands associated with operating floor-based vertical lift device are likely to exceed the maximum recommended strength requirements for many 16-17 year old workers. This conclusion is based on excessive force requirement to place the sling under the patient, as well as excessive forces to push, pull, or rotate a floor-based lift loaded with a patient, especially if the floor is carpeted.

The physical demands associated with operation of a sit-to-stand lift assist device loaded with a patient is likely to exceed the maximum strength requirements for many 16-and 17-year old individuals. This is based on excessive force requirements to push, pull, or rotate a sit-to-stand lift loaded with a patient across the floor, especially if it is carpeted.

The NIOSH review also found that “[t]he scientific literature indicates that most 16-17 year old workers **do not have the ability to properly assess the risks associated** with using power-driven lifts.” (Emphasis added). In addition, NIOSH found that “[s]pecific training is **not sufficient** to protect young workers from patient-lifting related injuries.” (Emphasis added).

NIOSH concluded:

⁷ https://www.dol.gov/whd/FieldBulletins/fab2011_3.htm.

⁸ Although not focused upon in the study, this includes powered driven patient hoists.

⁹ Ibid.

¹⁰ https://www.dol.gov/whd/CL/NIOSH_PatientLifts.pdf.

Based on a review of the relevant scientific literature regarding evaluations of patient handling devices and biomechanical analyses, NIOSH has determined that many 16-17-year old employees cannot safely operate power-driven hoists to lift and transfer patients by *themselves*, although they may be able to safely work as part of a team to assist another caregiver to transfer or move a patient/resident.

And as a result, issued this final recommendation: “It is recommended that two caregivers (one of whom should be an experienced caregiver at least 18 years of age) operate a mechanical lift to transfer a non-weight bearing resident.”

This recommendation, based on scientific evidence, is the basis for DOL’s current policy, which was implemented in 2011 (2011 FAB).¹¹ It allows 16- and 17- year olds to operate patient lifts, but only if they have completed 75 hours of nurse’s aide training, and “only if they are assisting in the use of lifting devices as a junior member of at least a two person team that is headed by an employee who is at least 18 years of age. All members of the team must be trained in the safe operation of the lifting devices being used.” This common-sense policy allows young workers to be trained and gain experience with this potentially hazardous equipment, without exposing them to increased risk of injury. It is based on a robust review of the scientific literature and a thorough biomechanical analysis conducted by the experts at NIOSH.

Over at least the past two decades, all the Hazardous Orders have been based on recommendations from the government’s workplace safety experts at NIOSH.¹² In fact, for over 20 years, up until now, every Administration, both Republican and Democrat, has relied on the expertise of NIOSH to provide a comprehensive review of worker injury data, scientific literature and biomedical analysis, prior to proposing any changes to existing Hazardous Orders. In fact, all the current Hazardous Orders **and** Labor Department policies regarding enforcement of those Orders, are based on NIOSH’s recommendations and conclusions. Not only is this Administration the first in over two decades to ignore the current data, but it did not even ask NIOSH to conduct any risk assessment of this proposed rule.

The proposed rule, which would allow 16 and 17 olds to use this equipment independently, and with no supervision or required safety training, is in contravention of all the science, data, and NIOSH’ findings and recommendations, which the Labor Department has ignored and rejected without any reasoned explanation. Further, the Labor Department provides no new scientific evidence or data, nor any new risk assessment of the current scientific literature to justify this proposed policy change. Instead, the Department mischaracterizes the clear and unrefuted existing scientific evidence that demonstrates that young workers will be at increased risk of injury if HO 7 and the 2011 enforcement policy are rolled back.

¹¹ https://www.dol.gov/whd/FieldBulletins/fab2011_3.htm.

¹² <https://www.cdc.gov/niosh/docs/nioshrecsdolhaz/default.html>.

The Department claims that “best practices” developed by OSHA and other government agencies can help mitigate the risks of using power lifts. However, nothing that the Department cites considers the unique safety risks that are present for youth workers. Indeed, the Department only cites guidance that already existed in 2011 when NIOSH concluded that it was not safe for 16 and 17 year olds to use these lifts on their own. The Department has provided no reasoned explanation why these so called ‘best practices’ should now be given greater weight than the specific NIOSH safety recommendations for youth workers. Indeed, much of the guidance by the Veteran’s Administration and other agencies that the Department cites on using patient lifts states that these devices must be used by two or more workers, regardless of age, in order to be used safely.¹³

Rather, instead of relying on scientific evidence, the Department seems to base its conclusion that 16 and 17 year olds can safely operate patient lifts by themselves almost entirely on two letters from a sum total of three Members of Congress who, based their letters to the Department on an incorrect understanding of the current enforcement policy.

