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The Fall of Residential Construction Rules?

Twenty years ago, the residential construction industry had reached a regulatory crisis. The fall protection rules at the time were confusing and unevenly enforced, leading to the widespread use of such techniques as "fall protection plans" (FPPs), with minimal plans and little protection. Then, Cal/OSHA moved to enforce its rules strictly and began paying surprise visits to worksites under a new program targeting construction sites.

The results were citations, orders prohibiting use, and anger. One meeting in 2002, sponsored by an industry group, drew 400 participants, where industry members confronted Cal/OSHA officials about its enforcement stance. That led to the industry submitting a petition to clear up the regulations, a series of advisory meetings, and finally, in 2004, a revised regulation – Construction Safety Orders §1716.2.

A residential construction project along Franz Kafka Ave. in Santa Rosa. Members of the industry say they are in a Kafka-esque situation with a Fed-OSHA demand that they adhere to a six-foot fall-protection trigger.

For the past 18 years, it has been considered a model of cooperation and regulatory success between Cal/OSHA and stakeholders. More importantly, the statistics show that the rules have proven to promote safety.

But Fed-OSHA doesn't seem to agree. For the past decade, it has demanded that California adhere to a uniform six-foot fall-protection trigger height for construction, with residential construction the first to take the plunge, so to speak.

Ultimately, the Feds want Cal/OSHA to adopt its six-foot rule for all construction. Industry members say the mandate ignores carefully crafted rules without justification, other than, "Six feet is lower than 15 feet." Under §1716.2, 15 feet is the trigger height for residential construction under its carefully considered procedures.

Feds Demands Will Set Back Safety

The Cal/OSHA Standards Board recently announced that it is moving ahead with the six-foot rule and released new draft language. The Board might publish a formal proposal this year.

"What this is doing is basically setting us back in safety 20 years," says Kevin Bland about the Fed-OSHA plan. Bland, an attorney with Ogletree Deakins in Irvine, is a longtime representative of the construction industry, including residential contractors.

"What this is doing is basically setting us back in safety 20 years."
– Kevin Bland

Bruce Wick, director of Risk Management for Housing Contractors of California and a frequent critic of Cal/OSHA's current regulatory process, adds, "Over the last five years, I've had more regulations where I've had to say to my contractors, 'I hope you choose safety over compliance.'" Wick says employers should not be placed in that position. "The Standards Board operates with true dialogue and transparency, but the problem in rulemaking emanates from Federal OSHA and the Division," he comments. Wick and Bland agree that the latest draft is a significant departure from what they thought they had agreed to more than five years ago. It obliterates the 15-foot demarcation and would force any activity higher than six feet to use fall protection.

That could mean widespread use of FPPs and, worse, ladders. Data shows that ladder falls are a continual source of workplace fatalities in California.

How We Got Here

Fed-OSHA's demand that Cal/OSHA adopt a uniform six-foot rule has its roots in a 2010 decision to rescind a federal compliance directive from the 1990s that suspended the agency's six-foot trigger height and allowed alternative procedures, such as FPPs and controlled access zones.

In 2013, the Feds informed Cal/OSHA that it was reviewing state plans for compliance, but the Standards Board pushed back, noting that state plans are not required to "mirror" federal standards but rather to be at least as effective. The Board supported the ☞

residential construction rules in place.

But Fed-OSHA insists that Cal/OSHA's fall-protection regulations are not "ALEA," and demands that the state adopt the six-foot trigger. The Board has had little choice but to acquiesce.

In 2016, the Board published a draft that revised the 15-foot trigger to six feet but kept exceptions for employees walking and working on securely braced joists, rafters, or roof trusses on center spacing no more than 24 inches; and when on installed floor joists. The draft considered floor or roof sheathing protective from interior falls.

It also retained an exception for short-duration and limited-exposure work when installing safety devices equals or exceeds the hazards of the actual work.

Bruce Wick: 'I hope you choose safety over compliance.'

But in the 2022 version released in August, those exceptions are deleted. Fall protection would be required at six feet when walking/working on top plates, joist, rafters, trusses, beams, floors, starter board, roof sheathing, fascia board, outside the gable end truss or rafters, and roof slopes 0:12 to 7:12.

Acceptable fall protection includes scaffolds, guardrails, safety nets, or personal fall protection. Employers would be allowed to use a fall-protection plan with safety monitors and a controlled-access zone if they can demonstrate that the use of conventional fall protection is infeasible.

Wick says the industry accepted the earlier draft as a trade-off, recognizing that having to install fall protection could expose installers to hazards "to protect the perimeter," while at the same time keeping other protections from the 2004 rules. "We were just exchanging who was exposed," Wick says. "And then out of the blue, we get this new proposal that just totally disregarded all the other protections that workers have." Residential worksites are "going to be much more chaotic, and ultimately, much less safe," he predicts.

