

CONSTRUCTION INDUSTRY SAFETY COALITION

June 10, 2019

VIA REGULATIONS.GOV

Loren Sweatt
Acting Assistant Secretary of Labor
Occupational Safety and Health Administration
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, D.C. 20210

Re: Construction Industry Safety Coalition
Comments to Request for Information; Powered Industrial Trucks
Docket No. OSHA-2018-0008; RIN 1218-AC99

Dear Ms. Sweatt:

I write on behalf of the Construction Industry Safety Coalition (“CISC”). The CISC respectfully files the enclosed written comments to OSHA’s Request for Information on Powered Industrial Trucks, 84. Fed. Reg. 8633 (March 11, 2019). The CISC appreciates OSHA’s consideration of the information and data presented in these comments.

Sincerely,

LITTLER MENDELSON, P.C.



Bradford T. Hammock
Melissa Harclerode

Enclosures

CONSTRUCTION INDUSTRY SAFETY COALITION

Comments to Request for Information on Powered Industrial Trucks

(Docket No. OSHA-2018-0008)

JUNE 10, 2019

C/O LITTLER MENDELSON, P.C.

1650 TYSONS BOULEVARD, SUITE 700, TYSONS CORNER, VA 22102

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**Construction Industry Safety Coalition
Comments to Request for Information on Powered Industrial Trucks
(Docket No. OSHA-2018-0008)**

I. INTRODUCTION

The Construction Industry Safety Coalition (“CISC”) respectfully submits these comments in response to the Occupational Safety and Health Administration’s (“OSHA”) Request for Information (“RFI”) on Powered Industrial Trucks (“PITs” or “forklifts”), 84 Fed. Reg. 8633 (March 11, 2019). Certain types of PITs are frequently used on construction worksites and, thus, CISC members are keenly interested in this RFI. The CISC appreciates OSHA’s consideration of the information and data presented in these comments.

The CISC is comprised of a number of trade associations representing virtually every aspect of the construction industry. The members of the CISC supporting these comments are:

American Road and Transportation Builders Association
American Society of Concrete Contractors
American Subcontractors Association
Associated Builders and Contractors
Associated General Contractors
Association of the Wall and Ceiling Industry
Concrete Sawing & Drilling Association
Construction & Demolition Recycling Association
Distribution Contractors Association
Interlocking Concrete Pavement Institute
International Council of Employers of Bricklayers and Allied Craftworkers
Leading Builders of America
Mason Contractors Association of America
Mechanical Contractors Association of America
National Association of Home Builders of the United States
National Association of the Remodeling Industry
National Demolition Association
National Electrical Contractors Association
National Roofing Contractors Association
National Utility Contractors Association
Natural Stone Council
Natural Stone Institute

Sheet Metal and Air Conditioning Contractors' National Association
The Association of Union Constructors
Tile Roofing Industry Alliance

The CISC was formed several years ago to provide OSHA thoughtful, data-driven comments on regulatory initiatives. By pooling resources and members from the wide range of trades affected by OSHA regulatory actions, the participating construction industry trade associations believe that stronger and more detailed information can be submitted to OSHA during the rulemaking process. The CISC speaks for small, medium, and large contractors; general contractors; subcontractors; union contractors; etc. The CISC has previously submitted comments on OSHA's proposed respirable crystalline silica rule, OSHA's recent proposal to revise its beryllium standard for construction, and OSHA's Standards Improvement Project ("SIPs") IV proposal.

The CISC and its member associations recognize the hazards posed by PITs at construction worksites. PITs are commonly used and the unique nature of construction worksites poses risks that construction employers need to understand and address. The CISC participating associations will continue to take steps to ensure members maintain and operate PITs in a safe manner.

The RFI put forward by the Agency:

requests information and comment on issues related to requirements in the standards on powered industrial trucks for general, maritime, and construction industries. OSHA is seeking information regarding the types, age, and usage of powered industrial trucks, maintenance and retrofitting of powered industrial trucks, how to regulate older powered industrial trucks, the types of accidents and injuries associated with operation of powered industrial trucks, the costs and benefits of retrofitting powered industrial trucks with safety features, and the costs and benefits of all other components of a safety program.

84 Fed. Reg. at 8633. OSHA states that it “will use the information received in response to this RFI to determine what action, if any, it may take to reduce regulatory burdens while maintaining worker safety.” *Id.*

The RFI provides a brief description of the current standards in effect for general industry, maritime, and construction activities and then seeks information on a number of areas including truck operations, maintenance, and training, incidents and injuries, consistency among standards and a variety of economic issues. *Id.*

The CISC’s comments attempt to respond to many of the areas set forth in the RFI. In addition, the CISC makes several important points about how OSHA should proceed with respect to any rulemaking undertaken for powered industrial trucks in construction. The CISC’s comments are divided into several sections. Part II provides a summary of the CISC’s comments. Part III outlines the current standard for PITs in the construction industry. Part IV provides an analysis of data collected by the various associations within the CISC regarding the specific use of powered industrial trucks by individual members. Part V addresses the unique and distinctive use of powered industrial trucks in the construction industry and the need for a separate rulemaking process for PITs in the industry that is led by OSHA’s Directorate of Construction (“DOC”). And Part VI discusses other critically important aspects of PITs in construction that must be considered by OSHA in determining whether to proceed into rulemaking in this area.

II. SUMMARY

OSHA promulgated its standards on powered industrial trucks in 1971 pursuant to Section 6(a) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 et seq. (“OSH

Act” or “Act”). For construction, those requirements are found in 29 C.F.R. § 1926.602(c) and (d) and cross reference ANSI B56.1-1969, “Safety Standard for Powered Industrial Trucks.” In 1989, OSHA promulgated additional requirements for operator training and certification for PITs.

The CISC appreciates OSHA publishing the RFI and seeking feedback at this early stage as to whether to proceed into rulemaking to update its PIT requirements. In response to the RFI, the CISC prepared and distributed a survey to members regarding PIT use and other issues raised by the *Federal Register* notice. The CISC received 277 responses. The responses showed heavy use of PITs in construction, largely rough terrain forklifts. But, they also showed few injuries related to PIT use, as well as substantial compliance with OSHA’s PIT operator training requirements.

The CISC strongly believes that any rulemaking that the Agency undertakes to review the PIT standards for construction should be pursued separately from a general industry/maritime rulemaking and should be led by the DOC. This rulemaking is well suited to the expertise of the DOC, which has a keen understanding of the unique aspects of the construction work environment and the challenges faced by contractors in same. The DOC will also work closely with the Advisory Committee on Construction Safety and Health (“ACCSH”) to ensure that its expertise is shared with Agency policymakers.

As OSHA is considering whether and how to proceed with rulemaking in this area, the CISC also wishes to emphasize the following important considerations:

- The appropriate baseline consensus standard for PITs in construction is not ANSI B56.1a-2018, but is ANSI B56.6-2016, “Safety Standard for Rough Terrain Forklift Trucks,” which addresses rough terrain forklifts, the predominate vehicle used in

construction. The RFI does not even mention ANSI B56.6 and, at least with respect to construction, it is that standard that should educate the Agency with respect to appropriate requirements.

- Before engaging in any rulemaking on PITs in construction, OSHA must first notify the U.S. Small Business Administration's ("SBA") Office of Advocacy and convene a Small Business Advocacy Review Panel under the Small Business Regulatory Enforcement Fairness Act ("SBREFA") to elicit views of small contractors on the requirements and OSHA's proposed approach. The Agency should pursue this, even if the proposal itself is not anticipated to have a significant impact on a substantial number of small entities.
- OSHA must carefully review injury data in construction before proceeding with rulemaking to determine if additional requirements are truly necessary, particularly given the very few reported injuries related to forklift use from the CISC survey.
- OSHA must specifically consider the multi-employer construction environment – and its unique challenges with PITs – in determining any regulatory or non-regulatory approach to the issue. The multi-employer worksite remains one of the most significant and important differentiators between construction and general industry/maritime, and this must be thoroughly considered in any review of PIT safety.
- OSHA should be very hesitant to change existing operator training requirements absent substantial evidence warranting such a change. The CISC survey found almost 100% compliance with existing operator training requirements. These have

generally been effective in construction and OSHA should be hesitant to revise them at this time.

