



# Construction & Real Estate Risk Transfer: Strategies for NY Labor Law Claims

Presenters: Michael Fleischer & Joshua Weisberg of SterlingRisk

# AGENDA

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Introduction to New York Labor Law

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Risk Transfer: Indemnity and Hold Harmless

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Risk Transfer: Additional Insured Coverage

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Risk Transfer: Summing it Up

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# I. INTRODUCTION TO NEW YORK LABOR LAW





# RELEVANT NEW YORK LABOR LAW STATUTES

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Labor Law §240  
"Scaffold Law"

2

Labor Law §241(6)  
"Safe Equipment Law"

3

Labor Law §200  
"Safe Place to Work Law"

# NEW YORK LABOR LAW VERDICTS & SETTLEMENTS

Mediated settlements				
Year	Total number of reported settlements	Settlement range	Median settlement	Highest settlement/venue
2018	22	\$300,000 - \$10,000,000	\$1,825,000	\$10,000,000 Supreme Court/New York County
2019	19	\$1,000,000 - \$19,685,849	\$2,500,000	\$19,685,849 Supreme Court/Kings County
2020	2	\$3,175,000 - \$15,000,000	Insufficient data	\$15,000,000 Supreme Court/Bronx County
Non-mediated settlements				
Year	Total number of reported settlements	Settlement range	Median settlement	Highest settlement/venue
2018	24	\$190,000 - \$8,900,000	\$2,375,000	\$8,900,000 Supreme Court/Kings County
2019	21	\$1,100,000 - \$11,500,000	\$2,000,000	\$11,500,000 Supreme Court/Bronx County
2020	2	\$2,195,000 - \$3,000,000	Insufficient data	\$3,000,000 Supreme Court/Bronx County
Verdicts				
Year	Total number of reported verdicts	Verdict range	Median verdict	Highest verdict/venue
2018	11 Plaintiff 1 Defense	\$1,962,636 - \$22,000,000	\$5,380,560	\$22,000,000 Supreme Court/Queens County
2019	7 Plaintiff 4 Defense	\$3,500,000 - \$102,114,768	\$9,035,909	\$102,114,768 Supreme Court/New York County
2020	1 Defense	N/A	N/A	Defense verdict Supreme Court/Ulster County

## RISING COST OF DISPOSING NYLL CLAIMS

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Because most cases remain dormant long after summary judgement on liability is granted, with 9% interest continuing to run, adds significantly to the verdict value.

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Post-COVID seeing an uptick in multiple surgeries now that elective surgery restrictions have been lifted.

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Claims that initially have settlement values of \$400,000-\$700,000 are now settling in the \$1 million + range, piercing excess layers.

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Liability is often decided in plaintiff's favor on summary judgement, which enhances the value of these cases.

## II. RISK TRANSFER: INDEMNITY AND HOLD HARMLESS



# WHAT IS RISK TRANSFER?

**Risk Transfer:** Shifting of liability from one party to another.

## Types of Risk Transfer

- Contractual Indemnification
- Additional Insured Coverage
- Common Law Indemnification
- Contribution



# CONTRACTUAL INDEMNITY PROVISIONS

BROAD FORM INDEMNITY	INTERMEDIATE FORM INDEMNITY	LIMITED FORM INDEMNITY
<p>Indemnitor assumes all legal liability regardless of fault.</p>	<p>Indemnitor assumes all legal liability except when the indemnitee is solely at fault.</p>	<p>Indemnitor only pays the portion of any loss directly related to its % of fault.</p>
<p>“To the fullest extent permitted by law, Vendor shall indemnify ABC Co. and its agents and employees from and against all claims, damages or losses <b><u>in any way arising out of or resulting from</u></b> the performance, condition or existence of the work or products provided under the contract, <b><u>whether or not such claim, damage, loss or expense is based in whole or in part [or solely] upon any negligent act or omission of ABC Co. or its employees or agents.</u></b>”</p>	<p>“To the fullest extent permitted by law, Vendor shall indemnify ABC Co. and its agents and employees from and against all claims, damages or losses <b><u>in any way arising out of or resulting from</u></b> the performance, condition or existence of the work or products provided under the contract, whether or not such claim, damage, loss or expense is based in part, <b><u>but not solely [or wholly], upon any negligent act or omission of ABC Co. or its employees or agents.</u></b>”</p>	<p>“Vendor shall indemnify ABC Co. and its agents and employees from and against all claims, damages or losses <b><u>in any way arising out of or resulting from</u></b> the performance, condition or existence of the work or products provided under the contract, <b><u>but only to the extent caused by the negligent acts or omissions of the Vendor.</u></b>”</p>
<p>Indemnitor assumes all legal liability, regardless of fault. <b>Indemnitor must pay for losses arising out of accidents, even those which were 100% the indemnitee’s fault.</b></p>	<p>Indemnitor assumes all legal liability except when the accident is caused by indemnitee’s sole fault, meaning when indemnitee is 100 % at fault. <b>Indemnitee can be 99% at fault and receive payment from indemnitor for all the costs associated with that loss.</b></p>	<p>Indemnitor only pays that portion of any loss that is directly related to its percent of fault in causing the loss.</p>

