

Debate Continues Over New York State Labor Law 240:

THE SCAFFOLD LAW

The Lines Are Drawn Again

The battle to reform or repeal Labor Law 240, commonly referred to as the Scaffold Law, has been raging for years. But now, both sides are stepping up advocacy and lobbying efforts, thinking this may be the time for action in Albany.

The stage has been set, with legislation introduced on two fronts during the 2013-2014 legislative session. One bill, sponsored by Senator Patrick Gallivan, supported by Assembly Majority Leader Joseph Morelle, and favored by a coalition of reform advocates, including contractor and real estate organizations, proposed to reform the law, reducing its so-called “absolute liability” provision to a “comparative negligence” standard. This change would allow contractors and owners to present facts that could mitigate their responsibility for damages in Scaffold Law cases. Another bill, entitled the “Construction Insurance Transparency Act of 2014,” sponsored by Assemblyman Francisco Moya and supported by construction labor organizations, immigrant rights groups, community and consumer groups, and trial lawyers, proposed requiring insurers to compile and report data that quantify expenses of suits and judgments related to the Law before any changes to it are considered.

Many advocates have been promoting their respective views for years. But new to the debate are groups representing minorities involved in construction throughout the State. Minority contractor organizations generally support reform, noting high insurance premium costs for their member firms and the difficulties the Law creates for public agencies and authorities who employ them. There are other organizations representing minority construction workers, however, that want to preserve what they see as essential worker protections in the Law.

WHAT IS LABOR LAW 240?

New York State Labor Law 240, enacted in 1885, **requires the provision of scaffolding and other safety devices by all contractors and owners and their agents directing “the erection, demolition, repairing, altering, painting, cleaning, or pointing of a building or structure” so as to give proper protection to workers.** The Law has remained static through the decades, despite the creation of the Federal Occupational Safety and Health Administration (OSHA), which has its own detailed regulations on scaffolding, and the dissolution of similar laws in virtually every other state.

While the statute seems inarguably wise, interpretation and application of the Law have been the subject of contentious debate. According to reform advocates, in practice the Law assigns absolute liability for worker injuries to the contractors and owners directing such work and does not allow for consideration of a worker’s contribution to his or her injuries. Ted Xenakis, Director of Claims for Lend Lease (US) Construction LMB Inc., said in his twenty years handling such cases, “[The] recalcitrant worker defense in Labor Law cases are few and far between.”

Countering the claim that contractors have “absolute liability” and no ability to argue worker negligence in Scaffold Law cases are the Law’s supporters, including the Building and Construction Trades Council of Greater New York (BCTC). BCTC President Gary LaBarbera maintains that the Law can only be applied if the contractor has failed to provide proper safety equipment. He adds that if the contractor fulfills their legal obligation to do so, and a worker ignores those safety measures, that worker is not entitled to damages.

Reformers say this is true in theory, but risk managers and defendant attorneys note that, in practice, defense of owners and contractors in these cases is virtually impossible and most are settled out of court to avoid what Mr. Upshaw called the “wild card” of jury awards. Contractors pay high premiums, legal fees, and settlements to the plaintiff, he said, adding, “You pay, and you pay again.”

Recent court decisions have broadened the application of the Scaffold Law even further to include: all injuries resulting from the force of gravity rather than falls from height (*Runner v. New York Stock Exchange*, 2009); injuries related to “same-level” falling objects (*Wilinski v. 334 East 92nd Housing Development Fund*, 2011); and injuries caused by worker negligence (*Kiln v. State of New York*, 2013).

These precedents have created conditions enabling a perfect storm of higher jury awarded damages for plaintiffs, higher payouts for insurance companies, and higher premiums for contractors and owners.

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President
BCTC*

WHAT IS THE CASE FOR REFORM OF THE SCAFFOLD LAW?

Contractor and real estate organizations contend that **absolute liability is the fatal flaw in the application of the Scaffold Law and that the situation is now a crisis not just about higher insurance premiums, but also about the availability of insurance/liability coverage** for real estate owners, construction companies, and public agencies working in the State. This crisis—exacerbated by higher jury awards and broadened judicial application of the Law—now threatens, they maintain, the size of public capital programs and costs, or will cost, tens of thousands of construction jobs. Consequently, according to Michael Elmendorf, President and CEO of the Associated General Contractors of New York State, there is and will be “less money for jobs and more for insurance.”

