Statement on the Issuance of Committee Reports Regarding New York’s Scaffold Law

The New York County Lawyers’ Association (NYCLA) announces the issuance of two reports by its committees relating to New York’s Scaffold Law. On November 6, 2014, two reports were issued by NYCLA committees: (i) the Construction Law Committee issued a report titled, “New York’s Scaffold Law and Pending Reforms”, and (ii) the Tort Law Section, with the support of the Civil Rights and Liberties Committee, issued a report titled, “The Scaffold Law and Legislative Proposals that Would Shift the Strict Burden for Workplace Safety from Owners and Contractors to the Injured Employee.” The views expressed in these reports are strictly those of the respective committees, have not been approved by the New York County Lawyers’ Association Board of Directors, and do not necessarily represent the views of the Association.

The New York County Lawyers' Association ([www.nycla.org](http://www.nycla.org)) was founded in 1908 as the first major bar association in the country that admitted members without regard to race, ethnicity, religion, gender or sexual identity. Since its inception, it has pioneered some of the most far-reaching and tangible reforms in American jurisprudence and has continuously played an active role in legal developments and public policy.
REPORT BY THE TORT LAW SECTION OF THE NEW YORK COUNTY LAWYERS’ ASSOCIATION

The Scaffold Law and Legislative Proposals that Would Shift the Strict Burden for Workplace Safety from Owners and Contractors to the Injured Employee

The views expressed in this report are strictly those of the Tort Law Section, have not been approved by the New York County Lawyers’ Association Board of Directors, and do not necessarily represent the views of the Association.

I. Introduction and Summary

The fundamental premise of New York Labor Law §§240, 241 and 241-a (collectively the “Scaffold Law”) is to ensure that safety equipment to protect workers is in place on construction sites in all circumstances.

Labor Law §240(1) was enacted to protect workers exposed to gravity-related hazards while performing the tasks enumerated in the statute which require the use of safety devices specified in the statute. Owners, general contractors and their agents will be held absolutely liable where a violation of Labor Law § 240(l) is a proximate cause of injuries. The statute is a safety standard implemented by the legislature and carefully interpreted by the courts with great deliberation over many years to protect workers engaged in hazardous elevation related tasks. Our New York law addresses a fundamental imbalance of power at the construction site. This statute protects workers from intimidation by those who control their jobs. There are too many work sites where workers toil in the absence of the necessary safeguards. Too often they are treated as fungible commodities. The courts understand that the legislative intent of the Scaffold

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1 The Civil Rights and Liberties Committee of the New York County Lawyers’ Association supports the Tort Law Section in the issuance of this report.

Law was to protect these workers. The protection this statute provides should not be eroded. New York should be proud that it has taken these measures to safeguard our workers.

Labor Law §240(l) provides in pertinent part as follows:

All contractors and owners and their agents...in the erection, demolition, repairing, altering, painting, cleaning or pointing...of a building or structure shall furnish or erect or cause to be furnished and erected for the performance of such labor, scaffolding, hoists, stays, ladders, swings, hangars, 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.

To prevail on a claim under §240(1), a plaintiff must prove that the statute was violated, and that the violation was a proximate cause of the injuries sustained.\(^3\) Comparative negligence is not a defense to §240(1). Sections 241(1)-(5) and 241-a also relate to violations of safety standards at the work site; however, the primary focus of most cases has been §240(1).\(^4\)

In enacting these provisions, the legislature understood that many deaths and injuries associated with working at construction sites with elevation related hazards could be avoided by requiring that site owners and contractors provide vital safety equipment that properly protects workers. Proposed legislation pending in Albany, S.111 (Gallivan)/A.3104 (Morelle), would damage the safeguards provided by Labor Law §240(1) by imposing a comparative negligence defense. This legislation would seriously undermine the existing absolute liability placed upon owners and contractors to ensure safety at the work site by allowing them to blame the workers who are rarely in a position to stand up for their rights and have no control over the worksite or the equipment provided to them. For the reasons that follow, the Tort Law Section believes that

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\(^4\) The Court of Appeals has determined that subsections 1-5 of Labor Law §241 impose absolute liability on an owner or contractor because these five provisions may also involve workers laboring and potentially falling from elevated heights during various stages of construction. In practice, no cases rely solely upon these sections. When a worker is injured due to insufficient safety devices on the work site, claims are generally brought under multiple sections of the Labor Law, including Labor Law § 200, §240, §241, §241-a and where applicable §202.
these bills would undermine workplace safety and allocate risk unfairly, without providing significant countervailing economic benefits, and therefore opposes the proposed legislation.

II. Analysis

A. The Scaffold Law Places Responsibility for Worksite Safety on Those Best Placed to Provide a Safe Workplace.

The bills [S.111 (Gallivan)/A.3104 (Morelle)] would introduce a comparative liability standard to Labor Law §240/241 cases, which would constitute an unjust allocation of risk that ignores the daily realities of construction work. This proposal is contrary to the long legislative and judicial history of this statute, which shows a continuing rejection of imposing an affirmative defense of comparative negligence, and would diminish recovery by workers injured while performing a task within the scope of these sections, especially §240(1).

It is all too common for a construction worker to be ordered to perform a task without proper safety equipment or with defective or improperly installed or secured equipment. Take, for example, a worker ordered to climb a ladder that is improperly placed or lacks proper footings. Refusal could mean being sent home and losing a day’s wages, or being fired outright. But if the worker obeys, and is seriously injured in a fall when the ladder slips, the owner and contractor could all too easily claim it was the worker’s fault in that he or she failed to follow safety instructions or safe work practices and was therefore negligent for using the ladder. The worker might find it difficult to persuade co-workers to testify against the employer, even if the co-workers clearly heard the order to use the ladder. Any worker who testifies against his or her

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5 According to the Bill Summary, it “amends the Civil Practice Law and Rules to add a new Section 1414. This section applies a comparative negligence standard as provided for in CPLR 1411 with respect to actions for personal injury, property damage or wrongful death arising under Labor Law Sections 240 and 241 to the extent the conduct relates to the following: a criminal act, use of drugs or alcohol, failure of the employee to use safety devices furnished at the job site, failure to comply with employer instructions regarding the use of safety devices at the job site, or failure of the employee to comply with safe work practices in accord with safety training programs provided by the employer.”
employer could risk retaliation, and it is unlikely, in such a case, that there would be any
documentary or other corroborative evidence. The case would thus come down to a credibility
contest between a single injured worker and all of the witnesses called by the owner or
contractor—a contest that would be difficult for the worker to win.

