JLC Report

OSHA Moves to Limit Alternative Fall Protection

Near the end of last year, builders got some unexpected — and unwelcome — news from OSHA. As of June 16, 2011, the agency announced, residential builders and subcontractors would no longer be permitted to work under an interim guideline that had effectively exempted them from some provisions of its fall-protection standard. Although not technically a new rule, the change means that residential fall-protection requirements will revert to the more restrictive standard that had been in effect in 1995. Builders who hope to remain compliant with the revised regulations now have about three months to overhaul their fall-protection procedures.

Where we are, and how we got here. In 1994, OSHA enacted Standard 1926.501, subpart M, which laid out fall-protection regulations for the construction industry as a whole. For residential builders, the key section was — and is — 126.501(b)(13), which mandates that employees engaged in residential construction at a height of more than 6 feet above a lower level be protected by guardrails, safety nets, or a personal fall arrest system. (The full text is available at the agency's website, osha.gov.) One exception to the fall-protection requirement was written into the new standard, however: Where an employer could demonstrate that conventional fall protection was "infeasible" or created a "greater hazard," an approved alternative fall-protection method could be used, such as the establishment of controlled access zones off-limits to all but designated trained workers. Employers were required to have a written, site-specific plan that explained exactly why conventional fall protection methods could not be used, and they had to provide details of the alternative approach they planned to use instead.

Recently enacted OSHA restrictions on alternative fall protection are designed to give residential builders a forceful nudge toward conventional fall-protection systems — like the retractable lanyard shown here.

The new standard was vehemently opposed by builder's organizations like the NAHB, as well as groups representing roofers and other subtrades. Complying with the new rules, critics argued, would require excessive paperwork and make routine tasks difficult and time-consuming.

OSHA responded to those complaints in December of 1995, by issuing an interim compliance guideline that backed off on the standard's most contentious provision. Under the temporary guideline, known as STD 3.1 (later

■ The U.S. Senate has voted to repeal a not-yet-enacted tax provision that had been condemned as burdensome to small businesses, including builders. Under the so-called 1099 provision of the 2010 health care reform law, which is scheduled to take effect in 2012, all businesses are required to submit reports to the IRS on every company from which they purchase more than $600 in goods each year. Although the repeal measure must win approval in the House and be signed into law by the White House, final approval is all but certain, as a majority of senators and President Obama have already expressed their support.

■ A recent decision by the South Carolina Supreme Court could leave the state's general contractors more vulnerable to construction-defect lawsuits. The January ruling had its origins in a case where a group of condominium owners sued the builder for water damage caused by poorly installed windows and other defects. Such damages are customarily covered by the builder's general liability insurance, but the insurance company in this case refused to pay, and was in turn sued by the builder. To the surprise of many legal observers, the court ruled that the insurer was within its rights to refuse coverage, since the damage did not result from a "fortuitous event" or "chance." "[The ruling] could bankrupt a lot of builders," the president of the regional chapter of Associated Builders and Contractors told the Charleston, S.C., *Post and Courier.* "It's going to have that effect."

■ Environmentally aware Southern Californians are reportedly snapping up new houses from KB Home that feature "smog-eating" tile roofs. The tiles, made by Irvine, Calif.–based Boral Roofing, contain a titanium dioxide–based catalyst that allegedly converts smog-producing nitrogen oxides into oxygen and nitrates. According to the manufacturer, the soluble nitrates that accumulate on the roofs wash to the ground when it rains, where they serve as a dilute fertilizer for lawns. KB Home has been using the tiles since last summer, and recently began offering them as an extra-cost option on all homes in its Southern California developments, at an average cost of about $800 per house.

replaced by a "plain language" version, STD 03-00-001), builders were permitted to use alternative fall protection at their discretion, without the written, site-specific fall-protection plan called for by the original standard. In principle, builders were to use the interim standard as a grace period to ramp up their fall-protection efforts to the level called for by 1926.501, at which time it would be rescinded and the more demanding requirements of the original standard would again hold sway.

That tipping point was finally reached on December 22 of last year, when OSHA's Advisory Committee on Construction Safety and Health voted to eliminate the 15-year-old temporary measure.

Grim numbers. "Fifteen years of 'temporary' is a long time," says Jeremy Bethancourt, who works as the safety officer for a Scottsdale, Ariz., framing company and serves as a member of the advisory committee. "Folks were so complacent about [the interim guideline] they forgot that it was never supposed to be permanent. And people were dying."

Indeed, falls continue to be the leading cause of death in residential construction. A recent NAHB study of industry deaths found that falls killed more than 600 workers in the period from 2003 to 2006, accounting for about 45 percent of all fatalities. NAHB safety expert Robert Matuga says those figures helped persuade the association to reverse its earlier position and come out in favor of rescinding STD 03-00-001 in a 2008 letter to OSHA. "It was difficult to put your arms around it," he says of the alternative fall-protection rules. "That confusion contributed to the lack of compliance."

Two questions. Everyone agrees that accidents are bad and avoiding conflict with OSHA is good. But for builders trying to figure out what the changed regulatory environment means, two major questions remain.

First, will the alternative fall-protection rules — which now require a written site-specific plan — be so burdensome they become effectively unworkable? And second, if residential builders are to use full fall protection on every job, where will they find the expert guidance they'll need to do so? This last question is particularly pressing for "leading edge" work like setting roof trusses, where no preexisting upper-level anchor points for conventional fall-arrest systems are available.

Infeasible or greater hazard? Under the fall-protection standard that will take effect in June, builders will still be permitted to use an alternative fall-protection approach if they develop a written plan in advance. That option is limited to situations where conventional fall protection — such as guardrails, nets, or harnesses and safety lines — is either "infeasible" or "creates a greater hazard."

