

Looming deadline threatens US showdown

With the expiration date for OSHA's delayed implementation of its contentious rule on crane operator certification looming and no progress made on an amendment, National Commission for the Certification of Crane Operators (NCCCO) CEO Graham Brent has warned that the industry may face the imposition of a flawed regulation.

The US industry has been arguing for some form of national operator certification for more than 20 years. NCCCO was set up in 1995. The organisation and industry lobbied for federal regulation on certification, while building up its own voluntary programme with the support of major contractors, and many regulators at state and municipal level. After a long consultation process, OSHA published a rule including a requirement for operator certification in 2010.

This, however, proved contentious. It included a requirement for certification by crane type and capacity. Moreover, it insisted that certification would be treated as directly equivalent to qualification as defined by OSHA, with no reference to any other assessment of an operator's competence. Neither were the intention of the Crane and Derricks Advisory Committee that had developed the rule at OSHA's request, and both were widely condemned by the industry.

In order to buy time to fix these two issues, OSHA announced a three-year delay in implementing the rule in 2014. This delay will expire on 10 November 2017 and, as things stand, the rule will come into effect as written on that date. The delay was vital as, while OSHA's rule had said that operators should be certified by NCCCO or a similar body, neither NCCCO nor most other accreditation bodies had certified by capacity.

By now, more than 135,000 operators have been certified by NCCCO.

While OSHA subsequently accepted that certification by type and capacity should not be required, defining how to bridge the gap between certification and qualification has proved more complicated.

OSHA first took the unusual step of informally suggesting the likely shape of a new approach in 2015. This was met with more consternation from the industry. At ConExpo, Brent said, "It was not just burdensome on the employer; it was completely unworkable.

"Operators had to be evaluated on every crane. The evaluation had to be performed every six months. If an operator hadn't operated a crane in six months, they had to be evaluated again.

"We had one employer with so many cranes from so many different manufacturers that they had worked out their operators would never be able to go out and work; they would have to spend six months just to pass the evaluation process, and then, as they hadn't been out working, would have to start all over again. After meeting with the industry, and Advisory Committee on Construction Safety and Health, even OSHA got that."

OSHA listened to the industry, and promised that it would soon come back with a new amendment to the rule. That didn't happen.

"They said OK, we'll go back again, and we'll simplify this, and we'll get it out right away. That was in 2015. In 2016, it didn't come out," Brent continued.

"OSHA has a regulatory agenda that comes out twice a year. Each time, it would put this on there with a deadline and, each time, it would go through and revise the deadline. But it still had the expectation that the rule would get published before the change in administration. It went week by week, almost day by

day, until the new president was sworn in.

"Now, OSHA says it is complete within OSHA. Everything OSHA needs to do, it says, has been done. The next step, with this and any regulation, is it has to go through the White House Office of Management and Budget (OMB) review, to determine if the rule is still necessary. It never got into OMB review before the change in administration."

With President Trump in the White House, amending the delayed sections of the rule faces a whole new set of challenges.

The US constitution demands that senior government employees nominated by the president must be approved by the Senate. In modern times, according to the Georgetown Law Library, this includes more than 2,000 appointees.

While this is a challenge for every new president, under President Trump, this process has been particularly lengthy. It took until 15 February for the Senate to confirm Michael Mulvaney as head of the OMB, the body that must assess any regulation for its fiscal impact. President Trump's first nomination for Secretary of Labor, also vital to the implementation of an amended rule, Andrew Puzder, withdrew from contention after opposition from Trump's own Republican party. His replacement as nominee, Alexander Acosta, has yet to be confirmed at the time of writing.

Trump's struggles to confirm senior staff is not the only cause for concern. The president has made clear his opposition to regulation. Here, though, inaction will not mean no regulation; it means delayed regulation widely thought to be bad will come into effect.

Brent said, "It's not that we don't have a rule written, or that it won't come into force. We just have a delay in implementation. The expiration date for that delay is 10 November

2017. Our understanding, based on legal advice, is that if nothing is done, then that rule will come into effect the way it is.

"What that would mean is that everything the industry has been working for since 2010, when the rule was first published, would have been for nothing. All that progress evaporates, and we're right back to where we were when it was first published.

"What people ask is 'what is going to happen?'. What is going to happen is the extension will expire and the existing rule as written will come into force."

OSHA could publish its amendment to the rule at any date. Asked what would happen if OSHA published this amendment in the week ConExpo took place, Brent said, "With just eight months until the rule comes into effect in November, if an amendment to the rule were to be published tomorrow, it would require an extraordinary pace to have it go through the process before the expiration of the delay."

One hope is that OSHA may not enforce the rule. Brent explained, "They could issue an instruction to compliance officers to not enforce. But there's still a process for that."

It is, however, something that Brent views as unlikely: "What's most likely is that OSHA will do nothing and the rule as written will come into force."

What, then, will the industry do? Legal action to try to stop enforcement may be the only answer. "There are legal avenues to pursue. The last thing in the world the industry wants is to be engaged in a legal battle with OSHA. But we have a coalition of ten labour, management and certification bodies that all agree that OSHA is headed in the wrong direction. There is a real concern. If our arguments are falling on deaf ears at OSHA, we may have no alternative but to follow a more aggressive path," Brent concludes.