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December 11, 2018

SUBMITTED ELECTRONICALLY TO:

<http://www.regulations.gov>

Melissa Smith, Director  
Division of Regulations, Legislation, and Interpretation  
Wage and Hour Division  
U.S. Department of Labor  
Room S-3502  
200 Constitution Avenue NW  
Washington, DC 20210

RE: Proposed Rulemaking Titled “Expanding Employment, Training, and  
Apprenticeship Opportunities for 16- and 17- Year Olds in Health Care  
Occupations Under the Fair Labor Standards Act.”  
WHD-2018-0002-0001/RIN1235-AA22

Dear Ms. Smith,

This comment is submitted by the Attorneys General of the States of Massachusetts, California, Delaware, Hawaii, Illinois, Maryland, New Jersey, New York, Rhode Island, Virginia and Washington, and the District of Columbia, in opposition to the United States Department of Labor’s (“Department”) proposed modification to Hazardous Occupation Order 7 (“the Order”), specifically, the rescission of the requirement that 16- and 17-year-olds have a trained adult present when utilizing a power-driven patient lift (RIN 1235-AA22).<sup>1</sup> We oppose the proposed rule change because it is not based on reliable evidence, endangers the health and well-being of both young workers and residents in their care, and is not supported by any evidence that it would improve job or training opportunities for youth.

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<sup>1</sup> 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. 48737 (Sept. 27, 2018), at <https://www.gpo.gov/fdsys/pkg/FR-2018-09-27/pdf/2018-20996.pdf>.

Under the Fair Labor Standards Act (“FLSA”), the Department is charged with determining whether occupations performed by persons under the age of 18 (“youth”) are sufficiently dangerous to the health, well-being or education of said youth to warrant the issuance of a Hazardous Occupation Order prohibiting them from performing certain job-related duties. The Order includes a prohibition on the use of power-driven patient lifts by youth. The Department’s Wage and Hour Division currently will not enforce this prohibition with respect to 16- and 17-year-olds if the following conditions are met: they are assisting a trained adult worker; they have successfully completed the 75 hours of nurse’s aide training required by the Federal Nursing Home Reform Act from the Omnibus Budget Reconciliation Act of 1987 (42 C.F.R. 483.152) or a higher state standard; they do not independently engage in hands-on contact with the patient/resident during the lifting/transferring process or during the pushing/pulling/rotating of the occupied lifting device; they are not already injured; and the employer provides them with a required notice (produced by the Department and detailing for youth what they can and cannot do).<sup>2</sup> However, the Department now proposes removing the prohibition entirely, thus allowing 16- and 17-year-olds to operate a power-driven patient lift without any training or adult supervision.

The Department explains that the proposed rule is intended to “enhance employment, training, and apprenticeship opportunities for 16- and 17-year-olds in health care occupations in the United States while maintaining worker safety.” Yet the Department provides no evidence that allowing youth to operate power-driven patient lifts without training or supervision will improve job or training prospects, and its proposal runs contrary to a 2002 study by the National Institute for Occupational Safety and Health (“NIOSH”) and its own established practices in determining what is or is not a hazardous occupation for youth.

For these reasons, which are stated in more detail below, we urge the Department to withdraw the proposed rule.

#### **A. The Proposed Rule Jeopardizes the Safety of Young Workers and Patients**

The Department asks whether the operation of power-driven patient lifts is “particularly hazardous to 16- and 17-year olds or is otherwise detrimental to their health and well-being.” The answer is yes, and in fact, the Department already has the information it needs to answer this question.

In 1998, after the Department requested that NIOSH perform a review of all Hazardous Occupation Orders, NIOSH issued recommendations related specifically to the Order that were later finalized in 2002.<sup>3</sup> NIOSH ultimately concluded that it is not safe for youth to operate patient lifts on their own.

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<sup>2</sup> Field Assistance Bulletin No. 2011-3 (“FAB”), [https://www.dol.gov/whd/FieldBulletins/fab2011\\_3.htm](https://www.dol.gov/whd/FieldBulletins/fab2011_3.htm).

<sup>3</sup> Thomas R. Waters, Ph.D., James Collins, Ph.D. and Dawn Castillo, MPH, Centers for Disease Control and Prevention, National Institute for Occupational Safety and Health, *NIOSH Assessment of Risks for 16- and 17-Year Old Workers Using Power-Driven Patient Lift Devices* (“NIOSH Assessment”), at 1 [https://www.dol.gov/whd/CL/NIOSH\\_Patientlifts.pdf](https://www.dol.gov/whd/CL/NIOSH_Patientlifts.pdf).

