



Mitigating the Impact
of the NY Labor Law
**Claim Management and Risk
Control Techniques**

Introduction

Construction in New York State has and continues to be subject to a highly litigious environment. The primary culprit is Labor Law section 240/241, commonly referred to as the "Scaffold Law," which imposes strict liability upon contractors and property owners for all "gravity-related" injuries. This law does not provide for any consideration of the injured employee's fault — essentially rendering defendants to be presumed at fault even if the worker's negligence contributed to the accident. New York is the only state left that has a scaffold law, and the cost to insure a construction project in New York is 10 times higher than it is in other states. The Scaffold Law also increases moral hazard, making it more likely to have injuries and related litigation.

In New York, Workers' Compensation Exclusive Remedy Statute bars an employee injured on the job from making a liability claim against their employer. However, the injured worker can still pursue an action against a responsible party and because of contractual obligations this liability may flow back down to the employer, circumventing the Exclusive Remedy Statute. This is known as an action over claim and it is very popular in New York. In fact, on a wrap-up construction project, approximately 80% of general liability claims have a correlating workers' compensation claim.

In recent years, the courts have broadened their interpretation of what constitutes a gravity-related accident, which has led to the unpredictable verdict amounts and large settlement values in these cross over claims. Given this significant shift in cost, the commercial insurance industry has taken necessary steps to mitigate their exposures, either by transferring significant risks to the policy holders by structuring programs with large or matching deductibles and/or fronted policies and raising premium prices, or by restricting their appetite significantly, including not taking on construction risks in New York.

Labor law section 240

Once the court determines that a violation of Labor Law Section 240(1) applies to an underlying lawsuit, it imposes absolute liability upon owners and general contractors, regardless of the comparative fault of the plaintiff. Interestingly, this liability determination does not prevent the owner or general contractor from shifting the liability to a downstream party. The New York Court of Appeals permits a vicariously liable owner to shift the entire loss to a contractor under common law indemnification: *Cunha v. City of New York*, 2009 NY Int. 96

Once a plaintiff succeeds in establishing a violation of this section, the defendant is essentially defending a damages-only claim. The exposure increases significantly if it involves a union worker with a competitive compensation benefits package that alleges his injuries prevent him from returning to work. Many times, lack of education and/or training renders the worker's prospects for future employment in other jobs paying similar salaries unlikely. A union worker in his/her twenties or thirties, earning a high salary with maximum benefits, who asserts claims for large future lost wages and pain and suffering presents the potential for a substantial jury verdict.

Example cases

The single highest verdict was rendered in 2014 in Queens County for \$62M. In *Lin v. Hutch Realty Partners*, 23253-08: A 20-year-old immigrant alleged he fell 10 feet off a roof while installing metal siding. Labor Law 240.1 was granted early in the case and started the 9% interest rate accumulation. The case proceeded to trial where only damages were disputed. The plaintiff alleged a traumatic brain injury, multiple spinal fractures, multiple rib fractures, splenic laceration, renal hematoma and lung contusion. The verdict was rendered in 50 minutes of deliberation.

Confidential pre-trial settlement: A union steel worker in his early twenties was guiding a beam that was being hoisted by a crane when the seven-ton beam rolled over the wood dunnage and onto the worker's leg. Plaintiff sustained fractures of the humerus for which he underwent open reduction, internal fixation; a fractured/splayed pelvis requiring surgery; multiple rib fractures; bilateral femur fractures requiring multiple surgeries; fractured ribs; and multiple internal injuries, including a staph infection resistant to antibiotics. Worker sustained permanent injuries that ended his career as an iron worker. The case settled pre-trial because it was very volatile with a potential that a court could have ruled it a 240.1 strict liability case. The case settled for \$17M after four years from date of injury. Estimated value was \$25M.

What coverages are impacted by the various labor law statutes?

The impact of these cases is focused on commercial general liability (CGL) and related excess or umbrella liability placements. This makes sense in light of the facts that these policies typically protect against claims arising from the legal liability of the policy holder and that the various statutes impose legal liability.