- And finally, OSHA should limit reliance on manufacturer’s instructions when promulgating any requirements and refrain from “incorporating by reference” those instructions into OSHA standards. The CISC has objected to such a practice in the past, which only leads to ambiguity and confusion by the regulated community.

III. CURRENT STANDARDS REGARDING POWERED INDUSTRIAL TRUCKS IN CONSTRUCTION

OSHA’s current standards for PITs in construction are found in 29 C.F.R. § 1926.602(c) and (d). Paragraph (c) describes a few basic requirements. For example, it (1) prohibits modifications or additions to PITs without the manufacturer’s written approval (29 C.F.R. § 1926.602(c)(1)(ii)), (2) prohibits unauthorized personnel from riding on PITs (29 C.F.R. § 1926.602(c)(1)(vii)), and (3) sets forth additional precautions that must be met when using PITs to lift personnel (29 C.F.R. § 1926.602(c)(1)(viii)). In addition, it includes a general requirement that “all industrial trucks in use shall meet the applicable requirements of design, construction, stability, inspection, testing, maintenance, and operation, as defined in American National Standards Institute B56.1-1969, “Safety Standards for Powered Industrial Trucks.” 29 C.F.R. § 1926.602(c)(1)(vi). Paragraph (d) incorporates the PIT operator training requirements from general industry, 29 C.F.R. § 1910.178(l), by reference and applies them to construction operations. 29 C.F.R. § 1926.602(d).

In the RFI, OSHA briefly describes these standards and notes that they were adopted in 1971 under Section 6(a) of the OSH Act. 84 Fed. Reg. at 8638. OSHA also highlights the provision above incorporating by reference ANSI B56.1-1969, and states: “[t]hus, by

incorporating by reference the same 1969 ANSI standard that was the source document for the general industry standard at 29 CFR 1910.178, the powered industrial truck construction standard imposes identical powered industrial truck requirements on the construction industry as applied to general industry.” *Id.*

The general industry requirements in 29 C.F.R. § 1910.178 contain safety requirements relating to fire protection, design, maintenance, and use of fork trucks, tractors, platform lift trucks, motorized hand trucks, and other specialized industrial trucks powered by electric motors or internal combustion engines. The current standard lists eleven different designations of industrial trucks or tractors, as follows: D, DS, DY, E, ES, EE, EX, G, GS, LP, and LPS. 29 C.F.R. § 1910.178(b). The standard also requires regular daily inspections of all powered industrial trucks before being placed in service. 29 C.F.R. § 1910.178(g)(7). Further, the OSHA standard provides extensive guidelines for safe travel practices while operating powered industrial trucks, load handling, and fork positioning on the trucks.

While OSHA correctly identifies 29 C.F.R. § 1926.602(c) and (d) as containing the relevant requirements for PIT use in construction, the CISC does not necessarily agree with the Agency that through the reference to ANSI B56.1-1969, the “construction standard imposes identical powered industrial truck requirements on the construction industry as applied to general industry.” 84 Fed. Reg. at 8638.

First, the cross-reference states that only “applicable” requirements in ANSI B56.1-1969 must be followed in construction. It is unclear exactly which requirements in ANSI B56.1-1969 are “applicable” to the construction environment. In fact, as set forth below, current versions of that standard *are not at all* applicable to the types of forklifts commonly used on construction worksites, such as rough terrain forklifts.

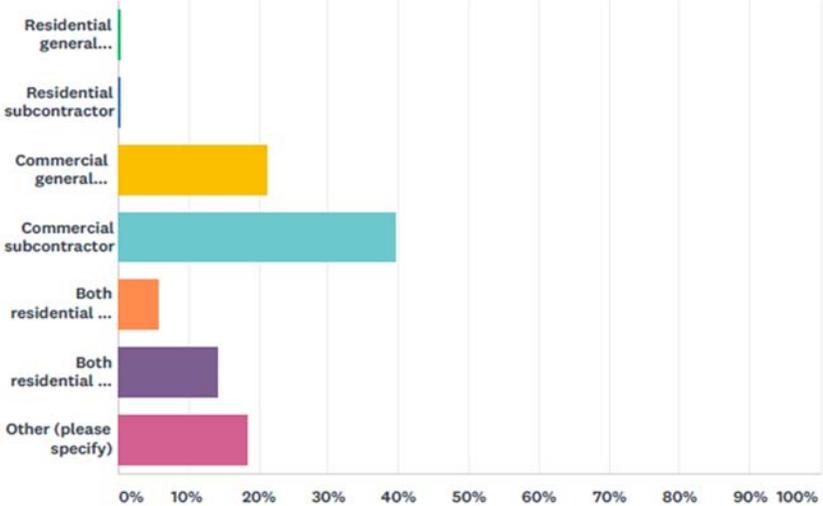
Second, while there is significant overlap between the provisions in ANSI B56.1-1969 and the language of 29 C.F.R. § 1910.178, the requirements are not “identical.” The regulatory language is different and certain provisions in ANSI B56.1-1969 are not included at all in 29 C.F.R. § 1910.178. *Compare* 29 C.F.R. § 1910.178(p) (“Operation of the truck”) with ANSI B56.1-1969 Paragraph 606 (“Operator Care of the Truck”) and 29 C.F.R. § 1910.178(q) (“Maintenance of industrial trucks”) with ANSI B56.1-1969 Section 7 (“Maintenance Practices”). A small construction employer who reads the Code of Federal Regulations and then purchases ANSI B56.1-1969 and follows the requirements in that document will not be following the “identical” requirements in 29 C.F.R. § 1910.178.

IV. CISC MEMBER DATA ON USAGE OF POWERED INDUSTRIAL TRUCKS

In response to OSHA’s request for information, data, and comments, the CISC developed and distributed a survey to its associations and members. The survey results are attached as Exhibit 1 and are summarized here. Approximately 277 members submitted survey responses, providing CISC with a substantial amount of data regarding powered industrial trucks across the spectrum of construction industry employers. Of the employers that submitted responses, over half of them, 148 out of 277, are commercial subcontractors (53.4%). Of the 148 commercial subcontractors, 109 of them work only in the commercial industry, and 39 of them work in both the commercial and residential spaces. The next largest group are the 59 commercial general contractors, 16 of which work in both commercial and residential spaces. The remaining members are generally utility and heavy industrial and civil contractors.

Q1 What type of business, and in what area of the construction industry do you operate?

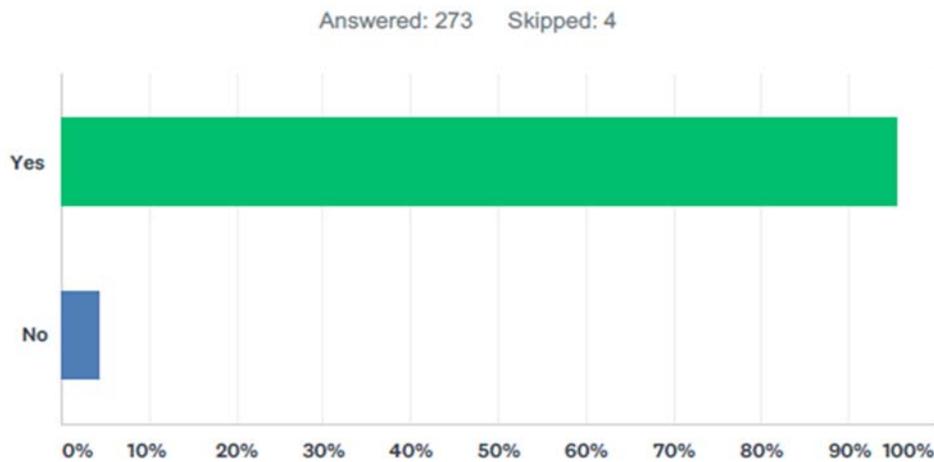
Answered: 276 Skipped: 1



ANSWER CHOICES	RESPONSES	
Residential general contractor	0.36%	1
Residential subcontractor	0.36%	1
Commercial general contractor	21.38%	59
Commercial subcontractor	39.49%	109
Both residential and commercial general contractor	5.80%	16
Both residential and commercial subcontractor	14.13%	39
Other (please specify)	18.48%	51
TOTAL		276

Powered industrial trucks are extremely prevalent in the construction industry based upon the CISC survey data. An overwhelming 261 of the 277 members that submitted survey responses (95.6%) use powered industrial trucks in their business. Not only do most construction industry employers use powered industrial trucks in their business, most employers use them more than 10 times a month (76.4%).

