

Product Liability ALERT

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DEFENDING CRANE MANUFACTURERS: NEW OSHA CRANE STANDARDS LIKELY TO IMPROVE PRODUCT LIABILITY DEFENSES

Crane manufacturers should welcome the 1,100+ pages of the Occupational Safety and Health Administration's ("OSHA") proposed new crane standards, a major overhaul of decades-old regulations largely based on a long-antiquated version of the American National Standards Institute's B-30.5 standard, that detail new requirements in operator training, inspection, and evaluation of surrounding conditions.

As anyone who defends product manufacturers recognizes, there is only a limited amount of safety that can be "engineered" into a product. At base, safety requires substantial effort on the part of those who use, maintain and train (i.e. employers). Nevertheless, manufacturers are called to defend themselves from product liability claims in expensive litigation following virtually each and every crane accident. The new OSHA crane standards will be helpful to manufacturers in demonstrating that others are in a better position, and legally mandated, to ensure safety. The new standards place increased responsibility on employers and general contractors with control of the site where the crane is being operated, and appropriately so.

As background, the OSHA crane standards do not arise in a vacuum. OSHA solicited input from a vast range of affected companies. Those interests were:

- Crane and derrick manufacturers, suppliers, and distributors.
- Companies that repair and maintain cranes and derricks.
- Crane and derrick leasing companies.
- Owners of cranes and derricks.
- Construction companies that use cranes and derricks.

- General contractors.
- Labor organizations representing construction employees who operate cranes and derricks.
- Labor organizations representing construction employees who work in conjunction with cranes and derricks.
- Owners of electric power distribution lines.
- Civil, structural and architectural engineering firms and engineering consultants involved with the use of cranes and derricks in construction.
- Training organizations.
- Crane and derrick operator testing organizations.
- Insurance and safety organizations, and public interest groups.
- Trade associations.
- Government entities involved with construction safety and with construction operations involving cranes and derricks.

This article outlines major points of the revised crane standards, with a special focus on those that lend themselves to new or improved product liability defenses for crane manufacturers injected into wrongful death or person injury suits involving the estimated 96,000 construction cranes in use per year in the United States.¹ The standards discussed are categorized into three areas: (1) Preventative; (2) Operational; and (3) Environmental.

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¹ The proposed new OSHA crane standards are in a public comment period until January 22, 2009, followed by a public hearing, and then a timetable for implementation.

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Preventative

While the revised crane standards are all intended to be preventative, each of the following sections involve pre-operational actions that OSHA expects will reduce injuries and fatalities in the construction industry: inspections; training; safety devices; maintenance and repair worker qualifications; and equipment modifications.

Inspections

Recognizing inspections as key to injury prevention, the revised crane standards seek to impose uniform inspection schedules with limited equipment-specific inspection requirements. OSHA structured this section “so that the inspection requirements would be triggered by activity (e.g., equipment modification, repair/adjustment, assembly, severe service or equipment not in regular use) and the passage of time (e.g., shift, monthly and annual/comprehensive).” An initial inspection of new equipment is not required because “manufacturers’ quality control and inspection practices are generally effective in ensuring that new equipment does not have deficiencies that constitute safety hazards.” Also, if the manufacturer proscribes a more frequent or more comprehensive inspection, then the manufacturer’s inspection requirements must be followed in recognition of the manufacturer’s expertise regarding its equipment. Finally, wire rope must be inspected with the same frequency as the other crane components – a critical change, as anyone who has litigated a wire rope failure case can attest.

Training

Section 1430 of the revised OSHA crane standard collects and cross-references the various subsections addressing training issues: power line safety [1926.1408(g)]; swing radius hazards [1926.1424(a)(2), 1926.1437(c)(2)(ii)]; crush/pinch points [1926.1430(e)]; tag-out [1926.1430(f)]; qualified persons [1926.1403(d)]; refresher training [1926.1430(g)(2)]; signal person training and re-training [1926.1430(b), 1926.1428(b)]; operator training during the trainee/apprentice, phase-in, and qualification/certification periods [1926.1427(f)(2)(i), 1926.1427(k), 1926.1430(c)(1)]; operator training for boom hoist testing and emergency procedures [1926.1430(c)(2)(i-ii)]; and operator training for capacities of 2,000 pounds or less [1926.1441(e)].