There is No Evidence This Will Increase Apprenticeship, Training and Employment Opportunities for Young Workers in Health Care Occupations

The Department “expects” that this proposed rule will increase employment opportunities for 16 and 17 year olds, yet offers no study or any evidence that supports this expectation. Nor is there any evidence that the provisions of HO number 7 and the current enforcement policy (2011 FAB) unnecessarily restricts programs that train high school students to become nursing assistants (FR CFR 48742).

The Department further claims that the current policy severely restricts employment opportunities for 16-17 - year olds in the health care industry (FR 48739). Yet again, the Department neither references nor includes any studies indicating that the current enforcement policy is a barrier to apprenticeship programs or employment in the health care industry.

The only scant evidence, if it can even be called evidence, that the Department cites to support its claim that current policies are placing burdens on vocational programs attempting to place young workers in health care occupations, is a 2012 draft fact sheet (with redacted segments), by the Massachusetts Department of Health Teens at Work Program.¹⁴ Upon closer examination however, the Massachusetts Department found that any burdens that arose in placement were from “misperceptions” about HO 7 and the 2011 enforcement policy, and uncertainty about what tasks co-op students or other minors could legally perform with powered patient lift assist devices. The fact sheet in no way at all proffered that there were any burdens in placement that arose from the policy itself. Most notably, the fact sheet references a survey of vocational schools that contained responses from a scant 22 programs in which the Massachusetts Department found that

¹³ Generally, this guidance recommends that two to three caregivers are appropriate when lifting or transferring a patient who cannot bear weight.” (83 FR 48743).

¹⁴ <https://www.regulations.gov/document?D=WHD-2018-0002-0015>.

“only about half of the survey respondents had seen the Wage and Hour Division’s Field Assistance Bulletin.” In fact, the MA Teens at Work Project prepared the fact sheet precisely because so many schools and employers did not know about the 2011 new enforcement policy. The fact sheet was prepared to help address the “uncertainty” and clarify the criteria required for teens to use patient lifts, **not** to justify allowing 16 and 17 year olds to use the machines unaided by a trained adult.

The Department claims that this survey found that 23% of survey respondents had to change jobs because of revisions in the law. This survey, however, is unpublished and the Department failed to include the survey in the record of the rule, despite many requests from Congress and the public.¹⁵ The entire purpose of the Administrative Procedure Act’s notice and comment requirement is so that the public can accurately assess the government’s proposed regulations and the facts, evidence and law upon which those proposals are based. But in this case, the Department has failed to provide the public with this survey, upon which it relies quite heavily to support its contention that teens are missing out on training and apprenticeship opportunities. Without information as to the survey methodology, the questions asked, and the quantity and substance of the responses, the public is unable to evaluate the Department’s claim that the DOL 2011 Field Assistance Bulletinⁱ unnecessarily restricts programs that place high school students in health care jobs.

Because DOL would not provide the survey, in early October, NELP filed a records request with the Massachusetts Department of Health and obtained [the survey](#), which is attached to these comments. Having now seen the survey, NELP understands why DOL has been unwilling to provide it to the public. Rather than being done by a professional trained in reliable survey techniques, this one was done via Survey Monkey and had a miniscule number of respondents. There were only 22 respondents to the above-mentioned question – which means five respondents (the 23%) thought the new rules might have increased burdens. However, fully half of these respondents were unaware of the Department’s policy that allowed 16 and 17 year olds to use patient lifts with certain restrictions to protect their safety. Most damning, the Department failed to note in its proposed rule that ten respondents (45%) indicated that the new restrictions had **no** impact on young workers’ opportunities in the health care industry. Indeed, the survey found that other important protective safeguards for young workers, such as restrictions on work hours, had a greater impact on job placement of teens in health care.

The Department also includes a 2011 letter from the American Health Care Association and the National Center for Assisted Living as evidence of the need for this new proposed rule. The letter however, written after the NIOSH recommendation, but before the Department adopted it in 2011, is actually a request for clarification “reflecting the acceptance of the recommendation made by NIOSH pertaining to the ability of individuals who are 16- and 17- years old to participate in the operation of mechanical lifts in nursing facilities. The recommendation, which we fully support, states ‘It is recommended that two caregivers

¹⁵ <https://www.regulations.gov/document?D=WHD-2018-0002-0101>.