Q2 Do you use any powered industrial trucks (i.e., forklifts) in your business?

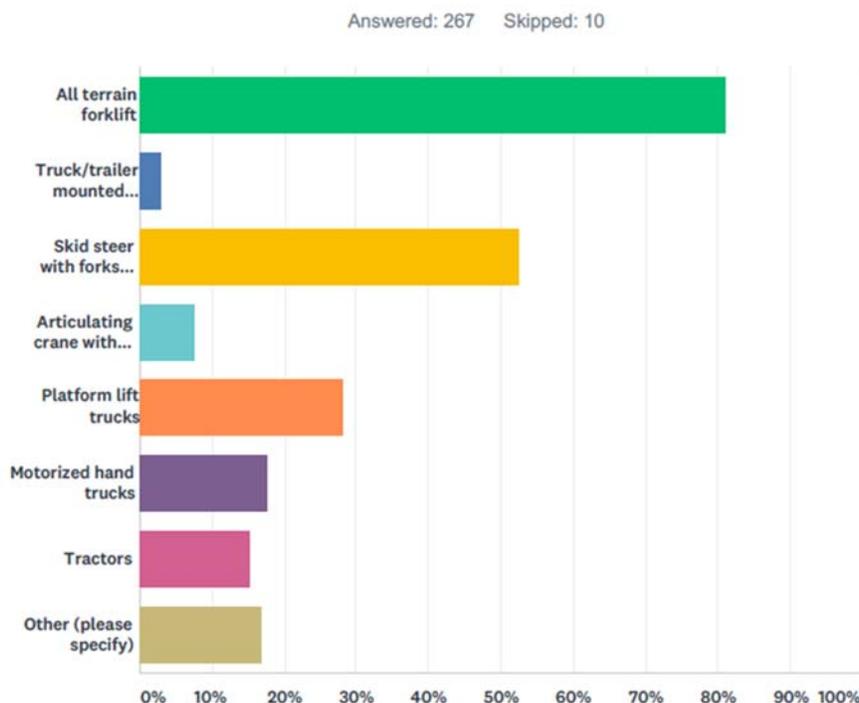


The CISC survey results show that a large majority (81.3%) use all-terrain forklifts, indicating that this is the most commonly-used powered industrial truck in the construction industry. Skid-steer loaders with forks attached are also quite common, with 52.4% using these powered industrial trucks as well. The third most common type of powered industrial truck, platform lift trucks, are used by 28.1% of the responding members. Motorized hand trucks and tractors are both utilized by around 16%. Other powered industrial trucks used by

the survey respondents include:

- Rough terrain/Straight mast forklifts;
- Truck/trailer mounted (piggyback 3-wheel) forklifts;
- Articulating crane with forks or cradle assembly;
- Towmotor/Warehouse forklifts; and
- Loaders/Backhoes with attached forks.

Q3 If “yes” in question 2, what type(s) of forklifts do you use? (Check all that apply)

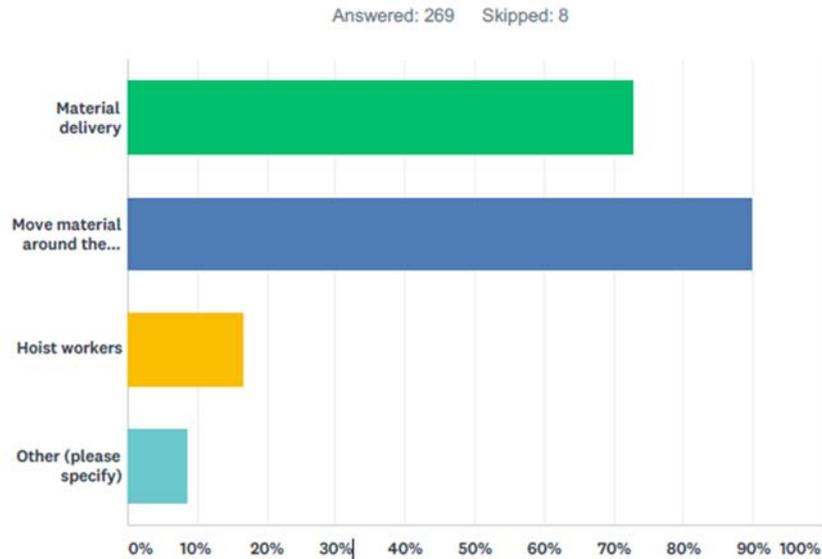


Construction employers mostly operate on jobsites in outdoor environments (at least for a large part of the construction process). Therefore, the types of powered industrial trucks used in the construction industry is generally geared towards outdoor activities. This contrasts with how powered industrial trucks are often used in general industry, where many trucks are used in warehouses and operate in tight spaces. Accordingly, the potential safety and health concerns regarding powered industrial trucks in general industry are quite different from those presented on construction jobsites (*see* discussion in Section V below).

Powered industrial trucks are mostly used for two main functions in the construction industry according to the survey: (1) material delivery; and (2) transportation of material around a jobsite. Approximately 90% of CISC members that submitted a survey response use

powered industrial trucks to transport material around jobsites and approximately 72.9% use powered industrial trucks to deliver material. A much smaller number of employers (just 16.7%), indicated that they use powered industrial trucks to hoist workers.

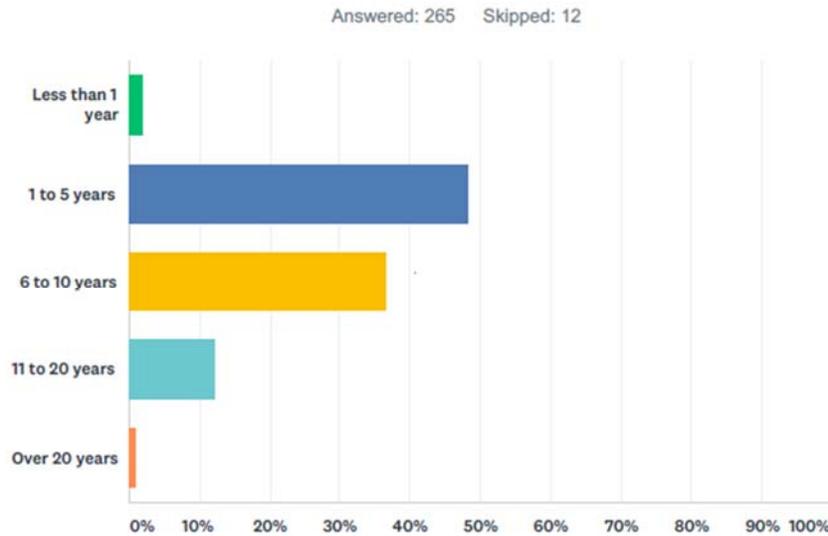
Q5 What are the forklifts used for in your business? (Check all that apply)



As for the age of the powered industrial trucks being used in the construction industry, while 48.3% of the responding CISC members use powered industrial trucks that are 1 to 5 years old, at least 36.6% of the respondents are also using 6 to 10 year old machines. Many CISC members are able to use slightly older equipment because they rely on regular maintenance and equipment inspection to lengthen each machine's lifespan. Indeed, 12.1% of the survey respondents are using equipment that is 11 to 20 years old. OSHA has asked for comments on the feasibility and cost of retrofitting older powered industrial trucks with new safety measures; retrofitting older equipment will inevitably cost more than retrofitting newer

machines. This survey data clearly demonstrates that retrofitting may come at an extremely high cost in the construction industry and places a significant burden on small employers.