The Standards Board noted at the 2016 advisory meeting that the draft presented at that meeting was subject to change.

From the Ground Up

Wick and Bland say the reforms from the early 2000s were undertaken with meticulous detail to how framing work is performed and the safest ways to accomplish each phase. The revisions to §1716.2 were crafted with agreement from all sides. The reality of the work was considered as how to achieve safety. "We wanted to create the safest way possible to frame a housing project with the engineering concepts that were available to us … and eliminate the old-school fall protection plans and controlled access" zones, Bland says. "We thought through every single step."

Wick adds, "for two and a half years, industry and Carpenter's Union members met 13 different times. We said, 'We're going to take this thing from the ground up,' every framing operation. What's the safest way to do it?" He notes that the 15-foot trigger that has Fed-OSHA so concerned "is just the demarcation between the first story and second story. The actual fall height is nine feet."

Wick comments, "We know what compliance is and we know what compliance isn't. We can train on it and hold our supervisors and employees accountable for it. We can do enforcement and Cal/OSHA can enforce it easily because compliance and noncompliance is a clear subject. If an employee goes to work for another framing contractor, they will be following the same safe practices."

The metrics indicate that current regulations promote safety, although Fed-OSHA has said that safety metrics aren't determinative.

In 2020, there were three fatalities in single-family home construction but no fatal falls in framing. Cal/OSHA statistics for 2019 don't break out data for framing or single-family homes; There were three fatal falls overall for carpenters. In 2018, there were no fatal falls in single-family home construction, with six overall for carpenters. In 2017, there were zero fatalities for new single-family home construction and five overall for residential building construction.

Fed OSHA's View

Fed-OSHA's reasoning for insisting on a uniform six-foot trigger height for construction throughout the United States is that falls in construction remain one of the leading causes of injuries and fatalities. Most states have adopted the trigger; California is one of the few who have balked, but Cal/OSHA's Division of Occupational Safety and Health supports the change, and the Standards Board, after initially pushing back, has now acquiesced and accepted the demand.

The Feds acknowledge that California has often exceeded federal standards, but former OSHA Deputy Assistant Secretary Jordan Barab said in 2016 that the fall protection trigger for residential construction is one area where California "lags behind almost every state." He stated that nationally, 25% of fatal falls occurred between six and 15 feet in residential construction. "What Barab fails to address is that most of the fatal falls are due to falls from ladders or utilization of fall protection plans," Wick says.

The industry has repeatedly pointed out to OSHA that California's 2004 rules have bucked that trend. "Our enforcement is something we should be proud of," Wick states. "That's part of why we're at least as effective." He adds that Fed-OSHA has not responded to the industry's entreaties. "It's just been frustrating that we haven't been able to get anybody to engage."

They summarize Fed-OSHA's attitude as "Six feet is lower than 15 feet." End of discussion.

Chris Cetin, safety manager for framing contractor Lawrence-Hovenier, Inc., based in Corona, comments that creating

a "uniform height of 15 feet created a clear boundary between one-story work, which would not require the use of scaffolding, guardrails or fall protection." Section 1716.2 "has created a safer work environment," he says. "Everything above the second floor requires fall protection for us. As soon as you raise your exterior walls, you begin setting your perimeter."

> A "uniform height of 15 feet created a clear boundary between one-story work. Everything above the second floor requires fall protection."
> – Chris Cetin

Barab also said that residential builders in other states have testified that there are "means and methods available" to make fall protection above six feet feasible under the Fed-OSHA standard, 29 CFR 501(b)(13).

Bland notes that he and other industry members have traveled to other states to see their techniques "because we kept hearing, 'Well, the Feds are doing it with six foot.'" He says out-of-state contractors meet the requirements with considerable use of fall protection plans, rope grabs, and ladders.

"Some will tie off the framing components, thinking it is compliant," Wick predicts. "In many places, you don't have anything to tie off except at your feet. So, if a six-foot employee falls of a nine-foot edge, they have no protection."

Wick and Bland also criticize the Standardized Regulatory Impact Assessment commissioned by the Department of Industrial Relations for the 2016 version of the rule change. They say that despite their tutelage on the basics of framing to the researcher from Berkeley Economic Analysis and Research (BEAR), which conducted the SRIA, the analysis underestimated the costs associated with the regulation by more than $100 million. They add that the latest changes increase the costs at least threefold.

Both Wick and Bland have called upon DIR to "fix" the SRIA but acknowledge that's unlikely. "I was told it's not going to happen," Wick tells *Cal-OSHA Reporter*.

The proposed changes to §1716.2 have not yet been published for comment, and the earliest that could happen would be about the end of October.