(one of whom should be an experienced caregiver at least 18 years of age) operate a mechanical lift to transfer a non-weight bearing resident.”¹⁶

The Department also cites two Congressional letters sent to the agency over 7 years ago as evidence of support for their current proposed rule. However, both letters, Senators Kohl, et al. letter in 2010¹⁷ and Representative Michaud’s¹⁸ letter in 2011, were written before the Department implemented the new (non) enforcement policy (2011 FAB). Neither letter mentions any issue with the 2011 FAB or its conditions for when young workers can use patient lifts. In fact, the new policy implemented in 2011 was written to address their concerns.

The Department claims that stakeholders and legislators have continued to voice concerns. However, there is nothing in the record that indicates any stakeholder concern with the 2011 policy. Further, there have been no stakeholder meetings, no official requests for the public to provide input, nor any other means whereby the public could have provided “significant input.” In fact, the only evidence provided by the Department of public input and bipartisan and bicameral requests since the 2011 policy are just **two** letters from Congressional members from the Wisconsin delegation.¹⁹ There are no post-2012 letters from any Congressional member from any of the other 49 states, the District of Columbia or any of the territories. In addition, one of the two letters from Wisconsin claims, mistakenly, that current DOL policy prohibits 16 and 17 year olds from using these patient lifts at all.²⁰

Moreover, it is ironic that the Department proposes to reverse the supervision requirement of the current policy on the basis of expanding apprenticeship when safety and supervision are at the core of apprenticeship work based learning.²¹ In particular, the Department recognizes that one of the most basic components of an apprenticeship program is supervised work experiences.²² In fact, it is the current policy which mandates that 16-17 year olds who are apprentices in medical settings be given proper supervision and training in using power driven hoists, which is exactly what apprenticeship programs are designed to do.

There is No Evidence Supporting the Department’s Claim that Current Policy Necessitates that Young Workers Manually Lift Patients More Often

The Department also claims that if they do not roll back the 2011 FAB and HO7, then young workers hired into nursing homes will end up lifting patients manually:

¹⁶ <https://www.regulations.gov/document?D=WHD-2018-0002-0003>.

¹⁷ <https://www.regulations.gov/document?D=WHD-2018-0002-0017>

¹⁸ <https://www.regulations.gov/document?D=WHD-2018-0002-0018>

¹⁹ <https://www.regulations.gov/document?D=WHD-2018-0002-0002>;

<https://www.regulations.gov/document?D=WHD-2018-0002-0002>

²⁰ <https://www.regulations.gov/document?D=WHD-2018-0002-0002>.

²¹ https://www.apprenticeship.gov/sites/default/files/2018-09/Accrediting_Organizations_Fact_Sheet.pdf “citing “safety and supervision “ as one of the core elements of an Industry Recognized apprenticeship program.

²² <https://www.apprenticeship.gov/faqs> : “On-the-job learning is conducted in the work setting under the direction of one or more of the employer’s personnel.”

The Department, however, has continued to hear concerns from the public and a bipartisan group of legislators that 16- and 17-year-olds' inability to independently operate such devices decreases their employment and training opportunities in health care occupations; often necessitates those who work in such occupations to manually lift patients—a practice that is more dangerous than using a patient lift. 83 FR 48739

But the record is utterly devoid of any evidence supporting this assertion. There is no evidence in the record of any 'public' concern or any complaints sent to the agency that confirms this assertion at all. In fact, there is no evidence in the record that the current 2011 FAB is restricting young workers from using powered patient lifts to lift patients. The law is clear that rulemaking cannot be made solely on the basis of unsupported assertions such as these. *Business Roundtable v. SEC*, 647 F.3d 1144 (D.C. Cir. 2011).

The Proposed Rule Would Endanger The Most Vulnerable Patients

Notably absent from the preamble in this proposed rule is any discussion or consideration on the impact of repealing current protections on patient safety. Revoking HO 7 regarding patient lifting devices and eliminating the 2011 FAB 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. 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 disability, hospitalization, and frequently death.²³

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 suffer from dementia.²⁴ 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]."²⁵

To assist the Wage and Hour Division in evaluating the risks for patients if young teens were allowed to use these complicated lifts by themselves, we urge the agency to review the serious injuries to nursing home residents from mechanical lifts that are documented in the FDA's MAUDE database (a voluntary database). We have attached a [sample](#) of the

²³ 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

²⁴ *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-residentsand-facility-deficiencies-2009-through-2016/>.