When asked what is different now that might improve the chances for successful Scaffold Law reform, Mr. Elmendorf said, “This used to be a crisis of cost. Now, it has gotten so bad that it is a crisis of availability.” He explained that “there are less than a handful of carriers” willing to take on the risk of insuring construction sites in the State since “they can’t control their exposure.” On the outlook for reform, he asserted, “The law is going to change soon, either on the merits or because of the near impossibility of insuring [projects].”

According to Joseph T. Gunn, Regional Partner, Willis of New York, the Scaffold Law is “the only liability law on the books in New York that does not allow contributory facts to be considered in cases.” Compounding this inability to defend against injury claims, he said, is the broader judicial interpretation of injuries that qualify for protection under the Law. To this point, reform advocates contend, no other state in the country has a similar law that is as broadly applied or as costly as New York’s Scaffold Law.

Stephan Upshaw, Vice President of Risk Management for Equity Residential, a national owner/developer, agrees that the situation is clearly worsening, judging by the comparative costs of insurance coverage on development projects in the City versus the rest of the country, as well as within the City in years past. He said Equity’s most recent development, at 170 Amsterdam Avenue, cost several million dollars more for insurance coverage than the company’s comparable project two years earlier at Tenth Avenue and 23rd Street. Equity was still able to make the newer project work, but he acknowledged that when other developers feel this kind of squeeze, building design and amenities could suffer as a consequence. What’s more, he believes that smaller projects, under \$100 million, “projects that could turn a neighborhood around, won’t get done” because of high insurance costs. Mr. Upshaw said similar projects the firm has completed in New Jersey and elsewhere include far less for insurance costs.

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Notably, organizations joining forces with the usual reform advocates now include many representing minority contractors and subcontractors who believe capital programs that employ them in greater numbers are, at a minimum, being scaled back by the pressure of mounting insurance costs. Explaining her organization's involvement, Elizabeth Velez, President of the Velez Organization and Chairwoman of the Latino Builders Council, said, "Any system which includes a provision of absolute liability where a defendant has absolutely no say in the matter is patently unfair. . . ." She added that the insurance premiums for her company, and others like hers, are expected to double this year, after nearly doubling last year as well.

WHAT IS THE CASE FOR RETAINING THE CURRENT LAW?

A prominent member of the newly formed Scaffold Safety Coalition, which is fighting efforts to "cripple a vital safety regulation" and seeking to have insurers release more data on the actual costs directly related to Scaffold Law cases and awards, is the BCTC.

Mr. LaBarbera said the organization agrees that insurance premiums have increased substantially. Unlike reform advocates, BCTC does not believe the fault lies with the Scaffold Law. BCTC contends, as does Assemblyman Moya, that insurers need to open their books to demonstrate the direct costs of the Scaffold Law. Assemblyman Moya has introduced legislation that would require such reporting. Mr. LaBarbera called this a necessary first step to really analyze data and figure out what is going on saying, "Businesses involved in construction suffer from a Stockholm syndrome of sorts where they believe insurers holding them hostage with absurdly high premiums are their allies." He added, "Instead of taking their fight to the insurers, these businesses have joined them in a campaign against the Scaffold Law, which talks about everything but the fundamentals that drive insurance costs."

BCTC also contends that even though New York City is statistically among the safest places to work, there are still too many accidents where workers are killed, disabled, and injured because of failures to provide adequate safety for work at heights. To this point, the organization refers to a Center for Popular Democracy report, which finds that "86% of Latino and/or immigrant fatalities from a fall from an elevation in New York were working for a non-union employer."

(http://populardemocracy.org/sites/default/files/CPD_Debunking_report_final.pdf)

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IS NEW YORK REALLY ALONE?