# III. RISK TRANSFER: ADDITIONAL INSURED COVERAGE



# INSURANCE REQUIREMENTS

Allocation of risk through insurance between GCs and Contractors typically originates with insurance procurement/requirement provisions in trade contracts or leases. Production of certificates of insurance evidencing the same should also be included.

## EXAMPLES:

- **OWNER/LANDLORD → CONTRACTOR** “...the Owner of the property location covered under this Contract *is to be named as an Additional Insured* on the Contractor’s Commercial General Liability policy.”
- **GENERAL CONTRACTOR → SUBCONTRACTOR** “...the General Contractor for the Project *is to be named as an Additional Insured* on the Subcontractor’s Commercial General Liability policy.”



# INSURANCE SPECIFICATIONS

## TYPES OF INSURANCE COVERAGE

- Workers' Comp & Employer's Liability
- Commercial General Liability
- Business Automobile Liability
- Umbrella or XS Liability
- Builders Risk or Installation Floater
- Professional Errors & Omissions
- Job-site Pollution Liability
- Contractors Pollution Liability
- Contractor's Equipment

## SAMPLE POLICY LIMITS & PER PROJECT LIMITS





# ADDITIONAL INSURED COVERAGE

- Another avenue of Risk Transfer - May be entitled to Additional Insured coverage under the policy of another involved party.
- Typically, the **Insurance Requirements** section of a contract will specify whether you must be added as an Additional Insured on the Indemnitor's Policy.
- Requirement for party to “purchase insurance” is not enough; must be explicit contract language requiring that the party seeking coverage be named as an Additional Insured.

# ADDITIONAL INSURED TRIGGERS

For *most* Insurance Services Office (ISO) and manuscript Additional Insured Endorsements:

- Additional Insured coverage is triggered when a loss either “arises out of work” of the named insured (Old ISO Form - less restrictive) or;
  - “Arising out of” trigger is in the earlier ISO forms but is still often referenced in insurance procurement provisions and endorsements.
- “Is caused by acts or omissions” of the named insured (New ISO Form - More restrictive).
  - “Caused by” standard is found in the ISO 04 13 and 12 19 Additional Insured Endorsements.
  - **NOT** a negligence requirement; named insured can be found 0% negligent, but the “proximate cause” of the incident and still owe Additional Insured coverage.
  - No Additional Insured coverage for party who is found to be 100% at fault.

## Sample “Older” ISO Form:

Reproduction of Insurance Services Office, Inc. Form

POLICY NUMBER: COMMERCIAL GENERAL LIABILITY

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

### ADDITIONAL INSURED—OWNERS, LESSEES OR CONTRACTORS (FORM B)

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART.

SCHEDULE

Name of Person or Organization:

(If no entry appears above, information required to complete this endorsement will be shown in the Declarations as applicable to this endorsement.)

WHO IS AN INSURED (Section II) is amended to include as an insured the person or organization shown in the Schedule, but only with respect to liability arising out of “your work” for that insured by or for you.