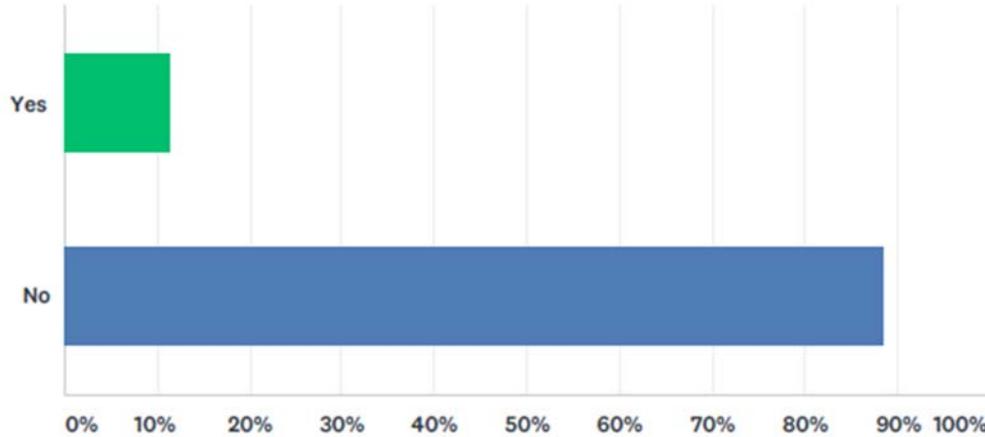
Q6 On average, what is the age of the equipment being used?



With respect to the rates of injuries, CISC survey respondents indicated that at least 90% did not have any injuries or incidents involving powered industrial trucks in the last five years. Of the remaining 10% that did report an injury or incident, only three employers reported an employee being struck by or falling off a powered industrial truck. Of course, no injury is acceptable and all employers must strive to prevent any injury or illness at the worksite. However, given the wide spread use of PITs throughout construction as indicated by the survey, the overall rate is low.

Q9 Have there been any incidents or injuries during use in the last five years?

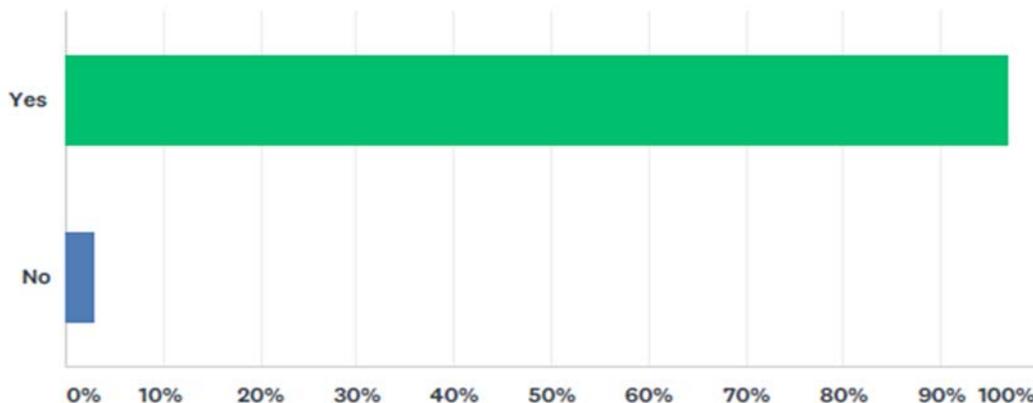
Answered: 269 Skipped: 8



The construction industry already has extensive training programs, pursuant to the current standard. The CISC survey indicated that over 97% of the survey respondents provide training for their powered industrial truck operators. CISC members offer operator training through both in-house and third party training programs, with a slight majority favoring in-house training (at least 59.9%).

Q7 Do you provide any training for the operators?

Answered: 269 Skipped: 8



The CISC encourages OSHA to carefully review the survey data and is willing to meet with the Agency to discuss the survey in more detail. As a whole, the survey shows several important aspects of PITs in construction:

- Forklifts are widely used in construction, with all terrain forklifts comprising by far the primary truck used in the industry.
- There are many older forklifts still in use in construction that do not include more recent safety features and these forklifts would need to be retrofitted if OSHA were to impose a requirement through rulemaking that all forklifts in construction contain safety features that have only become standard in recent years.
- Notwithstanding the wide use of forklifts, injuries resulting from their use are few, according to the survey.

V. THE NEED FOR SEPARATE RULEMAKING IN THE CONSTRUCTION INDUSTRY LED BY THE DIRECTORATE OF CONSTRUCTION

If OSHA determines that it is appropriate to enter rulemaking regarding PITs, the CISC strongly urges the Agency to pursue any rulemaking for the construction industry separately from general industry/maritime and have that rulemaking led by OSHA's DOC. The CISC respectfully states that a separate rulemaking by the DOC is needed for the Agency to consider the unique aspects of PIT use in the construction environment. The construction industry uses powered industrial trucks very differently than maritime and general industry and we believe that a separate rulemaking is appropriate to consider this unique environment.

As OSHA knows, requirements that may work well and be economically and technologically feasible in general industry and maritime will often not work well or provide

substantive benefit in the construction industry. Construction work is frequently performed outside and in varied, ever-changing work environments. For a rule to be successfully implemented in construction, OSHA must consider the unique construction work environment.

In the past, OSHA has recognized the need for separate standards to account for the unique aspects of construction. For example, OSHA promulgated a separate standard regulating respirable crystalline silica in construction. *See Occupational Exposure to Respirable Crystalline Silica*, 81 Fed. Reg. 16286 (Mar. 25, 2016). With the respirable crystalline silica rule, OSHA adopted separate standards for construction and general industry/maritime with different approaches to addressing the hazards posed. *Id.* And OSHA has done so on other occasions, as well. *See, e.g., Asbestos*, 29 C.F.R. § 1926.1101; *Chromium*, 29 C.F.R. § 1926.1126.

While having a separate standard for construction is important, the CISC also believes strongly that any standard on PITs applied to construction should be developed by OSHA's DOC. Most of the recent construction safety standards promulgated by the Agency have been developed by the DOC. This includes Cranes and Derricks in Construction (29 C.F.R. Part 1926, Subpart CC), and Confined Spaces in Construction (29 C.F.R. Part 1926, Subpart AA). OSHA's "Directorate of Construction" was created to serve as the principal source for standards development and enforcement of standards in the construction industry. *See About DOC, OSHA, available at <https://www.osha.gov/doc/aboutdoc.html>.*

The CISC recognizes that in certain circumstances the Directorate of Standards and Guidance has led rulemaking applicable to general industry, maritime, and construction, as it did during the respirable crystalline silica rulemaking. However, in many of these instances,

the rules were “health standards” where expertise from DSG was required. This is obviously not a health standard and the DOC has the in-house expertise to conduct this rulemaking.

The DOC is a one-stop shop for all OSHA construction activity. It has regulatory responsibilities, but also is involved in producing guidance material and advising the field on construction safety and construction enforcement actions. It *knows* the construction industry and knows the difficulties of compliance on construction worksites. This wide-ranging expertise would be important for a rulemaking on PITs given how ubiquitous they are on construction worksites and the often uncontrolled nature of those sites.

The DOC is also the primary contact with ACCSH. ACCSH must be heavily involved in any rulemaking regarding PITs in construction. This is precisely the type of rulemaking for which the expertise of ACCSH can provide valuable insights to the Agency. Having the rulemaking run through the DOC will help ensure that ACCSH is fully engaged in the Agency’s efforts and the Agency is, in turn, considering the thoughts and perspectives of ACCSH members.

The CISC wants to make clear that its desire for this rulemaking to be run out of the DOC should not be construed as a criticism of the Directorate of Standards and Guidance. It only reflects a recognition that forklift use on construction worksites falls easily within the expertise of the DOC and having the DOC be primarily responsible for and accountable for any proposed or final requirements will ensure that the unique construction environment is considered and a variety of stakeholders consulted during the rulemaking process.

VI. KEY CONSIDERATIONS REGARDING OSHA RULEMAKING ON PITS

In addition to the above, the CISC makes several additional points for the Agency's consideration as it determines whether and how to proceed with rulemaking in this area.

A. The ANSI Standard for Rough Terrain Forklifts is the Primary ANSI Standard Applicable to Construction PITs and is Different from ANSI B56.1.

The existing OSHA standards dealing with powered industrial trucks – and the RFI – reference ANSI B56.1-1969 or the most recent version, ANSI B56.1a-2018, “Safety Standard for Low Lift and High Lift Trucks.” The original standard and its later iterations were designed to cover PITs that operate in general industry, as opposed to outside construction environments.