Reform advocates argue that no other state has a Scaffold Law as broadly applied as New York's or as costly, in terms of the effect on insurance premiums, jobsite productivity, and economic development. BCTC asserts that, while provisions vary state by state, seven other states have scaffold laws, including some which specifically draw their inspiration from New York's Law. Reformers respond that, if that were the case, the dearth of willing insurers and skyrocketing premiums would be more common, presumably in these other states. But many in development and construction nationwide attest to New York's unique predicament.

A study released in February, *The Costs of Labor Law 240 on New York's Economy and Public Infrastructure*, commissioned by the nonprofit New York Civil Justice Institute and conducted by researchers at Cornell University and The Nelson A. Rockefeller Institute of Government, University at Albany, State University of New York, finds that New York is the only state in the country to have a law that applies an absolute liability standard, and, based on a preliminary review, no other country has a similar law. The study also finds that redirecting the money spent on lawsuits and insurance to the construction industry would generate an estimated net gain of 12,000 jobs and approximately \$480 million in labor income.

However, the website of the labor-backed coalition opposed to Scaffold Law reform notes that this study may have a fatal flaw. An article by Paul Basken of the *Chronicle of Higher Education* posted on the site describes specific concerns the Rockefeller Institute's director Thomas L. Gais expressed about the report and quotes him in saying that, "The report's analysis suffers from 'really big weaknesses' and that flawed statistical analysis was used to make the 'counterintuitive' argument that New York's worker-safety law actually leaves workers less safe" (www.scaffoldsafetylaw.com).

Mr. Gunn insists that if, instead of reacting to the added liability burden in New York, insurers were unnecessarily hiking premiums and reaping huge profits, as reform opponents imply, there would be numerous companies clamoring to cover construction projects in New York rather than virtually none. He and others advocating reform point to Illinois as an example, noting the costs saved and safety standards maintained after that State repealed its Scaffold Law in 1995. According to BCTC, however, after repeal, Illinois lost construction jobs while over the same period New York added construction jobs.

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The Costs of Labor Law 240 on New York's Economy and Public Infrastructure

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*Michael Elmendorf
President and CEO
Associated General Contractors
of New York State*

IS THE SCAFFOLD LAW PREVENTING MORE SCHOOLS FROM BEING BUILT?

Many advocates of reform now are using the NYC School Construction Authority (Authority or SCA) as the best illustration of the problems with the Scaffold Law. Indeed, the Authority's premiums are said to have increased by 250 percent in 2014. Beyond this year, reform advocates say, the SCA will need to be entirely self-insured. Consequently, the money the Authority needs to put aside for premiums and damage claims is cutting into its capital program, translating into fewer schools and fewer school seats. Mr. Elmendorf said that last year the SCA built two to three fewer schools due to rising insurance costs and that this year's insurance costs will double, translating into "one thousand pre-K seats [the SCA is] not able to build" or "ten schools not built."

The SCA's predicament also threatens its successful minority contractor mentor program, through which the Authority holds liability insurance for the small MWBE firms working on its projects. Without that coverage, many of these contractors would be unable to afford insurance and, ultimately, may be unable to continue operating.

Supporters of the Law question the basis for these assertions, arguing that they have seen no released data supporting the contention that the SCA's premiums have increased by 250 percent.

WHAT ARE THE IMPLICATIONS FOR WORKSITE AND WORKER SAFETY?

Labor representatives claim that reform would take away worker protections, particularly for minorities who make up a large percentage of construction workers. It seems reform certainly would eliminate what traditionally has been characterized as a no-fault benefit for workers.

Reform advocates argue that, currently, when the Scaffold Law is invoked, the only question to determine, through negotiation or litigation, is the amount of damages awarded. Of late, damage awards have, in the words of Felice Farber, Director of External Affairs for the General Contractors Association, "pierced the coverage umbrella," causing many insurance companies to back away from construction coverage and those that remain to increase their premiums dramatically.

Ms. Farber added that high awards for plaintiffs coupled with the expanding judicial definition of "heights" have increased premiums and reduced the number of willing carriers, precipitating the current crisis. "This is not about safety," she

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said, since safety protocols are not considered when seeking damages under the Law. BCTC agrees that worksite safety is consistently improving and injuries are down. All the more reason, the organization believes, for greater scrutiny of actual insurer costs and for skepticism about the drastic hikes in premiums.