Therefore, the increased severity of cases brought over the past 10-15 years has had a major impact on the profitability of these coverages for insurance companies, resulting in the dramatic impact on how carriers view construction liability in New York compared to the rest of the country. They are taking a number of actions to address the situation but, ultimately, costs will be borne by all policy holders in New York unless the underlying statutes are addressed by the legislature. Willis Towers Watson supports a number of organizations advocating reform; until this occurs the rising costs associated with insuring a project will affect not just insurance but ultimately construction costs.

Impact of labor law claims on the NY insurance marketplace

The current NY construction marketplace prices wrap-up programs at approximately 10% of construction volume (CV). Approximately 75% of the cost comprises the loss aggregate fund — money set aside to pay all general liability and workers' compensation claims for a given project. As an example, if an owner is going to build a \$1B residential tower, the costs to insure the project under a wrap-up would be \$100M with the corresponding loss aggregate set at approximately \$75M.

Given the above expectations, a four-year project should anticipate having 20 (five claims per year for four years) labor law claims at a total of \$50M (\$2.5M x 20 claims). Project teams need to understand the impact of these claims on the project budget and put in place necessary protocols and policies. Now that the majority of project costs are related to losses, to benefit from diligent claim and loss control management initiatives while also recognizing a significant potential downside.

New York City construction industry trends for 2017

Where are we in the boom/bust cyclical cycle (construction)?

- It is expected that single-family home construction will grow at a faster rate than the multi-family home market.¹
- Construction in the retail industry has managed to grow despite expectations of a slowdown due to increased favorability of shopping online.²
- Construction in new and renovated hotel properties is continuing to grow, but it is expected that that development will slow down or stop completely by 2018.³
- 2016 was the first year in the past three that we have seen a slight slowdown in the construction industry. However, it has now entered another phase of the construction industry cycle that may be characterized by slower rates of growth than what took place in the previous three years, but can be considered growth nonetheless. We can expect to still see moderate signs of growth through 2017 and going forward for the next few years.⁴

Increase of non-union construction

- Market research estimates that the market share for non-union construction projects has risen to at least 40% — with some reports saying that it may be as high as 50%.⁵
- On average, non-union labor is 20-25% cheaper than union.

However, these costs are supplemented by the fact that non-union labor requires more oversight and supervision due to the workers' lack of formal training.⁶

- Right now, unions have a hold on the market for larger and complex construction projects. However, as non-union labor gets more experienced and familiar with this type of construction, this may change. To keep a hold on their market share, unions may be more open to innovative ideas.
- According to the NY Committee on Occupational Safety and Hazard report, 79% of New York City accidents in the workplace that involved a worker falling to their death took place at a non-union site.⁷

Increase in safer construction methods, such as pre-fab/offsite construction procedures

- More companies will begin employing pre-fab/offsite construction procedures, as these methods are often less expensive and safer than the current alternative. This ability will decrease the construction schedule of a project and improve market efficiency.⁸
- Technological advancements, such as these tools, will allow contractors to minimize costs resulting from errors and necessary rework and to be able to improve communication and collaboration when working on a construction project.

Increase in job site accidents/fatalities due to various factors (unskilled labor, novice developers)

- There has been a 98% increase in construction accidents in the past three years alone.⁹
- The 421a program, a tax abatement program that gave subsidies to developers that sold a percentage of affordable housing units in their buildings and favored union workers, has been suspended.¹⁰
- Falls, trench and scaffold collapses, and injuries related to electric shock are the most common hazards at construction sites and are often related to a failure to follow safety protocols.¹¹
- While officials claim that construction worker safety is a priority in terms of creating adequate law regulation, we have yet to see those laws actually reduce the number of accidents and deaths on construction sites.
- There are, however, varying levels of controversy with these statistics because of regulatory bodies not properly accounting for non-union injuries.¹²

