



## Recommendations for limiting owner and general contractor liability under New York's "Scaffold" law

Section 240(1) of the New York State Labor Law imposes liability on most property owners, contractors, and sub-contractors for worker injuries occurring during building construction, demolition, cleaning, or repairs that are the result of certain height-related accidents (e.g., an injury caused by a falling object or an injury caused by an inadequate scaffold, ladder, or other protective device). It is commonly referred to as the "Scaffold" law. Liability is absolute (i.e., the reasonableness of any safety measures undertaken by any of the parties is not relevant for determining liability nor is any employee misconduct). The liability is also vicarious (i.e., liability can be imputed to one party for the acts of another). Under the law, a property owner may be held liable for the acts of a contractor or sub-contractor.

There are three traditionally-followed approaches for managing owner and contractor liability under Section 240(1). These are to:

- Hire contractors with good safety records.
- Incorporate written indemnification provisions in the contracts between the parties.
- Require all contractors to purchase liability insurance or otherwise be financially responsible.

All three approaches complement each other and should be part of any liability control program. Selecting a reliable contractor reduces the likelihood that an injury will occur. Including an indemnification provision in the contracts between parties will provide the owner or contractor with a resource to pay any judgment that they may become responsible for. Requiring the contractor to be financially responsible ensures that the person providing the indemnification (i.e., the indemnitor) has sufficient resources to meet their obligation. If the indemnitor does not have sufficient resources, the injured party may still collect against the owner or contractor.

It is extremely important that the indemnification agreement be expressly written into the contract documents. The 1996 Amendments to Workers' Compensation Law §11 eliminated an employer's liability for common law indemnification of work-related injuries except in cases where "grave injuries" occurred. This Amendment does not prohibit recovery actions for injuries taken under written indemnification agreements.

Many standard construction forms have "boilerplate" indemnification provisions. For example, Sec. 3-18 of the American Institute of Architects (AIA) Form A-201-97, General Conditions of the Contract for Construction, contains the basic indemnification provisions that are adopted by reference in many other AIA contract documents. The model forms produced by the Associated General Contractors of America (AGC) also contain indemnification provisions. Also, most legal publishers produce form books containing model indemnification clauses. Because state laws vary and the applicability and enforceability of indemnification clauses are frequently at issue in construction accident lawsuits, it is extremely important that the indemnification agreement be written or reviewed by an attorney competent in New York construction law.



Owners and contractors should be aware that, under New York law, the presence of an indemnification agreement will not provide them with a source of recovery in cases where the owner or contractor was negligent themselves, and this negligence caused or contributed to the injury. Section 5-322.1 of the state's General Obligations Law expressly bars the enforcement of otherwise permissible agreements in this situation, codifying the public policy argument that a negligent party should not be allowed to relieve its liability through the use of exculpatory contract language. Because of this, it is important that all persons working on the site maintain diligent construction safety programs.

The complete text of the Labor Law provision is available on-line at <http://assembly.state.ny.us/leg/?cl=54&a=13>.

Reference – Engineering and Safety, New York Scaffold Law, Report Number LB-92-10, July 29, 2003

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