B. The Scaffold Law Ensures that Owners, General Contractors and Workers Play an
Appropriate Role in Worksite Safety

The courts have consistently recognized that Labor Law §240(1) is a remarkable and
important safety provision. In its landmark decision, *Zimmer v. Chemung County Performing
Arts, Inc.*, 65 N.Y.2d 513, 493 N.Y.S.2d 102 (1985), the Court of Appeals noted the important
legislative purpose of Labor Law §240(1) to protect workers involved in elevation related tasks:

We begin our analysis by again observing that the legislative history of the Labor Law,
particularly sections 240 and 241, makes clear the Legislature’s intent to achieve the
purpose of protecting workers by placing “ultimate responsibility for safety practices at
building construction jobs where such responsibility actually belongs, on the owner and
general contractor” ... instead of on workers, who “are scarcely in a position to protect
themselves from accident….” (internal cites omitted).

In specifically addressing Labor Law §240(1), the court stated:

We gave early recognition to this legislative intent when we declared with respect
to section 240, which was then substantially in its present form, that “this statute is one
for the protection of workmen from injury and undoubtedly is to be construed as liberally
as may be for the accomplishment of the purpose for which it was thus framed” (Quigley

A defense of contributory negligence was explicitly rejected by the court in *Zimmer*:

Thus, we held unavailable to a defendant owner charged with a violation of section 240
the defense of the worker’s contributory negligence, noting that “both sound reason and
persuasive decisions, involving statutes whose content and purpose are similar to section
240, require the conclusion that that statute does not permit the worker’s contributory
negligence to be asserted as a defense.”7

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Although the scope of the statute has evolved over time, comparative negligence has never been held to be a defense so as to erode the protection provided by this statute. However, in *Weininger v. Hagedorn & Co.*, 91 N.Y.2d 958, 960 (1998), the Court of Appeals recognized a very limited exception to the liability imposed under §240(1) under the rare circumstances where the plaintiff’s actions were found to be the sole proximate cause of his injuries. This sharply curtailed defense, which is clearly distinguished from comparative negligence, was more closely examined in *Blake v. Neighborhood Housing Services of New York City, Inc.*, 1 N.Y.3d 280, 771 N.Y.S.2d 484 (2003). It is notable that even as the court in *Blake* recognized the limited defense to liability under the statute, where a worker’s actions were the sole proximate cause, it exhaustively reviewed the legislative history of the statute and concluded that the legislature never intended comparative negligence to be a defense, albeit that it was not explicitly stated. The Court observed: “Most tellingly, the lawmakers fashioned this pioneer legislation to ‘give proper protection’ to the worker. Those words are at the heart of the statute and have endured through every amendment.”

The Court of Appeals in *Blake* concluded that the statutory objectives could not be met if a defense of comparative negligence was imposed and that it was never intended to be a defense. The court stated:

The 1897 statute was a giant step forward, but it still left employers free to invoke the plaintiff’s contributory negligence …. Indeed, throughout all the scaffold law’s amendments, including the present section 240(1), the statutory language has never explicitly barred contributory negligence as a defense. Our Court, however, did so in 1948, reasoning that the statute should be interpreted that way if it is to meet its objective (*see Koenig v Patrick Constr. Corp.*, 298 NY 313, 316-317 (1948)). Since then we have steadfastly held that contributory negligence will not exonerate a defendant who has

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8 *Blake v. Neighborhood Housing Servs. of New York City, Inc.*, 1 N.Y.3d 280, 290-91 (2003) where the Court reaffirmed its finding in *Weininger* that liability will not be imposed under §240(1) under the limited circumstances where there is no evidence of violation and the proof reveals that the plaintiff’s own negligence was the sole proximate cause of the accident.

9 *Id.* at 285.
violated the statute and proximately caused a plaintiff’s injury (see, e.g., Zimmer v Chemung County Performing Arts, 65 NY2d 513, 521 (1985); Stolt v General Foods Corp., 81 NY2d 918 (1993)).

In Blake, the Court of Appeals clearly stated that if a statutory violation is a proximate cause of an injury, then liability is properly imposed, regardless of fault by the worker. The court held:

Under Labor Law § 240(1) it is conceptually impossible for a statutory violation (which serves as a proximate cause for a plaintiff’s injury) to occupy the same ground as a plaintiff’s sole proximate cause for the injury. Thus, if a statutory violation is a proximate cause of an injury, the plaintiff cannot be solely to blame for it.”

However, while emphasizing that the statute was never enacted so as to allow comparative negligence as a defense, the court recognized that if no violation of Labor Law §240(1) was a proximate cause of the accident and that plaintiff’s own acts or omissions were the sole cause of the accident then, under those very sharply limited conditions, defendant could be granted summary judgment. Thus, the defense of sole proximate cause was articulated by the Court of Appeals; however, it is narrow in scope. The courts have been diligent in not allowing this defense to evolve into comparative negligence under a different guise. Even as the courts have recognized that there are occasions when the worker is solely to blame, those occasions are rare and have been carefully distinguished from a worker’s comparative negligence, which is not a defense.

In Cahill v. Triborough Bridge and Tunnel Authority, 4 N.Y.3d 35, 790 N.Y.S.2d 74 (2004), the Court of Appeals held that to prove a worker was recalcitrant and the sole proximate cause of his accident, defendants must prove that (1) plaintiff had adequate safety devices available; (2) that he was aware of that availability and the expectation that he would use them;

10 Id. at 286.
11 Id. at 290.
(3) that for no good reason he chose not to; and (4) that had he not made that choice he would not have been injured.

