

It's the PITs! **Employer Guide to Forklift Liability in the Workplace**

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INTRODUCTION

Take a look around you.

There's a good chance you work at a facility that uses a Powered Industrial Truck (PIT). OSHA defines a PIT as "any mobile power-propelled truck used to carry, push, pull, lift, stack or tier materials." Most people think of PITs as forklifts. Though forklifts come in many shapes and sizes, they are all regulated under OSHA's PIT standard, 29 CFR § 1910.178. PITs also include manlifts, scissor lifts, boom lifts and motorized hand trucks. Though this article will often refer to forklifts, the requirements apply to all PITs. Earth moving and over the road haulage trucks are not included in the definition of PIT. Equipment that was designed to move earth but has been modified to accept forks are also not included.

Forklifts present many potential hazards: a pedestrian can be struck by a forklift; a load can fall off a forklift onto a person or the operator; the forklift can fall off a ledge or tip if driven on an uneven surface; a forklift can fall between a loading dock and a truck trailer. Frequently, an accident involving a forklift results in serious injury or a fatality. To address these hazards, OSHA sets out a comprehensive set of standards for training, maintenance, and operation of

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forklifts. OSHA also requires initial certification and recertification of forklift drivers every three years. If forklift certifications or maintenance records are falsified, OSHA has a history of seeking criminal sanctions to enforce its standards.

This article will briefly outline OSHA's requirements for use of forklifts in the workplace and will discuss a case where an employer falsified forklift maintenance records, resulting in criminal sanctions.

OSHA'S TRAINING AND CERTIFICATION REQUIREMENTS

OSHA's Powered Industrial Trucks Standard requires that "The employer shall ensure that each powered industrial truck operator is competent to operate a powered industrial truck safely..." The Standard also requires that operators receive training in the topics which are applicable to the safe operation of the truck in the employer's workplace. Employees must be trained separately for each different type of forklift they will be using, but they do not need to complete separate training for the same type of forklift made by a different manufacturer.

The Standard further requires an employer to develop a written program to train all employees who will be required and authorized to operate forklifts as to the hazards of such equipment. Employers must conduct classroom-type training and *actually observe* the employee operating the equipment under the physical conditions at the workplace, such as aisles, ramps, and loading docks. The employer must provide a certificate stating the employee has completed the training. The employee must be retrained and recertified every three years, at a minimum, or after an accident or "near miss" which resulted from an unsafe act.

If contract or temporary workers who are not employed by the host employer are required to operate forklifts, the host employer must take steps to assure that these individuals are properly trained before they are permitted to operate forklifts at the facility. At a minimum, the host employer is responsible for the safety of its own employees. If the operation of forklifts could endanger the host employer's employees, the host employer would be obligated to prevent such danger by satisfying itself that *all* forklift operators have been properly trained. This does not mean that a host employer is required to train forklift drivers who are not its employees. It must, however, ensure that such individuals have been trained in accordance with the PIT standard before they are permitted to operate forklifts at its workplace.

Because OSHA takes training requirements so seriously, it is recommended that all contract and temporary employees be trained and certified by the host employer before being allowed to operate a forklift, even if they received training and certification from another employer. In addition, the host employer should obtain the training and certification documentation from the contract or temporary staffing service company to confirm that it exists and is current if it intends to rely upon it and before allowing the contract or temporary worker to operate the PIT.

The PIT Standard does not specify how long training certifications must be retained after the initial certification or the recertification required every three years or after a "near miss". It is advisable that employers retain the training certifications for the duration of employment for each employee.

If OSHA can establish that training was not provided or that the employees did not understand it because the training is in writing and the employee is illiterate or the training was conducted verbally in a language the employee could not understand, the agency may claim that the certifications are false, resulting in citations or potential criminal liability for the individual who signed the certification as well as the employer.

