

HARLEYSVILLE RISK SERVICES

Your Partner in Preventing Losses[®]

Contractors and NY Labor Law



Precautions
you can take
to protect your
business against
potentially
damaging
lawsuits

Contractors and NY Labor Law



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Who will benefit from reading this brochure?

This brochure was created as a guide to contractors and subcontractors whose businesses are impacted on a daily basis by New York Labor Law. A companion piece, *Property Owners and New York Labor Law*, is geared to landlords and other commercial property owners in New York state.

What every New York contractor should know

Many of the most complex, innovative and important construction projects in the world can be found in New York. It is home to highly skilled and best-in-class construction and engineering firms. These are the companies and workers that built over 500 miles of canals, the Niagara Falls power plants, the Brooklyn Bridge, and towering steel and glass skyscrapers. New Yorkers engineered and built subways, bridges and tunnels, and they pioneered the large-scale use of electricity. New York roadways have become part of the largest public works project in history.

New York Labor Law (NYLL), which had its origins in the 1880s, continues to negatively impact the financial results of construction firms large and small—from artisan contractors, electricians, plumbers, and HVAC firms to the largest general contractors. All construction trades, subcontractors and property owners are impacted.

To minimize the potential for NYLL lawsuits, it's important to be knowledgeable of the law, pay close attention to possible consequences, and take necessary precautions. The most important of these are to follow strict safety protocols and build effective risk transfer clauses into contracts through indemnity and insurance procurement provisions.

Lawsuits alleging violation of NYLL, sections 200, 240(1) (aka Scaffold Law), and 241(6) can be costly to defend and may result in multi-million dollar damage awards—putting your organization's assets at risk. Such lawsuits also become part of your loss history and may adversely affect your insurance rates. These lawsuits may impose strict or absolute liability on your organization.

NYLL can make you responsible for injuries to: your employee or subcontractor construction workers, subcontractor employees, any agent, servant, supplier or others.

The law can make your company financially responsible for injuries to individuals and subcontractors hired by you, or hired by another contractor—with or without your knowledge. You can be liable for injured workers or other injured third parties even when you didn't supervise or control the jobsite, supply materials, select equipment or choose the employees to do the work.

NYLL: An overview

NYLL 200 requires that owners and general contractors provide a safe place to work. The law places responsibility on owners and general contractors to exercise reasonable care to protect workers. The law requires the injured worker to prove active responsibility on the part of the contractor or owner for the occurrence, and the injured worker's negligence in contributing to the occurrence can be raised by the contractor or owner in defense against, or to reduce, the worker's claim.



NYLL 240(1) (aka Scaffold Law), makes contractors and property owners strictly liable for height- or gravity-related injuries. With strict liability, contractors or property owners do not have to be found negligent or at fault. Lawsuits are driven by injuries occurring, at least in part, due to height or “gravity.” However, “height” can be considerably lower than what you might think—a fall from a bucket or even several stacked bricks could result in an NYLL lawsuit.

Potential NYLL 240(1) lawsuits include: 1) falls and injuries from ladders or scaffolding, 2) accidents involving platforms, hoists, stays, slings, ropes, blocks, braces or pulleys, and 3) persons struck by falling materials. The injured worker’s negligence in contributing to the occurrence **cannot** be raised in defense against, or to reduce, a claim under NYLL 240(1).

NYLL 240(1) requires that: ***All contractors and property owners*** and their agents (with an exception, under certain circumstances, for 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.***

NYLL 241(6) imposes liability on property owners and contractors and their agents, who are engaged in construction, excavation or demolition, for injuries that occur because of a failure to follow safety laws or regulations. Lawsuits must be based on a violation of a specific conduct regulation provision of the New York State Industrial Code. The injured worker’s negligence in contributing to the occurrence can be raised in defense to his/her claim under NYLL 241(6).



