



“My daddy’s working up there.”

Construction workers—and their families—are counting on our state leaders to help them stay safe on the job by protecting New York’s Scaffold Law.

According to the most recent federal data available, on-the-job accidents took the lives of 30 New York State construction workers.

Compounding the tragedy: devastating accidents like this can be prevented, but too often prevention takes a back seat to corporate profits. **When irresponsible contractors cut corners on safety because they know they can get away with it, it’s not just their employees who pay the price. We need to work to make sure New Yorkers are kept safer from construction accidents.**

New York State’s Scaffold Law was designed to protect construction workers—and their families—and to keep the public safe. It holds contractors and owners accountable for enforcing work site safety rules and regulations.

Unfortunately, some builders, contractors, insurers and other special interests are trying to dodge their responsibilities by pressuring the State Legislature to erode the Scaffold Law. **For all of our sakes, state leaders must continue to protect workers and all New Yorkers by keeping the Scaffold Law strong.**

**Protect worker safety
Support the Scaffold Law**



NEW YORK STATE TRIAL LAWYERS ASSOCIATION

Protecting New Yorkers Since 1953



DON'T LET CONTRACTORS PUT PROFITS OVER PEOPLE

OPPOSE A.3104 (Morelle) / S.111 (Gallivan)

These bills would abolish a long-standing public policy intended to protect workers by undermining the protections of New York's Scaffold Law – one of the most effective and important workplace safety statutes in the Nation.

- The Scaffold Law only applies to elevated construction activities and provides that an owner or contractor is strictly liable for injuries resulting from their own **failure to provide the prescribed safety equipment and training**.
- In enacting the current Scaffold Law, the Legislature understood that many deaths and injuries associated with working at elevated construction sites could be avoided merely by requiring that site owners and contractors provide vital safety equipment which properly protects workers.

The risk of death or serious injury at workplaces continues to be a threat:

- **On-the-job accidents took the lives of 30 New York State construction workers** in 2011 alone, according to the Department of Labor's Bureau of Labor Statistics.
- OSHA inspectors found violations of work site safety standards in 67% of New York State construction site inspections in 2008.

Devastating accidents can be prevented, but too often prevention takes a back seat to corporate profits. When irresponsible contractors cut corners on safety because they know they can get away with it, it's not just their employees who pay the price. **We need to work to make sure New Yorkers are kept safe from construction accidents.**

- These bills would allow site owners and contractors to **unfairly shift the burden of safety from the contractor, who exercises control and profits from the work site, to the worker, who exercises no control over the work site** and is clearly in a subordinate position.
- These bills would allow contractors to **avoid their moral and legal obligation to provide workers operating under inherently dangerous conditions with the necessary safety devices**. Moreover, it would add incentive to the existing practice of discouraging workers from making demands for a safe work site.

- The existing “recalcitrant” and “sole proximate cause” defenses make changes to the Scaffold Law unnecessary. The Court of Appeals has repeatedly held that workers who cause their own injuries by misusing or ignoring readily available safety devices, or by disobeying safety instructions, cannot recover under the Scaffold Law. As a result, for example, where a jury finds that a worker misused a ladder which caused his or her injury, the strict liability standard would not apply. Similarly, **if a worker’s drunkenness is the sole cause of a fall, the owner or contractor is not liable under the current statute.**
- These bills are unnecessary since, under the Scaffold Law, an owner or contractor is not held responsible for an accident unless their failure to provide proper safety equipment proximately causes the worker’s injury. Accordingly, an owner or contractor can avoid liability under these provisions, simply by having the proper safety equipment in place.
- The economic justifications advanced for the proposed bills are faulty and minimal compared to the costs (both in human suffering and monetary expense) of weakening construction safety requirements. It is true that New York's worker safety protections are stronger than those in many other states, yet many of those other states have experienced the same, or worse, drops in construction activity in recent years. It is therefore inaccurate to blame this recent economic decline on a worker safety statute in New York that applies to very few types of accidents, and which has been in place during a century that has largely seen tremendous **growth** and **profits** in this state's construction industry.

Construction workers - and their families - are counting on our state leaders to help them stay safe on the job by strengthening New York’s Scaffold Law.

PROTECT WORKER SAFETY

PROTECT THE SCAFFOLD LAW

Let's set the record straight on New York's Scaffold Law

A lot of misinformation is being disseminated about New York's landmark worker protection legislation, the scaffold law. Here's the real story.

