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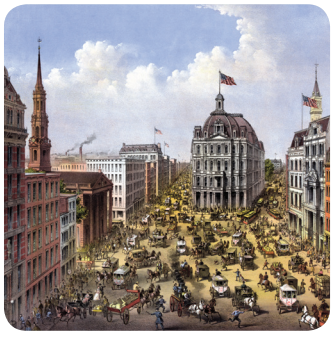
Managing the Scaffold Law liability risks for real estate owners and developers

The New York Labor Law – Section 240

Introduction



Lithograph color print circa 1875 of Broadway in New York City as seen looking north from the Western Union Telegraph Building.

Background on the New York Labor Law

In 1885, New York City's now-famous skyline had yet to take shape. The first skyscrapers, then 10 to 20 stories high, were just beginning to rise above the city's horse-choked streets. The state's workers' compensation system would not be developed until more than a quarter century later. But with the number of construction workers' fall-related injuries and deaths climbing along with building heights, New York State lawmakers enacted a labor law that enabled injured workers and their families to recover damage awards from building owners and real estate developers, the workers' own employers, and those entities' agents.

Some 129 years later, even with a workers' comp system in place, the Empire State's unique 19th Century statute – known as the Scaffold Law – is in many respects unchanged. In other ways, it's even broader. Under the law, workers injured in gravity-related accidents while performing construction, demolition and remodeling services in New York State can recover millions of dollars in damages beyond their statutory workers' comp benefits. Courts interpreting the Scaffold Law have determined that gravity-related injuries can stem not only from falls from nominal heights and by being struck by a plummeting object, but also by restraining an object.[1]

Real estate owners and developers face this liability regardless of whether they or their tenants contracted for the work. Moreover, a defendant's liability is not mitigated when an injured worker was substantially at fault for an accident.

Because of the potential damage awards that real estate owners and developers as well as contractors face under the Scaffold Law, the liability insurance marketplace for remodeling, repairing and construction risks has tightened considerably.[2] The legal climate also has spurred long-running efforts to repeal or modify the Scaffold Law.

Building owners and real estate developers, however, do not have to wait for any changes to the law to reduce their liability for gravity-related injuries. In consultation with their legal counsel and risk managers, owners and developers can proactively mitigate their Scaffold Law risk by contractually transferring their liability to contractors and tenants. To ensure they have laid off the risk, owners and developers must address many different points in a variety of contracts, as well as set up some process-monitoring systems.

1. Runner v. New York Stock Exchange, Inc. 13 N.Y.3d 599, 922 N.E.2d 865 (2009)

2. NY Labor Law 240. (Nov. 2012) Marsh & McLennan Cos.

New York Scaffold Law timeline

1885

- **New York State Legislature enacts the Scaffold Law,** holding liable the "person employing or directing another" when a scaffold, hoist, stay or ladder fails.
- Defendants can avoid liability if they place blame on employees.

1887

New York State Legislature **amends** the Scaffold Law, **creating a presumption of employer liability.** The amendment does not remove employers' contributory negligence defense.

1913

New York **court enacts a workers' comp law** that complies with the state's reformed constitution. The Scaffold Law remains in force.

1921

The Scaffold Law is **amended to include coverage for accidents** involving slings, hangers, pulleys, braces, irons and ropes.

1923

New York's high **court imposes absolute or strict liability on employers** in The Scaffold Law (Maleeny vs. Standard Shipbuilding).

1948

New York's high **court rules that employers do not have the contributory negligence defense** available in Scaffold Law litigation (Koenig vs. Patrick Construction).

1958

New York's high court first calls employers' **"absolute duty"** under the Scaffold Law an **"absolute liability"** (Connors vs. Boorstein). (In its 1990 Connors vs. Putnam ruling, the court begins using "absolute liability" and "strict liability" interchangeably.)

1995

Illinois, the last state with a law similar to New York's Scaffold Law, **repeals its statute.**

1998

New York's high court rules that Scaffold Law **defendants are not liable when an injured worker is solely responsible** for his injuries (Weininger vs. Hagedorn).

2003

A state appellate **court rules** that the Scaffold Law **applies to cases involving falls from heights as short as 15 inches** (Amo vs. Little Rapids Corp).

2009

New York's high **court expands** the scope of the **Scaffold Law**, ruling that gravity-related accidents extend beyond falls and falling objects to **injuries caused when workers restrain objects** (Runner vs. New York Stock Exchange).

2013

The legislature **kills a Scaffold Law reform measure**, supported by the Governor, that would have established a comparative negligence standard to hold injured workers liable for their share of responsibility for an accident.