Examples of NYLL claims that can lead to lawsuits

- A plumber is seriously injured when he falls from a ladder that was not tied off.
- An electrician falls 18' from a ladder that slips on tile.
- A subcontractor’s employee falls from a ladder that breaks and collapses. The ladder is owned by the general contractor and was reportedly borrowed before the start of the workday without the general contractor’s knowledge or consent.
- An employee is struck on the head by a bucket of cement as it’s being hoisted to the second story scaffolding.
- A worker falls while standing on paint buckets.
- A trench collapses causing injury to an HVAC construction worker.
- An electrician falls from a 6' ladder while pulling electrical wires through conduit.
- While repairing an overhead garage door, an employee falls 12' from a ladder.
- A worker is injured while unloading 300 lbs. of pipe.
- A construction worker is removing storage unit walls when the floor collapses, sending him to the floor below.

- A subcontractor's employee falls from a scaffold while helping co-workers set an I-beam.
- An electrician is injured when he falls through a suspended ceiling.
- A contractor hires a neighborhood handyman to paint fire escapes. That handyman hires another handyman, who falls from an unsecured ladder.
- An employee of a subcontractor falls from the bucket of a lift truck.
- A construction worker trips on debris.

Some questions to ask when choosing a subcontractor

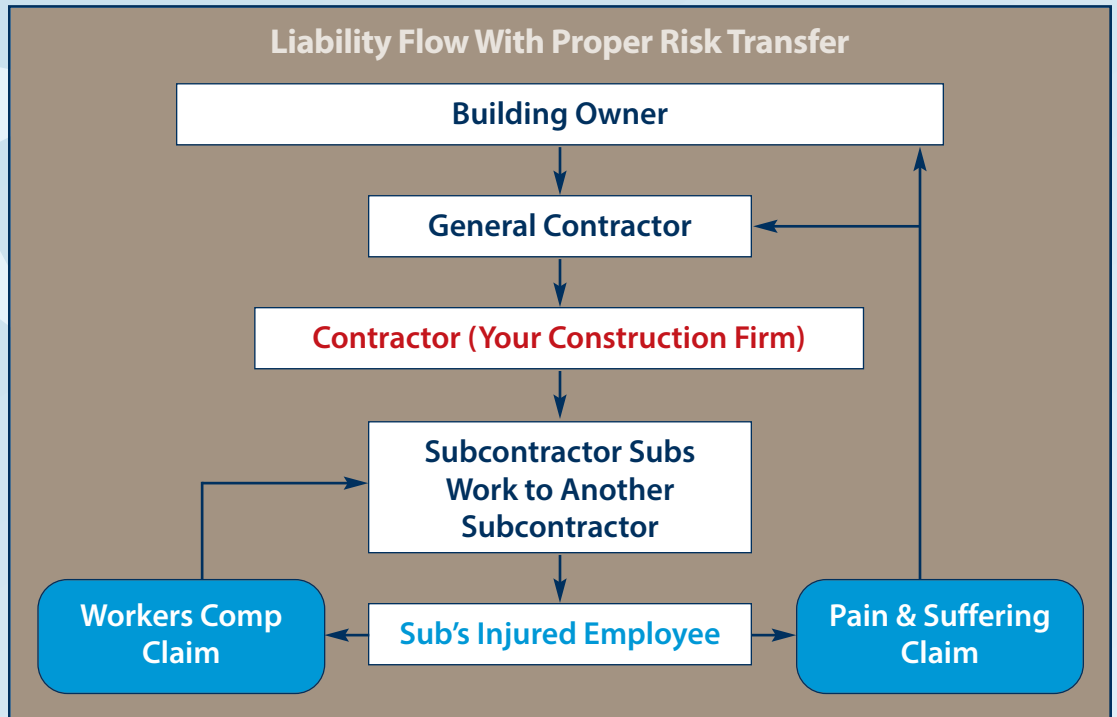
- Is the subcontractor competent, qualified, properly licensed and experienced?
- Is the subcontractor properly insured with appropriate limits for workers compensation, general liability, products-completed operations, automobile and personal and advertising injury?
- Does the subcontractor's insurance coverage exclude contractual liability, New York Labor Law, or have other coverage restrictions?
- Are subcontractor prequalification services used?
- Have you checked the subcontractor's references?
- Does the subcontractor properly screen other subcontractors and employees it hires and use proper risk transfer?
- Is the subcontractor's equipment new (or well-maintained)—especially ladders?
- Does the subcontractor have a written and enforced safety program that includes documented employee training?
- Does the subcontractor have specific safety procedures in place for the use of ladders, scaffolding, and working at heights?
- Does the subcontractor have a written OSHA-compliant fall protection program?
- Has the subcontractor made efforts to reduce the use of ladders by using alternatives such as lifts and fully protected elevated work platforms?
- Are platform ladders used by the subcontractor?
- Has the subcontractor designated a "competent person(s)" as defined by OSHA?
- Does the subcontractor conduct written job site inspections and maintain a daily "work log"?
- Have the subcontractor's employees and supervisors successfully completed OSHA 10- or 30-hour outreach courses for construction?
- Does the subcontractor adequately supervise the jobsite?
- Does the subcontractor have a history of OSHA violations?
- Is the subcontractor's workers compensation experience modification factor 1.0 or less?



