

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 992

INTRODUCER: Community Affairs Committee and Senator Dean

SUBJECT: Regulation of Hoisting Equipment Used in Construction, Demolition or Excavation Work

DATE: January 23, 2012 **REVISED:** _____

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|----|---------|----------------|-----------|--------|
| 1. | Toman | Yeatman | CA | Fav/CS |
| 2. | _____ | _____ | RI | _____ |
| 3. | _____ | _____ | BC | _____ |
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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:

The bill creates s. 489.1138, F.S., to establish state-wide standards for hoisting equipment and tower and mobile crane use at construction sites. The bill requires an applicant for a building permit involving the use of a tower or mobile crane to submit a site plan and compliance documentation to the appropriate local building official. In addition, the bill defines various types of hoisting equipment, provides for hurricane and high-wind event preparedness plans, and outlines crane operation safety measures. An intentional violation of this act is punishable under ss. 455.227 and 489.129, F.S.

The provisions of this bill preempt any local laws or permitting requirements pertaining to the regulation of hoisting equipment and persons operating the equipment in Florida. However, this act does not apply to elevators under ch. 399, F.S. or to airspace height restrictions under ch. 333, F.S.

This bill creates section 489.1138, Florida Statutes.

II. Present Situation:

Construction Contracting Regulation and Discipline

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 Industry Licensing Board (CILB) within the Department of Business and Professional Regulation (DBPR).¹ Section 489.115 provides that contractors must either be certified (licensed by the state to contract statewide) or registered (licensed by a local jurisdiction and registered by the state to contract work within the geographic confines of the local jurisdiction only) to engage in contracting in Florida.

The CILB is divided into two divisions: Division I and Division II.² Division I of the CILB has jurisdiction over the regulation of general contractors, building contractors, and residential contractors. Division II of the CILB has jurisdiction over the remaining contractors defined in s. 489.105(3), F.S., which include contractors in sheet metal, roofing, air conditioning, pools and spas, plumbing, underground utilities, solar panels, and pollutant storage systems.

The scope of work for which licensure is required for each type of contractor is specified in the definitions of s. 489.105, F.S. Each definition of a profession is known as the “practice act” for that profession which establishes guidelines for individual practitioners.

Section 455.227, F.S., provides grounds for disciplinary action by profession boards or the DPBR. 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 discipline measures that the CILB may take against licensed contractors. According to the DBPR, violating permit requirements has not been a violation of ch. 489, F.S.³ The DBPR generally gets involved in local building department violations after the local board takes disciplinary action against the contractor and forwards the Order to the department.⁴

Occupational Safety and Health Act and Regulation of Hoisting Equipment

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 (OSH Act)⁵ 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,

¹ See s. 489.103, F.S., for statutory exemptions.

² Section 489.107(4)(a)-(b), F.S.

³ Department of Business and Professional Regulation, *Senate Bill 992 Analysis* (Mar. 3, 2011) (on file with the Senate Committee on Community Affairs).

⁴ *Id.*

⁵ 29 U.S.C. ss. 651-78.

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.⁶

According to the DBPR, crane accidents are generally investigated by the Occupational Safety and Health Administration (OSHA) and their findings are obtained by the DBPR for possible disciplinary action against the contractor.⁷

Section 667(b) of the OSH Act 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 must submit a plan for the development of such standards for approval by the Administration Secretary.⁸

In *Associated Builders & Contractors Florida East Coast Chapter v. Miami-Dade County*,⁹ 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.¹⁰ 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.¹¹

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.¹²

Elevator Safety: Chapter 399, Florida Statutes

Chapter 399, Florida Statutes, known as the “Elevator Safety Act,” establishes minimum standards for elevator personnel to provide for the safety of life and limb and to promote public

⁶ 29 C.F.R. s. 1926.550(a)(1).

⁷ Department of Business and Professional Regulation, *Senate Bill 992 Analysis* (Mar. 3, 2011) (on file with the Senate Committee on Community Affairs).

⁸ See 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.”

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

¹⁰ 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.*

¹¹ 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.”)