CG 20 10 11 85 Copyright, Insurance Services Office, Inc., 1982

# CG 20 10 07 04

## ONE OF THE MOST COMMON VERSIONS

Section II. Who Is An Insured is amended to include as an additional insured the ... organization(s) shown in the Schedule, but only with respect to liability arising out of **your ongoing operations** performed for **that insured**, for “bodily injury,” “property damage” or “personal and advertising injury” **caused, in whole or in part, by:**

- 1. Your acts or omissions; or**
- 2. The acts or omissions of those acting on your behalf; in the performance of your ongoing operations for the additional insured.**

POLICY NUMBER:

COMMERCIAL GENERAL LIABILITY  
CG 20 10 07 04

**THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.**

### **ADDITIONAL INSURED – OWNERS, LESSEES OR CONTRACTORS – SCHEDULED PERSON OR ORGANIZATION**

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

#### SCHEDULE

Name Of Additional Insured Person(s) Or Organization(s):	Location(s) Of Covered Operations

Information required to complete this Schedule, if not shown above, will be shown in the Declarations.

A. **Section II – Who Is An Insured** is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule, but only with respect to liability for “bodily injury”, “property damage” or “personal and advertising injury” **caused, in whole or in part, by:**

- 1. Your acts or omissions; or**
- 2. The acts or omissions of those acting on your behalf;**  
in the performance of your ongoing operations for the additional insured(s) at the location(s) designated above.

B. With respect to the insurance afforded to these additional insureds, the following additional exclusions apply:

This insurance does not apply to “bodily injury” or “property damage” occurring after:

- All work, including materials, parts or equipment furnished in connection with such work, on the project (other than service, maintenance or repairs) to be performed by or on behalf of the additional insured(s) at the location of the covered operations has been completed; or
- That portion of “your work” out of which the injury or damage arises has been put to its intended use by any person or organization other than another contractor or subcontractor engaged in performing operations for a principal as a part of the same project.

# ADDITIONAL INSURED ENDORSEMENT LANGUAGE

*Standard Blanket Additional Insured Endorsement will have two requirements:*

1. Named insured has agreed in a written contract to provide additional insured coverage to an organization
2. Additional insured's liability was "caused, in whole or in part, by the named insured's acts or omissions in the performance of its ongoing operations"

POLICY NUMBER:

COMMERCIAL GENERAL LIABILITY  
CG 20 37 07 04

**THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.**

## **ADDITIONAL INSURED – OWNERS, LESSEES OR CONTRACTORS – COMPLETED OPERATIONS**

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

### SCHEDULE

Name Of Additional Insured Person(s) Or Organization(s):	Location And Description Of Completed Operations

Information required to complete this Schedule, if not shown above, will be shown in the Declarations.

**Section II – Who Is An Insured** is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule, but only with respect to liability for "bodily injury" or "property damage" caused, in whole or in part, by "your work" at the location designated and described in the schedule of this endorsement performed for that additional insured and included in the "products-completed operations hazard".



# WILL OWNER & GC BE PROTECTED BY ADDITIONAL INSURED COVERAGE?

If a written contract or agreement exists (signed);

If a requirement to provide coverage is included;

If accident “caused by” work performed;

No endorsements in the subcontractor’s policy interfere with coverage (e.g., injury to workers endorsement); *and*

If (depending upon version) “your work” or “ongoing operations” or “acts or omissions.”

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

## EXCLUSION – INJURY TO WORKERS ENDORSEMENT

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

It is hereby understood and agreed that Paragraph 2. Exclusions of Section I – Coverage A – Bodily Injury And Property Damage Liability and Paragraph 2. Exclusions of Section I – Coverage C – Medical Payments are amended by addition of the following exclusion at the end thereof:

This insurance does not apply to any claim arising from “bodily injury” to:

- a. Any contractor or subcontractor hired or retained by or for any insured;
- b. Any person who is an “employee”, “temporary worker”, “volunteer worker” or non-“employee” laborer of any contractor or subcontractor who was hired or retained by or for any insured;
- c. Any “volunteer worker”, “temporary worker” or non-“employee” laborer of any insured arising out of and in the course of performing duties related to the conduct of the insured’s business; or
- d. The spouse, child, parent, brother or sister of that contractor, subcontractor, “employee”, “temporary worker”, “volunteer worker” or non-“employee” laborer as a consequence of paragraphs a., b., or c. above.

This exclusion applies whether the insured may be liable as an employer or in any other capacity and to any obligation to share damages with or to repay someone else who must pay damages because of the “bodily injury” described in paragraphs a., b., c., or d. above.