For example, the Types of Trucks highlighted for coverage in ANSI B56.1-1969 includes High-Lift Trucks, Low-Lift Trucks, Motorized Hand Trucks, Industrial Tractors, Reach Trucks, Side-Loader Trucks, Order Picker Trucks, and Narrow-Aisle Trucks. *See* ANSI B56.1-1969, pp. 49-52. Absent from this list are rough terrain forklifts that are the most common in the construction industry, as found in the CISC survey.

Later editions of the standard made the distinction even more clear. In the ANSI B56.1a-2018 standard, the scope is limited to “the elements of design, operation, and maintenance of low lift and high lift powered industrial trucks controlled by a riding or walking operator, and intended for *use on compacted, improved surfaces.*” ANSI B56.1a-2018, p. 1 (emphasis added). This describes the type of terrain in general industry and maritime worksites, not the uneven “non-compacted” surfaces of construction jobsites.

The standard that is most applicable to PITs in construction is ANSI B56.6-2016, “Safety Standard for Rough Terrain Forklift Trucks.” That standard applies to “the elements of design, operation, and maintenance of rough terrain forklift trucks. These trucks are intended for operation on unimproved natural terrain *as well as the disturbed terrain of construction sites.*” ANSI B56.5-2016, p. 1 (emphasis added). A rough terrain forklift is defined in the standard as:

A wheeled-type truck designed primarily as a fork truck with a vertical mast and/or a pivoted boom, variable reach or of fixed length, which may be equipped with attachments. This truck is intended for operation on unimproved natural terrain as well as the disturbed terrain of construction sites. This definition excludes machines designed primarily for earth moving, such as loaders and dozers, even though their buckets and blades are replaced with forks, and machines designed primarily as over-the-road trucks equipped with lifting devices.

Id.

The starting point for any standard covering construction is not ANSI B56.1a-2018, but ANSI B56.6 governing rough terrain forklifts. It is a comprehensive standard with provisions applicable to users and manufacturers. Unlike ANSI B56.1a-2018, however, all of the requirements are designed with the construction terrain in mind.

The CISC was surprised that the RFI did not reference the rough terrain forklift standard at all. OSHA specifically seeks comment in the RFI on B56.1a-2018, asking whether the requirements of the standard “adequately protect workers operating powered industrial trucks, what requirements are missing from that ANSI standard, whether the standard addresses most hazards commonly encountered, and whether there are hazards that are not adequately addressed.” 84 Fed. Reg. at 8640. The CISC states that with respect to the construction industry, ANSI B56.1a-2018 is the wrong starting point. The standard is generally

inapplicable to most construction worksites and to the type of forklift that is most frequently used. The CISC strongly urges the Agency to consider ANSI B56.6-2016 as the most relevant and informative consensus standard should OSHA decide to go into rulemaking on PITs in construction.

B. Before Engaging in Rulemaking, OSHA Must Convene a SBREFA Panel.

In the event that OSHA proceeds to rulemaking in this area, the CISC strongly urges OSHA to first notify the SBA's Office of Advocacy and convene a Small Business Advocacy Review Panel under SBREFA. Under SBREFA, when an OSHA proposal is expected to have a significant impact on a substantial number of small entities, the Agency must notify the SBA and SBA's Office of Advocacy will recommend small entity representatives to be consulted on the proposal and its effect on small entities and businesses. OSHA must then convene a Small Business Advocacy Review Panel, consisting of OSHA officials, the SBA's Chief Counsel for Advocacy, and the Office of Management and Budget's ("OMB") Office of Information and Regulatory Affairs. The panel reviews the draft proposed rule and any comments or testimony brought before the panel, and issues a written report.

The CISC believes that any proposed rule regarding powered industrial trucks will undoubtedly have a significant impact on a substantial number of small entities, given the CISC's survey results and the general make-up of the construction industry, which is dominated by small employers. However, even if any proposal does not exceed the triggering threshold, the CISC encourages OSHA to convene a "SBREFA-like" panel to gather small entity views on the costs and impacts of OSHA's proposed regulatory approach. As OSHA can attest, small entity input at the earliest stages of a rulemaking can provide valuable insight and data to the Agency regarding how a rule should be structured, and the costs and economic

impacts of such a rule. Just recently, OSHA's SBREFA panel convened for its respirable crystalline silica rule was important in crafting the Agency's approach to exposure control in construction. "Table 1" and the specification approach to engineering controls was a major topic of discussion during the SBREFA process. OSHA also made several adjustments to its initial regulatory approach and feasibility analysis as a result of the SBREFA process.

In construction, virtually all employers are small entities and the CISC encourages direct outreach to them should it proceed into rulemaking. If OSHA welcomes the input of small entities as a source of real world understanding, any proposed requirements would likely be more narrowly tailored without sacrificing OSHA's mission or the regulatory objective of the rule. OSHA should always aim to conduct more SBREFA panels and directly engage the input of small entities. When OSHA opens channels for input from small entities that may be affected by proposed standards, OSHA is more likely to issue a final rule that will have maximum beneficial impact with minimized burden across affected industries.

C. OSHA Must Carefully Review Injury and Illness Data Before Proceeding with Rulemaking in Construction.

As stated above, the CISC agrees with OSHA that PITs pose potentially significant hazards to employees on all worksites, including construction worksites. However, before proceeding with rulemaking to impose additional regulatory burdens on construction employers, the CISC encourages the Agency to carefully review available injury and illness data to determine whether changes in regulations are warranted.

The RFI provides some limited information about fatalities and injuries associated with PIT use in a variety of industries. This information is a good starting point for the Agency's consideration of the best approach to address hazards associated with PITs. To the extent

possible, the CISC urges OSHA to look deeper into the causes of injuries that have resulted in the numbers presented.

The CISC notes that in its survey of members, survey respondents indicated that at least 90% did not have *any* injuries or incidents involving powered industrial trucks in the last five years. Of the remaining 10% that did report an injury or incident, only three employers reported an employee being struck by or falling off a powered industrial truck. Most of the incidents solely resulted in structural or property damage, but not employee injury or loss of life. As stated above, no injury is acceptable and construction employers must remain diligent in their approach to PIT safety. However, the CISC survey suggests that perhaps a wholesale change in *regulatory requirements* is unnecessary with respect to PITs in construction.

Furthermore, even a review of the fatality data in the RFI suggests that the Agency may not wish to focus its regulatory resources on PIT use in construction. The vast majority of fatal injuries related to PIT use occurred in agriculture and general industry. OSHA may wish to start its regulatory efforts in those industries while examining non-regulatory approaches to further improve compliance in the construction industry.

By the same token, OSHA should carefully review the fatalities and injuries that occurred to determine if older equipment without recent safety features were related to the fatalities or injuries – or not. Many CISC survey respondents stated that they used older equipment, some stretching back a couple of decades. Using well-maintained older equipment may not at all be related to injuries on construction worksites. OSHA should be reluctant to require retrofitting of this equipment – at potentially significant cost – without a showing that the older equipment causes a significant risk of injury when used.

D. OSHA Must Specifically Consider the Multi-employer Construction Environment in Any Regulatory Approach.

One of the more unique aspects of the construction environment is the multi-employer nature of construction work. On many construction worksites at any one time, there are multiple trades and employers performing a variety of different work tasks. Many trades will bring their own PITs onto a worksite to use or in some circumstances PIT use may be coordinated by one employer for use by multiple trades.

The multi-employer aspect of the construction worksite needs to be carefully considered by the Agency if it were to move forward with rulemaking. Because there is the potential for multiple trades and contractors to operate a single forklift on a worksite, any new requirements placed on employers through a revised PITs rulemaking must have built in flexibility and avoid unnecessarily burdensome requirements.

For example, requirements for pre-operation inspection of forklifts should be considered in light of the fact that multiple contractors may use a forklift throughout the course of a day or even a shift. Similar considerations should be given to issues of access to PITs generally, such as locking the equipment and overall control of the trucks. The CISC is not recommending a particular approach to handling these issues at this time (if OSHA were to go into rulemaking), however, it is important that the Agency consider these unique circumstances in determining its overall approach. It also highlights the need for the rulemaking to be led by the DOC, which has a long history with multi-employer issues and the challenges they create for construction contractors.