¹² See *Associated Builders*.

safety awareness. Section 399.01(6), F.S., defines “elevator” to mean one of the following mechanical devices:

- an escalator,
- a dumbwaiter,
- a moving walk,
- an inclined stairway chairlift,
- an inclined or vertical wheelchair lift, and
- a hoisting and lowering mechanism, equipped with a car and platform that moves in guide rails and serves two or more landings to transport material or passengers or both.¹³

Airport Zoning: Chapter 333, Florida Statutes

Chapter 333, Florida Statutes governs airport zoning in the state. Section 333.01(3), F.S., defines “airport hazard” to mean:

any structure or tree or use of land which would exceed the federal obstruction standards as contained in 14 C.F.R. ss. 77.21, 77.23, 77.25, 77.28, and 77.29 and which obstructs the airspace required for the flight of aircraft in taking off, maneuvering, or landing or is otherwise hazardous to such taking off, maneuvering, or landing of aircraft and for which no person has previously obtained a permit or variance pursuant to s. 333.025, F.S. or s. 333.07, F.S.

A permit from the Department of Transportation (DOT) is required for the erection, alteration, or modification of any structure the result of which would exceed the federal obstruction standards.¹⁴ Airport zoning regulation shall, as a minimum, require:

- a variance for structures exceeding federal obstruction standards,
- obstruction marking and lighting for structures,
- compliance with federal notification requirements for proposed construction,
- criteria for variances, and
- that no variance shall be approved solely on the basis that a proposed structure will not exceed federal obstruction standards.¹⁵

III. Effect of Proposed Changes:

Section 1 creates s. 489.1138, F.S., to establish state-wide standards for tower and mobile crane use at construction sites. Subsection (1) of s. 489.1138, F.S., 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 boom length of less than 25 feet or a maximum rated load capacity of less than 15,000 pounds; and

¹³ Section 399.01(6)(a)-(f), F.S.

¹⁴ Section 333.025(1), F.S.

¹⁵ See s. 333.03(2)(c), F.S.

- “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.

Subsection (2) 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 bill 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.

Subsection (7) stipulates that this section of law does not apply to the regulation of elevators under chapter 399, F.S., or to airspace height restrictions in ch. 333, F.S.

Section 2 provides 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.¹⁶

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.¹⁷ This is known as the pre-emption doctrine.

If the provisions of this bill are not submitted to OSHA 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-

¹⁶ U.S. CONST. ART. VI, CL. 2. [Emphasis added].

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

empted by the Eleventh Circuit Court in *Associated Builders & Contractors Florida East Coast Chapter v. Miami-Dade County*.¹⁸

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.¹⁹ 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.²⁰

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.”²¹

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Construction contractors will be required to provide additional compliance documentation when they apply for construction permits involving the use of a tower or mobile crane or other hoisting equipment.

C. Government Sector Impact:

According to the DBPR, passage of the bill may require the development of a new violation code in their online licensing system, LicenseEase.²² The work effort is estimated at six hours and can be accomplished with existing resources at the DBPR.

VI. Technical Deficiencies:

None.

¹⁸ 594 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.”)

¹⁹ *Id.*

²⁰ *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.”

²¹ 505 U.S. 88 (1992).

²² Department of Business and Professional Regulation, *Senate Bill 992 Analysis* (Mar. 3, 2011) (on file with the Senate Committee on Community Affairs).

VII. Related Issues:

According to the DBPR, the language in the bill at proposed subsection (2), lines 89-92, may be too broad to provide guidance as to which requirements the DBPR would be requested to enforce.²³ In addition, s. 455.223, F.S., grants the DBPR the authority to make inspections only when authorized by statute. SB 992 does not grant such authority but does mention at proposed subsection (4)(b), lines 97-99, that “. . . a hurricane and high-wind event preparedness plan for the crane must be available for inspection at the site.”²⁴

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 Community Affairs on January 23, 2012: Provides that the act does not apply to airspace height restrictions under ch. 333, F.S.

- B. **Amendments:**

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill’s introducer or the Florida Senate.

²³ *Id.*

²⁴ *Id.*