A contractor or subcontractor will be considered to be hired or retained by or for any insured if the contractor or subcontractor was:

- a. Hired directly by any insured; or
- b. Hired by another contractor or subcontractor who was hired by any insured.

All Other Terms, Conditions And Limitations Of This Policy Shall Remain Unchanged.

# YOU MAY NOT BE ALONE: OTHER INSURANCE

- Consider the application of “Other Insurance” provisions.
- If more than one policy is triggered, which bears the defense obligation?

COMMERCIAL GENERAL LIABILITY  
CG 20 01 04 13

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

## PRIMARY AND NONCONTRIBUTORY – OTHER INSURANCE CONDITION

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART  
PRODUCTS/COMPLETED OPERATIONS LIABILITY COVERAGE PART

The following is added to the **Other Insurance** Condition and supersedes any provision to the contrary:

### **Primary And Noncontributory Insurance**

This insurance is primary to and will not seek contribution from any other insurance available to an additional insured under your policy provided that:

(1) The additional insured is a Named Insured under such other insurance; and

(2) You have agreed in writing in a contract or agreement that this insurance would be primary and would not seek contribution from any other insurance available to the additional insured.

# CG 00 01 12 07 OTHER INSURANCE

If other valid and collectible insurance is available to the insured for a loss, we cover under Coverages A or B of this Coverage Part, our obligations are limited as follows:

a. Primary Insurance

This insurance is primary except when Paragraph b. below applies.

b. Excess Insurance

(1) This insurance is excess over ...

(b) Any other primary insurance available to you covering liability for damages arising out of the premises or operations, or the products and completed operations, for which you have been added as an additional insured by attachment of an endorsement.



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## A word about Wraps....

- Larger Construction Projects often consolidate insurance for all contractors on site (“Wrap Policy”)
- Contractor Controlled Insurance Program (“CCIP”) or Owner Controlled Insurance Program (“OCIP”)
  - Consolidates commercial general liability (“CGL”) insurance, excess liability insurance, and workers’ compensation insurance coverage for all enrolled participants under control of the owner/GC
- Identify all enrolled entities



# CERTIFICATES OF INSURANCE

**ACORD** RECEIVED JUN 8 2017. DATE (MM/DD/YYYY) 06/15/2017

**CERTIFICATE OF LIABILITY INSURANCE**

THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AFFIRMATIVELY OR NEGATIVELY AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW. THIS CERTIFICATE OF INSURANCE DOES NOT CONSTITUTE A CONTRACT BETWEEN THE ISSUING INSURER(S), AUTHORIZED REPRESENTATIVE OR PRODUCER, AND THE CERTIFICATE HOLDER.

IMPORTANT: If the certificate holder is an ADDITIONAL INSURED, the policy(ies) must have ADDITIONAL INSURED provisions or be endorsed. If SUBROGATION IS WAIVED, subject to the terms and conditions of the policy, certain policies may require an endorsement. A statement on this certificate does not confer rights to the certificate holder in lieu of such endorsement(s).

PRODUCER: [Redacted] CONTACT NAME: [Redacted] PHONE: [Redacted] FAX: [Redacted] (A.C. No. (E)) [Redacted] (A.C. No.) [Redacted] E-MAIL: [Redacted] ADDRESS: [Redacted]

INSURER: [Redacted] INSURANCE COMPANY NAIC # [Redacted]

INSURED: [Redacted]

INSURER B: [Redacted]  
INSURER C: [Redacted]  
INSURER D: [Redacted]  
INSURER E: [Redacted]  
INSURER F: [Redacted]

CERTIFICATE NUMBER: [Redacted] REVISION NUMBER: [Redacted]

THIS IS TO CERTIFY THAT THE POLICIES OF INSURANCE LISTED BELOW HAVE BEEN ISSUED TO THE INSURED NAMED ABOVE FOR THE POLICY PERIOD INDICATED. NOTWITHSTANDING ANY REQUIREMENT, TERM OR CONDITION OF ANY CONTRACT OR OTHER DOCUMENT WITH RESPECT TO WHICH THIS CERTIFICATE MAY BE ISSUED OR MAY PERTAIN, THE INSURANCE AFFORDED BY THE POLICIES DESCRIBED HEREIN IS SUBJECT TO ALL THE TERMS, EXCLUSIONS AND CONDITIONS OF SUCH POLICIES. LIMITS SHOWN MAY HAVE BEEN REDUCED BY PAID CLAIMS.