Increase of criminal prosecution of contractors for unsafe work sites

- With the increase in workplace injuries and deaths that we have seen over the past few years on various construction sites, the logical next move for lawmakers will be to increase enforcement of safety standards and penalties for going against them.
- There was the first criminal prosecution and indictment of a general contractor in New York City (Harco Construction) and a second case is currently pending with the Brooklyn District Attorney.
- Back in August of 2016, OSHA's new penalty and fine structure took effect with a 78% increase in fines across the board.¹³

Labor law claims by the numbers

The filing of cross over labor law claims has been both frequent and consistent over the past 15 years with a dramatic increase in the average severity of a claim over the past five years. Based on our historical and current construction projects, the average value of a labor law claim is approximately \$2.5M.

Reform

Scaffold Law reform focuses on proposing legislation that would replace the *absolute liability standard* (full liability regardless of fault) with the more fair *comparative negligence standard* (liability is proportional to fault), only in situations where a worker's injury is found to have been caused by that worker's failure to follow safety training or use available safety devices, intoxication, or commission of a crime. Every year coalition members gather at the state capitol to urge legislators and the governor to repeal the Scaffold Law, given the significant financial impact on tax payers and local governments.

Suggestions/recommendations

We monitor legislative reform but strongly suggest that additional steps be taken to avert the current insurance crisis. It's our opinion that to date, the remedial measures taken to address the impact of labor law claims have been ineffective. This is mostly due to their failure to address both loss prevention and loss mitigation once an incident occurs.

We recommend augmenting the proposed legislation with the following measures:

Loss prevention measures

Fall protection and falling object prevention programs — A detailed, comprehensive formal fall protection and falling object prevention "management" program should be established for all projects and contractors expected to work at elevation. This program should be communicated down to the workforce via a formal documented training program and incorporated into any ongoing safety plan and/or job hazard review planning efforts. Although ensuring the policy is equivalent to at least a 100% six foot policy, the program must also address aspects of protection that fall below the six foot trigger. For reasons explained earlier, labor law judgements are influenced more by the influence of gravity itself and less by the actual fall distance in question. As a result, we look to incorporate a comprehensive management program to help alleviate exposures that may contribute to any falling object or person. The following are just a few examples.

1. *Contractor pre-qualification procedures:* Many large projects and owners work diligently to create a pro-active safety culture to encourage the reduction of losses in their programs. However, history also shows that changing culture takes time that may extend far beyond the end of the project in question. To avoid that challenge, hire good contractors that already have at least the foundation of a good safety culture. All contractors should be pre-screened; review criteria such as loss history, insurance experience ratings, regulatory violation history, safety programs, minimum training requirements for supervisors, pre-planning



efforts, safety accountability programs, disciplinary policies, and safety responsibilities regarding program execution — these are just a few samples of criteria that should be assessed. Additionally, both loss and safety performance should be tracked to allow for better vetting of performance of all contractors. Doing so will allow for better selection of contractors and build better performance down the road.

2. *Ladder minimization programs:* Promote the use of man-lifts instead of ladders or scaffolds to reduce fall exposures. Ladders and scaffolds are inherently dangerous even with proper training.
3. *Labor force to reduce slip, trip and fall exposures:* Fall exposures could be minimized by assessing the effectiveness of the workforce responsible for maintaining housekeeping, temporary lighting, guardrails, netting systems, hole covers, ice/snow removal, for example. It is not uncommon for a workforce to be inadvertently reduced as general conditions are negotiated or perhaps reduced as a result of winning an opportunity with tight profit margins. Before hiring a contractor, always ask what the anticipated size of their allocated labor force for cleanup, carpentry crews for protection maintenance and even what supervisor-to-worker ratios are anticipated. This information will provide huge benefits, particularly, during the contractor review and selection phases.
4. *Tool and material tethering and/or tie back programs:* The prevention of falling objects is a critical component of any loss prevention program intended to combat labor law-type losses. Tool and material tethering is one way of achieving that goal. Tethering technology and available tethering products have come a long way in recent years. The addition of a tool tethering program should be considered for all elevated work including, at a minimum, shaft work, leading edge, perimeter and lift/scaffold work. As with fall protection, tethering programs should include detailed training regarding equipment, limitations, connection points, etc.

