

New York's "Scaffold Law":

An Essential Protection for Immigrant Construction Workers

**New York State Trial Lawyers Association
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Labor Law Sec. 240, the “Scaffold Law,” requires building owners and general contractors to provide workers with proper scaffolds, hoists, harnesses, and other appropriate worksite safety equipment for use when working at elevations. New York’s unique Scaffold Law is a major reason why New York’s construction industry occupational fatality rate is virtually the lowest in the nation.

Key to this success is placing ultimate responsibility for observing the Scaffold Law’s requirements on owners and contractors. They cannot avoid responsibility by delegating responsibility to their subcontractors and workers and then looking the other way when necessary safety equipment is not provided or maintained and an accident occurs.

Building owners, developers and contractors are now seeking to gut the Scaffold Law by effectively shifting onto workers the ultimate responsibility for worksite safety. Enactment of pending legislation to accomplish this change would result in more accidents and injuries.

Immigrant workers, especially Latinos, would be hurt the most. According to the U.S. Bureau of Labor Statistics, construction is the one of the most dangerous industries, accounting for a record high 20.8% of all workplace deaths in 2001. And Latinos account for a fast growing share of the construction workforce; in 2001, they held 17.4% of construction jobs nationally, up from 10.2% in 1993, and their share of New York City construction jobs was substantially higher. The death on June 7th of a Chinese immigrant worker when an un-buttressed concrete foundation collapsed on him at an Elmhurst, Queens construction site, illustrated that Asians immigrants are also vulnerable.

It is the immigrant construction worker – many of them day laborers, virtually all of whom are Latino or Asian – who take on the most dangerous jobs at the least safe construction sites and who are getting injured the most. Notably, seven of the 25 workers who were killed by accidents at New York City construction sites between October 2001 and September 2003 were classified as day laborers, according to the U.S. Occupational Safety and Health Administration.

Workers who speak little or no English, and who may be in the country illegally are in no position to complain to their employer, a labor union or to the government about worksite safety lapses. If the Scaffold Law is eviscerated, one of their few remaining protections would be gone.

Who's being hurt at the worksite

Latinos account for a disproportionate share of occupational fatalities.

Latinos are much more likely to be injured or killed in the workplace than are members of other ethnic groups. And this gap is widening.

- • In 2002, Latino workers accounted for 15% of U.S. workplace fatalities^{1[1]} even though they comprised only 12% of the workforce. While U.S. workplace fatalities declined to 4.0 per 100,000 workers in 2002 from 5.2 per 100,000 in 1992, the number of workplace fatalities among Latinos increased by 57% to 840 in 2002 from 533 in 1992.
- • A recent *USA Today* article cited similar data: more than 6,800 Latino workers died on the job from 1992 through 2001, and workplace fatality rate for Latinos jumped 15.1% in that period, even though the rate fell 15.4% for all other workers.^{2[2]}

A four-part *Newsday* investigative series (July 22-25, 2001), *Death on the Job*, also concluded that Latinos suffer a higher occupational fatality rate than other ethnic groups: "Toiling with hands or with dangerous tools, often in low-paying jobs for which they are ill trained, Hispanic immigrant workers make up a higher percentage of occupational deaths than any ethnic or racial group in America." *Newsday* found that more than 500 immigrants were killed on the job in New York State in a six-year period from 1994 to 1999.

In New York City, this pattern of higher occupational fatality rates for Latinos is particularly pronounced. According to the 2000 U.S. Census, Latinos^{3[3]} accounted for 27% of New York City's population. But, according to a report issued in November 2003 by the New York City Construction Industry Partnership (CIP), *Construction Safety: A Tale of Two Cities*, from October 2001 through September 2003, **Latinos accounted for 62% of worksite fatalities in New York City.**^{4[4]} In addition, according to the U.S. Bureau of Labor Statistics, some 91 of the 233 fatal occupational injuries (39%) that occurred in New York State in 2000 and 74 of the 111 fatal occupational injuries (67%) in New York City that year were immigrant workers.

^{1[1]}United States Department of Labor, Bureau of Labor Statistics, *Fatal occupational injuries and employment by selected worker characteristics*, 2002.

