

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Community Affairs Committee

BILL: CS/SB 1174

INTRODUCER: Regulated Industries Committee and Senator Altman

SUBJECT: Regulation of Hoisting Equipment

DATE: April 9, 2010 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Imhof	Imhof	RI	Fav/CS
2.	Gizzi	Yeatman	CA	Favorable
3.			MS	Withdrawn
4.			WPSC	
5.				
6.				

Please see Section VIII. for Additional Information:

- A. COMMITTEE SUBSTITUTE..... Statement of Substantial Changes
 B. AMENDMENTS..... Technical amendments were recommended
 Amendments were recommended
 Significant amendments were recommended

I. Summary:

This committee substitute (CS) creates s. 489.1138, F.S., to require individuals applying for building permits involving the use of a tower or mobile crane, to provide a site plan and compliance documentation to the local or applicable building official. The CS also requires an operable channel of radio communications between persons operating cranes within the same swing radius.

The CS provides hurricane and high-wind event safety standards for hoisting equipment, requiring use of manufacturer recommendations as a baseline. It also requires a hurricane and high-wind event preparedness plan for on-site tower or mobile cranes to be available for inspection. An intentional violation of this act shall be punishable by the disciplinary provisions under ss. 455.227 and 489.129, F.S.

The provisions of this CS preempt any local laws or permitting requirements that pertain to the regulation of hoisting equipment and persons operating the equipment in the state; however, this section does not apply to the regulation of elevators under ch. 399, F.S., or to maintenance or construction activities related to plant or mining operations at certain facilities.

This CS creates section 489.1138, of the Florida Statutes.

II. Present Situation:

Construction Contracting

Construction contracting is regulated under Part I of ch. 489, F.S. With certain statutory exemptions from licensure, construction contractors are regulated by the Construction Industries Licensing Board (CILB) within the Department of Business and Professional Regulation (DBPR). Contractors must either be certified (i.e., licensed by the state to contract statewide), or registered (i.e., licensed by a local jurisdiction and registered by the state to contract work within the geographic confines of the local jurisdiction only).

The CILB is statutorily divided into two divisions. Division I has jurisdiction over the regulation of general contractors, building contractors, and residential contractors. Division II has jurisdiction over the remaining contractors, often referred to as subcontractors, under the CILB, including roofing, plumbing, mechanical, sheet metal, air-conditioning, pool and spa, solar, pollutant storage systems, and underground utility contractors.

The “scope of work” for which licensure is required is specified in statute by definition. Each definition of the various professions is known as the “practice act” for that profession and establishes the guidelines for the individual practitioners.

Section 455.227, F.S., currently provides grounds for disciplinary action by a board or the Department of Business and Professional Regulation. Such grounds include, among others, violations of any provisions of the applicable professional practice act. Section 489.129, F.S., further specifies grounds for discipline and the disciplinary measures the Construction Industry Licensing Board may take against licensed contractors.

Regulation of Hoisting Equipment (Mobile and Tower Cranes)

Florida currently does not regulate the operation of mobile or tower cranes on construction sites or license crane operators, nor does it provide for hurricane or high-wind event standards or plans relating to on-site crane use.

Federal Occupational Safety and Health Act (OSHA)¹ regulations outline specific requirements for the use of cranes and other hoisting equipment at construction sites, and generally require compliance with either the manufacturer’s specifications for erection, maintenance, and operation of cranes and hoists, or in the absence of such guidelines, compliance with the determinations of a qualified engineer competent in the field.²

Section 18 of OSHA³ provides that a state may assume responsibility for development and enforcement of occupational safety or health standards concerning occupational safety or health issues with respect to which a federal standard has already been promulgated. To do so, the state

¹ 29 U.S.C. ss. 651-78.

² 29 C.F.R. s. 1926.550(a)(1).