5. *Material handling, stacking and storage requirements:* A “gravity-induced” labor law claim is not always the typical example of an object falling multiple floors or great distances. Historical case law has determined that an object falling from any distance could induce a labor law claim. Our most expensive claims resulted in objects falling from the same level, such as materials stacked improperly or material falling off a truck bed while unloading. A sound loss control program must include strong verbiage to promote safe handling and stacking of materials. Examples include:

- a. Stack materials horizontally vs. vertically
- b. Establish height limitations when stacking
- c. Establish a “no leaning” policy unless positively secured
- d. Establish controlled/restricted access zones with clear signage to restrict access to storage areas, debris removal areas and stripping/demolition areas, at a minimum.
- e. Store large steel beams or materials on the side of its largest width dimension to prevent accidental tipping
- f. Ensure trucks delivering material have manufactured, pre-fabricated access points/ladders
- g. Consider establishing common unloading areas with pre-established guardrails systems/platforms to limit fall exposures during unloading operations
- h. Strict material handling policies should be established to ensure material and debris is always moved in a controlled manner with the proper equipment. The need to “toss” or “drop” material without appropriate controls should also be prohibited.

6. *Housekeeping management plan:* It is not uncommon for projects to have detailed fall management programs because falls from heights result in the most fatalities in the construction industry. However, some often forget that the root cause of a serious fall may be an initial easily preventable slip or trip. We therefore recommend focusing on the following housekeeping-related loss control techniques, which may help in the alleviation of both falls and falling objects.

- a. Establish strict daily a.m. and p.m. perimeter and shaft inspection requirements to ensure all loose materials are removed and/or secured
- b. Consider additional temporary protection for fall exposures that may fall below six feet, such as by loading docks, elevator pits, etc.
- c. Clearly delineate main access/egress paths as “No Storage” areas
- d. Consider additional slip-resistant surfaces at main access/egress points and/or travel paths that may be exposed to the elements
- e. Assign responsibilities to ensure stairwells are inspected and cleaned daily
- f. Ensure that responsibilities of snow/ice removal are clearly identified
- g. Ensure any small offsets, changes in elevations or immovable objects in travel paths are highlighted or marked with high visibility material
- h. Ensure that project disciplinary policies are fully executed for violations of project housekeeping policies

7. *Establish a joint labor/management safety committee:* This establishes an excellent forum to address safety challenges inherent to NY construction sites by maintaining open lines of communication with ownership, labor, contractors and insurance companies. It is also an opportunity to discuss lessons learned, potential trends and identify incident root causes for the benefit of future loss prevention.

8. *Worker and supervisor training:* We believe that a better educated workforce will tend to have fewer injuries. The industry has made progress as many local jurisdictions now require OSHA 10-hour training for the workforce. However, it is important that the training also incorporate hands-on training for things like PFAS (personal fall arrest systems), ladder/scaffold safety, etc. Therefore, we always recommend supplemental project-specific fall protection and falling object prevention training. This training should be more than a typical toolbox talk and incorporate specific equipment issued for the task at hand. It is also important to note that often supervisors are held to the same requirements as the workers themselves. We believe strongly that supervisors should be held to a higher standard and be required to complete a minimum OSHA 30-hour training course. Additionally, consider a separate orientation program for on-site supervisors to ensure that responsibilities and expectations are established early on.

9. *Discipline and recognition programs:* To be successful, a project or contractor must have a good balance of both disciplinary policies and performance recognition. Disciplinary policies must be documented and have “teeth” to be effective. Performance recognition is also crucial to re-enforce positive behavior and set a good example for others to follow. Supervisors should also always be held accountable for the performance of their crews.