^{2[2]} Hopkins, Jim, "Fatality rates increase for Hispanic workers," *USA Today*, March 13, 2003.

^{3[3]} Defined as "Hispanic origin."

^{4[4]} The Construction Industry Partnership of New York City consists of the New York City Building Trades Employers' Association, which represents 25 trade associations, and the Building and Construction Trades Council, which comprises 54 affiliated unions and 100,000 workers.

Latinos account for a growing sector of the construction workforce.

Nationally, 17% of construction workers are Latino. The percentage is higher in New York City; the Fiscal Policy Institute estimates that 25% of construction workers in New York City are Latino.^{5[5]} However, inasmuch as this estimate is based on 2000 U.S. Census data and it is widely believed that the Census undercounted the numbers of undocumented aliens and immigrants generally^{6[6]}, Latinos' share of the construction workforce is probably somewhat greater than 25%.

An ambitious effort to estimate the number of day laborers in the New York area was undertaken by graduate students who randomly surveyed 290 day laborers at 29 sites (out of a total of 57 identified sites) in the New York metropolitan area in 2003. The students, from the Community Development Research Center of the Milano Graduate School of Management and Urban Policy at New School University, estimated that there are up to 8,333 day laborers^{7[7]} in New York City and the adjacent counties, although they noted that this number could be underestimated because the entire number of sites in the region is unknown. The students found that day laborers worked predominantly for small business owners primarily in construction, including painting, carpentry, and landscaping. They also concluded that they are overwhelmingly Latino, with one-third from Mexico, another third from the rest of Central America, and the final third from South America, Puerto Rico, the Dominican Republic, Haiti and other Caribbean islands. According to the resulting report, *Day Labor in New York*,^{8[8]} the majority of day laborers worked for contractors and 82% of the laborers interviewed stated that they have a background in construction.

A recent investigative article in *City Limits* magazine discussed how New York's affordable housing construction and rehabilitation programs are one of the major employers of immigrant construction workers – most of them Latino. According to the magazine, immigrants constitute much of “the underground workforce that builds New

^{5[5]} Fiscal Policy Institute, *NYC Construction Labor Market: Trends and Issues*, April 21, 2003.

^{6[6]} Although it is widely acknowledged that in 2000 the U.S. Census much more accurately counted African Americans, Latinos and other minorities than in 1990, numerous states and cities assert that significant undercounts still occurred.

^{7[7]} Defined as someone who gathers at a street corner, empty lot or parking lot of a home improvement store (e.g. Home Depot), or an official hiring site, to sell their labor for the day, hour or for a particular job.

^{8[8]} *Day Labor in New York: Findings from the New York Day Labor Survey*, by Dr. Edwin Melendez, professor and director, Community Development Research Center, Milano Graduate School of Management and Urban Policy, New School University, and Dr. Abel Valenzuela Jr., associate professor and director, Center for the Study of Urban Poverty, Institute for Social Science Research, University of California-Los Angeles, April 2003.

York City's 'affordable housing... Their cheap, sometimes off-the-books labor is what puts the 'affordable' in affordable housing."^{9[9]}

Latinos are more likely to be killed in construction than are members of other ethnic groups, although Asian construction workers are also at great risk.

The large and growing numbers of Latinos in construction is reflected in a dramatic and disturbing increase in the numbers of Latino construction workers killed on the job. The Bureau of Labor Statistics reports that Latino construction fatalities skyrocketed from 104 in 1992 to 277 in 2000, a 166% increase.^{10[10]} The Occupational Safety and Health Administration reports that in 2001, construction-related accidents accounted for 31.5% of Latino worksite fatalities, up from 20.3% in 1992.

In New York City, CIP's *Two Cities* report found, a solid majority – 62% -- of all worker fatalities that occurred from October 2001 to September 2003 occurred in the construction industry. Given that Latinos accounted for 63% of occupational fatalities in New York City during this period, it is clear that construction site fatalities have heavily affected Latino communities.

