



**Workplace Safety Eludes
Construction Workers of Color
in New York State**



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A Report by the Center for Popular Democracy

*All sidebar accounts of accidents are direct quotes from
OSHA summaries on Inspection Reports, 2003-2011, New York City.*

EXECUTIVE SUMMARY

The construction industry is full of dangerous jobs. Smaller companies often have particularly unsafe workplaces – they tend to be non-union and lack the necessary training, proper equipment, and respect for workers’ reports about unsafe conditions. Workers of color disproportionately face construction dangers because they work in construction in relatively high numbers, they are concentrated in smaller, non-union firms, and they are over-represented in the contingent labor pool.

Our review of 2003-2011 OSHA investigations of construction site accidents involving a fatal fall from an elevation revealed that Latinos and immigrants are disproportionately killed in fall accidents.

- ◆ In 60% of the OSHA-investigated fall from an elevation fatalities in New York State, the worker was Latino and/or immigrant, disproportionately high for their participation in construction work.
- ◆ In New York City, 74% of fatal falls were Latino and/or immigrant.
- ◆ Narrowing further, 88% of fatal falls in Queens and 87% in Brooklyn involved Latinos and/or immigrants.
- ◆ 86% of Latino and/or immigrant fatalities from a fall from an elevation in New York were working for a non-union employer.

In 2011 focus groups, Latino construction workers reported fearing retaliation as a key deterrent to raising concerns about safety.

The primary protection for construction workers’ safety, the federal Occupational Safety and Health Administration (OSHA), is ineffective. Understaffed because of inadequate funding, OSHA is unable to inspect a significant number of construction, demolition, and building rehabilitation sites active at any one time in the state. And, when OSHA does inspect a construction site, the monetary penalties imposed for violations are so small that employers can see them as just an incidental cost of doing business. Further, OSHA almost never pursues criminal penalties, even for egregious and willful violations that are directly linked to a worker’s death.

New York State offers supplemental protection through the Scaffold Law (Labor Law §240), which requires owners and contractors to provide appropriate and necessary equipment, such as safe hoists, ladders, and scaffolds. The law holds owners and contractors fully liable if their failure to follow the law causes a worker to be injured or killed.

The construction and insurance industries are proposing an amendment to the Scaffold Law that would shift responsibility for workplace safety from owners and contractors, who control site safety, to workers, who do not. The change will have a disparate impact on construction workers of color, which makes the preservation of the current Scaffold Law a civil rights issue.

Construction workers' safety should be improved by:

- ◆ Appropriately funding, staffing and empowering OSHA to effectively prevent dangerous worksite conditions and punish preventable and foreseeable accidents;
- ◆ Ensuring that all construction owners, contractors, and workers receive proper safety training; and
- ◆ Protecting and enforcing the New York State Scaffold Law.

Introduction

Construction workers work in one of the most dangerous industries in the country, in order to build, repair, and rebuild our state. Union worksites are about three times safer than non-unions sites, according to the Occupational Safety and Health Administration (OSHA).¹ But workers of color face a heightened chance of injury or death on the construction site because they work construction in disproportionate numbers and those numbers are concentrated among smaller, non-union contractors.

This risk translates into a fatal inequality as workers of color die in disproportionate numbers on construction sites; for example, 60% of all deaths from a fall from an elevation in New York were Latinos and/or immigrants, but only 34% of all construction workers reported being either Latino and/or an immigrant.²

Construction workers, like other workers, expect the protection of the Occupational Safety and Health Administration (OSHA). However, OSHA is inadequately staffed to do preventive inspections and usually fails to pursue aggressive penalties after serious accidents.³

New York State has filled some of that gap with the Scaffold Law (Labor Law §240), an essential safety measure to protect construction workers. The law holds owners and contractors fully liable if their failure to follow the law causes a worker to be injured or killed. It short-circuits the incentive for owners and general contractors to contract with cut-rate subcontractors who take safety shortcuts. Under the Scaffold Law, owners and general contractors must provide adequate compensation for medical care *and* pain and suffering if their inadequate safety equipment causes serious injury to a worker. Also, the law fills an important gap in workers' compensation. Workers' compensation is time-limited, running out whether or not a worker has recovered. Under the Scaffold Law, owners and contractors cover health care for the life of the covered injury.

The construction and insurance industries are proposing an amendment to the Scaffold Law that would shift responsibility for workplace safety from owners and contractors, who control site safety, to workers, who do not.

