CHUBB®

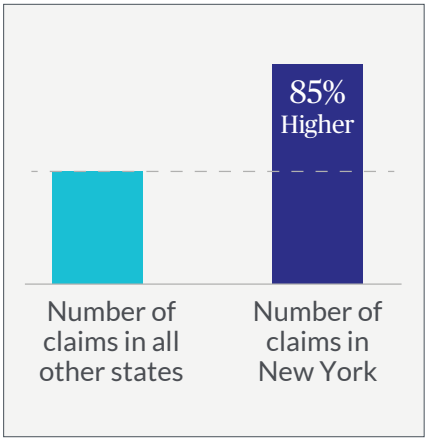
New York Labor Law § 240:

Preparing for the Statute's Outsized Impact on Liability Risks

AON

New York State's 20 million residents and New York City's status as a global center for business and culture make the Empire State an attractive market for contractors. There has historically been significant potential for new construction growth, particularly in the City, and the services of reputable builders are often in high demand. However, contractors in New York also face additional risks, including liabilities imposed by New York State Labor Law Section 240, often referred to as the "scaffold law."

The frequency of workers' compensation claims greater than $5,000 in New York is nearly 85% higher than in all other states.



According to Chubb's data, on average, there is one bodily injury general liability claim filed for every $2.74 million in construction payroll in New York.

New York Labor Law § 240

Labor Law § 240[1] is unique to New York and applies to incidents that occur within state borders, regardless of the residency of the injured worker. The law was originally enacted in 1885 – long before the creation of the workers' compensation system across the United States – to provide enhanced protection for construction workers exposed to height-related risks. It imposes strict or absolute liability on owners, general contractors, and their agents for injuries within the scope of the statute.

Labor Law § 240 brought needed protections to construction workers in New York when enacted, but it has also brought additional costs to the New York construction industry. More specifically, in recent years, there has been a dramatic increase in claim costs under general liability policies issued to general contractors and owners in New York. There are a number of reasons for this increase in claim costs, but the primary drivers are: (1) an expanded interpretation of the statute; (2) higher jury awards that have been sustained by appellate courts; and (3) more widespread use of exclusions for Labor Law claims on subcontractors' policies that effectively shift liability for such claims to general contractors and owners. These trends have accelerated in recent years, and as a result, New York has become one of the most expensive states in the United States to develop real estate.

Strict Liability and Expanded Interpretations

Labor Law § 240 makes property owners and general contractors vicariously responsible for injuries to workers on their projects for any failures to provide proper fall protection onsite, even if without fault themselves. The law imposes strict liability, eliminating defenses such as the workers' own potential comparative fault or compliance with OSHA standards, which are comprehensive and regularly updated. In fact, the New York Court of Appeals has stated repeatedly that there are no defenses to liability under § 240 for property owners or general contractors, making many construction site accidents effectively undefendable.

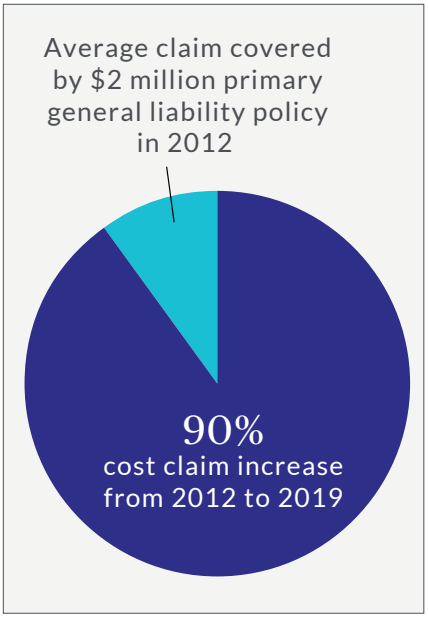
In recent years, New York courts have expanded application of the law beyond traditional interpretations to include liability for injuries caused by or resulting from tip-overs of anchored objects, slides down slopes, trips over stacked materials, near-falls, and injuries that occur while moving heavy items.[2] This expanded application of the law has led to a higher frequency of Labor Law claims against owners and contractors. Those familiar with New York construction know the challenges caused by Labor Law § 240 and evidence of the impact is revealed in the claims data.