- **New York's Scaffold Law makes construction safer.** According to U.S. Bureau of Labor Statistics, from 2000 to 2010 New York had the nation's fifth-lowest construction injury rate.
- **The Scaffold Law applies *only* to gravity (height)-related accidents.** An owner or contractor is *not* held strictly liable for such accidents unless their failure to provide proper safety equipment proximately caused a worker's injury. **Liability can be avoided simply by having the proper safety equipment in place.**
- **Owners and general contractors are not responsible under the Scaffold Law if a worker is injured solely because they failed to follow instructions,** failed to use available safety equipment, misused or incorrectly set up safety equipment, **or were injured because of their own actions such as being intoxicated.**
- **Weakening the Scaffold Law would shift safety responsibility from owners and general contractors, who control and profit from the work site, to workers, who have no such control of the site and are in a subordinate position.** Workers are commonly ordered to perform tasks without any safety equipment or with defective or improperly installed or secured equipment.
- For example, a contractor may order a worker to climb a ladder that does not have safety legs or is not secured. Refusal could mean being sent home and losing a day's wages or outright firing. This is what is referred to as economic coercion – do the job or get off the site. Weakening the scaffold law simply encourages such behavior and puts workers in danger without recourse. If the worker complies and is injured, **a weakened Scaffold Law that applies comparative negligence would encourage the contractor to falsely assert in court that the worker refused to follow proper safety protocols.**
- **OSHA cannot be relied on to keep construction sites safe.** OSHA acknowledges that it can inspect only one construction site a day in the entire New York metro area. More often than not, OSHA comes in after an accident has already occurred, to assess what went wrong and issue a report. And the New York Committee for Occupational Safety & Health has reported, "OSHA's penalty structure is insufficient to serve as a deterrent. Fines are reduced, and unsafe workplaces remain. In New York state...many employers fail to prioritize safety and contribute further to the dangers." No wonder studies have shown that in more than one-third of construction sits in New York OSHA inspectors found serious violations of fall-prevention safety standards and that employers violated these standards in 80% of the accidents where a worker fell and was killed.
- **The scaffold law has *not* hindered construction or cost construction jobs in areas where the economy has been strong.** The same argument has been made for decades by those who seek to lessen the standard of liability. Yet, the number of housing units permitted in NYC soared from 5,100 in 1995 to 34,000 in 2008. Saratoga County added more than 10,000 new homes over the last decade alone. as for jobs, in the 15 years from 1996 to 2011 construction employment increased 20.3% in new York but declined 0.5% in the us and in the five years from 2006 to 2011 construction employment declined only 9.1% in new York but fell 28.4% in the us. Construction employment has suffered only in areas of the state where employment and population has lagged or declined. For more on this, read NYSTLA's white paper, "It's the economy, not the Scaffold Law," available at www.nystla.org.

City report: Close to half of all construction sites raise safety concerns

Department of Buildings reveals 55% in full compliance. But a full 13% were so unsafe that work needed to be halted.

BY [FRANCESCA TRIANNI](#) AND [NIKI BLASINA](#) / NEW YORK DAILY NEWS
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SHAWN INGLIMA FOR NEW YORK DAILY

A building under construction. A city survey found major safety problems at a large portion of jobsites.

Close to half of the city's construction sites are unsafe at any given time, a new city survey suggests.

A recently completed two-month Department of Buildings sweep uncovered just 55% of jobsites in full compliance with existing safety requirements, while 33% had some violations and a sizeable 13% had violations so severe that construction needed to be halted.

The survey was conducted in response to last year's 37% increase in construction site accidents.

"We cannot let this trend continue," said Buildings Commissioner Robert LiMandri told construction industry insiders at the annual Build Safe/ Live Safe conference Monday in lower Manhattan.

The city's focus is on low-rise buildings, where seven of the eight fatalities in 2012 occurred.

"Each accident was absolutely preventable," LiMandri said.

LiMandri said the agency would focus on enforcement and education, but the city's own policies may be contributing to the danger in low-rise buildings.

High-rise developers must employ a full-time safety manager, but low-rise builders can use "site safety coordinators" who can oversee up to 10 buildings at once, said Tim Hogan, the assistant commissioner of enforcement for the Buildings Department.

The agency also revealed:

- Half of the fatal accidents in 2012 stemmed from falls.
- In 2012, the city experienced a 16% increase in accidents caused by falling debris.
- Injuries to the public spiked by 25% in 2012.
- Construction permits rose 3% citywide, but bounced back 72% in Manhattan after a post-crash lull.

Union workers seized on the rules of the inspection sweep as evidence that non-union sites are less safe.

"Low-rise sites are not regulated well because they are non-union," said a member of Laborers' Local 18A, who did not want to provide his name. "Workers are scared to open their mouths because they would get fired."

