



# New York's Scaffold Law Leaves Contractors, Subs and Project Owners Exposed



There are three primary insurance considerations for contractors, subcontractors and project owners when it comes to New York's Scaffold Law, all of which concern the cost of injured workers:

1. Who pays when a construction worker gets hurt?
2. How can your company reduce its exposure to loss?
3. Which workers are your employees, and which aren't?

The quick answers to each are:

1. Multiple parties may have to pay, since an injured worker can collect workers' compensation from their employer *and* sue another party for that same injury under the Scaffold Law.

2. Construction firms should transfer some of their risk to insurers via workers' compensation and general liability insurance and protect themselves through hold-harmless agreements in their work contracts. They should also enforce stringent safety protocols.
3. Who is considered an employee and who is considered an independent contractor can be a complex, fact-specific determination. The Biden administration is considering changes that would mean more workers are classified as employees.

## Details of the Scaffold Law

Any construction company doing business in the state of New York needs to be familiar with Labor Law Sections 240 and 241, which are commonly referred to jointly as the "Scaffold Law." This law creates corporate liabilities for worker injury that are different from any other state, and it directly impacts what insurance you need to buy.

The Scaffold Law, which was enacted in 1885, holds contractors and property owners doing construction, repair or demolition work in the state fully liable for "gravity-related" injuries — despite any gross negligence on the part of the injured worker.

In fact, case law has upheld that any worker involved in erecting, demolishing, repairing, altering, painting, cleaning or pointing a building or structure in New York is covered under the Scaffold Law. Covered incidents include not only human falls, but also injuries from falling objects.

There are several aspects of the law that construction businesses should understand.

### **Standard of strict liability**

First, the law uses a standard of strict liability, which imposes legal responsibility on construction contractors and property owners for injuries suffered by workers, even if the employer did not act with fault or negligence and the worker did.

### **"Action over" exposure**

A second consideration is the "action over" exposure that the law allows.

Normally, workers' compensation insurance provides the exclusive remedy and remuneration when an employee is injured on the job; in return, the employee cannot sue the employer for negligence.

While this is true in other states, it is not the case in New York. The Scaffold Law allows the injured worker to sue a third party — someone other than their employer — in addition to collecting workers' compensation.

Take, for example, a subcontractor's employee who is injured on the job. Even if the employee is already collecting workers' compensation, they may still be able to sue the property owner or general contractor for contributing to their injury, thus bringing the "action over" to the general contractor.

But that lawsuit could boomerang back to the subcontractor if the subcontractor and contractor entered into a hold-harmless agreement indemnifying the general or project owner. This can create a significant uninsured exposure for the subcontractor, depending on their insurance.

In order to address this exposure, you need to talk to your insurance agent or broker about both your statutory workers' compensation coverage and your liability for negligence, in case you are sued by a nonemployee.

In the case of the subcontractor who signed a contract with a hold-harmless clause in favor of the general contractor, the subcontractor's insurer needs to provide contractual liability coverage.

Standard general liability insurance purchased by subcontractors usually provides this coverage under provisions for "insured contracts," but this is one item that should be specifically discussed to make sure there are no gaps. Out-of-state construction companies doing business in New York should also be on alert, since New York's strict liability standard within the context of action over entails greater risk than experienced elsewhere.

According to the Lawsuit Reform Alliance of New York, the number of Scaffold Law cases has increased 500% since 1990, even though the rate of injury has decreased. This greatly impacts insurance costs, as the frequency and severity of claims are primary drivers of premiums. With New York's broad employer liability standard, adequate safety training, supervision and enforcement cannot be stressed enough.

### **Liability of independent contractors**

A third consideration is that construction firms and property owners (and potentially other employers) are exposed to the vicarious liability of any independent contractors working on the project or property. For example, in *Allen v. Cloutier*, 44 N.Y. 2d 290 (Court of Appeals, 1976), it was held that all owners and their contractors, whether independent or not, also bear responsibility when a worker is injured.

Additionally, many states — including New Jersey — have adopted a very limited definition of "independent contractor," which means that more workers are considered employees. The Biden administration would like to adopt a similar standard nationally.

For example, one prong of New Jersey's "ABC" employee classification criteria requires that, to be deemed an independent contractor, "The work is either outside the usual course of the business for which such service is performed, or the work is performed outside of all the places of business of the enterprise for which such service is performed."

Many construction firms using independent contractors for temporary work can inadvertently violate this clause. When this occurs, it means that they should actually be treating the independent contractor as an employee and covering them under their workers' compensation policy.

While New Jersey's ABC independent contractor law is considered a particularly stringent standard, it is important that contractors working in New York keep abreast of all relevant [state](#) and [federal](#) guidelines. Additionally, some municipalities, including [New York City](#), have their own rules regarding independent contractors. Consult with counsel as needed if you have questions about proper employee classification.

Under all laws, it is critical that you verify the accident and workplace history of independent contractors you plan to use. Of course, you should also require a copy of the independent contractor's certificate of insurance and, if necessary, their entire insurance policy.

# Consult your agent or broker

Your business needs a commercial insurance agent or broker who understands the intricacies of New York's Scaffold Law, is able to engage insurance companies that work with clients operating across multiple states, and can advise you on the involvement of independent contractors.

You should also ask about off-the-shelf loss-control programs if you don't have one already. These manuals and guidelines can help you kick-start a quality safety program or beef up the plan you already have.

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