Power-driven patient lifts are utilized to lift and move patients and residents in nursing as well as residential facilities and hospitals. The lifts require that staff place straps under or behind a patient, hook the straps up to the lift, raise the patient, physically move the lift and patient, lower the patient into a new position and then remove the straps and move the lift again.

Injury rates in general for the health care industry, specifically for patient aides, are extremely high, with a significant risk for musculoskeletal injury while using lifts.<sup>4</sup> Because of this, both OSHA and the Veteran's Health Administration recommend that at least two people, regardless of age, operate patient lifts. According to OSHA, resident lifting and repositioning tasks can be variable, dynamic, and unpredictable in nature. In addition, factors such as resident dignity, safety, and medical contraindications should be taken into account.<sup>5</sup> The NIOSH study determined that there were specific concerns related to the use of each type of patient lift, including "(a) excessive forces required to place the sling under the patient and (b) excessive forces required to push, pull, and rotate the fully loaded lifting device along the floor."<sup>6</sup> NIOSH concluded that the use of any form of the power-driven patient lift devices were likely to exceed the maximum recommended strength requirements of many 16- and 17-year-olds.

Among the additional reasons why it is not safe for 16- and 17-year-olds to operate lifts on their own is the fact that youth at these ages have a limited ability to recognize the risks associated with performing hazardous tasks to themselves or their patients. One of the tasks that teenagers are least likely to recognize as hazardous is the operation of power equipment, including hoisting equipment.<sup>7</sup> In fact, fewer than 2% of youth recognize this as a dangerous task.

On top of the limited ability of youth to assess risk, the NIOSH study also noted that many patients/residents are "frail and have health conditions that affect their posture, balance and mobility" and identified additional factors that can contribute to the complexity of moving a patient/resident, including: recent surgery, fragile skin or bones, limited range of motion, inability to see or hear, confusion, combativeness, propensity to fall or lose balance and

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<sup>4</sup> According to the U.S. Bureau of Labor Statistics, the health care/social assistance industry has the highest rate of injuries and the third highest incidence rate (after (1) agriculture, forestry, fishing and hunting; and (2) manufacturing) of industries of any private industry sector. For public sector employees, nursing homes and hospitals have a higher injury incidence rate than correctional institutions or the police. Nursing assistants had among the four highest injury/illness incident rate, with falls, overexertion and violence by persons as the most common leading events. In short, nursing and residential care facilities have some of the highest rates of non-fatal occupational injuries and illnesses of any industry sector. U.S. Department of Labor, Publication No. 3708, Safe Patient Handling: Preventing Musculoskeletal Disorders in Nursing Homes and Bureau of Labor Statistics, <https://www.osha.gov/Publications/OSHA3708.pdf>; U.S. Department of Labor, Survey of Occupational Injuries & Illnesses Charts Package, <https://www.bls.gov/iif/osh0060.pdf>.

<sup>5</sup> Occupational Health & Safety Administration [revised 2009]. U.S. Department of Labor, Guidelines for Nursing Homes: Ergonomics for the Prevention of Musculoskeletal Disorders, [http://www.osha.gov/ergonomics/guidelines/nursinghome/final\\_nh\\_guidelines.html](http://www.osha.gov/ergonomics/guidelines/nursinghome/final_nh_guidelines.html).

<sup>6</sup> NIOSH Assessment, *supra n. 3*, at 6.

<sup>7</sup> *Id.* at 4.

unexpected changes in behavior.<sup>8</sup> NIOSH already determined that youth are less able to perform adequate risk assessments. Nothing has changed since the original NIOSH report to indicate that allowing youth to utilize power-driven patient lifts alone would in any way improve the care of patients or residents needing the lifts. NIOSH also recommended that two caregivers, one of whom is an experienced adult, should work together when utilizing one of the lifts and that “training alone is not sufficient to protect young workers from patient-lifting related injuries.”<sup>9</sup> This recommendation is consistent with OSHA and the Veteran’s Health Administration guidelines which recommend that at least two people operate patient lifts. Nothing has changed since 2002 to make operating power-driven patient lifts safer for either patients or the youth operating them. The use of lifts is complex and lift emergencies are diverse, and so are the resolutions. Supervision by experienced adult staff who have the ability to appropriately assess risk is necessary for safe operation.

