

# Memorandum

To: Governor Andrew M. Cuomo  
From: Philip L. Paige  
Re: Scaffold Law Reform

## Abstract

*A myriad of factors support the argument that New York State Labor Law § 240, also known as the “Scaffold Law,” should be reformed. In short, Section 240 imposes an incredibly broad absolute liability standard (also known as “liability without fault”) on property owners and contractors for workplace accidents involving gravity. Proponents of the statute claim it is necessary for workplace safety, and opponents charge that what began generations ago as a legislative attempt to protect workers from negligent contractors has morphed into a counterproductive and undue cost burden on contractors, businesses, governments alike. The Scaffold Law should be reformed to reflect its original intent, which was to be a requirement for contractors to provide adequate safety equipment for height-related projects, and to replace the absolute liability standard with the contributory negligence standard used in forty-nine other states.<sup>1</sup> An absolute liability standard restricts due process for defendants, because even with no culpability they (and their insurance company) bear the full cost of any legal settlement. A contributory negligence standard would restore due process, and provide an opportunity for both sides to present their case to the court. In addition to the legal ramifications of the Scaffold Law, it also sets up a perverse incentive structure for both contractors and their employees: there is little incentive for contractors to improve workplace safety if they will be held entirely responsible for any accident regardless of their actual culpability, and for employees there is little incentive to take extra precautions, because they will be held harmless regardless of personal fault. The Scaffold Law is incredibly costly, manifestly unfair, and a recent study conducted jointly by Cornell University and the University at Albany finds it may actually hurt the very people it was created to protect.*

## New York Alone

Originally passed in 1885, New York State’s Scaffold Law is the last of absolute liability statute of its kind in the United States (Illinois repealed theirs, The Structural Liability Act, in 1995).<sup>2</sup> In forty-nine other states, absolute liability statutes applying to contractors and property owners have been repealed and replaced to reflect a the contributory negligence standard; a standard which has been barred by the Court of Appeals in New York since 1948 based on a reading of the current statutory language.<sup>3</sup>

A study conducted by The Rockefeller Institute compared fatal and non-fatal construction sector injuries in Illinois, and New York since the Illinois absolute liability standard’s 1995 repeal. The study concluded injury rates in Illinois without the absolute liability standard fell far more rapidly than New York’s over the fifteen-year study. Though the study does not delve into

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<sup>1</sup> William Greagan. “Reforming New York Labor Law Section 204 (1).” *Albany Law Review* (2015): 184.

<sup>2</sup> *Ibid*, 167.

<sup>3</sup> Michael Hattery. “The Cost of Labor Law 240 on New York’s Economy and Public Infrastructure.” *The Nelson Rockefeller Institute of Government* (2013): 4.

conjecture about the incentives in play, it is reasonable to assume that with comparable negligence standard, workers have a greater incentive to protect and advocate for their own safety, as well as a diminished ability to collect the very large legal settlements common in an environment with absolute liability (more than half of the thirty largest legal settlements in New York during 2012 were generated by the Scaffold Law).<sup>4</sup> In addition to incentives for employees to take a more active role in protecting their safety, a reformed Scaffold Law also incentivizes contractors to enhance workplace safety, because in the event of an accident and a lawsuit, unlike the current legal climate, a defendant can make effectual claims about the nature of the workplace and how the actions of an employee may have directly lead to the accident. The costs of absolute liability are very high for contractors and employers, but the actual incidence of the cost is far broader and higher than surface level estimates indicate.

### **Direct and Indirect Costs**

Absolute liability imposes a tremendous cost burden on insurance holders, because it is a major indirect cost driver for insurance premiums on individuals or entities, even those not engaged in a lawsuit. Using data provided by the bi-state Port Authority of New York and New Jersey presents a unique opportunity to analyze the effects this statute has on the cost of insurance for public infrastructure projects; on bridge projects where the worksite is divided by the state line, the Associated General Contractors found average incurred claims costs on the New Jersey side to be less than half of those on the New York side of the bridge (\$10.3M v. \$22.7M). Again, comparing New York, and New Jersey, the New York City School Construction Authority paid \$240M for an insurance plan nearly identical in size and scope to one purchased by New Jersey for \$25M. Ross Holden, Vice President and General Counsel for the NYC School Construction Authority points out, “We could build another two or three schools a year for all the extra money we’re spending on insurance.” Insurance costs represent roughly 7% of public sector construction costs in New York, or roughly \$800M, and if the same percentage were applied to the private sector we would estimate \$1.5B spent on insurance annually.<sup>5</sup> Of course reforming the Scaffold Law would not eliminate this expense, but it would dramatically reduce insurance costs for New Yorkers and free up money for more expansive public and private construction projects, which would improve our infrastructure and our employment metrics.