Read more: <http://www.nydailynews.com/life-style/real-estate/report-construction-sites-unsafe-article-1.1331102#ixzz2UsWuMQL6>



May 14, 2013

S.111 (Gallivan) / A.3104 (Morelle)

AN ACT to amend the civil practice law and rules, in relation to the applicability of certain provisions with respect to persons injured in the use of scaffolding and other devices for use by employees.

The New York State Trial Lawyers Association (NYSTLA) strongly opposes this bill, which would amend the Civil Practice Law and Rules to provide that damages for personal injury, injury to property or wrongful death pursuant to Labor Law §§ 240, 241(1)-(5) and 241-a shall be subject to a comparative negligence standard.

This bill would undermine the protections of New York's Scaffold Law – one of the most effective and important workplace safety statutes in the Nation – and abolish a long-standing public policy intended to protect workers, significantly increasing the opportunity for abuse by unscrupulous owners and contractors of construction sites. It is also unnecessary given the existing defenses of the recalcitrant worker and sole proximate cause. The fundamental premise of Labor Law §§ 240, 241 and 241-a is to ensure that safety equipment to protect workers is in place in all circumstances. Labor Law § 240 only applies to height-related construction activities, and provides that an owner or contractor is strictly liable for injuries resulting from their own failure to provide the prescribed safety equipment and training. Sections 241(1)-(5) and 241-a similarly relate to safety standards, although generally for non-elevated work sites or elevator shafts and stairwells.¹ In enacting these provisions, the Legislature understood that many deaths and injuries associated with working at elevated construction sites could be avoided by requiring that site owners and contractors provide vital safety equipment which properly protects workers, placing the responsibility for workplace safety squarely where it belongs.

Current statutes and court decisions already provide substantial protections to owners and contractors. Under Labor Law §§ 240, 241 and 241-a, an owner or contractor is not held responsible for an accident unless their failure to provide proper safety equipment proximately caused the injury. Accordingly, an owner or contractor who provides proper safety equipment under the statute can ensure it will not be liable for a gravity-related accident on its project. Moreover, the Court of Appeals has repeatedly affirmed the “recalcitrant worker” and “sole proximate cause” defenses whereby, if a worker fails to follow directions on the worksite and such failure ultimately leads to the worker's injury, or if a worker's own actions are the sole proximate cause of an accident that results in

¹ The Court of Appeals has determined that subsections 1-5 of Labor Law § 241 impose absolute liability on an owner or contractor because these five provisions may also involve workers laboring and potentially falling from elevated heights during various stages of construction. In practice, no cases have relied solely upon these sections. When a worker is injured due to insufficient safety devices on the work site, the claim is brought under Labor Law § 240, and not § 241.

his or her injury, there can be no liability.² As a result, where a jury finds that a worker misuses a ladder which causes his or her injury, the strict liability standard would not apply.³ Similarly, if a worker's drunkenness is the sole cause of a fall, the owner or contractor is not liable under the statute.⁴ As such, while proponents of the amendment of this worker safety statute have argued repeatedly that all workers who fall automatically obtain recoveries in court no matter what they may have done to cause their own accidents, including being intoxicated on the worksite, such arguments are simply untrue and are clearly meant to inflame for the purposes of easing owner and general contractor responsibility for safety, thereby putting workers at risk.

Unfortunately, this bill would allow site owners and contractors to unfairly shift the burden of safety from the site owner or contractor, who exercises control of the work site, to the worker, who is powerless to exercise such control and is clearly in a subordinate position. In doing so, this amendment would skew the playing field and allow such owners and contractors to avoid their obligation to provide workers operating under inherently dangerous conditions with the necessary safety devices as required by the statute.

While this bill purports to create a fair comparative negligence standard, what it would actually accomplish is to allow site owners and contractors who fail to provide safe equipment and a safe work environment to shift the blame over to workers. For instance, as cases have illustrated time and again through the years, an unscrupulous owner or contractor may order a worker to climb a ladder that does not have safety legs or is not secured by another worker. Should the worker refuse, he or she will often be subject to economic coercion and either be sent home and thus deprived a day's wages, or fired outright for refusing to work absent safety measures required by statute. If the worker complies and is subsequently injured, this bill would actually encourage the owner or contractor to falsely assert in court that the worker refused to follow proper safety protocols or ignored instructions that were given during a safety course. And even in the absence of such a false assertion, a worker who was subject to economic coercion and worked under dangerous circumstances so as to earn a day's pay would be subject to a defense of comparative negligence for something entirely out of his or her control, and thusly a potential miscarriage of justice.