Liability

Risk management measures will help to reduce owners' and developers' Scaffold Law liability exposure.

The New York Labor Law, the official name of the Scaffold Law, has been amended by the state legislature and interpreted numerous times by state courts. But its main intent has not wavered since its enactment.

Section 240 of the law requires owners, contractors and their agents involved in constructing, demolishing, repairing, altering, painting and cleaning structures to either furnish workers with or ensure they are provided equipment that will prevent them from falling or being struck by falling objects. The devices include scaffolding, ladders, hoists, blocks and pulleys.[3]

Under Section 240, owners and contractors who do not provide the devices assume absolute liability, which means they can be held fully liable for an injury even if a worker knowingly assumed the risk or if the worker's negligence – working while intoxicated, for example – contributed to the accident.[4,5] Section 240's imposition of absolute liability on defendants even when the plaintiff was partially at fault is an exception to New York personal injury law.[6]

Even the general availability of fall-protection devices at a worksite does not fully relieve a defendant of its liability. The equipment must be available, visible and in place for use at the worker's station.[7]

In addition, an injury-causing fall need not be from a great height to trigger liability. Indeed, a New York court has determined that the Scaffold Law applies to falls of as little as 15 inches.[8] Section 240 exempts only owners of one- and two-story family dwellings.

Financial impact

The Scaffold Law's financial impact has been notable.

In terms of court awards, some of the largest verdicts in New York State are delivered in Scaffold Law cases.[9] For example, in 2012, there were Scaffold Law verdicts for almost $20 million, $16.5 million, $13 million and two for $11 million.[10]

Government entities are not immune from liability, either. Scaffold Law litigation costs local governments in the state more than $1 billion annually.[11]

The losses have dramatically tightened the liability insurance and excess markets for owners and developers as well as contractors. Insurers are boosting deductibles and attachment points as well as premiums.[12,13]

No other state has a comparable statute on its books. Illinois, the last state that did, repealed its measure in 1995.[14] As a result, construction site fatalities declined 30 percent and injuries dropped 54 percent.[15] Insurance loss costs in each of the next five years dropped from more than 50 percent to more than 90 percent.[16]

New York's business community has pressured lawmakers for decades for relief from the law; the latest reform effort died in June 2013.

3. 4. New York Construction Law. Chapter 11: Liability Under the New York Labor Law

5. Know when to scaffold. (Dec. 16, 2013) New York Daily News. m.nydailynews.com/1.1547400#bmb=1

6. N.Y.3d 280, 803 N.E.2d 757, 771 N.Y.S.2d 484, (2003)

7. New York Construction Law

8. 9. 10. NY Labor Law 240. (Nov. 2012) Marsh & McLennan Cos.

11. www.Scaffoldlaw.org

12. NY Labor Law 240. (Nov. 2012) Marsh & McLennan Cos.

13. Donna Abbott Vlahos. (Feb. 12, 2013) Capital Region builders, insurers target scaffold law in Albany. The Business Review

14. 15. www.Scaffoldlaw.org

16. Geddes, Rick. Loss Costs Due to the New York Labor Law 240.

Managing contractor risk

Building owners and real estate developers can take action to help shield themselves from the effects of the Scaffold Law. Through appropriate contract language, owners and developers can transfer their potential Scaffold Law liability to contractors and subcontractors. Those contracts should contain hold-harmless provisions and broad indemnity agreements covering the developer or owner for any liability arising out of the contracted work. Negligence should not be a factor that triggers those protections for owners and developers.

To ensure that contractors and subcontractors have the financial wherewithal to honor their indemnity agreements, the contracts should require them to name owners as additional insureds on a primary, non-contributory basis in all liability insurance policies, including excess insurance policies.

Beyond imposing those requirements, owners and developers can establish a system that ensures contractors and subcontractors have complied with contract terms. Those recommendations presume, however, that a developer's liability for a gravity-related injury arises only from its status as a liable party as defined by Section 240 and not because of its own negligence.

Under New York State's separate General Obligations law, which applies to contracts governing construction work, an owner or developer may not contractually transfer its Scaffold Law liability to, or seek indemnification from, a third party if the owner's or developer's own negligence caused an injury.[17]

For example, consider the case of a developer that retains direct responsibility for providing fall prevention equipment but fails to, and a worker is injured as a result. In two independent cases, the New York Courts of Appeals ruled that such contractual transfer of its Scaffold Law liability was not enforceable. [18,19]

Therefore, owners and developers should not control or supervise any work performed by contractors and subcontractors. They also should not be directly involved with providing construction and remodeling workers any equipment to safeguard them against gravity-related injuries.