But the problem—for insurers and their clients and the workers these clients employ—seems less to do with overall safety and more to do with the unchecked and unknown liability of Scaffold Law claims. Putting it succinctly, Mr. Elmendorf says reform will benefit all parties, adding that now, “The only people winning are lawyers.”

Louis J. Coletti, President of the Building Trades Employers’ Association, which represents contractor organizations, has been involved in reform efforts and safety programs for many years. He said, “All parties agree that the building industry has made tremendous progress on safety in the decades since the Scaffold Law was enacted. And study after study shows that the provisions in the Law no longer help to protect workers, but only protect those who want to exploit them and their employers.” He added, “Now is a perfect time to update the Law so it can reflect current standards and practices, and help—rather than hinder—New York’s economy.”

IS IT ALL ABOUT MONEY?

Simply put, reformers argue, **higher insurance costs necessitated by New York’s Scaffold Law mean less construction activity in all sectors.** It means less money for roads, SUNY facilities, and other worthwhile construction projects sponsored by State agencies. In New York City, it means fewer classrooms and less money for improvements to all manner of public facilities. In the private sector, it means it is harder to make the numbers work and, consequently, fewer deals get done, fewer housing units are built, and fewer office towers, hotels, and expansions break ground. Or, if the jobs do move ahead, they may be scaled back, use non-union labor, feature less creative architecture, or include fewer amenities to contain costs. In the private sector, added project costs driven by the Scaffold Law have been cited by developers as a leading contributor to the unprecedented level of non-union construction taking place in New York City, as developers struggle to make the financials of a project viable in New York’s extreme liability climate.

At Willis, Mr. Gunn and his colleagues broker insurance for clients throughout the country and have firsthand knowledge of the varying insurance costs in other states. Mr. Gunn said that, in general, insurance costs run five percent of project costs in 49 states, but run 10 percent in New York State. Picking one example, he compared Massachusetts, where insurance costs run two percent of construction value.

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A *Crain's New York Business* article on the issue quotes AIG Property Casualty data that says historic insurance rates for New York City projects were three to four percent and have risen to eight percent or more (*Insurance Hikes Hit Builders*, November 25, 2012). It also shows Port Authority of New York & New Jersey figures of \$10.3 million for George Washington Bridge work on the New Jersey side and \$22.7 million for similar work on the New York side.

According to the Lawsuit Reform Alliance of New York's "Quick Facts," "New York's general liability insurance costs are between 300 percent and 1,200 percent higher than other states because of the Scaffold Law," and, "The Scaffold Law adds about \$10,000 to the cost of the average home" (www.nylawsuitreform.org). Joseph Russo of insurance broker Aon cautions, "While legislative reform is needed to bring a component of comparative negligence to bear, it will not result in a radical or immediate decrease in construction insurance premiums" until judges are appointed to the New York State Court of Appeals who are willing to impose a stricter interpretation of the Law.

Evidence the Scaffold Law is hurting New York mounted further with the release in March of a report by the Center for an Urban Future entitled *Caution Ahead; Overdue Investments for New York's Aging Infrastructure*. The report advocates repeal of the Law among its recommendations for reducing infrastructure costs.

Albany elected officials should repeal the nation's last remaining Scaffold Law, which significantly inflates insurance costs compared to other states. The Scaffold Law holds builders responsible for "elevation related" injuries regardless of fault. Determining compensation based on comparative liability, as is done in most other states across the country, could save agencies like the School Construction Authority tens of millions of dollars in insurance premiums every year (page 60).

IS MORE INFORMATION NEEDED?

Supporters of the current Law argue these alleged costs need clarification and examination to determine the true impact of the Scaffold Law on insurance rates, whereas the newly expanded coalition of reform supporters say there is more than enough information to warrant a long overdue adjustment to the absolute liability standard applied under the Law. According to Mr. Elmendorf, the call for the release of more information is a "red herring," because this information and more is already collected by the New York State Department of Financial Services, the agency that regulates insurance providers in the State.