MAINTENANCE AND INSPECTION REQUIREMENTS

OSHA prohibits operation of forklifts if they are not in safe operating condition. It is recommended that employers conduct an inspection of each forklift at the beginning of each shift and after any maintenance has been done or an accident has occurred. At a minimum, forklifts are required to be inspected daily. While not required, the employer should consider developing and using a written daily checklist to confirm that the operator conducted the daily PIT inspection. The checklists should be reviewed periodically to assure that they are being utilized. In addition, the employer should maintain inspection and maintenance records for at least the duration of the time they own the specific forklift. An inspection should include the following as applicable:

- **Overhead Guard** - Are there broken welds, missing bolts, or damaged areas?
- **Hydraulic Cylinders** - Is there leakage or damage on the lift, tilt, and attachment functions of the cylinders?
- **Mast Assembly** - Are there broken welds, cracked or bent areas, and worn or missing stops?
- **Lift Chains and rollers**
 - Is there wear or damage or kinks, signs of rust, or any sign that lubrication is required?
 - Is there squeaking?
- **Forks**
 - Are they cracked or bent , worn, or mismatched?
 - Is there excessive oil or water on the forks?
- **Tires**
 - What do the tires look like?
 - Are there large cuts that go around the circumference of the tire?
 - Are there large pieces of rubber missing or separated from the rim?
- Are there missing lugs?
- Is there bond separation that may cause slippage?
- **Battery Check**
 - Are the cell caps and terminal covers in place?
 - Are the cables missing insulation?
- **Hydraulic Fluid** - Check level.
- **Gauges** - Are they all properly working?
- **Steering**
 - Is there excessive free play?
 - If power steering, is the pump working?
- **Brakes**
 - If pedal goes all the way to the floor when you apply the service brake, that is the first indicator that the brakes are bad. Brakes should work in reverse, also.
 - Does the parking brake work?
- **Lights** - If equipped with lights, are they working properly?
- **Horn** - Does the horn work?
- **Back Up Alarm** - If equipped with backup alarm, is its functioning?

- **Safety seat** - if the truck is equipped with a safety seat is it working?
 - **Load Handling Attachments**
 - Is there hesitation when hoisting or lowering the forks, when using the forward or backward tilt, or the lateral travel on the side shift?
 - Is there excessive oil on the cylinders?
 - **Propane Tank** - Is the tank guard bracket properly positioned and locked down?
 - **Propane Hose**
 - Is it damaged?
 - Is the connector threaded on squarely and tightly?
 - **Propane Odor** - If you detect the presence of propane gas odor, turn off the tank valve and report the problem.
 - **Engine Oil** - Check levels.
 - **Engine Coolant** - Visually check the level. Note: Never remove the radiator cap to check the coolant level when the engine is running or while the engine is hot. Stand to the side and turn your face away.
(Source: https://www.osha.gov/dte/library/pit/pit_checklist.html)
- Always use a glove or rag to protect your hand.
 - **Transmission Fluid** - Check levels.
 - **Windshield Wipers** - Do they work properly?
 - **Seat Belts** - Do they work?
 - **Safety Switch** - (found on stand up riding tow tractors) Is it working?
 - **Hand guards** - (found on stand up riding tow tractors, walking pallet trucks, walking transtackers) Are they in place?
 - **Tow Hook**
 - Does it engage and release smoothly?
 - Does the safety catch work properly?
 - **Control Lever** - Does the lever operate properly?
 - **Safety Interlock** - (found on order pickers) If the gate is open, does the vehicle run?
 - **Gripper Jaws** - (found on order pickers) Do the jaws open and close quickly and smoothly?
 - **Work Platform** - (found on order pickers) Does the platform raise and lower smoothly.

The PIT Standard lists a number of conditions under which a forklift must be removed from service. If the operator notes these conditions while driving, the operator must stop, park the vehicle and get assistance:

- If the forklift is not in safe operating condition.
- If the forklift emits hazardous sparks or flames from the exhaust system.
- If the temperature of any part of any forklift is found to be in excess of its normal operating temperature.
- If the forklift has a leak in the fuel system.

(Source: <https://www.osha.gov/SLTC/etools/pit/operations/servicing.html>)

If there is a question regarding the safe operation of a forklift, the vehicle must be immediately removed from service until it can be thoroughly inspected and any repairs are made. Similar to falsification of employee training certifications, any falsification of inspection or maintenance records can result in citation by OSHA and possible criminal liability.