Risk transfer is your best defense

Under New York Labor Law, injured employees of a contractor, subcontractor or other persons may sue if they are hurt at a construction site. (See our *Property Owners and New York Labor Law* brochure—Z-1551.) Strict liability applies in many labor law violations. When there has been a proven violation of NYLL 240(1), there is no “offset” for the injured worker’s own negligence—whether it be significant or minimal. (Strict liability is a legal concept of *automatic* responsibility. It is not necessary to prove negligence or fault. In some cases, the only item the jury decides is the amount of financial damages that will be awarded to the injured person.)

In risk transfer written agreements, one party assumes the liability for another. With good risk transfer language in place, the contractor and owner are much more likely to be “defended,” “indemnified” financially, and “held harmless” should there be an insurance claim or lawsuit. Without good risk transfer procedures in place, your company or insurance carrier may be responsible for monetary awards.



Liability Flow with Risk Transfer Mechanisms—In this example, the contractor (your construction firm) can, by way of the risk transfer mechanisms discussed in this brochure, transfer the ultimate responsibility to pay a pain and suffering award down to your subcontractor.

Using written contracts to execute risk transfer

Below are examples that illustrate how written contracts can be used to execute risk transfer, consistent with NYLL principles. As your insurer, Harleysville wants you to view these as the five essential minimum requirements of any agreement you sign with another contractor. This information is provided to help you gain an understanding of risk transfer principles, but we advise that you have a qualified attorney review any such contract to verify its legal soundness for the jurisdictions where you conduct business.

YOUR 5 ESSENTIAL MINIMUM CONTRACT REQUIREMENTS

1 Hold harmless, indemnification agreements, and waiver of workers compensation immunity

EXAMPLE: *To the fullest extent permitted by law*, the party performing the work under this agreement, hereby known as the *subcontractor*, shall defend, indemnify and hold harmless the *contractor*, *property owner* or their agents for whom the work is performed, for any liability, loss, or other claim for damages for death, bodily injury or property damage arising out of performance of the work by the *subcontractor* or any of its agents, servants, employees, *subcontractors* or suppliers, except to the extent of any fault attributed to the *contractor*.

In addition, the *subcontractor* agrees the indemnification obligation shall not be limited in any way by any limitation on the amount or type of damages, compensation or benefits payable by or for the *subcontractor* under workers compensation acts, disability benefit acts or other employee benefit acts.

IMPORTANT: If you use work orders for simple work, the work order should include a hold harmless/indemnification provision to be signed by the *subcontractor* before beginning work. For *contractors* that use *subs* for multiple small jobs for the year, a master *subcontractor* agreement meeting these requirements may be a better alternative.

2 General acceptance provision

EXAMPLE: Any work order, contract or similar document should contain or reference an indemnification/hold harmless provision and an insurance/additional insured status provision. Such documents should specify that commencement of any part of the work shall be deemed as acceptance of such provisions and for all purposes legally equivalent to full execution of same. With regard to service work which may be done throughout the year, it should be expressly stated in writing that these requirements remain in effect until otherwise agreed in writing.



YOUR 5 ESSENTIAL MINIMUM CONTRACT REQUIREMENTS (cont'd.)

3 Insurance requirements and additional insured coverage

Insurance procurement requirements call for additional insured status for ongoing operations and completed operations on your *subcontractor's* general liability (GL) and umbrella policies on a primary and non-contributory basis. Note: The contract should be clear that these requirements are to apply to any *subcontractors* hired by the *subcontractor* as well. The table on p. 9 lists specific requirements for *contractor* and *subcontractor* insurance limits.