The proponents of this change are calling for “comparative liability,” which

“Two employees were brick-pointing from a two-point suspension scaffold at a height of 16 ft above ground level. They were moving and adjusting the scaffold when employee #1 fell. Employee #1 was not tied off to his lifeline. Employee #1 was pronounced dead at the hospital.”

1 Michael Gartland, “Death toll at NYC construction sites tripled last year,” *New York Post* (April 7, 2013).

2 American Community Survey, “ACS 2006-2010 Equal Employment Opportunity Tabulation”, US Census Bureau (2012). To get the number of Latinos and immigrants, we added the ACS categories for immigrant blacks, immigrant white, immigrant Asian, and Latino.

3 AFL-CIO, *Death on the Job: A Toll of Neglect – A National and State-by-State Profile of Worker Safety and Health in the US, 22nd Edition*, (April 2013).

would try to apportion culpability between workers and owners or contractors. Comparative liability, though, ignores the realities of construction work. Construction workers often find themselves ordered to work in unsafe conditions, without safety equipment or with defective or improperly installed or secured equipment. This change would place workers at a serious disadvantage when facing unsafe conditions: they may lack knowledge of their legal rights, face language barriers in some cases, and fear retribution for speaking out. The proposed change would disproportionately harm construction workers of color,⁴ possibly leading to more deaths among those workers in particular. The preservation of the Scaffold Law is, at root, an act to protect workers from dangers at work that lead to disparate outcomes based on race, ethnicity, or language.

“Employee #1 stepped off a roof onto a ladder that was placed on top of a scaffold. The scaffold collapsed. Employee #1 fell and was killed.”

Construction work is dangerous, with workers of color facing the greatest risks.

Construction is one of the most hazardous industries. Four of the 10 most hazardous jobs in the nation are in construction.⁵ The added dangers of inadequate training, employer inattention to safety and corner-cutting, and an atmosphere of fear created by great job insecurity, increase the risk to workers’ lives. Workers of color, particularly Latinos and immigrants,⁶ disproportionately face these dangers because of their relatively large participation in the construction workforce and their concentration in smaller, non-union firms and super-contingent work structures. In 2010, a national study of the medical records of 7,000 construction workers found that Latino construction workers were nearly 30% more likely to have work-related injuries than white non-Latinos, after controlling for sex, age, education, and specific construction occupation.⁷

4 Throughout this paper, we have used the term “people of color” to refer to the census racial/ethnic categories Latino/Hispanic of any race; Black/African-American alone; and Asian alone.

5 Bureau of Labor Statistics.

6 Research on the demographic disparities in injury and fatality rates has largely focused on Latinos and immigrants because OSHA tracks “fatalities among Hispanic and immigrant employees...to assess the impact of potential language barriers and training deficiencies on fatal accidents” (OSHA, *Investigations Field Manual*). Additionally, Latinos make up, by far, the largest share of construction workers of color. Because OSHA does not record the race of workers, we are unable to track the injuries and fatalities to other workers of color; however, we know that they are in many of the same working conditions that increase risk for Latino and immigrant workers.

7 Xiuwen Sue Dong et. al., “Work-related injuries among Hispanic construction workers: Evidence from the medical expenditure panel survey,” *American Journal of Internal Medicine* (February 2010).

Falls from an elevation cause the most fatalities in the construction industry, accounting for more than one-third of fatal occupational injuries in the industry.⁸ Incidents involving construction workers account for half of all fatal falls in private industry.⁹

People of color account for 40% of New York State’s construction workers. In New York City, Westchester, Mount Vernon, New Rochelle, Rochester, White Plains, and Yonkers, people of color constitute the majority of residents working construction. More than a third of construction workers who reside in Nassau and Rockland counties and Buffalo, Schenectady, and Syracuse are people of color (Table 1).

Table 1. Construction workers by race/ethnicity

Jurisdiction	Total Construction Workers	White Alone (%)	Latino/ Hispanic (%)	Black/ African American Alone (%)	Asian Alone (%)
New York State	481,130	59.8	24.8	9.6	3.9
New York City	190,290	29.1	41.1	18.2	9.1
Downstate Suburban Counties					
Suffolk	46,185	72.8	23.1	2.8	0.4
Nassau	29,200	63.4	25.9	8.1	1.8
Westchester	27,300	44.9	46.0	6.6	1.0
Rockland	7,384	62.5	30.1	4.1	1.7
Cities of 55,000 or more					
Albany	1,315	58.5	22.7	16.3	0.0
Buffalo	4,390	63.0	7.0	25.0	0.4
Mt. Vernon	2,350	31.9	16.4	33.6	1.9
New Rochelle	3,190	32.0	58.2	6.1	2.7
Rochester	3,579	48.5	19.9	28.1	1.8
Schenectady	1,464	66.7	10.8	19.8	0.0
Syracuse	2,615	64.8	7.8	23.8	0.6
Utica	1,225	82.8	4.1	9.2	0.8
White Plains	1,440	23.9	72.9	2.8	0.7
Yonkers	6,164	48.9	43.4	5.8	0.4