Loss mitigation measures

1. *Alternative dispute resolution programs (unions are more open to innovative ideas)*

Overview of ADR: Collective bargaining agreements can establish an ADR program for managing workers' compensation claims outside of the New York statutory workers' compensation system. ADR requires that all participating unions agree to the terms and conditions of the ADR program within a collectively bargained agreement. ADR allows for the use of arbitration and mediation to resolve claim disputes, the use of an agreed medical managed care organization or a list of authorized providers for medical treatment, customized indemnity benefits, return-to-work programs, vocational rehabilitation programs, safety programs, and a labor management committee.

History of ADR: In 1995, legislation was passed approving the creation of a workers' compensation ADR pilot program for the unionized sector of the construction industry in New York. Legislation in 2010 transitioned ADR from a pilot program to a permanent program. The most prominent user of ADR is the New York City electrician's union, Local 3 for their Electrical Employers Self Insurance Safety Plan (EESISP).

Claim Process: Workers' compensation claims are submitted to the carrier/TPA just as in the normal statutory system. Because ADR is a collectively bargained workers' compensation program, it is not overseen directly by the New York Workers' Compensation Board and is managed by an ADR program administrator.

ADR components

- Mediation Resolution Management acts as the ADR program administrator. They assist our clients seeking union approval, create all ADR program documents, obtain approval from the New York Workers' Compensation Board, coordinate implementation with the carrier/TPA, and oversee the labor/management committee.
- Willis Towers Watson provides insurance brokerage services, claim advocacy, claim program design, and assists in gaining carrier approval of the ADR program.
- PPO network inclusive of designated medical providers.
- Program representative/ombudsperson is appointed to guide injured workers through the claim process, answers claim-related questions from the workforce, and acts as their claim advocate.
- Claim disputes may be resolved through a special mediation and arbitration process using mediators and arbitrators selected by the Joint Labor-Management Committee. Attorneys can be hired by claimants, but are not officially part of the initial claim dispute process.
- A third-party administrator (TPA) or insurance carrier manages the day-to-day activities for all workers' compensation claims. The workers' compensation adjuster(s) would be responsible for completing and submitting all necessary formwork required by the New York State Workers' Compensation Board, approving all indemnity and medical payments, setting reserves, settling claims and monitoring the progression of all claims.
- The sponsor of an ADR program generally receives the benefits of better control.

Requirements for ADR implementation

- Can only be implemented on unionized projects
- ADR language in the project labor agreement (PLA) is required
- Union approval of the PLA, including ADR sign-off
- Client must choose a program administrator
- ADR must be approved by the insurance carrier
- Creation of an ADR program requires approval from the NYSWC Board
- Creation of a Labor Management Committee

Benefits

- Better control over medical treatment and approximately a 30% reduction of medical costs through use of a PPO network
- Anticipated improved return-to-work rates
- Decrease in WC expenses
- Injured workers get swifter resolution of their claims and enhanced access to medical treatment/services
- Claimant/plaintiff attorneys are not permitted in the dispute process

- Lower expenses and more timely settlements
- Potential to reduce costs of general liability labor law claims
- Customized safety program with union involvement
- Client may be in a better position to obtain lower insurance rates from carriers and decrease their overall insurance costs

Results

- A decrease in the number of litigated workers' compensation and general liability claims
- Claims that are filed should have a lower settlement value due to a decreased length of disability time for injured workers
- Overall reduced workers' compensation and general liability premium costs for the project's controlled insurance program (CIP)

April 2012 Cornell University statistics

- ADR claims saw a 75% reduction in lost time days
- A project with expected losses of \$18M had \$4M in actual losses
- Less than 1% of all claims were litigated past the point of mediation

2. Site medical services

The primary goal of on-site medical services is to reduce the project's workers' compensation exposure and allow for on-site assessment/treatment following an accident. This will allow the work force to gain the advantage of experienced medical professionals without leaving the site.