Chubb is a large writer of casualty construction insurance across the country and has maintained a consistent presence in the New York construction insurance marketplace for more than a decade. A review of Chubb's workers' compensation and general liability losses from owner-controlled and contractor-controlled insurance programs from 2011 through 2019 revealed that the frequency of workers' compensation claims greater than $5,000 in New York is nearly 85% higher than in all other states. This review also found that more than 70% of New York workers' compensation losses result in companion Labor Law § 240 claims.

According to Chubb's data, on average, there is one bodily injury general liability claim filed for every $2.74 million in construction payroll in New York. By comparison, the average for all other states is one bodily injury general liability claim filed for every $37 million in construction payroll. Moreover, according to Chubb's data, the frequency rate of bodily injury claims in New York is more than 12 times higher than in all other states. The original intent of the Labor Law was to enhance protection and increase safety for construction workers in New York, and it was an effective public policy measure for many years. However, recent data suggests the net benefit of the law today is waning.

Ever-Increasing Jury Awards

The average amount of a New York Labor Law claim covered by a Chubb primary general liability policy with a $2 million limit has increased by nearly 90% from 2012 to 2019.



New York appellate courts have simultaneously and steadily expanded the scope of this statute to include a broader variety of injuries and have upheld higher values for the most common injuries in Labor Law cases. Catastrophic injury verdicts often garner media attention, but less frequently reported are the relatively minor injuries to knees, necks, and backs that Chubb has found are also increasing significantly in value.

When a construction worker is injured on the job, in New York, as in other states, medical benefits are provided through workers' compensation. However, unlike in other states, the New York Workers' Compensation Statute provides that the workers' compensation insurer cannot direct care, and approval is not required from the insurer or board for many procedures. Managed care provided by workers' compensation insurers has proven to be quite effective in expediting return-to-work scenarios through conservative non-invasive treatment and therapy. Without such managed care being provided routinely in New York, surgeries and other medical procedures are more frequently performed on injured construction workers. This generally results in an increase in medical damages in general liability Labor Law claims. Chubb data indicates that bodily injury general liability claims greater than $250,000 in value occur in New York more than 30 times more frequently than in other states, and that the average amount of a New York Labor Law claim covered by a Chubb primary general liability policy with a $2 million limit has increased by nearly 90% from 2012 to 2019.

New York Labor Law claims have become a specialized practice for a relatively small number of plaintiff's lawyers. They have been successful in achieving increasingly large verdicts by using medical experts, economists, and other specialists who are also experienced in this niche legal market. Some examples of increased values for less-severe injuries include jury verdicts in the amount of $1 million for an arthroscopic knee surgery[3] and $3 million for a cervical fusion.[4] Moreover, in 2021, a pain and suffering award for a non-surgical shoulder injury was sustained at $600,000,[5] and a broken leg with surgery was upheld at $4 million.[6] These amounts do not include past and future medical costs or past and future lost wage claims.

No two Labor Law claims are ever the same. The largest awards often involve a construction worker who can project many more years of work expectancy, often worth several million dollars in lost earning and benefits alone. Moreover, there is a continuing trend of large verdicts. For example, in December 2019, a Manhattan jury awarded $102 million to a 36-year-old Labor Law plaintiff.[7] The trial judge reduced the verdict to about $54 million and, in April 2021, the Appellate Court further reduced the award, but the result was a doubling of the highest ever sustained value for pain and suffering for a single personal injury plaintiff in New York, jumping from $10 million to $20 million. Later in 2021, the same court broke that record with a sustained pain and suffering award of $29.5 million.[8]

The Future

Efforts to amend New York Labor Law have focused on replacing strict liability with the more common comparative negligence standard. Some aspects of the law may warrant legislative change, but fair and reasonable compensation for injured workers should remain the legislative goal. Recently, there has been broad support for change. More than 75 diverse groups, including members of The Lawsuit Reform Alliance of New York, such as the New York State School Boards Association, Habitat for Humanity, the Association of Minority Enterprises of New York, and the Latino Builders Council, along with insurance carriers and brokers, have lobbied for an amendment to this law for more than 10 years. There has been little progress.

In 2021, the New York State Conference of Mayors and Municipal Officers, the Minority & Women Contractors & Developers Association, the New York State General Contractors Association, and the General Contractors Association of New York sent a letter to United States Secretary of Transportation Pete Buttigieg requesting he use his regulatory authority to waive applicability of Labor Law § 240 for the $11.6 billion federally funded Hudson River Tunnel project, noting how it would significantly reduce the cost of the project. As of publication of this paper, there had been no response.