³ 29 U.S.C. s. 667.

must submit a plan for the development of such standards for approval by the Administration Secretary.⁴

In *Associated Builders & Contractors Florida East Coast Chapter v. Miami-Dade County*,⁵ the Eleventh Circuit Court held that a Miami-Dade County ordinance regulating the construction, installation, operation, and use of tower cranes was preempted by OSHA with regard to wind load standards for tower cranes and hoists.⁶ It further held that, while OSHA regulations do not expressly provide a national standard for on-site wind load capacity or hurricane and high-wind event plans, they present a principle of law sufficiently intelligible to preempt similar county ordinances.⁷

Because there are no state regulations concerning cranes, any regulations in Florida regarding wind loads for on-site cranes stem from local government ordinances, which, under *Associated Builders*, are pre-empted by federal law if not part of a federally-approved state plan.⁸

III. Effect of Proposed Changes:

The CS creates s. 489.1138, F.S., to establish state-wide standards for tower and mobile crane use at construction sites.

The CS sets forth site plan requirements for construction-site tower or mobile crane use and hurricane high-wind events, and provides specific procedures for on-site crane security in preparation for high-wind events and hurricanes.

Subsection (1) of s. 489.1138, defines the following terms:

- “Hoisting equipment” means power-operated cranes, derricks, hoists, elevators, and conveyors used in construction, demolition, or excavation work that are regulated by the Occupational Safety and Health Administration under 29 C.F.R. parts 1910 and 1926;
- “Mobile crane” means a type of hoisting equipment incorporating a cable-suspended latticed boom or hydraulic telescoping boom designed to be moved between operating locations by transport over a roadway. The term does not include a mobile crane with a

⁴See 29 U.S.C. s. 667(b), “Any State which, at any time, desires to assume responsibility for development and enforcement therein of occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated under section 6 shall submit a State plan for the development of such standards and their enforcement.”

⁵ 594 F. 3d 1321, 1322 (11th Cir. 2010).

⁶ The county ordinance at issue set forth a 140 miles per hour hurricane wind load for tower cranes. The court granted a permanent injunction against county enforcement of the ordinance. It reasoned that OSHA set a federal standard by requiring employers operating cranes or hoists on a job site to comply with manufacturer specifications or limitations set forth by a competent engineer in the field. See *Associated Builders*. It further noted that, since the majority of crane manufacturers have adopted the European Standard 93 mile-per-hour wind load, there is an intelligible principle in requiring employers to use manufacturer specifications. See *id.* Without a state regulation plan approved by the Occupational Safety and Health Administration, Miami-Dade County ordinances concerning wind load standards were pre-empted by OSHA. See *id.*

⁷ See *Associated Builders*. See also *Towne Constr. Co. v. Occupational Safety & Health Review Comm’n*, 847 F.2d 1187, 1189 (6th Cir. 1988) (“[T]he requirement that employers comply with manufacturer’s [sic] load limits is not an unlawful delegation because the manufacturer’s limits reflect the ‘national consensus standard’ that Congress authorized the Secretary to adopt.”)

⁸ See *Associated Builders*.

- boom length of less than 25 feet or a maximum rated load capacity of less than 15,000 pounds; and
- “Tower crane” means a type of hoisting equipment using a vertical mast or tower to support a working boom in an elevated position, where the working boom can rotate to move loads laterally either by rotating at the top of the mast or tower or by the rotation of the mast or tower itself, whether the mast or tower base is fixed in one location or ballasted and moveable between locations.

Subsection (2) requires an applicant for a building permit for construction, demolition, or excavation work involving the use of a tower crane or mobile crane, to submit a site plan to the local building official of the appropriate county, municipality, or other political subdivision.

The site plan must accurately identify:

- The location of the crane;
- Clearances from above-ground power lines;
- The location of adjacent buildings; and
- The structural foundation of the crane.

The CS also requires the applicant to submit documentation of compliance with the requirements of all governmental authorities related to operation of the crane on the work site, including Federal Aviation Administration lighting requirements.

Subsection (3) provides that when two or more mobile or tower cranes are operating within the same swing radius, there must be a clear, independent, and operable channel of radio communications between the crane operators at all times.

Subsection (4) states that when a tower crane or mobile crane is located on a work site, a hurricane and high-wind event preparedness plan for the crane must be available for inspection at the site.

In preparation for a hurricane or high-wind event, the CS requires that hoisting equipment be secured as follows:

- Hoisting equipment must be secured in compliance with manufacturer recommendations relating to hurricane and high-wind events and the placement, use, and removal of advertising banners and rigging;
- Tower crane turntables must be lubricated before the event;
- Whenever feasible, fixed booms on mobile cranes must be laid down;
- Booms on hydraulic cranes must be retracted and stored;
- Hoist counterweights must be locked below the top tie-in;
- Tower cranes must be set in the weathervane position;
- All rigging must be removed from hoist blocks; and
- All power at the base of tower cranes must be disconnected.