Willis Towers Watson has partnered with a number of firms that currently offer on-site industrial medical services for New York City projects. The scope of services includes:

- Physical examinations
- Biological monitoring
- Nursing/first aid station
- Project reporting/record keeping
- Follow up/monitoring
- Return-to-work coordination
- Respiratory projection
- OSHA compliance
- Substance abuse testing programs
- Safety training
- Emergency transportation services

When on-site medical services are delivered, the results have been extremely positive and significant, reducing claim frequency and workers' compensation costs; avoiding unnecessary recordable incidents; and increasing early identification/intervention, support/tactical training for safety and risk programs, and drug testing.

On-site trailers allow policy holders the advantage of experienced medical professionals to help reduce workers' compensation costs and have been shown to realize reductions anywhere between 15% – 17%.

3. Drug and alcohol testing

Drug abuse in the workplace could result in employees' absenteeism, tardiness, poor work performance, increased accidents in the workplace and more. A survey indicated that drug abuse in the workplace costs the business community anywhere from \$75B to \$100B annually in accidents, lost time, and workers' compensation and health care.¹⁴

The percentage of employees in the combined U.S. workforce testing positive for drugs has steadily increased over the last three years to a 10-year high. Post-accident positivity increased 6.2% in 2015 compared to 2014 (6.9% versus 6.5%) and increased 30% since 2011 (5.3%). In addition, post-accident positivity for the safety-sensitive workforce has risen 22% during a five-year time period (2.8% in 2015 versus 2.3% in 2011).¹⁵

Substance abuse programs deter employees from engaging in recreational drug and alcohol use while employed and can lead to a decrease in workplace accidents and subsequently a decrease in action over claims. At the very least, they can provide an additional level of defense from frivolous claims.

A successful substance abuse testing program for drugs and alcohol should include all aspects of pre-employment, reasonable suspicion, random and post-accident testing. To be successful, all substance abuse programs must be formalized in writing, developed based on industry recognized practices, fairly administered, consistently monitored and enforced and communicated to all levels of the workforce via formalized training programs.

In recent years drug and alcohol testing has been successfully negotiated in union collective bargaining agreements (CBAs) and PLAs.

4. Return-to-work programs

A coordinated loss management program that includes a return-to-work program will have a great impact on your labor law action over claims. An injured worker who can be returned to work at modified duty reduces the lost wage component that makes up most of the labor law claim value. Workers who return to work are more likely to continue working and eventually return to full duty than those who stay out on disability.

5. Unbundling of claim services (nurse case management, claim handling)

With policy holders taking on significant risk on these projects, it makes financial sense to structure the insurance program by unbundling services. Unbundling services allows for policyholders to handpick the best vendor partners that will manage the program on the owner's behalf. Creating bench strength in all the resource areas allows for aggressive management and cost containment of the workers' compensation file, which in turn improves results in the action over general liability claims. As we discussed earlier, labor law claims are made up largely of lost wages — however, if you are able

adjudicate the workers' compensation claim early or return the worker to employment, the lost wage component is capped and exposure on the general liability side significantly decreases.