However, the Scaffold Law requires that owners and developers ensure the safety of those workers. Owners and developers should incorporate into their agreements with all contractors and subcontractors a provision that clearly states those parties are primarily responsible for workers' safety and are solely responsible for the manner, means and method of their work. The size of the job is irrelevant. The provision should be included in contracts even with, for example, a contractor painting a single room and an electrician installing a light fixture. That means even very small jobs should be formally arranged through a contract and not merely a purchase order.

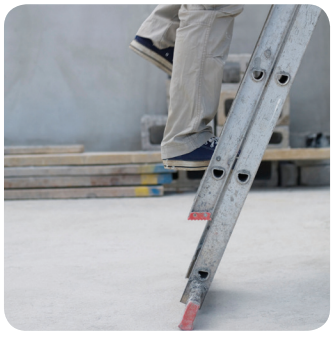
Of course, the surest way of avoiding Scaffold Law liabilities is to run a project free of any gravity-related accidents. Selecting contractors, subcontractors and vendors who have a demonstrated safety culture goes a long way toward minimizing that risk. Owners and developers or their property managers should consider establishing a formal selection process in which a contracted firm's safety culture and history is a prime consideration.

17. General Obligations law of the State of New York Section 5-322.1

18. Brown v. Two Exchange Plaza, 76 N.Y.2d 172 (1990)

19. Itri v. Aetna Casualty & Surety Co., 89 N.Y.2d 786 (1997)

Leasing risk management



Leaseholders that contract out remodeling and renovation work also can create Scaffold Law liability for owners and developers. Therefore, any lease agreement should contain a hold-harmless provision stating that the tenant agrees to assume sole responsibility for all work it conducts on the premises.

Another contract clause also should provide that the leaseholder will indemnify the developer or owner for any damages resulting from accidents arising out of any use of or work performed at the property, including construction. The indemnification requirement should not be linked in any way to proof of the tenant's or contractor's negligence.

This clause could be doubly beneficial to an owner or developer if its own negligence contributed to a construction or remodeling worker's job-related injury. Because lease contracts are not subject to Section 5-322.1 of the General Obligation law, the indemnity provision would be enforceable even if the developer or owner were found negligent.[20]

To ensure that a tenant will have adequate resources to meet its indemnification responsibility, the lease agreement should require the tenant's primary and excess liability insurance policies to name the developer or owner as an additional insured on a primary, non-contributory basis. Similarly, another provision in the lease agreement should require the tenant to furnish the developer proof that construction contractors have provided the same insurance protection to the owner or developer.

In both cases, an owner or developer can ensure that it is adequately protected by obtaining copies of not only the policy endorsements naming them as additional insureds but also the entire policies. Certificates of insurance are inadequate proof of protection, because those documents establish only that some form of insurance is in place. Unlike endorsements, certificates do not provide coverage details, such as which parties are covered as additional insureds. Even with that proof, entire policies – especially those written by sub-standard insurers – should be reviewed for language that excludes coverage for construction-related losses. Such exclusions would make the additional-insured endorsements meaningless.

Owners' and developers' legal counsel should formally review all endorsements and policies to ensure they are current. Under another provision that should be part of every lease agreement, a tenant would have to document any construction or remodeling-related injury and immediately notify the owner or developer about the accident. With that early notice and information, the owner or developer and its insurer have the ability to adequately prepare their defense against any subsequent Scaffold Law liability lawsuit, which a plaintiff does not have to file for up to three years. Owners and developers who do not begin preparing a defense until that late date jeopardize their cases, because the accident scene no longer can be examined, and witnesses with clear memories of the incident could be tough to locate.

Lease agreements also should contain mutual waivers of subrogation. With all contractor, subcontractor and leasing agreements, failing to note that the indemnity provisions are enforceable only to the extent permitted by law and that the provisions exclude the indemitor's negligence violates New York's General Obligation law. That could result in the voidance of the entire indemnity provision.[21]

The New York Labor Law 240 – better known as the Scaffold Law – is ever changing, and the court interpretations are constantly evolving. All contract language should be reviewed by an attorney.

20. Itri v. Aetna Casualty & Surety Co., 89 N.Y.2d 786 (1997)

21. General Obligations law of the State of New York Section 5-322.1

Conclusion

The liability risk that the law creates is troubling for owners and developers, but it is manageable. Indeed, with the proper contract language with contractors, subcontractors and tenants and by implementing controls to ensure contract compliance, owners and developers can transfer their Scaffold Law liability to parties who are directly responsible for worker safety. Those contractual risk transfer measures also demonstrate sound risk management to the insureds' own liability insurers, making them far more attractive risks.

A1-11200729-A (02/14) 11200729

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