Source: American Community Survey, “2006-10 Equal Employment Opportunity Tabulation,” (2012). Note: Columns do not necessarily equal 100% because workers who selected two or more races, “some other race”, or American Indian and Alaska Native” are not shown.

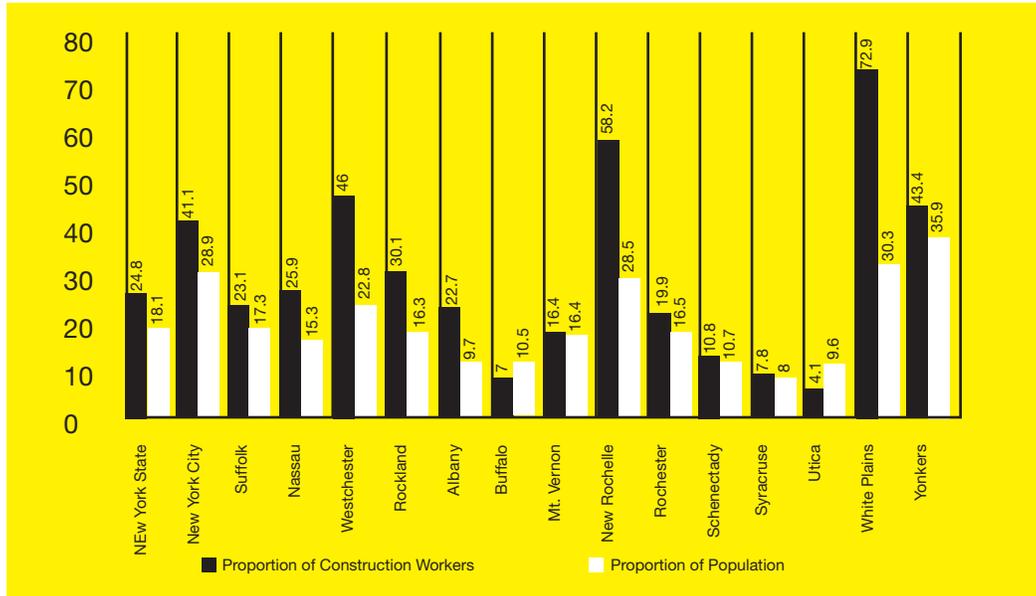
8 Xiuwen Sue Dong et. al., “Fatal falls from roofs among U.S. construction workers,” *Journal of Safety Research* (February 2013).

9 OSHA Training Institute, *Construction Focus Four: Fall Hazards* (Instructor Guide) (Washington, DC: OSHA, 2011): 4.

Although significant numbers of African-Americans and Asians/Asian-Americans work in construction, Latinos are disproportionately represented among construction workers across the state.

“Employee #1 fell 8 floors through an unguarded window wall opening. He was killed.”

Chart 1. Latinos as proportion of construction workers, general population (in percent)



We have reviewed the violations OSHA cited in New York construction-site fall accidents from 2003 to 2011, with particular attention to those in which a Latino and/or immigrant worker was killed.¹⁰ This study revealed that Latinos and immigrants are disproportionately killed in fall accidents.

- ◆ In 60% of the OSHA-investigated fall from an elevation fatalities in New York State, the worker was Latino and/or immigrant, disproportionately high for their participation in construction work.¹¹
- ◆ In New York City, 74% of fatal falls were Latino and/or immigrant.”
- ◆ Narrowing further, 88% of fatal falls in Queens and 87% in Brooklyn involved Latinos and/or immigrants. 51 percent of all the fatal falls that OSHA investigated in New York between 2003 and 2011 involved a Latino and/or immigrant worker at a non-union construction site.
- ◆ 86% of Latino and/or immigrant fatalities from a fall from an elevation were working for a non-union employer.