In *Gallagher v. New York Post*, 14 N.Y.3d 83, 896 N.Y.S.2d 732 (2010), the Court of Appeals made it clear that this incursion into absolute liability under a defense of sole proximate cause would be limited and in keeping with the letter and spirit of the law. In *Gallagher*, the Court held that a safety device is not “readily available” if the worker does not know where to find it or that he or she was expected to use it. The application of sole proximate cause is limited to situations where the safety devices are “readily available” such that plaintiff knew where to find them, knew he was expected to use them, but for no good reason chose not to do so, thereby causing an accident.

The proposed amendment intended to introduce a broad comparative negligence standard as an affirmative defense flouts the legislative and judicial history of this statute. Our legislature and courts have implemented a safety standard designed to protect workers engaged in hazardous elevation related tasks. The very limited defense to a cause of action under Labor Law §240(1) that has been recognized by the courts is available only when there is a total absence of a statutory violation (such that the owners and contractors are in complete compliance with their obligations under the statute) and the worker is found to be the only or “sole proximate cause” of the accident. If an owner or contractor is in complete compliance with the statute and the worker is solely at fault, then under this limited defense liability will not be imposed. This exception is more than adequate protection for such defendants in the situation where they are in complete compliance with the statutory mandate to protect workers exposed to dangerous elevation differentials within the scope of the statute.
The proposed amendment to the Scaffold Law is a radical change from the legislative wording and intent of the statute and the judicial construction of the statute over many years. Weakening the Scaffold Law would unfairly shift safety responsibility from owners and general contractors, who control the site, to the workers themselves. Even with the responsibility now imposed by §240(1), every day there are accidents involving violations which have exposed workers to serious injury. It is frightening to consider how workplace safety will be further eviscerated if this statute is modified.

Construction workers do not control the manner in which the work is performed, nor do they supply the material or safety devices used on the project. Workers are there for the purpose of performing the manual labor ordered by the general contractor and owner of the project so the project is done to their specifications. Since workers do not have control over safety issues on the jobsite, the responsibility for safety should rest squarely on the owner and general contractor.

C. **The Scaffold Law Creates a Strong Incentive to Keep Construction Sites Safe**

Falls from heights account for over 35% of all construction deaths in the U.S.\(^{12}\) Falls are the leading cause of fatalities in the construction industry.\(^{13}\) By holding owners and contractors strictly responsible whenever their violation of the Scaffold Law’s requirements cause a worker’s injury or death in a gravity-related accident, the Scaffold Law puts the onus on owners and contactors, who determine worksite safety (rather than on workers, who do not) to run a safe worksite. The proposed legislation would eliminate a strong and effective incentive for owners or contractors to ensure that the Scaffold Law’s requirements are being strictly observed at their

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13 See U.S. Occupational Safety and Health Administration, at https://www.osha.gov/stopfalls/.
job sites. This current incentive to provide a safe workplace is one reason why from 2000-2011, New York had the nation’s sixth-lowest construction injury rate.\textsuperscript{14}

Some proponents of effectively repealing New York’s Scaffold Law say it is not needed because the U.S. Occupational Safety and Health Administration (OSHA) ensures that construction sites are safe; however, OSHA is so severely understaffed that it can inspect only a small fraction of construction sites.\textsuperscript{15} The New York Committee on Occupational Safety and Health (NYCOSH) has called it “unacceptable” that OSHA has only enough staff to “conduct approximately one construction inspection per day” in the New York metropolitan area.\textsuperscript{16} In addition, OSHA’s small fines are a relatively minor cost of doing business. As reported with regard to the construction industry, “[f]ines are reduced, and unsafe workplaces remain. In New York State… many employers fail to prioritize safety and contribute further to the dangers.”\textsuperscript{17}

The New York Scaffold Law is based on a fair and simple premise — that those who supervise and control a construction site are best able to monitor and ensure its safety and should therefore be held liable if their failure to do so causes a worker’s injury or death. The evisceration of the Scaffold Law, which would be the effect of the currently pending legislation to amend Labor Law §240, would encourage construction employers to take even more safety shortcuts because of the possibility of assessing blame against the worker.


\textsuperscript{15} Center for Popular Democracy, \textit{Fatal Inequality: Workplace Safety Eludes Construction Workers of Color in New York State}, October 2013. Available at \url{http://populardemocracy.org/sites/default/files/fatalinequality_report.pdf}.


D. The Scaffold Law Represents Fair and Equitable Public Policy

In enacting the Scaffold Law, New York recognized that the risks of elevation related work are especially hazardous. New York public policy, as enacted into law and interpreted by the Appellate Divisions and Court of Appeals, is consistent and based on the understanding that construction workers need special protection from height-related injuries. The construction trades unions, who know the most about the dangers posed by construction work, uniformly oppose legislation to weaken the Scaffold Law (See Appendix A.). Weakening the Scaffold Law will further diminish the protections available to construction workers.

E. New York Is Not Alone in Recognizing the Hazards of Working at Heights and Providing Workers with Special Protections

At least seven states in addition to New York have statutes specifically applicable to equipment for working at an elevation, such as scaffolds and hoists. In Ohio, there are criminal penalties for employers that violate the statute. Louisiana applies an absolute liability standard. It is often overlooked that for construction accidents generally, at least 16 states apply stringent liability standards.

New York’s Labor Law §240(1) applies to the hazards of elevation related differentials as broadly construed by the Court of Appeals. It must be noted that there are construction

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18 Ohio’s Law provides: “No person shall employ or direct another to do or perform labor in erecting, repairing, altering, or painting a house, building, or other structure, and knowingly or negligently furnish, erect, or cause to be furnished for erection for and in the performance of said labor, unsuitable or improper scaffolding, hoists, stays, ladders, or other mechanical contrivances which will not give proper protection to the life and limb of a person so employed or engaged.”