### **Support and Opposition**

As is the case in almost any major policy debate, there are supporters of the status quo and proponents of change, but in the case of the Scaffold Law, these camps have not only tremendous fiscal skin in the game, but also tremendous power and influence over decision-makers. The primary, and most vocal opponents of Scaffold Law reform are the New York State Trial Lawyers Association. The NYSTLA are one of the most generous campaign donors for state-level political campaigns, and many legislative leaders and rank-in-file members of New York State legislature are practicing trial lawyers. In 2014, when amending the Scaffold Law was up for discussion as part of

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<sup>4</sup> Michael Hattery. “The Cost of Labor Law 240 on New York’s Economy and Public Infrastructure.” *The Nelson Rockefeller Institute of Government* (2013): 3.

<sup>5</sup>Ibid, 51.

the state budget, Governor Andrew M. Cuomo said of the NYSTLA, “[NYSTLA is] the single most powerful political force in Albany.”<sup>6</sup> The 2014 Scaffold Law reform attempt failed, and has not been openly discussed by leaders since. Trial lawyers have a keen interest in keeping the Scaffold Law the way it is, because in addition to the fact that more than half of the thirty largest legal settlements in 2012 were generated by Scaffold Law cases, Justice Smith, in a recent Court of Appeals case, pointed out that the Scaffold Law is, “one of the most frequent sources of litigation in the New York courts...”<sup>7</sup> The frequency and magnitude of Scaffold Law cases make the current law a boon for trial lawyers, with settlement payouts ranging from \$3M to \$15M in 2012.<sup>8</sup>

In the Illinois case, years after the absolute liability standard’s repeal, trial lawyers sought to reinstate it, but they faced stiff opposition – from organized labor; organized labor in New York State does not currently support amending the Scaffold Law, but a growing coalition of groups formerly opposed to reform, including an association of construction firms owned and operated by women and minorities, is pushing lawmakers to reform the statute. Even members of the Assembly majority have signaled a new willingness to study and reform the statute following an analysis of insurance industry profits, which advocates of reform say are all but non-existent.<sup>9</sup> The size and risk of insurance company losses make New York an uncompetitive insurance market, with only a few companies offering coverage.

Support for reforming the Scaffold Law comes from various interest groups and entities, but they are organized and amplified by the Associated General Contractors, and the New York State Lawsuit Reform Alliance. Local governments, the New York State School Construction Authority, Habitat for Humanity, and many others have long supported reform. In addition to interest groups and local governments, fourteen newspapers across the state and nation have editorialized in favor of reforming the statute, including Crain’s, under the headline, “New York’s Stupidest Law,” meanwhile not a single newspaper has come out in favor of the status quo.<sup>10</sup>

### Conclusion

Unique to New York State, the Scaffold Law’s absolute liability standard is responsible for both the costliest insurance in the nation, and the disincentive for workers to take a greater role in assuring their own safety. As we see from the analysis of Illinois post-repeal, the state’s workers are safer without the statute, and their public and private sectors pay a far lower rate for insurance. It is clear that reforming the Scaffold Law is both fiscally prudent, and likely to produce more effective incentives for both employers and employees to foster a safe work environment and to behave wisely.

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<sup>6</sup> “Documents: Read Disputed Scaffold Law Report, More.” *Albany Times Union*.

[http://www.rockinst.org/newsroom/news\\_stories/2014/2014-05-01-TU\\_Capital\\_Confidential.pdf](http://www.rockinst.org/newsroom/news_stories/2014/2014-05-01-TU_Capital_Confidential.pdf)

<sup>7</sup> Judge J. Smith, New York State Court of Appeals. From the decision in *Dahar v. Holland Ladder* (Feb 2012). Decided 7-0.

<sup>8</sup> “Contractors and Workers at Odds Over Scaffold Law.” *New York Times*.

<http://www.nytimes.com/2013/12/18/nyregion/campaign-underway-to-amend-scaffold-law-protecting-construction-workers.html>

<sup>9</sup> *Ibid*.

<sup>10</sup> “Editorial: New York’s Stupidest Law.” *Craine’s New York Business*.

<http://www.crainsnewyork.com/article/20130607/OPINION/130609905/editorial-new-yorks-stupidest-law>