"Infeasible," however, is a highly elastic word. Under the interim guideline, it was often interpreted as meaning "inconvenient" or "tending to increase operating costs." And once a builder had concluded that conventional fall protection was infeasible, it was a short additional step to taking the loosest possible view of alternative fall protection. "The interim guideline had basically become a convenient excuse to do nothing," says Bethancourt.

In reviving the requirement for a definite written plan, OSHA is sending a clear signal that "infeasible" now has a much narrower meaning. The agency declined to make anyone available for a telephone interview, but in a written response to a series of questions from *JLC,* an unnamed OSHA official put it this way: "Feasible in this context means 'capable of being done.' While OSHA believes that conventional fall protection is feasible most of the time, there may be circumstances when it is impossible to accomplish the work using conventional fall-protection systems, it is technologically impossible to use conventional fall-protection systems, or the use of conventional fall protection would create a greater hazard to employees ... Generally cost and inconvenience are not acceptable reasons for failing to provide conventional fall protection."

Gray areas. In short, beginning in June, "it's going to be very difficult to make a case for infeasibility," says Matuga. "Fifteen years ago, fall protection was much less available than it is today. There are various kinds of top-plate scaffolding available, and you can go down to Lowe's to buy a safety harness, retractable lanyard, and anchor point for 150 bucks."

Builders who want to use alternative fall protection, Matuga believes, would do better to focus on the "greater hazard" justification. "You might be able to work without fall protection by running up and down ladders all day," he says, "but there's some risk associated with that." (OSHA doesn't

Here's one way to provide fall protection for leading-edge workers during roof framing: Assemble three or more truss sections on the ground (above) and crane them into position, allowing workers to clip into anchor points pre-installed by the truss manufacturer (left).

This rooftop anchor point, installed during framing, is designed to remain a part of the completed structure so that roofers and other workers can use it in the future.

require fall protection for workers on ladders, in most cases.) For example, he suggests, "you might make a case that using an alternative method of fall protection for a much shorter time actually reduces the overall level of risk."

The problem with the "greater hazard" concept is that it may not have a whole lot of life left in it. There may be cases where alternative fall protection is safer than working from a ladder — but under the new rules, it would seem to be an option only if the employer can show that making the task safer yet through some form of conventional fall protection (regardless of cost) is simply impossible. How demanding OSHA will be on this score is unclear. "There are still a lot of gray areas," NAHB's Matuga observes. "It's a source of concern for us."

Thousands of hours. According to Jeremy Bethancourt — whose company, LeBlanc Construction, has had a comprehensive fall-protection program in place since 2007 — alternative fall protection is very seldom needed. "We have an alternative fall-protection plan, and it's a good one," he says. "But in tens of thousands of man-hours, we haven't had to use it yet. We've always been able to use conventional protection."

The company uses a variety of methods, including interior safety nets and moveable staging. When framing roofs, the crew often preassembles, braces, and partially sheathes several trusses at ground level before craning them into position. A preinstalled anchor point — which can be reached from a ladder — protects the first worker at the peak. Another benefit of installing secure anchors during framing, Bethancourt says, is that they are then available to roofers, stucco workers, and other tradespeople, so they don't have to set up additional fall-protection systems of their own.

Getting the fall-protection system up and running took time and effort, says Bethancourt — and it came into being only after a tragic accident. "We lost a worker in a fall on June 15, 2006," he says. "That's when we started partnering with OSHA." In the years since, he says, many of the company's safety practices have been developed by its own employees. "OSHA can tell you if something's safe or not, but they can't design the program for you. Once you convince your workers that you're serious about safety, you're on your way. And to people who complain about costs, I say this: We started our program at the beginning of the worst economic conditions anyone can remember. Four years later, we're still in business, and we're still making money."

Reaching out to small builders. To date, a systematic approach to fall protection has largely been the province of commercial contractors and some big residential builders, who — in addition to being highly visible to OSHA — can spread the cost of a safety program across many employees, reducing per-head costs.

Many small builders and remodelers, on the other hand, do their best to fly below the agency's radar while relying on caution and common sense to stay safe. As far as Bethancourt is concerned, those companies are living on borrowed time. "The less safely you work, and the longer you work unsafely, the more likely you are to think that what you're doing is safe," he says. "The reality is probably that you've just been lucky."

Death and injury statistics seem to support that observation. "Small companies definitely do account for a large percentage of falls and fatalities," says Rob Matuga. "Those are the people we have to reach." Through a grant provided by the Susan Harwood Training Program — an OSHA subsidiary — the NAHB will be conducting a fall-protection seminar in about 40 different cities around the country this spring. The four-hour course will be free (though a small fee may be charged to cover the cost of the meeting space) and open to NAHB members and nonmembers alike. Topics will include identifying fall hazards; developing a written fall-protection plan; protecting stairways, leading edges, wall openings, and floor holes; proper use of personal fall arrest systems; and safe roof truss installations. Participants will also receive fall-protection and scaffold-safety handbooks and videos jointly produced by the NAHB and OSHA. More information on the program is available online at nahb.org/fallprotection.

Regulation fatigue. For builders already grappling with lead-safety rules, the upgraded energy-efficiency requirements now showing up in some state codes, and possible new residential fire-sprinkler requirements, the revised fall-protection rule may seem like one regulation too many. It's tempting to simply ignore the issue and hope it goes away — and in fact the rule change will reportedly not be accompanied by stepped-up enforcement. OSHA told *JLC* that even though the agency will begin enforcing the fall-protection requirements on June 16, there are "no new initiatives underway that would increase OSHA's current enforcement efforts for residential construction."

Still, Matuga has his doubts: He notes that OSHA has been more active under the Obama administration than it has been in years. "The secretary of labor has made it clear that OSHA is back in the enforcement business," he says. — *Jon Vara*