19 LSA-RS 40:1672. This statute was construed in Kempff v. B. E. King & Sons, Inc. 222 So.2d 921, 924 (La.App., 1969) where the court stated: “The intent of this statute is to impose a strict liability on persons who erect scaffolds to properly construct and maintain these devices so that those who use them will be protected from the hazard presented by their defective conditions. Barilleaux v. George D. Mattix, Inc., 202 So.2d 461, La.App. 4 Cir. 1967.

20 This liability standard is spelled out in the Restatement of Torts (2nd), which is applied in at least 16 states. Owners in these states can be held vicariously liable for construction accident injuries and deaths caused by the negligence of a contractor they hired as long as the owner retained some degree of control over any aspect of the work or where the owner should have recognized that the work was likely to create a peculiar risk to others unless special precautions were taken.
accidents in New York that are not within the scope of §240(1) because they did not entail either the enumerated tasks or dangerous elevation differentials for which this statute was enacted. However, they may well fall within the scope of statutes such as Labor Law §200, §241(6) or §202 that have also been enacted to protect workers, but which permit an assessment of comparative negligence in determining liability.

F. Weakening the Scaffold Law Would Disproportionately Harm Immigrants and People of Color

A recent study by the Center for Popular Democracy\textsuperscript{21} of OSHA investigations of construction site accidents involving a “fatal fall from an elevation” between 2003 and 2011 found that:

- In 60\% of the OSHA-investigated “fall from an elevation” fatalities in New York State, the worker was Latino and/or an immigrant, disproportionately high for their participation in construction work (people of color make up 40\% of construction workers).

- In New York City, the victims in 74\% of fatal falls were Latino and/or immigrant workers.

- 88\% of fatal falls in Queens and 87\% in Brooklyn involved Latinos and/or immigrant workers.

- 86\% of Latino and/or immigrant workers killed in a “fall from an elevation” on a construction site in New York were working for a non-union employer.

The vast majority of these falls came at construction sites where an OSHA investigation found “serious” violations of safety regulations.

The Scaffold Law helps ensure the safest possible workplace conditions for all construction workers. To protect against injuries and deaths among construction workers of color, the preservation of this workers’ protection law is vital.

G. Weakening the Scaffold Law Will Not Bring Economic or Safety Benefits

Avoiding accidents saves money through fewer accident-related delays in project schedules, which drive up project costs, not to mention medical and other costs. As noted above, from 2000 to 2011, New York had the nation’s sixth lowest construction injury rate thanks in part to the Scaffold Law.\(^{22}\)

Illinois AFL-CIO President Michael T. Carrigan addressed the dangers of repealing important safety standards when he noted the sharp increase in construction industry deaths following the repeal of the Illinois Scaffold Law. He stated:

The Illinois General Assembly repealed the Illinois Structural Work Act (Scaffolding Act) in 1995 under Republican control. Prior to the repeal of the law, Illinois had been the second safest state in construction deaths and accidents. In the year following the repeal of the law, construction industry deaths increased by 40%.\(^{23}\)

A key element of efforts to weaken the Scaffold Law has also been a focus on insurance costs, particularly for government entities such as the NYC School Construction Authority (“SCA”). The SCA purchases wrap-up insurance on behalf of its contractors. This cost of this insurance includes general liability, excess liability, Workers’ Compensation, builder’s risk and pollution liability coverage, not just liability insurance. Opponents of the Scaffold Law have issued exaggerated and inconsistent estimates for the premium the SCA will pay for wrap-up insurance in coming years and have erroneously argued that New York’s Scaffold Law is responsible for these future hikes. For instance, *Crain’s New York Business*, which has published editorials opposing the Scaffold Law, reported in December 2013, “[i]n total, the SCA is budgeting $650 million over the next three years for its insurance coverage. That is nearly

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22 See footnote 14.

three times the cost of its policy that expires at year’s end.”\(^{24}\) In fact, the Department of Education’s proposed 2015-2019 Five Year Capital Plan released in February 2014 budgets $650 million over five, not three, years.\(^{25}\)

Other reports indicate that the cost of insurance will increase 25% in 2014, from $100 million to $125 million. The 25% projection is currently posted on the website of “Get New York Building,” a group created by the construction industry in late September 2013 to oppose the Scaffold Law.\(^{26}\) The construction industry nationally has been experiencing large premium hikes as contractor’s liability insurance has entered a “hard market.” As an *Insurance Journal* headline reported in August 2012, “U.S. Construction Firms Facing Double-Digit Increases for Liability Insurance: Marsh.”\(^{27}\) So a 25% increase would not be out of line with the market. Moreover, any increase in insurance costs should not be attributed only to liability insurance because the SCA’s wrap-up insurance includes additional coverages listed above, which have also seen significant increases. It is also apparent that little attention, if any, has been paid to the potential impact on the Worker’s Compensation system as a result of the evisceration of Labor Law §240(1) by introducing a comparative negligence standard.

Finally, absolutely no supporting data has been made public by the SCA or its liability insurer, Liberty Mutual, for the assertion that in New Jersey wrap-up insurance for a school

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\(^{26}\) [Available at http://www.getnybuilding.com/school-construction-authority (last visited Sept. 17, 2014). The website states that this insurance in 2014 will be “in the $125 million range annually—a 25% increase.”](http://www.getnybuilding.com/school-construction-authority)

construction plan similar to New York’s would cost one-quarter of the same insurance in New York.\textsuperscript{28} That assertion is as credible as the claim that the cost of SCA’s liability insurance will double or triple.

III. Conclusion

The Scaffold Law has protected the hard-working men and women of New York’s construction industry for over 120 years. The law places responsibility for safety where it is most appropriate: upon the owners and general contractors who have the most control and oversight over the workplace. Weakening or repealing the Scaffold Law will do little or nothing to improve the economics of construction in New York, but will provide a further incentive for those who would take shortcuts on worker safety. As New Yorkers, we only have to look up to see an enormous new crop of skyscrapers changing our skyline. Their owners and developers do not require additional subsidies from workers who are injured or killed as a result of unsafe workplaces. The Tort Law Section therefore opposes S.111/A.3104, which would drastically undermine the protections the Scaffold Law affords to those who work at height in the construction industry in New York.