¹⁰ We reviewed investigation reports of fatalities in the three construction Standard Industrial Classification codes, 15, 16, and 17. OSHA investigated 136 fatal “fall from elevation” incidents in that time.

¹¹ The American Community Survey reports that approximately 34 percent of construction workers reported that they are Latino and/or non-citizen.

Their concentration in small, non-union contractors accounts for the heightened risk construction workers of color face.

Workers of color disproportionately work for smaller, non-union contractors. According to one national study, “In 2010, only 7% of Hispanic workers in construction were union members, compared to 18% among non-Hispanic construction workers.”¹² Non-union contractors tend to offer less training and follow safety procedures less rigorously.¹³

Small, non-union employers disproportionately fail to train and equip workers in accordance with the law. Minority workers, particularly immigrant workers, are more likely to participate in the underground construction labor pool. In 2003, the New York City Construction Industry Partnership issued a report on safety in the city’s underground construction industry, *Construction Safety: A Tale of Two Cities*. The report described underground employers that overwhelmingly hire immigrants of color and are characterized by “the lack of any skill or safety training” and a failure “to comply with any city or federal rules and regulations to build in New York City.” The report documented that employers in this segment of the construction industry “invest virtually nothing in the safety training of their project management and/or trade labor force” and concludes that the underground employers jeopardize “the safety of the public and their workforces because of poor construction practices.”¹⁴

In 2007, the Brennan Center for Justice studied the same industry and found similarly dangerous conditions: “Unregulated workers lack protective equipment, rarely receive mandated safety training, and can be exposed to hazardous materials.”¹⁵

Our review of OSHA citations in fatal falls corroborates the findings of the Construction Industry Partnership and Brennan Center. In the vast majority of these fatalities, OSHA found at least one violation of their requirements to provide training in fall protection, scaffolds, ladders or stairway safety.

Small, non-union contractors have poorer safety records overall. A study by the New York State Trial Lawyers Association (NYSTLA) of all OSHA construction site inspections in New York during 2008 found that OSHA safety standards were violated substantially less frequently among the largest contractors

“Employee #1 was removing panels from the roof of a one-story building that was being demolished. He fell over 15 ft into the inside of the building, striking his head first on the concrete wall, and then the concrete floor. He was pronounced dead by the New York Police Department.”

12 The Center for Construction Research and Training, *The Construction Chart Book: The U.S. Construction Industry and its Workers* (Silver Spring, MD: 2013), 18.

13 CCRT, 31.

14 New York City Construction Industry Partnership, *Construction Safety: A Tale of Two Cities* (November 2003), 4.

15 Brennan Center for Justice, *Unregulated Work in the Global City* (New York, NY: 2007), 73-78.

than among contractors generally. Approximately 13% of inspections of New York’s largest building general contractors (e.g., Tishman Constructions, StructureTone, Skanska) yielded violations, compared to 51% of inspections of building general contractors as a whole. In this study, NYSTLA found that the substantially lower violation rates among large general contractors results from two key factors:

1. Large contractors are more likely than small contractors to employ site safety professionals who monitor constructions sites and require remediation of safety deficiencies; and
2. Their subcontractors are significantly more likely to be unionized and less likely to employ day labor.¹⁶

In our current review of OSHA investigations of fatalities from construction falls in New York, only one of the employers in the 136 incidents was among the 30 largest contractors in New York City in 2004 or 2010.¹⁷ We found that most fatal construction falls from 2003 to 2011 happened at smaller construction and renovation projects and, primarily, in demolition work. For instance, the fall fatalities in Queens involved activities such as demolishing a walk-in cooler in a fruit store, brick-pointing a six-story building, and working on a roof.

Workers fear reprisals for demanding a safe workplace. All workers may hesitate before refusing an order to use unsafe equipment or to perform a task in a dangerous manner. Refusal can mean removal for the day or the loss of the job altogether. For non-union workers, who are disproportionately immigrant and/or of color, factors like a lack of training in proper procedures, incomplete information about their rights,, and absence of a grievance procedure” should be “, and the absence of a grievance procedure compound that initial hesitance.

In recent years, the percentage of New York City construction workers who are members of labor unions has declined, limiting access to a vital protection for worker safety. One study estimates the number of unionized construction workers at 45% in the period of 2004-2006, down from 63% in the early 1990s.¹⁸ In the years since, non-union contractors in New York City have expanded beyond just the smaller projects in the outer boroughs and are erecting substantial residential and hotel projects in Manhattan.¹⁹

16 New York State Trial Lawyers’ Association, *Lives in the Balance: Workers at Elevated Heights at Greatest Risk in Construction* (2008), p8.