Among the Latino construction fatalities – most involving apparent violations of the Scaffold Law -- in New York City since 1999:

- In May 2004, Angel Segovia, an Ecuadorian immigrant, paid \$90 a day with no benefits, was killed when a balcony roof that was being illegally built in Bay Ridge, Brooklyn, suddenly collapsed. Segovia and two co-workers were pouring concrete when the collapse threw them three stories down, along with tons of wet concrete and bricks. *The New York Times* reported that their work “required heavy lifting while balancing on flimsy platforms three stories high, exposed to the elements but not to the knowledge that the work flouted safety rules and construction blueprints.”^{11[11]} A homicide investigation is pending.
- In November 2003, Manual Falcon, an 18-year old day laborer also from Ecuador, died after falling from a roof of a Queens house he was working on. According to Oscar Paredes, executive director of the Latin American Workers Project, who met with the family, Falcon was given no protective belt or

^{9[9]} “Invisible men: meet the muscle behind New York’s new wave of affordable housing. With low pay, no benefits and no respect, construction workers are paying for our homes,” *City Limits*, May 2003.

^{10[10]} U.S. Bureau of Labor Statistics, *Hispanic or Latino Workers – Private Sector Construction Industry, Fatal occupational injuries to workers of Hispanic or Latino origin in the private sector construction industry by selected characteristics, 1992-2000*.

^{11[11]} As reported by: Brick, Michael and Wisloski, Jess, “Laborer’s Death Prompts Homicide Investigation,” *New York Times*, May 22, 2004.

cord.^{12[12]} An attorney hired by the family said that they would file a Scaffold Law lawsuit against the construction company because safety devices were not available.

- In May 2002, a Mexican day laborer was killed and six workers were injured after scaffolding collapsed in an Upper East Side brownstone undergoing renovation. The scaffolding had been overloaded with concrete blocks. A year later, the contractor was sentenced to three years probation and community service.
- Five undocumented Latino immigrants earning only \$7 an hour were killed when defective scaffolding at 215 Park Avenue South collapsed in October 2001. Fourteen others were injured in the accident.
- In 1999, a worker from Mexico was drowned in concrete when a floor collapsed in a Williamsburg, Brooklyn building under construction. Twelve others were injured. Three workers had been previously injured at the same site when a floor that had been overloaded with cinder blocks collapsed.

It is quite likely that Latino construction worker non-fatal injuries are never reported. If an injured worker is a day laborer or an undocumented worker, they are likely to be working “off the books” and injuries will typically not be recorded nor the government informed.

The death of a Chinese immigrant worker on June 7th, 2004 when an un-buttressed concrete foundation collapsed on him at an Elmhurst, Queens new home construction site illustrated that Asian immigrants are also vulnerable to the dangers posed by unsafe worksites. As *The New York Times* reported, the developer, Yong Fa Cai, and his company, USA Heng Tai Inc., “were accused of failing to provide protection for their workers” and, according to City inspectors, “the area where the workers were injured was eight feet deep, the wall that fell was 25 feet long and ‘no sheeting, shoring or bracing’ had been erected to prevent the collapse.”^{13[13]}

This most recent construction site fatality cast public light on the widespread use of Asian day laborers in small construction projects, especially in portions of New York City with large Asian populations such as Queens. The conclusion of the *Day Labor in New York* survey by New School University graduate students that virtually all day laborers in New York are Latino may have understated the size of the Asian day laborer population. New York City Council Member John Liu (Queens) was quoted in the *New York Times* on June 9th, “It is not uncommon to see many contractors begin their day...

^{12[12]} Howell, Ron, “Teen Laborer Dies After Falling from Roof,” *Newsday*, November 21, 2003.

^{13[13]} Leuck, Thomas, and Chen, David, “Construction Accident in Queens Kills Worker and Injures 2,” *New York Times*, June 8, 2004.

by heading to certain street corners in Flushing that teem with Asian day laborers eager to work.”^{14[14]}

Why immigrants are disproportionately being injured and killed in construction

They are more likely to work non-unionized, small construction companies,^[MSJ] where safety standards are often lower.