Subsection (5) subjects construction contractors licensed under Part I of s. 489, F.S., to the disciplinary procedures provided under ss. 455.227 and 489.129, F.S., for any intentional violations of this act.

Subsection (6) provides that this regulation shall preempt any local act, law, ordinance, or regulation, including the local building codes or permit requirements of a county, municipality, or other political subdivision pertaining to the regulation of hoisting equipment and hoisting equipment operators.

The CS clarifies that this act does not apply to the regulation of elevators under ch. 399, F.S., or to maintenance or construction activities related to plant or mining operations at facilities that have North American Industry Classification System codes 212392, 325188, or 325312.

The provisions of this act shall take effect upon becoming a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

The Supremacy Clause of the U.S. Constitution provides that:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, *shall be the supreme Law of the Land*; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.⁹

The Supremacy Clause applies when state law is inconsistent with federal law. In instances where the state law attempts to invalidate the substance of a federal law or treaty, the state law cannot stand. Similarly, a state law that encourages conduct inconsistent with that required by federal law is invalid. The same result holds if state law forbids conduct that federal law is designed to foster, or interferes with the achievement of a federal objective.¹⁰ This is known as the pre-emption doctrine.

⁹ U.S. CONST. ART. VI, CL. 2. [Emphasis added].

¹⁰ *Perez v. Campbell*, 402 U.S. 637 (1971); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

If the provisions of this bill are not submitted to the Occupational Safety and Health Administration as part of a state plan for safety and health regulation of crane use, it may face preemption by federal OSHA crane safety standards in a manner similar to the Miami-Dade County ordinance ruled federally pre-empted by the Eleventh Circuit Court in *Associated Builders & Contractors Florida East Coast Chapter v. Miami-Dade County*.¹¹

In *Associated Builders*, the Eleventh Circuit Court held that OSHA regulations establish a superseding federal standard relating to wind loads for on-site crane use.¹² Accordingly, any Florida legislation that purports to regulate wind load safety standards for hoisting equipment could be pre-empted by a federal court if not part of a federally-approved state plan.¹³

In reaching its decision, the Eleventh Circuit Court relied on the Supreme Court case of *Gade v. National Solid Waste Management Ass'n*, where a plurality of the Supreme Court held that “nonapproved state regulation of occupational safety and health issues for which a federal standard is in effect is impliedly pre-empted as in conflict with the full purposes and objectives of the OSH Act.”¹⁴

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Contractors will be required to provide additional compliance documentation when they apply for construction permits.

C. Government Sector Impact:

The CS does not require an appropriation and would have a minimal fiscal impact on the affected agencies, outside of costs associated with DBPR’s investigation and prosecution of licensed contractors who violate the provisions of this CS.¹⁵

VI. Technical Deficiencies:

None.

¹¹ 594 F. 3d 1321,1322 (11th Cir. 2010) *citing* The Supreme Court Case *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 102, 112 (1992) (held that “the OSH Act precludes any state regulation of an occupational safety or health issue with respect to which a federal standard has been established, unless a state plan has been submitted.”)

¹² *Id.*

¹³ *See Gade* at 98-100. “The OSH Act as a whole evidences Congress’ intent to avoid subjecting workers and employers to duplicative regulation; a State may develop an occupational safety and health program tailored to its own needs, but only if it is willing completely to displace the applicable federal regulations.”

¹⁴ 505 U.S. 88 (1992).

¹⁵ Department of Business and Professional Regulation, *2009 House Bill Analysis 923 (Identical to 2010 HB 375)* (on file with the House Insurance, Business & Financial Affairs Committee). **Note** HB 375 is the House companion bill to SB 1174.

VII. Related Issues:

None.

VIII. Additional Information:

- A. **Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Regulated Industries on April 7, 2010:

The CS clarifies that the provisions of this CS do not apply to the regulation of maintenance or construction activities related to plant or mining operations at facilities that have North American Industry Classification System codes 212392, 325188, or 325312.

- B. **Amendments:**

None.