17 “New York Tristate’s Top Contractors”, *ENR New York* (2011, 2004).

18 Fiscal Policy Institute, *Building Up New York, Tearing Down Job Quality: Taxpayer Impact of Worsening Employment Practices in New York City’s Construction Industry* (December 2007), 2 and 11.

19 See, for example, Daniel Massey, “Zell bends on union construction: Chicago developer lands discount pact with labor on Park Ave. South building,” *Crain’s New York Business* (April29, 2012).

“Employee #1, a laborer, was installing floor tile grout with a coworker in a fourth floor hallway, outside the elevator entrance. Earlier, when they were preparing to work on the tile, they moved the 4-foot by 8-foot sheet of plywood that had been leaning against the entrance to the elevator shaft. The coworker was working on the tile and facing the other way, but when he turned to look, Employee #1 was gone. Employee #1 had fallen approximately 50 feet down the shaft and was killed.... The elevator shaft entrances should have had secured barriers, such as guardrails to allow employees to install floor tile with the guardrails still in place.”

In addition, the construction industry – particularly in residential construction–relies on day laborers. A 2009 study by a city commission found that “local organizations working with day laborers estimate that this population [day laborers] now totals over 10,000.”²⁰ An earlier study found that employers “routinely abused” day laborers and assigned them to “dirty and/or dangerous jobs” that might “expose them...to occupational hazards.”²¹ Testimony before the New York City Council by the National Employment Law Project reported, “Desperate for work and fearing retaliation, day laborers often risk life and limb without ever reporting work hazards.”²²

One recent study found that this fear of retaliation on a current job or in the future affects Latino construction workers’ actions regarding their workplace safety, regardless of whether they are contingent workers or employees. The 2011 study was specifically designed to learn Latino construction workers’ perspectives on the reasons for higher injury and fatality rates for Latinos in construction. In focus groups, “Participants described an atmosphere of intimidation that prevented workers from speaking up about safety. They feared retaliation, most often in the form of getting fired or not offered future work.”²³

OSHA does not effectively protect construction workers.

OSHA efforts to ensure worker safety are stymied before they begin. OSHA falls woefully short of having sufficient staff to inspect any significant number of construction, demolition, and building-rehabilitation sites active at any one time in the state. According to the AFL-CIO, OSHA has only 113 safety and health inspectors in New York State. It would take those inspectors 107 years to inspect each workplace once.²⁴

When OSHA does inspect a construction site, the monetary penalties imposed for violations are so small that employers can see them as just an incidental cost of doing business. The AFL-CIO’s study found that the average penalty assessed for a “serious” violation of an OSHA standard in New York in 2012 was \$2,164. The average penalty per fatality investigation was a \$12,767. The median initial penalty was \$4,200. Given that the initial penalty is almost always

20 New York City Temporary Commission on Day Laborer Job Centers, *Final Report* (April 2009), 3.

21 Community Development Research Center, *Day Labor in New York: Findings from the New York Day Labor Survey* (New York City: Milano Graduate School of Management and Urban Policy at New School University: 2003), 9-10.

22 National Employment Law Project, Testimony at “Hearing on Day Laborers” (New York City: January 2003).

23 Carla Roefofs et.al., “A qualitative investigation of Hispanic construction worker perspectives on factors impacting worker safety and risk,” *Environmental Health* (September 30, 2011).

24 AFL-CIO, *Death on the Job: A Toll of Neglect – A National and State-by-State Profile of Worker Safety and Health in the US, 22nd Edition* (Washington, DC: 2013), 109 and 112.

reduced if there is a conference or appeal, the current median penalty in fatal incidents was only \$3000 in 2012.²⁵ The New York Committee for Occupational Safety & Health summarizes: “OSHA’s penalty structure is insufficient to serve as a deterrent. Fines are reduced, and unsafe workplaces remain.”²⁶

OSHA almost never pursues criminal penalties, even for egregious and willful violations that are directly linked to a worker’s death. Since 1970, there have been almost 400,000 worker deaths and liable parties have served only 89 months in jail.²⁷

The resulting impunity for employers encourages their maintenance of unsafe working conditions. These unsafe working conditions have a disparate impact on construction workers of color.