²⁵ 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

serious patient injuries and fatalities caused by power driven patient lifting devices. Here are two samples from 2018:

The resident fell out of the sling while being moved in the lift. When the resident was picked-up, the strap came off the cradle. The resident fell out of the sling backwards, head first. The resident was sent to the hospital via 911 and sustained a laceration to the left back side of the head that required 8 staples.

And:

The patient was being transferred from a bed to a wheelchair, and her back and bottom were in the chair, when the lift tipped forward and the swivel bar hit her in the head... The patient was sent to the hospital where she received x-rays and a CT scan, and it was determined that she had sustained a bruise to her forehead and neck fracture.

The agency should also read closely the comments of nursing home resident Penny Shaw, who states in part:

I have been living in a nursing home for over 16 years, and have experienced many lift emergencies and their resolutions. I want to point out to you how potentially dangerous lift transfers can be...I personally have had probably 300 incidents where the battery has failed, while I'm up in the air. If I am over my bed and the lift will not descend, the bed can be put up to meet me. But if it's a lift that goes up really high, it may be necessary to pull out the emergency valve which releases the lift completely, and drop me the rest of the way. This has to be done carefully to avoid accidents....If the emergency is one where one or more of the legs of the framework does not fully open or close, or if one or more of the wheels is stuck in the opposite direction from which the lift is being pushed, there is also a critical risk of injury. It's a judgment call about how to proceed. It's best to leave legs where they are, if they're open enough for the lift to be stable. For turned wheels, continued pushing slowly might right them, or turning them gently by hand can sometimes be safely done. Force should never be used on either the legs or the wheels, as the lift might be knocked over. . . . "With my best aides, I let them handle potentially dangerous incidents. With inexperienced aides, as I have the expertise, I direct them how to proceed. I doubt that 16 and 17-year olds have encountered lift emergencies, and could resolve them. I'm also fearful teenagers would not respond to my direction in critical situations, putting me at risk of harm. ²⁶

The Department Has Not Legally Justified its Proposed Policy Change

²⁶ <https://www.regulations.gov/document?D=WHD-2018-0002-0064>.

In order for an agency to change a regulatory policy, it must provide a detailed justification for reversing course that “rests upon factual findings that contradicts those which underlay its prior policy” FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009). Absent such justification, an action will be considered arbitrary and capricious and cannot stand. Id. Agency action is arbitrary and capricious if the agency has “offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” Org. Vill. of Kake v. U.S. Dept. of Agric., 795 F.3d 956, 966 (9th Cir. 2015) (quoting Motor Vehicle Mfrs. Ass’n of the U.S., Inc. v. State Farm Mut. Ins. Co., 463 U.S. 29,43 (1983)). Agency action is also arbitrary and capricious if it ignores available scientific evidence. LuLac v. Wheeler, <http://cdn.ca9.uscourts.gov/datastore/opinions/2018/08/09/17-71636.pdf>.

As described in detail above, this proposal provides no reasoned explanation for reversing the 2011 policy allowing 16 and 17 year olds to operate patient lifts only when working with and being supervised by someone over 18. It ignores the report and specific recommendations of NIOSH, the government’s own scientists, concerning young workers safe use of powered patient lifts. There is no new scientific evidence that contradicts or even questions the NIOSH report and recommendations. While the Department appears to base its safety justification on the greater risks that arise from manual lifting, it did not even consider NIOSH’s recommendation that the Wage and Hour Division also consider regulations prohibiting youth less than 18 years of age from manually lifting residents. This surely calls the veracity of its assertion of such concern into doubt. There is no real evidence that a requirement of supervised operation of the lifts impairs apprenticeship opportunities or employment. For all these reasons, this proposal, if finalized would surely be found by a federal court to be arbitrary and capricious in violation of the Administrative Procedures Act.

CONCLUSION

The risk of harm to young workers is too great to abandon the mere and simple requirement that they have adult assistance and supervision when operating machinery that could put them at risk for injuries that could impact their health and well-being, and therefore their career potential, for the rest of their lives. NELP urges the Department to abandon this rule making.

Sincerely,

A handwritten signature in cursive script that reads "Christine L. Owens". The signature is written in dark ink and is positioned above the typed name.

Christine Owens, Executive Director

Attachments:

- Survey by Massachusetts Department of Public Health's Teens at Work Project, 2012, referred to at 83 FR 48742
 - List of Recent Injuries to Patients from Powered Industrial Lifts, from FDA MAUDE data base
-