Furthermore, the realities of daily life for construction workers should not go unstated. Were this misguided amendment to this worker safety law to be enacted, in order to prove his or her case, the worker would have to prevail upon witnesses who either heard or saw the owner or contractor direct the worker to use the ladder without the proper safety equipment or protocols to come forward and testify against employers, contractors and owners who routinely provide such workers with the ability to earn a living, not to mention the near impossibility of obtaining the support of non-unionized, immigrant day-laborers where coming forward to testify in support of a co-worker would be nearly unheard of if not impossible. Consequently, despite having no control over workplace safety and despite the owner and contractor having failed to provide statutory safety measures to prevent an accident from occurring, the injured worker would risk being found wholly or partially at

² *Cahill v. Triborough Bridge Authority*, 4 N.Y.3d 289 (2004); *Vona v. St. Peter's Hospital of the City of Albany*, 223 A.D.2d 903 (3d Dep't 1996).

³ *Robinson v. East Medical Center, LP*, 2006 N.Y. Slip Op 2457 (2006); *Blake v. Neighborhood House Services of NYC, Inc.*, 1 N.Y.3d 280 (2004); *Weininger v. Hagedorn and Co.*, 91 N.Y.2d 958 (1998).

⁴ *See, e.g., Tate v. Clancy-Cullen*, 171 A.D.2d 292 (1st Dep't 1991); *Bondanella v. Rosenfeld*, 298 A.D.2d 941 (4th Dep't 2002); *Berman v. Franchised Distributors, Inc.*, 88 A.D.3d 755 (2d Dep't 2011).

fault for something entirely out of his or her control and denied reasonable compensation, while the owner or contractor could completely or substantially escape liability.

While some may think this an infrequent occurrence, NYSTLA members see and deal with this issue on a daily basis. Those who handle construction accident cases can attest to the fact that, time and time again, in almost every case, no matter how clear or obvious the failures to provide worker protection are, owners, developers, contractors and the worker's employers, swear to tell the truth and either themselves or through their employees offer a defense based on the worker's failure to act in a certain way. This despite their knowledge that what they claim the worker did wrong was, at a bare minimum, allowed if not encouraged and more likely an everyday, integral and accepted work practice.

Finally, the OSHA safety courses that are mandatory for workers on New York State projects in excess of \$250,000 provide wholly insufficient safety training to protect workers on the job. The outreach courses are designated by OSHA as a "general orientation" to a range of topics, however, they do not provide enough detailed information for workers to function at a level of "competency" as required under federal standards. Because OSHA government officials do not operate or monitor the courses and instructors need only be OSHA-certified, individual instructors determine which topics they will cover, how long and their content. There is thus no uniformity of instruction, nor are their specific course materials, and no guarantee that workers will receive the training that will teach them how to prevent or avoid accidents and be safe on the job. Although required for state funded projects, the course fails to cover the specifics of state code rules, which are often more stringent in their protection of workers. Because of the lack of adequate, uniform, and comprehensive safety training, having the Labor Law's work protections in place provides a necessary incentive to contractors to train their employees and keep their workplaces safe. Without the Scaffold Law, there will undoubtedly be many more construction workplace deaths each year.

Perhaps the single greatest mistake this bill makes is that it turns a century of sound workplace safety policy on its head. The entire rationale behind the Labor Law's safety provisions is as simple as it has been effective: those who supervise, control and profit from a construction enterprise are by far best able to monitor and ensure safety. No factual analysis of workplace behavior over the last 100 years can come to any other conclusion.

This legislation has been repeatedly re-introduced while the incidences and severity of workplace deaths and injuries have increased. In 2011 alone, there were 30 construction workplace deaths statewide as reported by the Department of Labor's Bureau of Labor statistics.⁵ At a time when crane collapses and other serious height-related accidents are reported on a regular basis, sadly, this bill focuses on curtailing injured workers' rights rather than making an effort to focus on safety to protect those in harm's way.

For all of the reasons outlined above, NYSTLA strongly opposes any change to this time-tested worker safety law which has for decades made clear an owner and general contractor's responsibility for worker safety. By maintaining the current state of the law, the legislature makes clear that the State of New York will not tolerate anything less than complete safety for workers who

⁵ 2011 Statistics are the most recent available. United States Department of Labor (DOL), Bureau of Labor Statistics, Injuries, Illnesses and Fatalities, 2011 statistics, available at: www.bls.gov/iif/oshstate.htm#NY.

put themselves in the greatest danger on construction projects throughout our State. Indeed, if recent trends and headlines are any indication, the protections afforded workers under the current statute remain as important today as they have been throughout the decades. Therefore, NYSTLA strongly opposes this bill and urges the Assembly to reject it.

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