Most fatalities from falls from an elevation could have been averted. In OSHA parlance, a “serious” violation is one in which “a substantial probability that death or serious physical harm could result and the employer knew, or should have known, of the hazard.” A “Gravity” score of 10 indicates that the violation has the highest level of “severity” with a greater probability that an injury will result. Our review of OSHA reports found that:

- ◆ At 85% of the construction sites where a worker of color or immigrant worker fell from an elevation and died between 2003 and 2011, OSHA accident investigators found there had been a *Serious, Gravity 10* violation of an OSHA construction safety standard.
- ◆ In 78% of these accidents, OSHA found a *Serious, Gravity 10* violation of a construction standard expressly intended to prevent fall from an elevation injury or death.²⁸

“Employee #1 was scraping and painting the fire escape on the second floor of a 5-story building. The side rail gave way causing Employee #1 to fall approximately 20 feet to the ground. Employee #1 suffered a concussion and was killed.”

The New York Scaffold Law closes the loopholes left by OSHA.

New York State has filled some of that gap with the Scaffold Law (Labor Law §240), an essential safety measure to protect construction workers. The law holds owners and contractors fully liable if their failure to follow the law causes a worker to be injured or killed. It short-circuits the incentive for owners and general contractors to contract with cut-rate subcontractors who take safety

25 AFL-CIO.

26 NYCOSH, *Dying for Work in New York* (New York, 2009).

27 AFL-CIO.

28 These standards are CFR 1926 Suparts L (Scaffolds), M (Fall Protection), and X (Ladders); CFR 1926.020 and 1926.021 of Supart C (“general safety and health provisions” and “safety training and education”); three E subpart standards (CFR 1926.106 “working over or near water”; CFR 1926.104, “safety belts, harnesses, and lanyards”; CFR 1926.104, 105 E “safety nets”); and CFR 1926.760 of Subpart R (steel erection “fall protection and protection”).

shortcuts. Under the Scaffold Law, owners and general contractors must provide adequate compensation for medical care *and* pain and suffering if their inadequate safety equipment causes serious injury to a worker. Also, the law fills an important gap in workers' compensation. Workers' compensation is time-limited, running out whether or not a worker has recovered. Under the Scaffold Law, owners and contractors cover health care for the life of the covered injury.

The Scaffold Law provides strong incentive for owners and contractors to follow the law requiring appropriate safety equipment for workers at elevations. Given the disproportionate number of people of color working for smaller contractors with poorer safety track records, the Scaffold Law plays a vital role in mitigating the disparate outcomes of OSHA's inability to inspect significant numbers of worksites.

Conclusion

Working in construction is dangerous – and working for small, non-union contractors is particularly dangerous. People of color – who disproportionately work in construction – are concentrated among these more dangerous small, non-union contractors. Because of this, their injury and death rates are exceedingly high, even in relation to their relatively high participation in the construction industry. Currently, OSHA, tasked with protecting the health and safety of all workers, cannot meet the task of preventing workplace accidents and disciplining negligent employers. The New York State Scaffold Law, which works to fill a gap left by OSHA, currently faces attempts to curtail its effectiveness.

Workers have a right to basic safety on the job. To make that right meaningful for construction workers, and workers of color in particular, we must:

- ◆ **Appropriately fund and empower OSHA** so it can hire and train more inspectors, conduct more inspections to prevent tragic and unnecessary accidents, and increase penalties for violations so that they will be a credible deterrent to ignoring OSHA construction safety standards.
- ◆ **Ensure that all construction owners, contractors, and workers receive proper safety training**, including training on the basics of OSHA safety standards. Owners, contractors, and foremen should be trained on how to inspect and remediate problems with their safety equipment. Employees should be trained on how to inspect their safety equipment and how to report problems to employers, the State, and OSHA.

“An employee, a laborer, was working from a tubular welded frame scaffold. The employee fell from approximately three stories to the top of the freight elevator car below. The employee was transported to the hospital, where he was pronounced dead.”

- ◆ **Protect and enforce the New York State Scaffold Law.** The Scaffold Law helps ensure the safest possible workplace conditions for all construction workers. To protecting against disparate injuries and deaths among construction workers of color. The preservation of this critical worker protection law is vital.

About CPD

The Center for Popular Democracy (CPD) works in partnership with innovative community-based organizations, local and state networks, and progressive unions across the country to promote equity, opportunity, and a dynamic democracy. CPD supports partners in developing cutting-edge state & local policy that deliver tangible benefits to communities and also helps to build organization infrastructure and capacity so our partners can grow stronger and expand.