LINE	TYPE OF INSURANCE	ADCL (SUBR) (INS) (END)	POLICY NUMBER	POLICY EFF (MM/DD/YYYY)	POLICY EXP (MM/DD/YYYY)	LIMITS
A	<input checked="" type="checkbox"/> COMMERCIAL GENERAL LIABILITY	Y	[Redacted]	04/28/2017	04/28/2018	EACH OCCURRENCE \$ 1,000,000
	<input type="checkbox"/> CLAIMS-MADE <input checked="" type="checkbox"/> OCCUR					DAMAGE TO RENTED PREMISES (EA. OCCURRENCE) \$ 50,000
						MED EXP (Any one person) \$ 5,000
						PERSONAL & ADV INJURY \$ 1,000,000
	GEN'L AGGREGATE LIMIT APPLIES PER: <input checked="" type="checkbox"/> POLICY <input type="checkbox"/> PRO. <input type="checkbox"/> LOC					GENERAL AGGREGATE \$ 2,000,000
	OTHER:					PRODUCTS - COMP/OP AGG \$ 2,000,000
	AUTOMOBILE LIABILITY					COMBINED SINGLE LIMIT (EA. OCCURRENCE) \$
	ANY AUTO					BODILY INJURY (Per person) \$
	OWNED AUTOS ONLY					BODILY INJURY (Per accident) \$
	HIRED AUTOS ONLY					PROPERTY DAMAGE (Per accident) \$
	SCHEDULED AUTOS ONLY					\$
	NON-OWNED AUTOS ONLY					\$
	UMBRELLA LIAB					EACH OCCURRENCE \$
	EXCESS LIAB					AGGREGATE \$
	WORKERS COMPENSATION AND EMPLOYERS' LIABILITY					PER STATUTE / OTH. \$
	ANY PROPRIETOR/PARTNER/EXECUTIVE OFFICER/OWNER EXCLUDED? (Mandatory in NH) If yes, describe under DESCRIPTION OF OPERATIONS below					E.L. EACH ACCIDENT \$
						E.L. DISEASE - EA EMPLOYEE \$
						E.L. DISEASE - POLICY LIMIT \$

DESCRIPTION OF OPERATIONS / LOCATIONS / VEHICLES (ACORD 101, Additional Remarks Schedule, may be attached if more space is required)

Certificate is subject to the terms, conditions, and exclusions of the policy.

[Redacted] are listed as additional insured (landlord) for [Redacted]

CERTIFICATE HOLDER: [Redacted] CANCELLATION: SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, NOTICE WILL BE DELIVERED IN ACCORDANCE WITH THE POLICY PROVISIONS.

AUTHORIZED REPRESENTATIVE: [Signature]

Named Insured / Policyholder

Insurance Carriers (Primary/Excess - Umbrella)

Policy Number

Policy Limits

Policy Period

Excess / Umbrella Policy Limits

Description of properties intended to be covered by additional insured endorsement.

Include direct referenced to the Loss Location from the COI in your tender demand as evidence of intended coverage

Additional Insureds Identified (typically will add all AI entities - Ex. multiple ownership entities)

Certificate of Insurance issued to the party that owes coverage will provide you with relevant information for the carrier's tender demand.

# IV. RISK TRANSFER: SUMMING IT UP

# CONTRACTUAL INDEMNITY V. ADDITIONAL INSURED

Contractual Indemnity and Additional Insured Coverage do **NOT** go hand-in-hand

Even if coverage is not owed as Additional Insured, you may have recourse seeking contractual indemnification

Contractual Indemnitees are in privity with the named insured not the insurer

Standard for determining whether an Additional Insured is entitled to a defense is the same as the standard applied to the named insured

Additional Insureds are in privity with the insurance carrier

Additional Insured is entitled to the same policy benefits as named insured (e.g., defense, indemnification for own negligence; good faith and fair dealing)

Additional Insured must comply with Policy Conditions (e.g., notice, cooperation)



# V. QUESTIONS



# CONTACT INFORMATION



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