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**OPPOSE ROLLBACK OF SCAFFOLD LAW**

**S. 111 Gallivan / A. 3104 Morelle**

The New York State AFL-CIO, representing 2.5 million union workers and their families as well as our retirees and their families opposes the above-referenced legislation.

This bill would limit the absolute liability of contractors in scaffolding-related workplace deaths and injuries. It would curtail injured claimants’ remedies by shifting responsibility away from contractors, exactly the opposite of the underlying statute’s intent. That statute reflects the reality that contractors are uniquely able to prevent injuries by implementing and adhering to stringent safety protocols. Limiting liability will remove contractors’ incentive to prioritize safety.

Experience has shown that the liability of unsafe contractors is generally found in injuries to non-union, unskilled workers, many of whom are minority or immigrant day laborers, often without proper experience, supervision or safety training.

The inability of contractors to obtain cheap insurance should not be remedied at the expense of the dead, their widows or orphans, or the maimed and injured. Contractors’ general liability insurance remains available. However, those that operate unsafely or have poor claims history will pay higher premiums. This is not a reason to gut worker protection legislation.

For all of these reasons, it is urged that this bill be defeated.

For further information, contact the Legislative Department at 518-436-8516.

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Memo#38/2013
MEMORANDUM IN OPPOSITION

A.3104 (Morelle)                                                  S. 111 (Gallivan)

On behalf of our 220,000 members, the New York State Building & Construction Trades Council OPPOSES A.3104-S.111 which would establish a comparative negligence standard for certain claims brought under Labor Law §§ 240-241.

Commonly referred to as the Scaffold Law, Sections 240-241 of the Labor Law require building owners and contractors to provide workers with proper scaffolding, hoists and harnesses to protect from on-the-job falls and elevated injuries. By placing responsibility for safety with the project owners and contractors who control the worksite, the law is credited with keeping New York's construction-related fatality rates among the lowest in the country.

A comparative negligence standard would create ambiguity in the law and provide a loophole for owners and contractors to shift the blame onto the injured worker. When “reform” presents an opportunity to weaken workplace safety laws – to actually endanger a human being’s right to a safe work environment – the cost of that reform is simply too high to justify any possible benefit.

The New York State Building & Construction Trades Council and its affiliate local unions go to great lengths to ensure our members receive proper safety training. It would be unfortunate for the legislature to undermine our efforts by eliminating this safety measure. We therefore OPPOSE A.3104-S.111 and urge you to consider the ramifications that would result if it were passed.

For more information contact:
Patrick Brown
(518) 427-7350
MEMORANDUM IN OPPOSITION

S111(Gallivan)/A3104(Morelle)

In 2009, private industry construction workers had a fatal occupational injury rate nearly three times that of all workers in the United States: 9.7 per 100,000 full-time equivalent construction workers vs. 3.3 for all workers. Construction also had two of the ten occupations with the highest fatal injury rates: roofers at 34.7 fatal work injuries per 100,000 full-time equivalent workers and structural iron and steel workers at 30.3.

Labor Law 240/241 forces employers to be proactive on worker health and safety. Despite protestations from the Farm Bureau and others, S111 would have the greatest negative impact on the construction industry. Out of 4,070 worker fatalities in private industry in 2010, one-fifth were in construction. Further, falls were the leading cause of worker deaths on construction sites, being responsible for 260 out of 751 total deaths in construction in 2010, fully 35% of the fatalities.

In my 32 years of experience in the construction industry, rare have been the times where I've found a contractor supplying all of the proper training and safety equipment needed to work safely on a construction site. And my history is in unionized construction. The record in the non-union sector is far worse. This was made quite clear during the last building boom. In the 12-month period ending September 30, 2006, there were 25 incidents in which 29 construction workers were killed in New York City. Twenty-four of the 29 fatalities, or 83%, occurred on non-union jobsites.

The top two most frequently cited OSHA Standards violations in 2011 were Scaffoldings, general requirements, construction (29 CFR 1926.451) and Fall Protection, construction (29 CFR 1926.501). If contractors are ignoring the rules now, even with 240/241 forcing them to be more diligent, imagine how they would behave without the requirements.

Further, OSHA cannot be counted upon to do enough enforcement to make this repeal scheme work. OSHA is a very small agency. They have approximately 2,200 inspectors responsible for the health and safety of 130 million workers, employed at more than 8 million worksites around the nation—or one compliance officer for every 59,000 workers. In 2011, OSHA conducted 40,215 worksite inspections. Forty thousand out of eight million.

Labor Law 240/241 saves lives. This is an indisputable fact. An industry that is increasingly non-union, that in 2006 spawned the term “disposable Mexicans” because so many were falling and dying from construction sites, that has proven itself to be more dangerous than any other major industry in the United States cannot be trusted to police itself.

Accordingly, The Mason Tenders’ District Council of Greater New York and Long Island, along with the 15,000 members of its six constituent local unions, vigorously opposes S111. If you have any questions, please feel free to contact legislative director Mike McGuire (212-452-9501) at your convenience.
Memorandum in Opposition
A.3104 (Morelle)/S.111(Gallivan)

The New York State Laborers’ Union strongly opposes A.3104 (Morelle)/S.111 (Gallivan). This legislation would add a new section to the Civil Practice Law and Rules to provide a comparative negligence standard for claims arising out of Section 240 and 241 of the Labor Law. This legislation would unfairly shift the burden of safety from the owner or contractor, who has complete control of the worksite, to the worker, who has no control over the worksite.