E. OSHA Should be Hesitant to Change Operator Training Requirements.

The RFI describes in detail OSHA's rulemaking on PIT operator training and certification finalized in 1989. OSHA states:

On December 1, 1998 (63 FR 66270), after notice and comment rulemaking, OSHA published a final rule updating the provisions covering powered industrial truck operator training, which was codified at 92 CFR 1910.178(l). These provisions mandate a training program that bases the amount and type of training required on the operator's prior knowledge and skill; the types of powered industrial trucks the operator will operate in the workplace; the hazards present in the workplace; and the operator's demonstrated ability to operate a powered industrial truck safely.

* * *

Evaluations of each operator's performance are required as part of the initial and refresher training and each operator's performance must be evaluated every three years.

84 Fed. Reg. at 8638.

These training requirements apply in construction and are comprehensive. They have generally been effective at ensuring that operators of PITs are skilled and knowledgeable about the safe operation of the equipment. As set forth above, the CISC survey found that *over 98.1% of the survey respondents* provide training for their powered industrial truck operators in conformance with the standard. CISC members offer operator training through both in-house and third-party training programs, with a slight majority favoring in-house training (at least 62.4%).

The RFI asks a number of questions of commenters regarding their training programs, the scope of the programs, and their effectiveness. 84 Fed. Reg. at 8639. The CISC survey provides some information in response to these questions, but the CISC also wishes to emphasize that OSHA should not upend the existing comprehensive training regime absent

compelling information that fatalities and injuries are linked to inadequacies in the requirements.

To that end, as OSHA reviews the fatality and injury data, it should carefully assess if (1) lack of training was a cause of a particular fatality or injury, and (2) whether the lack of training was due to inadequate training requirements *or* a failure to follow existing requirements. If the cause is linked to failure to follow existing requirements, the Agency should be careful not to change or add other training requirements, but rather to examine ways to improve compliance with existing rules. The CISC survey indicated widespread training in conformance with OSHA standards and, after adopting an extensive training regime through notice and comment a few years ago, OSHA should be very reluctant to “re-revise” its PIT training requirements once again.

F. OSHA Should Limit Reliance on Manufacturer’s Instructions.

The CISC believes that it is important for construction employers to ensure that manufacturer’s instructions regarding maintenance, use, and operation of PITs are reviewed, followed as appropriate, and that operators and others are familiar with their provisions. As a general matter, manufacturer’s instructions should be kept with the PIT and be readily available for operators to consult in the course of PIT operation. Notwithstanding this, the CISC believes that the Agency should, as a general matter, avoid “incorporating by reference” manufacturer’s instructions into OSHA standards, essentially turning the statements in the instructions into enforceable OSHA standards.

As the CISC has stated in other rulemakings (e.g., respirable crystalline silica), there are a number of statements in manufacturer’s instructions that are included for reasons unrelated to employee safety and health or safe operation of equipment. Manufacturers may

include instructions for product liability reasons, reliability, or other performance-related purposes. Requiring employers to “follow” manufacturer’s instructions is confusing and inappropriate.

For example, in Table 1 of OSHA’s respirable crystalline silica rule, OSHA states that employers must “operate and maintain tool[s] in accordance with manufacturer’s instructions to minimize dust emissions.” While well-intentioned, this caused significant confusion amongst construction stakeholders and ultimately resulted in the Agency publishing FAQs providing additional interpretive guidance as to what types of instructions in a manufacturer’s manual needed to be followed. *See* https://www.osha.gov/dsg/topics/silicacrystalline/construction_info_silica.html.

One area in particular where manufacturers frequently provide information to employers is in pre-operation inspections. Frequently, equipment manuals will set forth what controls should be inspected before a PIT is used. These will differ depending upon the manufacturer and the equipment involved. Some of the items for the pre-shift inspection are clearly safety-related, but some may not be. Implementing a blanket requirement – for purposes of OSHA compliance – that employers must abide by manufacturer’s instructions for pre-use inspections may not be necessary and in fact place obligations on employers that are not reasonably necessary and appropriate to address safety and health concerns.

The CISC recommends that, if OSHA were to engage in rulemaking in this area, the Agency review operator manuals and make a determination as to what rules/requirements are appropriate to apply to PITs and PIT operators, propose those requirements through the rulemaking process, and then receive comment on them. If the rulemaking record supports the requirements, then OSHA could proceed to include them in a final rule. Including broad

provisions such as “follow manufacturer’s instructions,” however, abdicates this rulemaking responsibility and does not appropriately target the safety and health of employees.

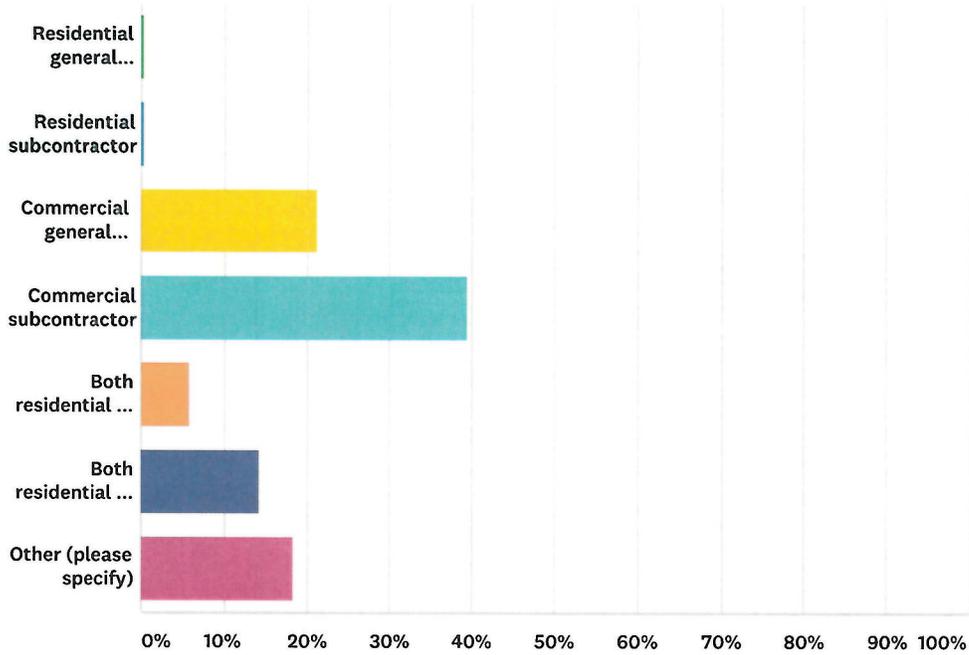
VII. CONCLUSION

The CISC appreciates OSHA coming forward with this RFI to seek initial feedback on whether to go into rulemaking on PITs. The CISC hopes that OSHA takes these comments into account when determining whether to issue any proposed rule in this important area. The CISC would be happy to meet with the Agency to discuss these comments, our views on PITs in construction, and to answer any questions OSHA may have.

EXHIBIT 1

Q1 What type of business, and in what area of the construction industry do you operate?

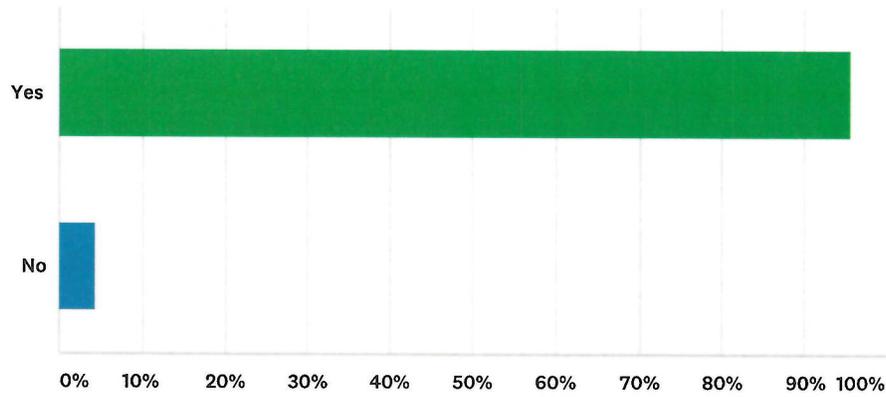
Answered: 276 Skipped: 1



ANSWER CHOICES	RESPONSES
Residential general contractor	0.36% 1
Residential subcontractor	0.36% 1
Commercial general contractor	21.38% 59
Commercial subcontractor	39.49% 109
Both residential and commercial general contractor	5.80% 16
Both residential and commercial subcontractor	14.13% 39
Other (please specify)	18.48% 51
TOTAL	276

Q2 Do you use any powered industrial trucks (i.e., forklifts) in your business?