Factors driving the value of labor law claims in NYC

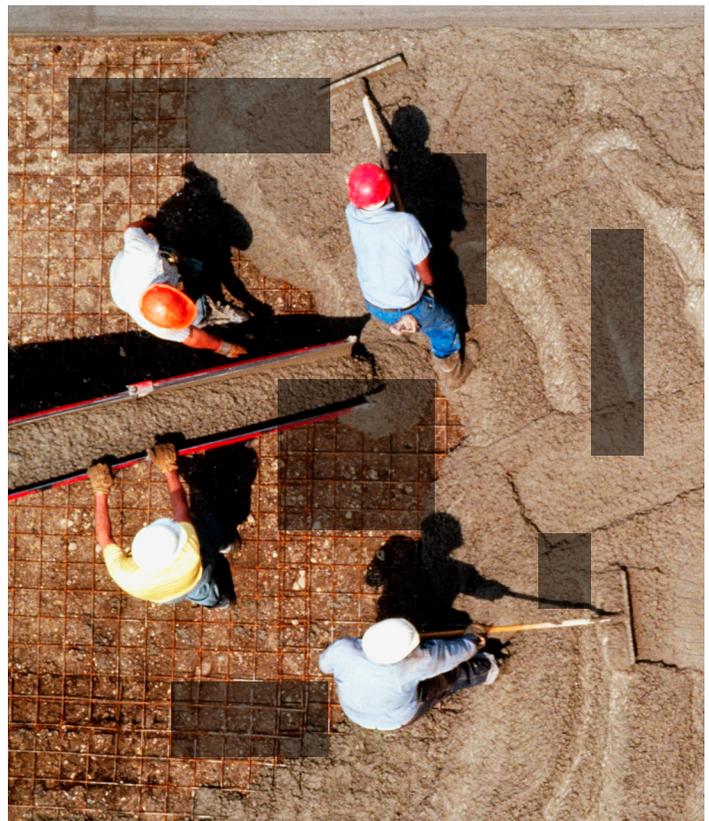
It's important to understand why NY labor law cases have such high values when compared to general liability losses in other states.

- Historically, 70% of the value in a labor law case is the lost wage component. ADR will have a significant impact in lowering the injured worker's duration of disability and expediting RTW.
- The remaining 30% of the value of a GL claim is comprised mainly of pain and suffering, which relates directly to the number of surgeries and the effectiveness of the medical claim process an injured worker undergoes. ADR should reduce the overall medical spend by approximately 40% and greatly reduce the number of surgeries.

Since states that retain the ability to direct treatment for the injured worker typically have disability durations that are akin to that of the Pressley Reed guidelines. Without that ability in NY, durations are 400% to 500% higher than other states.

Carrier response

Carriers are remaining conservative, and their appetite has further declined in NY due to an aggressive increase in labor law claim awards. Certain carriers have removed themselves almost entirely from writing any NY exposure. Even when the client retains 100% of the claim, in way of retention, there is still adverse selection on the carrier's part.



Changes we've seen in the NY construction insurance marketplace pursuant to labor law

Practice Policies

- 20% – 40% premium increases
- Minimum primary GL limits increased to \$2M/\$4M/\$4M
- Some carriers requiring \$5M/\$10M/\$10M
- Many smaller placements have been forced to be placed in the wholesale market to get coverage
- Coverages provided have become more stringent with certain carriers not affording as favorable terms

OCIPs/CCIPs

- Maximum rates have continued to increase.
- The split between premium/loss content has also increased, with over 75% pertaining to losses.
- Standard primary GL limits of \$2M/\$4M/\$4M are no longer acceptable for an attachment point for lead umbrella/excess carriers.
- Depending on the project and experience, we have seen an increase to \$3M/\$6M/\$6M when the excess carriers are comfortable affording limit excess, while certain situations have required \$5M/\$10M/\$10M.
- When excess carriers place excess of \$3M/\$6M/\$6M, we have seen a short limit of \$5M xs primary.
- Buffer quotes have not been an option as they have proven to be overpriced, and most markets are not even offering options.
- Deductibles increased from \$250K WC/\$500K GL to \$500K WC and \$1M to \$3M for GL

Defense success stories

The defenses to a Labor Law §240 Cause of Action are limited. A plaintiff's own negligence is not considered, unless it can be deemed the sole proximate cause of the injury. In *Blake v. Neighborhood Housing Services Of New York City, Inc.*, 1 N.Y.3d 280, the court of appeals addressed the issue of strict or absolute liability under Labor Law §240(1).

Plaintiff, who operated his own contracting company, was working alone on a renovation job in a two-family house in the Bronx. Plaintiff set up an extension ladder that he owned and had used frequently. Plaintiff acknowledged at his deposition that the ladder was steady, had rubber shoes and was in proper working condition. While performing rust removal on a window, the upper portion of the ladder retracted, causing the plaintiff to sustain injury. Plaintiff sued the homeowner and NHS alleging a violation of Labor Law §240(1). At trial, plaintiff conceded that he could not identify a defect in the ladder and testified that he was not sure if he had locked the extension clips in place before climbing the ladder.