Furthermore, a significant body of loss-cost data from all major insurance carriers, compiled by the Insurance Services Office (ISO), has been released and shared with the administration of Governor Andrew Cuomo and the New York State Legislature.

Both supporters and reform advocates agree there is a problem in New York State with insurance costs that is negatively impacting the construction industry generally, and minority contractors and workers specifically.

The debate centers around how best to address rising insurance costs.

It shows dramatically higher loss costs in impacted classes of construction in New York compared to all comparable and neighboring states. Supporters claim, however, that loss-cost data likewise warrant closer examination because they also may include non-height-related injuries.

“There is plenty of data and the data is irrefutable. The problem is the other side doesn’t like what the data says, so they reject it. Any additional data will tell the same story because the reality is clear to everyone involved,” said Mr. Elmendorf. Still, Mr. Coletti says that the Get New York Building organization the BTEA and others have formed is researching data that can help expand support for Scaffold Law reform, but adds, “The data is difficult to retrieve since most cases are settled not litigated, and the parties agree to keep the details confidential.”

IS COMPROMISE POSSIBLE?

Despite the seemingly rigid rhetoric on both sides of the Scaffold Law debate, there is common ground. Both supporters and reform advocates agree there is a problem in New York State with insurance costs that is negatively impacting the construction industry generally, and minority contractors and workers specifically. Both agree that solving this problem should be a priority for Governor Cuomo and the State Legislature. Both agree that, overall, construction site safety in the State has drastically improved. The debate centers around how best to address rising insurance costs.

In Mr. Coletti’s words, “We are going to continue to press our case. Right now, the ball is in the Legislature’s court” (*City & State*, May 2, 2014). While Governor Cuomo recently acknowledged the law is “infuriating,” he indicated that reform is not in his top five agenda items (*Crain’s*, April 25, 2014). Still, advocates like Ms. Velez are optimistic that the economic disadvantages of the Law will necessitate action soon. “We’ve reached a tipping point [for reform of the Scaffold Law],” she said, adding, “We simply cannot afford to continue to do business this way.”

While the Legislature has yet to act, the good news is that various industry groups are grappling with possible solutions. Whether to improve other worker protections and benefits or to examine more closely available data on cases and awards, the design, construction, and real estate industry should be committed to hashing out a solution that can be proposed to elected officials.

SOURCES

Jeffrey Alpaugh, *Global Real Estate Practice Leader, Marsh USA*

Richard T. Anderson, *President, New York Building Congress*

Center for an Urban Future, *Caution Ahead; Overdue Investments for New York’s Aging Infrastructure*, March 2014

City & State, Louis J. Coletti on Scaffold Law, May 2, 2014

City & State, Forum on the Scaffold Law, featuring panelists Paul Fernandes then-Chief of Staff, (BCTC), Assemblyman Francisco P. Moya, Ross Holden (SCA), et al., November 14, 2013

Louis J. Coletti, *President/CEO, Building Trades Employers’ Association*

Construction User Council video from 2012 forum, featuring Mr. Coletti and Mr. Holden as panelists

Crain’s New York Business, *Cuomo Won’t Push Scaffold-law Reform This Year*, April 25, 2014

Michael Elmendorf, *President/CEO, AGC NYS*

Felice Farber, *Director, External Affairs, GCA GetNYBuilding.org*

Joseph T. Gunn, *Regional Partner, Willis of New York*, et al. (Mark Theriault, Christopher Franks)

Gary LaBarbera, *President, Building and Construction Trades Council of Greater New York*

Marsh & McLennan Companies, *NY Labor Law 240*, November 2012

NYLawsuitReform.org

Joseph Russo, *Senior Vice President – Regional Practice Leader, Aon*

ScaffoldLaw.org

ScaffoldSafetyLaw.com

Thomas C. Tenerowicz, *Senior Vice President, Construction Project Risk Insurance, Marsh USA*

Stephen Upshaw, *Vice President, Risk Management, Equity Residential*

Elizabeth Velez, *Chairwoman, Latino Builders’ Council, and President, Velez Organization*

Ted Xanakis, *Director of Claims, Lend Lease (US) Construction LMB Inc.*

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