Impact on Today's New York Liability Insurance Market

Claim frequency and settlement values continue to increase, and many insurers have evolved their approach to underwriting in the New York construction liability market, while others have exited the market altogether. Notably, many insurers have increased the deductibles or self-insured retentions typically required for primary general liability policies, requiring the owner or contractor to bear more of the risk. Today, general liability deductibles can start at $1 million per occurrence, and more often will be $3 million to $5 million per occurrence. In 2014, by comparison, insureds often purchased general liability insurance with deductibles in the $500,000 range.

Some carriers have also reduced the scope of coverage available, especially for subcontractors. Many subcontractors are buying liability insurance policies with exclusions for Labor Law claims. When this coverage is excluded by the subcontractor's insurer, exposure for damages to an injured employee of the subcontractor can shift to the general contractor, the property owner, and their insurers.

In New York, the current excess liability insurance market for construction risks – both project-specific and annual "practice" programs – is extremely difficult and is expected to continue to trend in this direction. Excess liability capacity in the first $25 million layer above primary general liability is shrinking because fewer markets are interested in supporting the first $25 million of excess/umbrella as the increase in frequency of claims exceeding the primary limits becomes more pronounced. Stand-alone umbrella/excess carrier capacity (where the umbrella carrier is different than the primary general liability carrier) is generally more difficult to secure, and even when it is available, it is typically limited to $5 million or $10 million in capacity. Also, Excess & Surplus (E&S) and London/ Bermuda markets that are willing to consider risks in New York are restricting general aggregates and limiting the number of reinstatements available on a multi-year project.

Best Practices

The best-in-class construction companies operating in New York have a multi-faceted strategy to reduce their balance sheet exposure to Labor Law claims. First, they have a robust culture of safety focused on loss prevention to keep workers safe and reduce or eliminate claims.

Second, when accidents do happen, claims and litigation management is critical. Less than 5% of Labor Law cases go to jury verdict following trial, and escalation of settlement values can be prevented in many cases with prompt investigation and retention of experienced defense counsel.

Finally, a robust and active risk transfer strategy is key. Wrap-up programs and strong indemnity and insurance procurement provisions can help increase the chance of appropriate risk transfer for general contractors and owners and can help reduce the chance that downstream subcontractors' policies with exclusions for Labor Law losses will impact appropriate risk transfer objectives.

Conclusion

New York presents significant opportunities for contractors and owners, but Labor Law § 240 creates significant risks for organizations with construction liability exposure. These conditions are worsening because of existing litigation trends and the insurance market is becoming more challenging in response.

As competition intensifies across the construction marketplace and construction spending in New York continues to increase, it is imperative that contractors and developers work with seasoned and knowledgeable risk management partners – including those with a deep understanding of Labor Law § 240 – to obtain best-in-class protection of their assets and most importantly, their workers.

SOURCES

1. *N.Y. Labor Law § 240(1) (Lab. Law) provides, in pertinent part: Scaffolding and other devices for use of employees.1. All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.*
2. *See, e.g., Wilinski v. 334 East 92nd Housing Development Fund Corp., 18 N.Y.3d 1 (2011), La Veglia v. St. Francis Hosp., 78 A.D.3d 1123, (2d Dep't 2010).*
3. *Luna v. NYC Tr. Auth., 116 A.D.3d 438 (1st Dep't 2014)*
4. *Cabrera v. NYC Tr. Auth., 171 A.D.3d 594 (1st Dep't 2021)*
5. *Gontarek v. NYC Tr. Auth., 197 A.D.3d 1036 (1st Dep't 2021)*
6. *Flores v. NYC Tr. Auth., 198 A.D.3d 412 (1st Dep't 2021)*
7. *Perez v. Live Nation Worldwide Inc., 193 A.D.3d 517 (1st Dep't 2021).*
8. *Yvonee Y. v. City of New York, 199 A.D. 3d 551 (1st Dep't 2021). ($12M past & $17M future)*

CONTACTS

Julian D. Ehrlich, Esq.
Senior Vice President, Claims
Construction Services Group
Aon Commercial Risk
O: (212) 441-2501
C: (914) 282-5555
julian.ehrlich@aon.com

Lyndsey Christofer
Executive Vice President
Chubb Construction
Major Accounts
O: (212) 703-7182
C: (347) 266-2579
lyndsey.christofer@chubb.com

AON

Chubb. Insured.℠