Currently, New York State Labor Law, §§240 and 241, known as “New York’s Safe Place to Work Act” or “Scaffold Law,” provides that when scaffolding fails or when certain safety equipment is not provided, strict liability for injuries attach to those who control the property and the job site. These laws cover all workers who are injured by a gravity or elevation and provide injured workers with an avenue to collect compensatory damages. The Laborers’ Union strongly opposes legislative initiatives which would undermine the protections granted to construction workers pursuant to the laws.

These laws, first enacted in 1885, have provided construction workers with important health and safety protections. From time to time, the Legislature has closed loopholes springing from judicial interpretation of the laws. By doing this, the Legislature has affirmed its recognition that workers undertake enhanced risks when working at elevated heights. Appropriately, the purpose of the laws is to reduce injuries by placing the responsibility for workers’ safety on the property owners and contractors. Property owners and contractors solely control safety conditions on work sites and therefore are in the best position to protect the health and safety of workers. There is no just cause for deviation from this liability standard. To abandon the core principle of these laws that have stood the test of time would be irresponsible.

While some owners and contractors argue that strict liability is unfair, the reality is owners and contractors place “hold harmless agreements” in their contracts with subcontractors and therefore are not liable for many §§240/241 violations. Additionally, insurance premiums, which are based on work experience ratings, are held down because those who have liability are incentivized by the law to maintain a safe workplace and therefore have reduced incidence of injuries. If this legislation were adopted, unscrupulous contractors would cut costs by hiring subcontractors with dismal safety records. Economics should not win over worker safety.

For the above referenced reasons, the Laborers’ strongly urge the Legislature to reject this proposal. For additional information, please contact Jim Melius at (518) 449-1715.

May 31, 2013
MEMORANDUM IN OPPOSITION TO A.3104 / S.111

The New York City District Council of Carpenters, consisting of eight local unions representing 25,000 working members throughout the metropolitan region, strongly opposes this bill because it would gut Sec. 240 of the Labor Law, known as the "Scaffold Law." The "Scaffold Law," which requires the use of scaffolds, hoists, harnesses and other appropriate equipment to protect workers toiling at elevated heights, is one of the principal reasons why New York has for the past several years has had nearly the lowest rate of construction injury in the nation.

Construction sites are dangerous places for workers. Just one misstep can lead to a fatal fall. Owners and contractors are in the best position to make construction sites as safe as possible because they exercise ultimate site control through the hiring and supervision of subcontractors. Recognizing this, the Scaffold Law holds an owner or contractor responsible for an accident if their failure to provide the required safety equipment was a cause of the accident. They can entirely avoid liability for accidents if they simply provide this equipment.

Unfortunately this bill shifts the safety burden away from the owners and the contractors and onto workers. It would do this by, in effect, allowing owners and contractors to avoid responsibility whenever a worker was given general safety instructions and these instructions were ignored or whenever a worker failed to comply with safe work practices in accordance with employer-provided safety training programs.

This may seem reasonable at a first glance, but consider what really occurs at construction sites. For example, a subcontractor’s foreman – perhaps weeks after general safety instructions were given – may order a worker to mount a deficiently erected scaffold and the worker is injured or killed when the scaffold collapses. In this scenario, the owner or general contractor could entirely escape liability by arguing that the worker had been given safety instructions or had failed to follow safe work practices. The worker, of course, had little choice because failure to follow on-site orders could lead to loss of a day’s pay or even to being fired. This is especially true for day laborers and undocumented workers, who typically are in no position to say no to the boss or to complain to government worker safety agencies.
Ultimately, if this bill were enacted, owners and general contractors—who could now be insulated from liability—would save money by engaging subcontractors who do not provide or maintain in good working order the safety equipment the Scaffold Law requires. The result would be more worker injuries and deaths.

Finally, this bill entirely ignores that the “recalcitrant worker defense” has been consistently upheld by New York State’s highest court. An owner or contractor will not be held liable if a worker’s injury was entirely caused by his or her failure to use available safety devices. This defense also applies where a worker’s own drunkeness was the sole cause of a fall.

Please contact Daniel Walcott at (212) 366-3398 if you have further questions.
THE IRONWORKERS DISTRICT COUNCIL OF METROPOLITAN NEW YORK REPRESENTING MORE THAN 10,000 IRONWORKERS AND THEIR FAMILIES IS STRONGLY OPPOSED TO THE PROPOSED LEGISLATION.

There is currently in place in New York Labor Law Sections 240, 241 and 241-a, commonly referred to as the “Scaffolding Law” and the “Safe Place to Work Law.” There has been such a law in New York, in one form or another, for over 100 years. The current versions of sections 240 and 241(6) are, in essence, those enacted in 1969. The law exists because it has long been the public policy of New York State to be at the forefront of worker safety. The law owes its existence to the rightful recognition that construction is an inherently dangerous, but necessary, occupation; that a construction site is a “Symphony of Danger.”

Proponents of this legislation argue that otherwise safe contractors are being victimized under the provisions of the existing law, as interpreted by the Courts, when workers are injured due to a criminal act, drug use, alcohol use, or after safety training. This is patently false and insulting to construction workers. In order for a worker to collect on a suit for damages under 240, 241, 241-a of the Labor Law, there must be a violation of the statute by the owner/contractor which must be the proximate cause of the workers’ injury. There is no conflicting case law on this issue, especially since the Court of Appeals decision in (attached) Blake v Neighborhood Housing Services of New York City, Inc. (1 NY3d 280; 2003 LEXIS 4213) which is must reading for anyone honestly trying to understand the law. What this proposed legislation really does, by creating statutory defenses to a Labor Law Section 240, 241 and 241-a action is to guarantee every suit will be defended with a “Recalcitrant Worker” claim, thus converting every action to one of comparative negligence.