Be cautious! In an attempt to save premium dollars, some *subcontractors* are purchasing insurance from non-standard insurance carriers. While some of these carriers provide reasonable levels of coverage, others exclude primary liability exposures, even if such liability was assumed by the *subcontractor* in the contract with you (such as employee injuries or other injuries governed by NYLL). This hold harmless obligation coverage gap can result in your *subcontractor* being virtually uninsured for certain types of losses. This increases your liability exposure and problems with your insurability. ***Please consult with your agent or broker to make sure that your subcontractors are properly covered.***

It is also important that your *subcontractor* carry workers compensation coverage for the states related to the contract. If not, the *subcontractor's* employees' wages may be added to your payroll as if they were your employees, and you may be responsible for their injuries. If your *subcontractor* is an individual or partnership, then confirm that he/she has elected to be covered by the workers compensation policy.

4 Waiver of subrogation and workers compensation immunity

The *subcontractor* agrees to waive any and all rights of subrogation against the *contractor* (your construction firm) and *owner*. Waivers of subrogation for general liability and umbrella policies should require the *subcontractor* to waive their insurer's right to be reimbursed by you should a loss occur that was a result of your negligence.

5 Certificate of insurance requirement

A certificate of insurance must be provided to the *contractor* prior to the commencement of work as evidence the *subcontractor* is maintaining its own general liability and workers compensation insurance with sufficient limits to cover a significant loss. The certificate must show the *contractor* and *owner* as additional insureds for ongoing and completed operations on a primary and non-contributory basis. A requirement should exist that the *subcontractor's* insurance policies be endorsed to guarantee you a right to at least 10 days' notice of cancellation.

A certificate of insurance provides evidence that particular types of coverage are in force at a particular time. It also provides evidence of the limits of coverage in force at the time coverage was issued. It is most commonly used to provide the certificate holder (e.g., you or your customer) with evidence that certain insurance requirements have been met.



YOUR 5 ESSENTIAL MINIMUM CONTRACT REQUIREMENTS (cont'd.)

5 Certificate of insurance requirement (cont'd.)

No *subcontractor* should be allowed on a job site without first providing an up-to-date certificate of insurance. The ACORD Certificate of Insurance form has become the industry standard. It provides evidence of the types of coverage as well as endorsements to the commercial general liability (CGL) policy. The type of coverage, name of insurer, policy term, and limits of coverage are the typical entries on the form. It provides a brief summary of the coverage in force when it was issued. Since it provides information only, it does not constitute a contract between the insurer and the certificate holder.



INSURANCE LIMIT REQUIREMENTS: SUBCONTRACTORS

General liability (GL) coverage	At a minimum, limits should be \$1 million each occurrence, \$2 million general aggregate, and \$2 million products-completed operations aggregate to avoid being considered an “inadequately insured <i>subcontractor</i> .” In addition, the general aggregate should apply on a per-project or per-location basis.
Umbrella liability coverage	The umbrella coverage limit should be a minimum of \$1 million and provide additional insured coverage to you on a primary and noncontributory basis in order to provide additional protection in the event of a catastrophic loss.
Workers compensation/ Employers liability coverage	At a minimum, the employers liability limit of bodily injury (BI) by accident required should be \$100,000 per accident; the limit of BI by disease required should be \$500,000 per policy and \$100,000 per employee. These minimum limits should apply in any state in which work is being done under the contract.
Automobile liability coverage	At a minimum, a per-accident limit of \$1 million combined single limit should be required.
Personal and advertising injury (PAI) coverage	The PAI limit should be \$1 million. An ISO GL policy automatically provides this limit when a \$1 million occurrence limit is selected. For non-ISO GL policies, a \$1 million PAI limit should be provided.

‘But I’m a contractor—not a lawyer or insurance professional!’

Executing contracts and risk transfer agreements are common practices in your industry. Written contracts can be short and simple. Choose a competent and qualified attorney to review your contracts, risk transfer agreements and procedures. You may also want to consider using “standard” contracts from sources such as www.AIA.org, www.consensusdocs.org or www.contractorsknowledgenetwork.org.