Comment: Ask NYCOSH – Bennett – for some experts

According to the Construction Industry Partnership’s (CIP) *Two Cities* report, some 77.6% of the 10,000 construction firms that operate in New York City have nine or fewer employees and another 13.6% have between 10 and 24 employees. Contractors with fewer than 25 employees accounted for 42,404 workers, or 39% of all construction workers in the City.

Smaller firms often lack the financial resources to implement safety protections or to observe safety rules. What the CIP report calls the “underground construction industry” is comprised of smaller contractors – contractors, who the report says “ignore permit requirements,” who “work at night and on weekends to avoid construction inspections” and who “take great risks with public and worker safety – especially when they hire illegal and undocumented immigrants”. Smaller firms are also the most likely to hire immigrants, including day laborers and undocumented workers. In 2002, the surge in Latino construction fatalities prompted the U.S. General Accounting Office, the investigative arm, to urge the Labor Department to crack down on small construction sites, which the GAO said were the most dangerous.

Worker safety training has been demonstrably proven to reduce accidents. But, according to the CIP, smaller “underground” construction companies “invest virtually nothing in the safety training of their project management and/or trade labor force”.^{15[15]} To stay competitive, the CIP found, many of these smaller operations do not offer safety training and encourage corner-cutting tactics that include low job qualifications, night and weekend work to avoid inspections, flagrant violations of permit requirements, and improper safety training. These deficiencies result in unsafe job sites. And Louis Colletti, President and CEO of the Building Trades Employers’ Association, cites OSHA’s findings that, “70% of the 25 construction fatalities in New York City in 2001... occurred at sites where companies did not provide safety or skill training for their workforce.”^{16[16]}

^{14[14]} Chen, David, and Kilgannon, Corey, “Chinese Builder’s Death Reveals Anonymous Web of Risky Labor,” *New York Times*, June 9, 2004.

^{15[15]} Construction Industry Partnership, *Construction Safety: A Tale of Two Cities*, November 2003, p. 4.

^{16[16]} Real Estate Weekly, “Making construction safer is a priority for industry,” January 29, 2003.

The *Newsday* series on immigrant working conditions reported on the sometimes tragic consequences of the lack of training, “Experts say a lack of training often results in immigrant workers stepping into life-threatening work environments. ‘We do a lot of work with day laborers who get hurt in construction and landscaping,’ says Nadia Marin-Molina, executive director of the Workplace Project in Hempstead, a group that helps immigrant workers. She recalls recent cases of Spanish-speaking day laborers being hurt on the job, including one hospitalized with burns suffered at a car wash and another who fractured bones in a scaffolding accident.”^{17[17]}

In contrast, large firms, which employ predominantly a unionized and non-Latino workforce, can afford to hire site safety professionals and offer special safety training. They are more likely to utilize the latest safety equipment, such as improved safety harnesses, to install guardrails that encircle the top level of a building under construction, and to install temporary decks to stop falling construction debris.

They often have little choice but to accept dangerous work.

According to Oscar Paredes, executive director of the Latin American Workers Project, thousands of immigrant day laborers in New York City regularly take dangerous construction jobs.^{18[18]} Often, they come to the United States with a background in construction and there is little or no other work available to them. Small contractors are willing to hire them on a daily basis, and pay cash, usually between \$7 and \$10 an hour, but some workers receive less. So they gather on street corners in Hollis, Queens, or at the corner of Division Street and Bedford Avenue in Williamsburg, Brooklyn. And as *Newsday* concluded in its *Death on the Job* investigative series, “Injury and death have become accepted risks to the men gathered on these streets”.^{19[19]}

Day laborers, recent immigrants and non-English speakers are in no position to complain about safety lapses.

Omar Henriquez, a naturalized immigrant from El Salvador who is now an advocate for immigrants as director of the New York Committee on Occupational Safety and Health, told investigative journalism students at the Columbia University School of Journalism, that in addition to flouting labor law, employers using undocumented immigrants also are unlikely to follow other workplace regulations that may involve safety. The students’ series of investigative articles noted, “These circumstances leave workers in a difficult position. If they complain to their employers, they can be fired or the employers may attempt to retaliate by calling the INS. That could mean being sent

^{17[17]} Maier, Thomas, “Death on the Job; A Group in Danger; Hispanic immigrants face greatest workplace risk,” *Newsday*, fourth in a series, July 25, 2004.