Over the last half-century, Labor Law § 240(1), in particular, has proven to be an effective safety measure, in large part because it places upon owners and general contractors a clear-cut, non-delegable duty to provide workers at construction sites with proper ladders and scaffolds. Recognizing that accidents involving workers who fall invariably receive compensation for the injuries they sustain, owners and general contractors continue to explore new methods and technologies to ensure workers are not injured because their scaffolds or ladders fail. For example, adjustable beam clamps are now common at construction sites, and contractors are taking steps necessary to assure that workers use them.
The Labor Law’s effectiveness as a safety measure will be undermined if owners and contractors are able to avoid liability simply by producing an expert or other witness who will claim that an accident was caused by a worker’s failure to comply with a particular safety measure, or to use a particular safety device, whether or not it was available to him or her. As the Court of Appeals recognized more than 60 years ago in *Koenig v. Patrick Const. Corp.*, 298 NY 313, 318-319 (1948), construction workers have no choice but to follow their foreman’s directions and to make use of the safety equipment provided to them.

At the very least, the Gallivan/Morelle Bill will provide an easy way for defendants to prolong litigation and avoid paying workers for the full value of their injuries. Cases involving failed ladders and scaffolds are now routinely disposed of by early settlements or summary judgment motions. With comparative negligence inserted into Labor Law § 240(1), these cases will invariably go to trial. The very purpose of the statutes, as amended in 1969, will be frustrated.

Ironworkers risk their lives daily to perform their work in a highly skilled fashion. Neither they nor any other building tradesman goes to work looking to be injured. They fully expect to make their money by earning it, not in the manner this legislation insultingly suggests. They hope to pay their children’s college tuition and retire healthy.

This bill if not designed to pierce the veil of protection for workers currently provided in the Labor Law to cure specific abuses. It is designed to shred it for all purposes! Proponents of this legislation speak of a limited application and of reform. Both arguments are transparent. If this legislation becomes law, the health and safety of construction workers throughout the State will be at grave risk as insurers and contractors will have successfully removed all incentives to be safe. This legislation should be rejected as unworthy of consideration.

The Ironworkers of the District Council will be happy to discuss this issue further with anyone who wishes to spend a day with us at our place of work.
Workers Needs Safety on the Job: Do Not Gut the Scaffold Law

Sponsors: Prime Assembly Sponsor: Joseph Morelle (D-Rochester)
Co-Sponsors: Schimminger (D-Buffalo), Magee (D-Oneida), Galef (D-Westchester), Robinson (D-Brooklyn), Gabryszak (D-Cheektowaga), Stirpe (D-Syracuse), McDonald (D-Albany), Goodell (R-Jamestown) as of 6/7/13.
Multi-Sponsors: Corwin (R-Erie), Duprey (R-Plattsburgh), Hawley (R-Genesee), Jordan (R-Saratoga), McDonough (R-Nassau), McLaughlin (R-Columbia), Stec (R-Essex), Tenney (R-Oneida), Walter (R-Erie) as of 6/7/13
Prime Senate Sponsor: Patrick Gallivan (R-Erie County)
Co-Sponsors: Adams (D-Brooklyn), Ball (R-Hudson Valley), Dilan (D-Brooklyn), Larkin (R-Hudson Valley), Libous (R-Binghamton), Marchione (R-Capital Region), Seward (R-Oneonta), Young (R-Jamestown) as of 6/7/13.

Bill Status: In the Assembly, the bill is referred to the Judiciary Committee. In the Senate, the bill is also referred to the Judiciary Committee.

What the Bill Would Do: This bill greatly reduces the rights of workers injured in slips, falls and other accidents on scaffolds to recover monetary damages from occupational injuries and removes the obligation of employers to provide the proper safety equipment on scaffolding to protect workers.

Working Conditions are Currently Not Safe Enough:

CWA does not represent workers at construction companies. However, CWA members in telecommunications and manufacturing often work at dangerous elevation, such as on utility polls. All-too-often, members are seriously injured or killed on the job. The most recent CWA fatality occurred last year, when Douglas Lalima, a Verizon worker was killed while working at elevation on a utility poll. Verizon did not provide – and continues to fail to provide – the proper safety equipment and training. Verizon was cited for repeat and serious safety violations, the company’s tenth citation after a string of accidents and fatalities; OSHA also placed Verizon on its list of “Severe Safety

Violators\textsuperscript{2}. Verizon is one of the few large corporations that OSHA has placed on this list. Mr. Lalima is survived by his widow and four children.

Construction workers also face serious occupational risks. Eliminating all accidents is impossible. Ensuring minimally safe working conditions is not. Unfortunately, too many employers are willing or even eager to cut corners. The Scaffold law’s provisions act as a corrective incentive to prevent employers from reaching a cold-hearted business decision to cut costs by cutting safety.

The Scaffold Law holds property owners and general contractors liable for injuries resulting from a failure to provide the proper conditions. The requirements are not overly burdensome. They have helped to make New York State among the safest States for construction work.

**New York State Should Not Go Backwards:**

According to the Bureau of Labor Statistics, New York had the nation’s fifth-lowest construction injury rate from 2000 - 2010. Of course, New York should aspire to do better. Nevertheless, policy makers should be justly proud of the State’s leadership.

Gutting the Scaffold Law’s requirements would result in more preventable injuries and fatalities. CWA supports our sisters and brothers – both union and non-union – in the construction industry who need safe conditions on the job. We urge the Legislature to reject this legislation and the prime and co-sponsors of this bill to change their positions.

**Workers Need to Be Safe on the Job: Do Not Gut the Scaffold Law by Passing A3104/S111**

MEMORANDUM IN OPPOSITION

S.111 (Gallivan)/A.3104 (Morelle)

The undersigned, on behalf of the above-noted construction locals of the International Brotherhood of Electrical Workers opposes S.111/A.3104 for the following reasons:

(1) The bill would increase the risk of catastrophic injury to construction workers engaged in high risk work, particularly to undocumented immigrant workers.

In circa 2005, the Court of Appeals ruled that being an illegal immigrant injured on a construction site did not bar standing to sue a contractor who violated the strict (not absolute) safety requirements of the Scaffold Law (Labor Law Secs. 240, 241 et al.).