After trial, the jury found that the ladder used by the plaintiff was constructed and operated to give proper protection to the plaintiff.

The court concluded that the evidence "leads to the inescapable conclusion that the accident happened not because the ladder malfunctioned or was improperly placed, but solely because of plaintiff's own negligence in the way he used it."

Essentially, the court of appeals in *Blake* reiterated its prior decisions and highlighted that there can be no liability under §240(1) where there is no violation and the worker's actions are the "sole proximate cause" of his accident.

The recalcitrant worker defense is available in those situations where plaintiff has affirmatively refused to follow direct instructions. The court of appeals in *Cahill v. Triborough Bridge and Tunnel Authority*, 4 N.Y.3d 35 (2004) expanded this defense, which is not contained in any statute and is predicated upon the idea that the statutory protection does not extend to workers when adequate and safe equipment is made available to them but they refuse to use it. Prior to the court's decision in *Cahill*, owners or general contractors had to prove that directions regarding safety devices were provided to workers almost contemporaneously with the worker's accident.

In *Cahill*, the court held that the giving of the instruction or direction and any lapse of time between same will not undermine the "recalcitrant worker" defense in and of itself. In *Cahill*, the plaintiff was instructed to use his safety harness and lanyard weeks before the incident occurred. No specific direction was given to the plaintiff on the date of the incident. Then, while ascending a "form" without employing his available safety harness, the plaintiff fell approximately 10 to 15 feet to the ground. The court of appeals held that the plaintiff's failure to use the available safety devices, when taken in conjunction with the fact that he ignored the direction issued weeks earlier by a supervisor, meant that he met the definition of a "recalcitrant worker." As set forth in *Blake*, where the plaintiff's recalcitrant acts constitute the "sole proximate cause of the accident," they dismissed the plaintiff's Labor Law §240(1) cause of action.

Conclusion

Willis Towers Watson is intimately familiar with all viable defenses to New York labor law claims and develops loss control procedures focused on mitigating the number of gravity-related incidents for our clients. We have also handled more than 5,000 labor law claims in the past 10 years and achieved favorable results ranging from defense verdicts to defeating labor law motions outright. We have vast experience in dealing with all aspects of New York Labor Law 240 (1) as well as the other components, 241 (6) and 200. We continue to encourage aggressive investigative and claim handling techniques that will mitigate the client's overall exposure to these claims. We have already developed a panel of construction oriented defense counsel that deals exclusively with defending labor law claims. At this point the NY labor laws have created significant impacts to construction owners and contractors, and we encourage all firms working or thinking of working in NY to contact us early in the process to make sure all alternatives are examined.

Footnotes

¹ Carrick, Alex. US Construction Outlook Heading into 2017. 1 December 2016. 16 February 2017.

² (Carrick)

³ (Carrick)

⁴ (Carrick)

⁵ Brenzel, Kathryn. Are Unions Losing Their Grip in NYC? 1 March 2016. 16 February 2017.

⁶ (Brenzel)

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¹⁰ Stulberg, Ariel. Developocalypse: 421a expires. 15 January 2016. 16 February 2017. <https://therealdeal.com/2016/01/15/developocalypse-421a-expires/>.

¹¹ (Howard R. Sanders)

¹² Williams, Jumaane. Council Committee Wants City to Record Data on Accidents at Union, Nonunion Sites. 17 October 2016. 16 February 2017.

¹³ Slowey, Kim. Drawing the Line: Does Heightened Legal Enforcement 'Cultivate Change' in the Construction Industry. 3 August 2016. 16 February 2017.

¹⁴ www.testcountry.com

¹⁵ The Quest Diagnostics Drug Testing Index 2106 www.QuestDiagnostics.com/DTI

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