The employer must also consider whether the forklift is properly rated to be operated in certain workplace environments, for example, is it rated to operate in an area where flammable or combustible materials are being utilized or stored, to insure that the forklift does not create a source of ignition for flammable or combustible materials.

OPERATOR FITNESS AND DISCIPLINE

As employers should know, there is a duty to enforce compliance with the PIT regulation with discipline for violations, including unsafe operation, failure to inspect, etc. This discipline needs to be in writing in order to remove a non-compliant operator and also to be able to establish the unavoidable employee misconduct defense to a citation. Finally, the employer must monitor whether an operator is fit to operate a PIT because of physical conditions, including vision, hearing and motor skills if there is objective evidence that these conditions are rendering the operator unfit to operate the equipment in a safe manner. In making this determination, the employer must consider the requirements of the Americans with Disabilities Act regarding assessment of the operator's ability to perform the essential functions of the job.

In addition, the employer needs to be observant as to whether the operator is impaired by drugs or alcohol. This can be done by training supervisors on the objective signs of drug or alcohol impairment including speech, coordination, bodily odors, etc. If they are observed, the operator should be taken out of service and the employer should consider sending the employee to be tested for drugs or alcohol. Further, if there has been an accident involving personal injury or property damage, the employer should consider a post accident drug and alcohol test. In either event, the employer should consider establishing a written drug and alcohol testing policy to be able to ensure that the operator is not impaired and creating a safety hazard.

FORKLIFT HAZARDS CREATE CRIMINAL LIABILITY

As previously mentioned, OSHA will seek criminal prosecution if an employer falsifies employee training certifications, inspection records, or maintenance records. In *United States v. Atlantic States Cast Iron Pipe Company*, the conviction of an employer on multiple criminal counts involving EPA and OSHA violations demonstrates how an employer can be exposed to this liability for a conspiracy to defraud OSHA during an inspection.

In *Atlantic States*, the employer was indicted for defrauding OSHA by altering existing conditions at the employer's foundry to conceal safety hazards to which employees were exposed. In March 2000, an employee died after he was run over by the employer's forklift. In the indictment, the government charged that the employer ignored hazards involving forklifts, including brake problems and allowing untrained employees to operate the forklifts.

In addition, after the fatality, the employer took action to deliberately conceal what had occurred from OSHA (perhaps to avoid OSHA citations). The concealment was alleged to include:

- **repairing the forklift brakes after the accident but shortly before OSHA commenced its inspection** (after a workplace fatality OSHA must be notified within eight (8) hours and the accident scene cannot be disturbed until the OSHA inspector has an opportunity to commence the inspection and releases the scene).
- **Conducting a demonstration of the forklift for the compliance officer that was misleading** (since the brakes had been surreptitiously repaired after the accident but before the inspector arrived).
- **Instructing employees to provide false information to the inspector as to how the fatality occurred.**
- **Creating a false written inspection report after the accident which indicated that the forklift had been inspected prior to the accident and was in “perfect operating condition.”**

As a result of its inspection, OSHA identified employees who were willing to testify against the employer as to the foregoing actions, resulting in felony convictions. It is important to note that if the employer had not engaged in these post-accident wrongdoings and OSHA had decided to proceed with its limited criminal prosecution authority under the Act, the employer’s liability would have likely been limited to a misdemeanor; the concealment resulted in much greater liability than the underlying violation.

CONCLUSIONS AND RECOMMENDATIONS

The Powered Industrial Truck Standard is not the most complex or the longest of the OSHA Standards. However, the requirements contained in the PIT standard are often the subject of OSHA Citations and can expose an employer to potential criminal liability if they are not followed. If your company owns a forklift, or any other type of PIT, take a look at your program to ensure all of OSHA’s requirements are satisfied: training and certification of employees, inspection and maintenance of PITs, and accurate recordkeeping. OSHA is not shy about making sure employers follow the PIT Standard; stay one step ahead of OSHA and make sure you are following the rules.

NOTE: If you wish to receive complimentary copies of this article and future articles on OSHA and employment law related topics, please contact Mark A. Lies, II at mlies@seyfarth.com to be added to the address list.