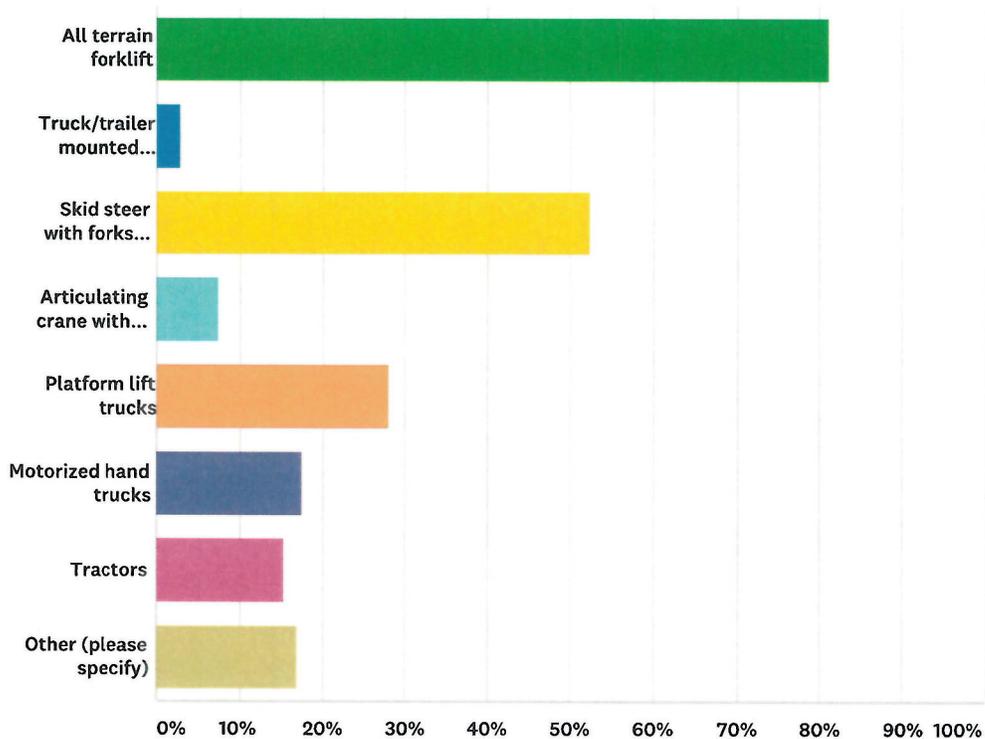
Answered: 273 Skipped: 4



ANSWER CHOICES	RESPONSES	
Yes	95.60%	261
No	4.40%	12
TOTAL		273

Q3 If "yes" in question 2, what type(s) of forklifts do you use? (Check all that apply)

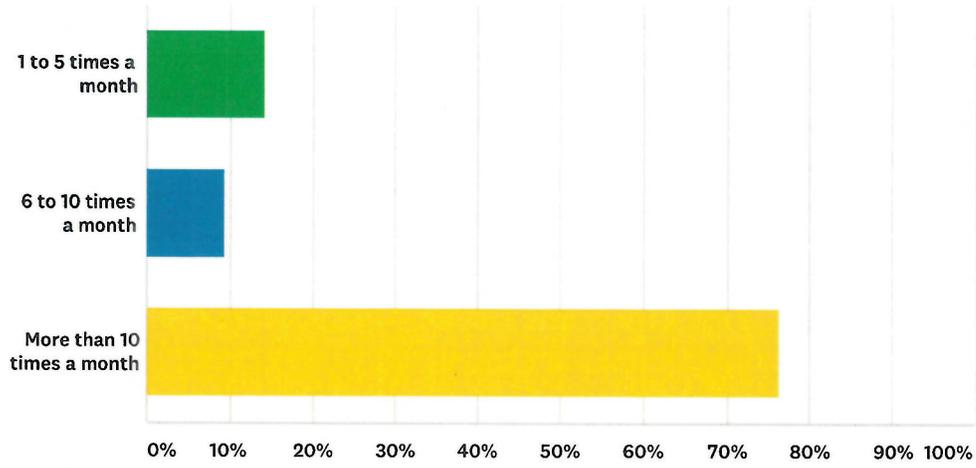
Answered: 267 Skipped: 10



ANSWER CHOICES	RESPONSES	
All terrain forklift	81.27%	217
Truck/trailer mounted (Piggyback 3-wheel) forklift	3.00%	8
Skid steer with forks attached	52.43%	140
Articulating crane with forks or cradle assembly	7.49%	20
Platform lift trucks	28.09%	75
Motorized hand trucks	17.60%	47
Tractors	15.36%	41
Other (please specify)	16.85%	45
Total Respondents: 267		

Q4 How frequently do you use forklifts?

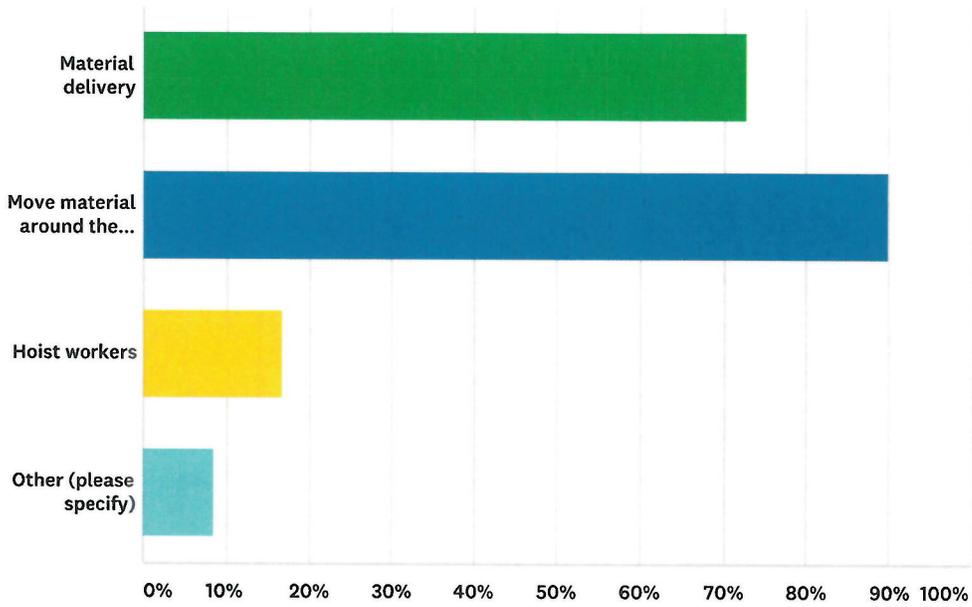
Answered: 267 Skipped: 10



ANSWER CHOICES	RESPONSES	
1 to 5 times a month	14.23%	38
6 to 10 times a month	9.36%	25
More than 10 times a month	76.40%	204
TOTAL		267

Q5 What are the forklifts used for in your business? (Check all that apply)

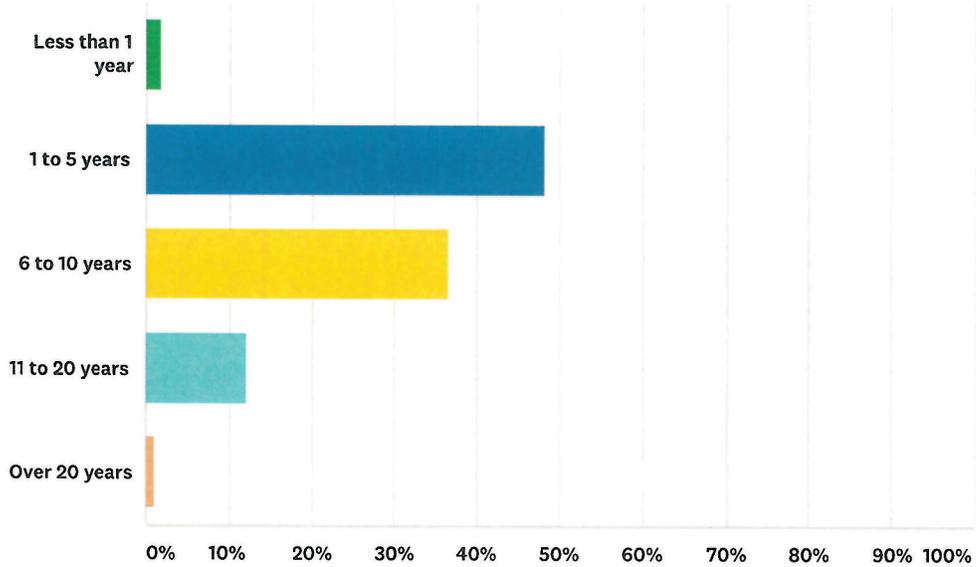
Answered: 269 Skipped: 8



ANSWER CHOICES	RESPONSES	
Material delivery	72.86%	196
Move material around the jobsite	89.96%	242
Hoist workers	16.73%	45
Other (please specify)	8.55%	23
Total Respondents: 269		

Q6 On average, what is the age of the equipment being used?