^{18[18]} Howell, Ron, *op cit*.

^{19[19]} Maier, Thomas, *op.cit*.

back to countries they may have faced great peril to escape. America's undocumented immigrants live in constant fear of deportation.”^{20[20]}

Fear of retaliation is well grounded. A survey of day laborers in Cleveland, Ohio, found that 48.1% of the laborers who were interviewed “report experiencing retaliation after complaining about even the most inconsequential matter” The survey report observed, “In reality, this number under-represents the seriousness of the situation... A similar effect can be seen in the number of workers compensation claims that are not filed for fear of the same retaliation.”^{21[21]}

The *Day Labor In New York* survey found that day laborers are “routinely abused” at the work place. Abuses range from non-payment or underpayment of wages to assignment to what the report calls “dirty and/or dangerous jobs” that might expose them ... to occupational hazards.”^{22[22]} Lack of necessary safety equipment and failure to observe safety rules can be seen as another form of worker “abuse.”

Typically, undocumented construction workers and day laborers are not compensated when they are injured.

Because they work in small construction companies that are part of the “underground construction industry,” immigrant workers are typically left to their own devices if they are injured. Contractors who do use day laborers do not pay liability insurance, Social Security, unemployment insurance or workers' compensation insurance for these workers. In addition, the investigative series on immigrant workers by Columbia University Journalism students cited earlier, which was based on interviews with dozens of workers, found that “none of the immigrants interviewed said they received benefits such as health insurance, overtime, vacation and sick time.”

^{20[20]} Corcoran, Sean, “Under the Table: Waiting on the Streets for Work,” an article in the investigative articles, “Under the Radar,” produced by The Investigative Journalism Project class of the Columbia University Graduate School of Journalism, 2001.

^{21[21]} Kerr, Daniel and Dole, Chris, *Challenging Exploitation and Abuse: A Study of the Day Labor Industry in Cleveland*, report prepared for the Cleveland City Council, September 4, 2001.

^{22[22]} *Day Labor in New York*, pps. 9, 10.

Immigrant workers, generally, “face an overwhelming fight to get benefits, often waiting months, if not years, to get any wage or medical compensation,” according to the *Newsday* “Death on the Job” series. According to *Newsday*, “Although nearly all injured workers in private industry - regardless of their legal status - are entitled to compensation under the law, experts say a host of obstacles prevent many immigrants from receiving needed benefits, ranging from language and cultural differences to a complex bureaucracy that often drags out cases.”

When workers lacking health insurance or workers compensation are injured and taken to the hospital, it is typically the public pays for the emergency room and any resulting admission. And because they do not they receive disability payments, a worksite injury can spell disaster for the worker and their family.

Labor Law 240 is critical to making construction sites safer for Latinos, Asians and all construction workers.

New York City construction accident statistics compiled by the Department of Buildings document that, notwithstanding the Scaffold Law, scaffolding safety remains a serious problem at many worksites. According to the Department, during 2002 scaffolding accidents comprised 56% of 101 recorded construction accidents. Without an effective Scaffold Law on the books, one of the few deterrents to cutting safety corners would have been absent and the number of scaffold-related accidents would have been even higher. In addition, another 23% of construction accidents involved construction equipment, and 80% of these involved a crane or derrick; safety equipment required by the Scaffold Law, such as proper hoists, can prevent many crane and derrick-related injuries.

With severe cost pressures on owners and general contractors to build cheaper and faster, there will continue to be an enormous incentive to cut safety corners – and to hire immigrants who, desperate for work, take on great risk to their personal safety by accepting employment at unsafe construction sites. This temptation to give safety short shrift may not be as great for the larger construction companies, which are more closely scrutinized by OSHA than are smaller ones, and which typically provide safety training and hire site safety professionals to reduce the incidence of accidents. While the Scaffold Law’s deterrent effect is needed throughout the construction industry, it is the smaller companies – the ones which make the most extensive use of immigrant labor – where the Scaffold Law is especially necessary to make sure that appropriate safety equipment for working at an elevation is provided.