The Honorable Victoria Graffeo, former Chief Counsel to the Assembly Republican Conference, writing for the majority of the Court, rejected the argument of two different non-union contractors and their insurance company paid attorneys that immigrants in violation of federal law had no rights under the Scaffold Law to sue their employers. Invoking the “clean hands” doctrine of the Law of Equity taught (or used to be taught) in every law school, Judge Graffeo rejected the notion that law breaking contractors were immune to suit by undocumented workers.

Underlying these decisions was the theory of the “recalcitrant worker” advanced by the proponents of this “reform” of the Scaffold Law. Undocumented construction workers never argue with their employers about unsafe conditions for reasons that should be obvious to all: If not, read the Op Ed by Senator Jose Peralta published in the New York Times.

The Scaffold Law was passed in the 1890s after over 100 immigrant (mostly Irish) laborers were killed or severely injured in the construction of the Brooklyn Bridge. Recovery in court was next to impossible as contractors could plead assumption of the risk and contributory negligence as a complete defense. The instant legislation would change the strict liability standard to comparative negligence. The sponsors are correct that this would not bar recovery in all cases, it would however greatly reduce recovery in many cases and bar any recovery in some cases.
Comparative negligence permits the use of contributory negligence and assumption of the risk to reduce recovery anywhere from 1% to 99%.

(2) The recalcitrant worker defense is already available to contractors and owners in 240/241 cases. It is not in the statute; it is judge imposed common law. It is, under strict liability, an affirmative defense that the owner or contractor must prove, rather than be entitled to automatically.

(3) This legislation will increase not decrease the cost of workers compensation to contractors who obey the law, and to the State of New York.

Proponents argue that the fiscal implication to the State of New York is “none”. This is not true.

Over 50% of the construction contractors in New York State receive their workers compensation coverage from the New York State Insurance Fund. Recoveries by workers who win Scaffold Law lawsuits are subject to subrogation under New York State Insurance law.

In plain English this means the following: If a worker wins a Section 240/241 award, all medical expenses and certain economic loss payments made by that worker’s employer worker compensation carrier are a lien on that 240/241 award. That is, the worker compensation insurance company that paid the injured worker’s medical bills and lost wages is entitled to get its money back.

New York State Worker Compensation Insurance is an absolute liability standard, but is entitled to reimbursement from insurance companies that do not enforce work place safety on their clients.

(4) This memorandum is already too long but it could go on about the fact that the cost per thousand dollars for 240/241 insurance is lower for a 60 story skyscraper in Manhattan than for a 6 story apartment building in Queens because union iron workers have protocols while non-union workers have no say (or no job) if they insist on safety when they work on a roof, as the Sponsors Memo refers to the problem of small contractors in obtaining 240/241 insurance. The solution to that problem was addressed in the past by proposals to have the NYS Insurance Fund write 240/241 coverage, but that was opposed for some reason by the lobby groups that support this legislation.

Respectfully Submitted,

Paul N. D’Onofrio
Legislative Counsel
MEMORANDUM IN OPPOSITION

Working Families Party

S.111 (Gallivan) / A.3104 (Morelle)

The Working Families Party (WFP) opposes S.111/ A.3104, which would eviscerate the Scaffold Law under Labor Law sections 240 and 241, and act as corporate welfare for wealthy contractors who earn their money by cutting corners on worker safety. The WFP and our supporters understand that the primary concern of working men and women is their safety and the safety of the people working alongside them. That’s why we oppose any changes to the Scaffold Law.

Simply put, the Scaffold Law works. It holds business owners and corporations accountable when a worker is injured. Workers across the state face the consequences of unsafe worksites everyday. When construction industry lobbyists and faceless corporations drown out the voices of New York’s working class, we all lose. The loudest drumbeat in Albany cannot be for saving insurance companies money; it must be for protecting the lives of hard working New Yorkers.

The Scaffold Law says that contractors must provide proper safety equipment at job sites such as harnesses, scaffolding, hoists, stays and ladders. When contractors provide that safety equipment, they cannot be held liable. We should never give anyone a free pass when they recklessly break the law. It doesn’t make any sense to working families.

New Yorkers are tired of news stories about workers injured or killed on the job. Recent tragedies around the country and around the world, such as in Texas, Philadelphia and Bangladesh have showed us that now is not the time to ignore worker safety or even worse, turn a blind eye to lax safety practices.

The Working Families Party stands committed to protecting worker safety and protecting working class New Yorkers. That is why we must reject any attempt to water down the basic and necessary provisions of the Scaffold Law.
Memorandum in Opposition to S.111 Gallivan/A.3104 Morelle

The undersigned, on behalf of the above-noted construction local of the International Brotherhood of Electrical Workers, urges a no vote on the above referenced bill.

The statute in question: Section 240 of the Labor Law, has provided strong safety protections to workers on construction projects for over 100 years, being strengthened during Gov. Rockefeller’s administration approximately 30 years ago. Our members frequently work under hazardous conditions at elevations, performing dangerous tasks involving high voltage electricity. Safeguarding them is of paramount importance.

Any effort to dilute the protections provided by the Labor Law is an affront to electricians, and other construction workers, throughout the State of New York. It threatens their ability to provide for themselves and their families in the unfortunate event of a work related injury and resulting disability. Any attempt to eviscerate or reduce these protections would place our member at serious risk and would be unconscionable.

It must be pointed out that the Labor Law also serves the laudatory purpose of forcing owners and contractors, who benefit from the labor of our members, to follow and enforce strict safety practices to ensure injuries do not happen. Indeed, it is precisely this direct byproduct of the statute that requires it to remain as presently constituted. Although business and insurance interests may claim the contrary, any reduction in the legal obligation of owners and contractors to protect workers under the Labor Law will, undoubtedly, result in a reduction of the protection provided and, inevitably, devastating consequences. This is simply a matter of common sense.

For the foregoing reasons, Local 3 of the International Brotherhood of Electrical Workers, on behalf of its members, strongly and vigorously oppose any effort to modify or reduce the protection provided by Labor Law Section 240.

Respectfully submitted,

Christopher Erikson

Business Manager Local #3 IBEW