Safety Devices

The following crane safety devices “are so essential and integral to safe equipment operation that [OSHA will now require them to be used because] there is no acceptable alternative to having them in proper working order”:

- Crane Level Indicators – “level equipment is a key factor in ensuring crane and derrick safety”
- Boom Stops (except for derricks and hydraulic booms) – “restrict the boom from moving above a certain maximum angle and toppling over backwards”
- Jib Stops (except for derricks) – “perform the same function for jibs as boom stops perform for booms”
- Foot Pedal Brake Locks (except for portal cranes and floating cranes) – “Such locks are needed to prevent the unintentional disengagement of a foot pedal brake, which could lead to unintended equipment movement and consequent injuries and fatalities. Due to the physical effort needed to keep the pedal engaged, this is particularly important where the brake is applied for long periods of time.”
- Integral Holding Devices/Check Valves – for hydraulic outrigger jacks “to prevent the outrigger jack from collapsing in the event of a hydraulic failure”
- Rail Clamps and Rail Stops (all equipment on rails except for portal cranes) – restrict the equipment from “lifting off” or “moving past a specific point” of the rails

The revised crane standards prohibit operation of the equipment if any of the above safety devices are not in “proper working order.”

Maintenance and Repair Worker Qualifications

OSHA sought to place restrictions of equipment operations during maintenance or repair and to ensure that such maintenance and repair workers are qualified to perform their work. OSHA’s qualification standard for such maintenance workers is not as strict as its requirements for crane operators. Instead, recognizing the comprehensive on-the-job experience of maintenance and repair workers, such workers need only be a “qualified person” (i.e. “a person who by possession of a recognized degree, certificate, or professional standing, or who by extensive knowledge, training, and experience, successfully demonstrated the ability to solve/resolve problems relating to the work, the subject matter, or the project.”)

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Equipment Modifications

OSHA decided to retain the requirement of manufacturer written approval for any crane modifications, but it also addressed situations when a manufacturer does not respond to a request to approve a modification or when a manufacturer is no longer in existence. If a manufacturer declines to review or fails to respond within 30 days, the employer would be permitted to proceed with the modification provided that a registered professional engineer approves the modification, specifies “the equipment configurations to which that approval applies” and modifies “load charts, procedures, instruction manuals and instruction plates/tags/decals as necessary to accord with the modification/addition” – effectively shifting much of the potential liability to the engineer and employer. If a manufacturer has gone out of business and does not have a successor entity, the same requirements apply.

This section also “prohibit[s] modifications or additions which affect the capacity or safe operation of the equipment where the manufacturer, after a review of the technical safety merits of the proposed modification/addition, rejects the proposal and explains the reasons for the rejection in a written response.” OSHA then provides the employer the “opportunity to modify the proposal to address the manufacturer’s objections.”

Operational

Operator Qualification and Certification

Finding that human error is a significant cause of fatal crane accidents and that existing OSHA crane operation training standards (that do not require testing verified by a third party) have resulted in inconsistent degrees of operator knowledge, OSHA will now mandate formal certification/qualification of crane operators. Employers would have four options to ensure that crane operators reach the required skill level: (1) certification by an accredited third-party testing organization; (2) qualification by an audited employer program; (3) qualification through the U.S. military; and (4) qualification through a governmental licensing authority. Experienced crane operators would not be grandfathered.

Manufacturer Procedures

As discussed above, the new standards “would require employers to comply with the manufacturer procedures applicable to the operational functions of all equipment covered by” this standard as another acknowledgement

that “the manufacturer has a high degree of expertise with respect to the capabilities and limitations of the equipment that it has designed and built.”²

As a common-sense catch-all, OSHA mandated that “operators refrain from engaging in any practice that would divert” attention from the crane (e.g., personal cell phone use).

Environmental

Ground Conditions

In an effort to reduce crane tip-over incidents, OSHA’s new standards prohibit the “controlling entity”³ from assembling or using crane equipment “unless ground conditions are firm, drained (except for marches/wetlands), and graded to a sufficient extent so that, in conjunction (if necessary) with the use of supporting materials, the equipment manufacturer’s specifications for adequate support and degree of level of the equipment are met.” These standards shift the responsibility to the controlling entity rather than leaving it to the judgment of the crane operator.

Weather Conditions

Because “wind velocity and weather must be considered so that crane stability and capacity are not compromised,” the new standards require that the crane assembly/disassembly supervisor determine the maximum wind and other weather conditions (e.g., ice) for safe crane operations under the circumstances.