The Department now attempts to justify its reconsideration of the safety of the patient-driven power lift by pointing out that only one worker fatality occurred between 2012 and 2016 that was attributed to a patient hoist or lifting harness. This purported justification falls short in two ways. First, the Department fails to address the totality of the injuries sustained by workers utilizing the devices. The rule, as it exists, was not implemented solely to protect against death. It was put in place to protect youth against workplace injury, illness or death, a much broader classification of harm. Second, contrary to the Department’s suggestion, the small number of fatalities during a period when the existing Order was in effect suggest that the Order has made all workers, including young workers, safer, therefore its restrictions should not be relaxed.

In summary, the performance of this specific job duty is not currently any less inherently dangerous to either youth or patients and residents, nor is there any data to indicate that youth have become more able to perform this task without an adult present. Therefore, no modification should be made to the current enforcement prohibition against youth utilizing these lifts without trained adult supervision.

**B. The Proposed Rule Is Not Based On Any Evidence That Job Or Training Opportunities For Youth Would Be Improved**

The Department asserts that the prohibition on 16- and 17-year-olds operating power-driven patient lifts without supervision “hinders health care providers’ ability to care for patients due to lack of staff available to timely move patients.”<sup>10</sup> The Department also argues that the prohibition negatively impacts youth training programs. The Department offers no meaningful support for either justification.

The Department suggests that certain “stakeholders” have indicated that the Order has severely impacted their hiring ability and that it has also inhibited training opportunities in the health care industry. As evidence, the Department points to a “Survey Monkey” conducted by

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<sup>8</sup> *Id.* at 3.

<sup>9</sup> *Id.* at 10.

<sup>10</sup> 83 Fed. Reg. at 48,739.

the Massachusetts Department of Public Health's Occupational Health Surveillance Program. In fact, while the survey results indicate that vocational schools were uncertain about changes to the Order when first effectuated, there is little evidence that respondents reported that actual employment was in any way significantly impacted and the survey did not address employers at all.<sup>11</sup> As part of this very limited and informal survey, only 24 program administrators/instructors indicated that they had a health care services program in which students were placed in hospitals, nursing homes and assisted living facilities. A full half of these respondents were not even aware that the applicable Field Assistance Bulletin actually allows youth to operate power-driven patient lifts under certain circumstances. Only five respondents indicated that they had students who had to change co-ops because of the original modification to the Order, and only two respondents indicated that they had to adjust their curriculum due to a change in the law. These survey results fail to justify a change to the rule.

In fact, in its current FAB related to the use of power-driven patient lifts, the Department specifically discusses questions that arose in the past regarding the business need to staff facilities with 16- and 17-year olds and the potential negative impact on nursing aide education programs. It indicates that "[a]lthough WHD appreciates these concerns, when children ages 16 and 17 are employed, WHD has a statutory obligation under FLSA to ensure that the work is not hazardous or detrimental to their health or well-being." The FAB also discusses that the risk of loss of work-time injuries for nursing aides, orderlies and attendants (all ages) that is almost four times greater than workers at large, impacting the business viability of utilizing youths to perform these tasks.

In short, the Department has already addressed the issue of employment/training and has indicated that any impact of their enforcement policy is mitigated by risk to youth. Nothing has changed to indicate that teen employment and training opportunities have been negatively impacted.

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The Department has provided no reliable evidence to supplant the 2002 NIOSH study that justified the existing rule. In fact, its proposed modification is contradicted by its current FAB, and guidelines issued by OSHA and the Veteran's Health Administration – each of which requires two people to operate patient lifts. The undersigned States urge the Department to rescind its proposed modification to Hazardous Occupation Order 7 which would otherwise risk the health and safety of both youth workers and their patients.

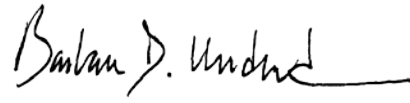
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<sup>11</sup> In response to the survey results, the Teens at Work Project put together a packet of information to assist vocational staff and employers in order to address the lack of knowledge related to the FAB, they did not to take any action related to employment options.

Sincerely,



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Attorney General of Massachusetts



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Attorney General of New York



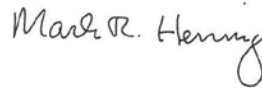
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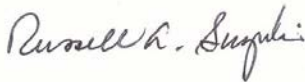
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