Your insurance agent is an excellent resource and can provide additional assistance such as identifying insurance companies that limit or exclude contractual liability coverages—which could increase your liability. And in matters involving New York Labor Law, it’s especially important to seek professional advice!

Other information of value to contractors

Common pitfalls that may increase your liability

- A handshake or verbal agreement rather than a written contract
- Contracts that do not include insurance requirements
- A contract that does not include hold harmless and indemnification clauses without the “to the fullest extent permitted by law” language which is commonly known as the “saving language”
- A contract that does not include language requiring the additional insured coverage for the contractor to be applicable on a primary/non-contributory basis
- An assumption that a contractor has insurance
- A contractor whose insurance coverage excludes contractual liability, NYLL or other related limitations
- A contractor’s certificate of insurance that has expired or is counterfeit
- Allowing use of your tools and equipment by others not employed by you
- Failing to adequately screen contractors
- Allowing work to proceed before risk transfer agreements are in place
- Failing to use master subcontractor agreements for frequently used subcontractors
- Job sites that do not meet or exceed OSHA requirements, especially for work involving heights
- Lack of pre-qualified contractors to be used in rush or special circumstances?



The importance of job site safety

The best way to avoid NYLL suits is to prevent accidents on the jobsite through:

- Pre-job planning to anticipate hazards/exposures and needed control measures
- Written and enforced safety programs
- Special emphasis programs on fall prevention including OSHA Fall Protection programs, employee training on working at heights, proper equipment, and use of ladder alternatives
- Employee participation in safety efforts
- Building a safety culture by making each employee accountable for safety
- Applying all applicable OSHA standards to daily operations
- Proper employee selection, orientation and ongoing training
- Providing and enforcing the use of safety equipment
- Adequate jobsite supervision and inspections
- Prompt accident investigation (including near misses) and corrective actions



Additional resources from Harleystville

To provide you with further protection against the risk of a lawsuit, the following materials and training are available from Harleystville Risk Services:

- *Property Owners and New York Labor Law* brochure—Z-1551
- *Contractual Risk Transfer for Commercial Property Owners* brochure—Z-1748
- *Building A Ladder Alternative Jobsite* fact sheet—Z-1787
- *Best Practices for Managing Liability and Workers Compensation Risk*—ST-7653
- OSHA 10-Hour Outreach Courses
- Toolbox Training Topics
- Other written materials to assist your efforts

For help with obtaining these materials, visit www.harleystvillegroup.com and choose “Risk Services” from the “Policyholders” drop-down menu in the dark blue navigation bar, or contact Harleystville Risk Services at **800-523-6344, ext. 8100**, or by email at riskservices@harleystvillegroup.com.

OSHA fall protection resources

Materials Available on OSHA Website:

Visit www.osha.gov and click on the “Publications” tab in the top navigation bar. In the “Search” window, type in the number or name of the item you wish to view (e.g., OSHA 3625 – 2013).

- **OSHA 3625 – 2013: Ladder Safety: Falling Off Ladders Can Kill: Use Them Safely**
- **OSHA FS-3662 – 2013: Ladder Safety: Reducing Falls in Construction: Safe Use of Stepladders Fact Sheet**
- **OSHA 3124 – 2003: Stairways and Ladders**
- **OSHA 2202 – 2011: Construction Industry Digest**
- **Aerial Lifts Fact Sheet**

OSHA Web Pages with Ladder Safety Information:

Preventing Fatal Falls—Visit www.osha.gov/stopfalls

Mobile Scaffolding—Visit www.osha.gov, type “Mobile Scaffolding” into the “Search” window, and click on the first item listed.

Solutions for Electrical Contractors—Visit www.osha.gov, type “Solutions for Electrical Contractors” into the “Search” window, and click on the first item listed.

OSHA Construction Standards—Visit www.osha.gov, type “29 CFR Part 1926” into the “Search” window, and click on the first item listed. Included on the page you will reach are links to:

- **1926 Subpart C - General Safety and Health Provisions**
- **1926 Subpart L - Scaffolds**
- **1926 Subpart M - Fall Protection**
- **1926 Subpart X - Ladders**

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