Power Lines

To reduce the number of fatalities resulting from electrical contact with power lines, the standard provides for a variety of employer options for assembly, disassembly, travel and operation of cranes near power lines (e.g., de-energizing and grounding power lines), taking encroachment measures (e.g., a dedicated spotter or proximity alarm), or maintaining minimum clearance distances depending on the circumstances. Additional requirements exist depending on the option(s) chosen.

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² The term “manufacturer procedures” includes “all recommendations by the manufacturer regardless of the format of those recommendations.”

³ Section 1926.1401 defines “controlling entity” as “a prime contractor, general contractor, construction manager or any other legal entity which has the overall responsibility for the construction of the project – its planning, quality and completion.”

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Manufacturers' Defenses Improve

In defending future litigation, manufacturers will be in a better position defensively from the start. Indeed, there may be some suits that never get commenced due to the new standards, and in those that are commenced, perhaps the manufacturer will not be named as a defendant. More likely, however, is that general contractors, as well as maintenance companies, will be named as co-defendants based on alleged violations of the above-referenced OSHA crane standards. In states such as New York, with its construction workplace "Labor Law," such suits are common, and the "Labor Law" case has historically been the easier case for plaintiff's counsel to prosecute. If plaintiffs do not pick up on the nuances of the new standard, it will fall to manufacturer's counsel to name the appropriate parties either as third-party defendants or direct defendants. Presumably, with experience, the plaintiff's bar will pick up on the "new" (or newly highlighted) avenues for recovery outlined by the new standard.

In the discovery phase, well-targeted interrogatories, notices to produce, and requests for admissions may be used to obtain key information and documents about mandated inspections and training, as well as the use or misuse of safety devices. Third-party subpoenas may be served to elicit worker qualifications and to verify mandatory training. Because the majority of the new standards place express responsibility for safety measures on the general contractor or employer, the case against these entities will become streamlined. In addition, organized recordkeeping by crane manufacturers will assist counsel in proving possible deviations from manufacturer procedures or failures to obtain manufacturer approval prior to modification of equipment.

While summary judgment may still remain a challenge to defendant manufacturers, the detail in these new regulations raises the issue of whether this may expand opportunities for the preemption argument. *See, e.g., Gonzalez v. Ideal Tile Importing Co., Inc.*, 184 N.J. 415 (2005). *Gonzalez* involved a plaintiff who was seriously injured when he was struck by a forklift operated by a co-worker. Plaintiff, through an expert, advocated that warning devices other than a horn should have been incorporated into the design of the forklift. OSHA adopts and incorporates the ANSI forklift standard. As the Supreme Court of New Jersey concluded:

"As can be seen, the ANSI standards, do not merely set a mandatory minimum for forklift safety devices, but regulate the universe of warning devices, concluding that the inclusion of warning devices other than an operator-controlled horn, may tend to create more dangers than they prevent and, thus, should depend upon the conditions in which the forklift is used, as determined by the owner/user. Plaintiff urges application of a product liability standard regarding "other" warning devices that, by being more rigorous, attempts not to supplement, but to supplant, OSHA's more discretionary regulation. In short, the result of ANSI's expertise in this area—which OSHA co-opted—was its conclusion that the "other" warning devices, which plaintiff alleges were required to render the forklift safe, actually may tend to create additional dangers in the workplace."

In sum, the Court found "conflict preemption" because compliance with the proposals of plaintiff's expert would violate OSHA. Indeed, preemption applied even though, as anyone who litigates in this field has argued, OSHA applies solely to employers, not manufacturers. Put bluntly, a product which cannot be used by workers is hardly a feasible alternative design.

Finally, in defending a crane manufacturer, being able to cite to employer violations of these preventative, operational, and environmental crane standards should prove to be great assets at trial. If OSHA calls a safety device "essential," that has greater meaning than a witness saying so. When an employer does not comply with mandatory operator training, the manufacturer now has OSHA to point to. If a general contractor alters a crane without consulting the manufacturer, the manufacturer now has a built in defense.

A skilled defense attorney for a crane manufacturer can make very effective use of the new standards. These standards serve the salutary purpose of placing responsibility for accident prevention squarely where it belongs, primarily upon employers and contractors, and not on manufacturers. ♦

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