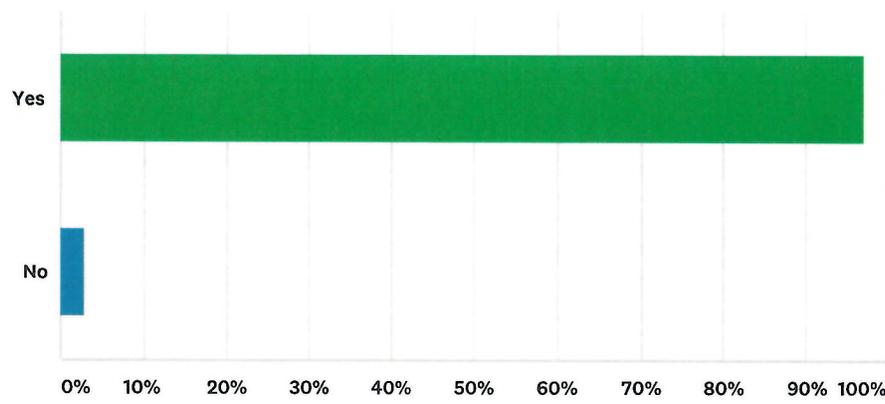
Answered: 265 Skipped: 12



ANSWER CHOICES	RESPONSES	
Less than 1 year	1.89%	5
1 to 5 years	48.30%	128
6 to 10 years	36.60%	97
11 to 20 years	12.08%	32
Over 20 years	1.13%	3
TOTAL		265

Q7 Do you provide any training for the operators?

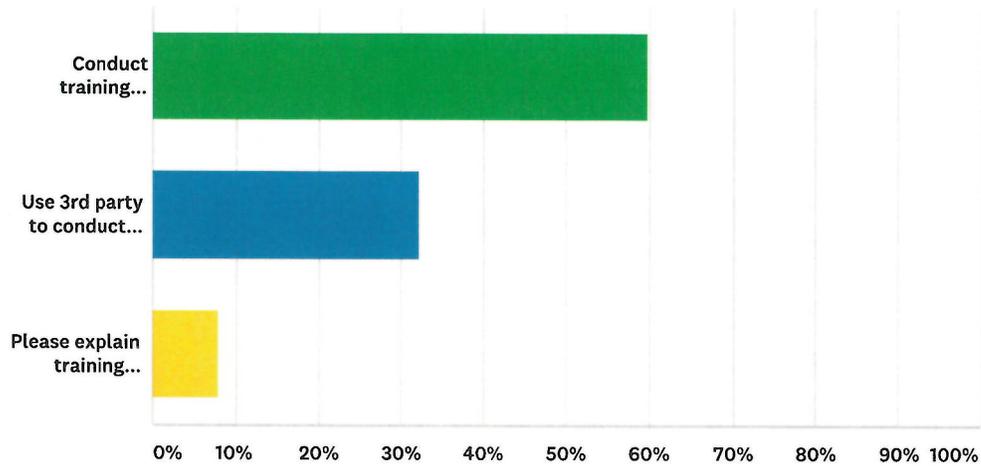
Answered: 269 Skipped: 8



ANSWER CHOICES	RESPONSES	
Yes	97.03%	261
No	2.97%	8
TOTAL		269

Q8 If "yes" in question 7, do you offer the training in-house or use a different format?

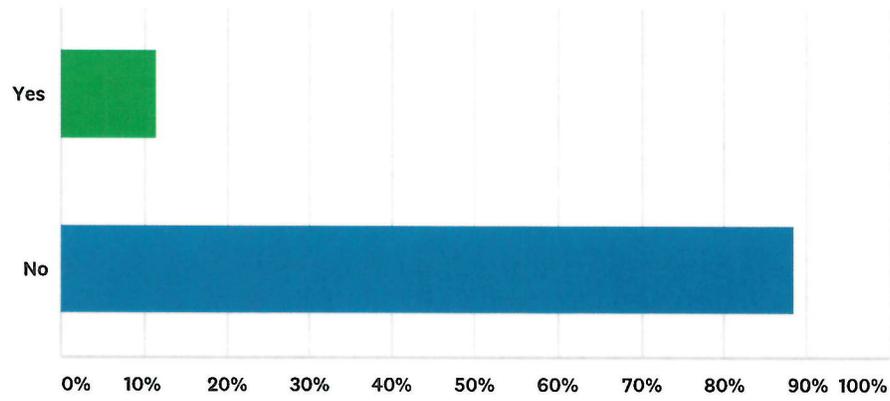
Answered: 264 Skipped: 13



ANSWER CHOICES	RESPONSES	
Conduct training in-house	59.85%	158
Use 3rd party to conduct training	32.20%	85
Please explain training provided	7.95%	21
TOTAL		264

Q9 Have there been any incidents or injuries during use in the last five years?

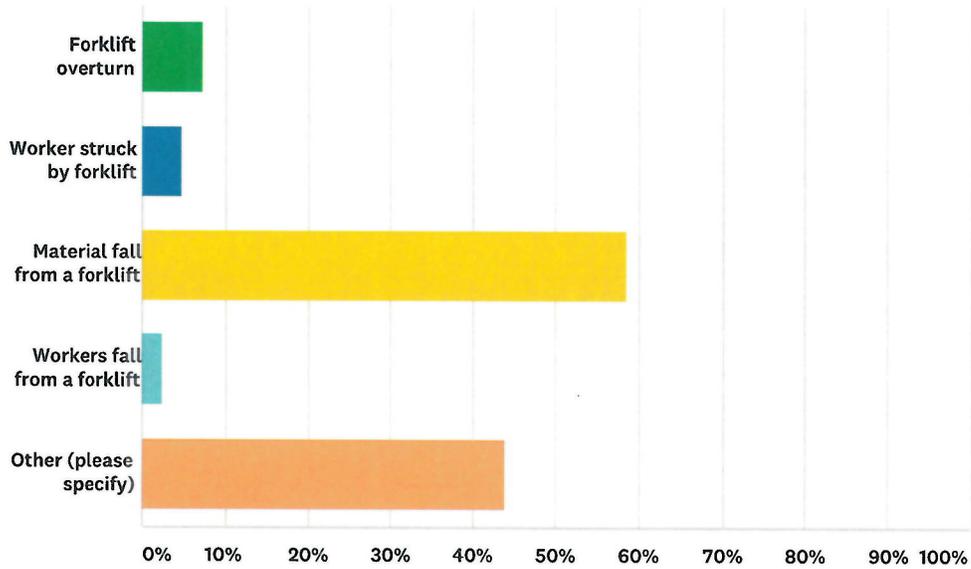
Answered: 269 Skipped: 8



ANSWER CHOICES	RESPONSES	
Yes	11.52%	31
No	88.48%	238
TOTAL		269

Q10 If "yes" in question 9, what was the nature of the incidents or injuries? (Check all that apply)

Answered: 41 Skipped: 236



ANSWER CHOICES	RESPONSES
Forklift overturn	7.32% 3
Worker struck by forklift	4.88% 2
Material fall from a forklift	58.54% 24
Workers fall from a forklift	2.44% 1
Other (please specify)	43.90% 18
Total Respondents: 41	