New York Labor Laws and Action Over Exclusions

By Theresa A. Guertin & Ashley McWilliams

One of the most important methods for shifting risk in the construction context is insurance coverage. Upstream parties such as owner/developers and general contractors typically require that their downstream subcontractors who perform work on their properties or projects bring specific insurance to the table. These insurance requirements have a twofold purpose: protect the upstream parties, through additional insured coverage, from liabilities caused by the subcontractor; and protect the downstream parties by ensuring that they have adequate insurance for their own potential liabilities.

In New York, subcontractor insurance coverage can have some surprising terms which frustrate risk transfer. Numerous policies contain "Action Over" exclusions, which bar coverage for one of the most significant exposures faced by owner-developers and general contractors: bodily injury lawsuits brought by subcontractor employees. It is critical that upstream parties understand the unique impact of New York's labor laws on the insurance market and be prepared to identify and request removal of Action Over exclusions on subcontractor insurance policies.

I. NEW YORK LABOR LAWS

An "Action Over" claim is shorthand for a type of suit brought by an injured employee against a third-party to contribute to their work-related injury after collecting workers' compensation benefits from their employer. Typically, the target of such suits are project owners or general contractors ("GCs"), for several reasons: such entities generally do not enjoy the sole remedy protection afforded to employers by workers' compensation statutes,[1] since they are not the direct employer of the injured party and, moreover, they are seen as "deep pockets" who can (at least, theoretically) afford to compensate the employee for their pain and suffering and other consequential losses stemming from the injury.

In New York, there is an added incentive for injured employees to bring suit against project owners and GCs: the state's unique labor law statutes. These laws impose stringent guidelines on project owners and GCs and allow injured employees of subcontractors to sue those parties directly even

[1] See Cutillo v. Emory Housing Corp., 190 N.Y.S.2d 502 (N.Y. Sup. Ct. 1959) (finding that injured subcontractor's employee could obtain worker's compensation benefits from the general contractor and still pursue general contractor as a negligent third party).

where neither the project owner nor the GC controlled, directed, or supervised the work site where the injury occurred.[2]

New York Labor Laws §§ 200, 240(1), and 246(6) impose a "nondelegable duty" on project owners and GCs, which results in absolute liability if an employee is injured at his or her workplace. A "nondelegable duty" is one that is deemed so important to the community that it cannot be transferred to another, through contract or otherwise. [3] The resulting absolute liability when a labor law is breached means that the project owner or GC will be held accountable for the injured worker's damages if it is found that the breach was a "proximate," or contributing, cause of the injury.[4]

The labor law statutes impose an array of non-delegable duties on owners and GCs, as follows:

- Labor Law § 200 (the Safe Work Environment Statute) requires a reasonably safe work environment for all employees and others legally at the worksite. Employers must properly maintain, guard, and light the worksite, safely operate machinery, equipment, and other devices.

- Labor Law § 240(1) (the Scaffold, Ladder and Working at a Height Statute) has been interpreted by New York courts to impose a nondelegable duty to provide safety devices to protect against elevation-related hazards on construction sites. Project owners and GCs are absolutely liable for any violation that results in an injury, regardless of whether the project owner or GC supervised or controlled the work.[5] Further, the worker's own negligence will not bar or reduce the worker's recovery.[6]

- Labor Law § 241(6) (the Construction, Excavation and Demolition Work Statute) imposes a nondelegable duty on project owners and GCs to keep workplaces safe from trip and slip hazards and other related hazards. A plaintiff seeking damages pursuant to this statute is not required to show that the project owner or GC exercised supervision or control over his worksite to establish a right of recovery. However, a violation under this statute, unlike a violation of Labor Law § 240(1), is only evidence of negligence on the part of project owner or GC. Absolute liability is not imposed by proof of a violation; therefore, the injured worker's contributory and comparative negligence are considered viable defenses to a claim under this section.[7]

The underlying purpose of these laws, which were enacted over 100 years ago, is to ensure that construction workers injured on job sites receive fair compensation for the losses they suffer. Over the years, New York courts have broadened the scope of these statutes and adapted them to modern worksite dangers. At the same time, juries in the five boroughs have consistently awarded large verdicts to injured workers who allege violations of these laws. This confluence of factors has created unique challenges for risk transfer: insurance premiums are higher and beneficial coverage terms are harder to obtain.

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[2]See Allen v. Cloutier Const. Corp., 376 N.E.2d 1276 (N.Y. 1978).
[3]See Lopez v. Allied Amusement Shows, Inc.,921 N.Y.S.2d 231 (N.Y. App. Div. 2011).
[4]See Blake v. Neighborhood Hous. Servs. of New York City, Inc., 803 N.E.2d 757, 761 (N.Y. 2003).
[5]See Ragubir v. Gibraltar Mgmt. Co., Inc., 146 A.D.3d 563 (N.Y. App. Div. 2017).
[6]See Violette v. Armonk Assocs., L.P., 823 F. Supp. 224 (S.D.N.Y. 1993).
[7]See Wojcik v. 42nd St. Dev. Project, 386 F. Supp. 2d 442 (S.D.N.Y. 2005).

II. LABOR LAW CLAIMS AND INSURANCE COVERAGE

The biggest problem for upstream parties, however, is that subcontractor coverage fails to meet standard contractual requirements in New York much more frequently than in other jurisdictions. Owner/developers and GCs have to take special precautions to ensure that subcontractor policies provide coverage for the Action Over exposure they face. There are two ways upstream parties can ensure that risk transfer functions as desired.

First, to ensure proper risk transfer for workplace-related injuries, the contract between the project owner or GC and the subcontractor must be carefully crafted. The subcontractor should be obligated to provide indemnity to the upstream parties for all liabilities that arise out of, are related to, or are caused by, the performance of their work. Under New York's anti-indemnity statute, it is permissible for a party to assume the responsibility when they are only partially at fault; the only limitation is that another party's sole negligence may not be assumed by the indemnitor.[8]

Second, the contract should specify the insurance coverage the subcontractors are required to provide – and that this coverage must extend to employee bodily injury suits. Standard CGL policies contain an Employer's Liability exclusion, which bars coverage for:

> e. Employer's Liability
> "Bodily injury" to:
> (1) An "employee" of any insured arising out of and in the course of:
> a) Employment by any insured; or
> b) Performing duties related to the conduct of any insured's business; . . . .
>
> 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 repay someone else who must pay damages because of the injury.
>
> This exclusion does not apply to liability assumed by the insured under an "insured contract."

The last paragraph of the Employer Liability exclusion contains a critical exception for preserving coverage for Action Over suits: liabilities assumed in an insured contract, i.e., an indemnity agreement, are not excluded. Thus, one important way to ensure that subcontractor policies do not exclude coverage for Action Over suits is to contractually mandate that the insured contract exception to the Employer's Liability exclusion is not removed or modified in any way.

Unfortunately, Action Over exclusions can appear in less obvious places in subcontractor CGL policies. Although some such exclusions may be clearly labeled, others could be buried amidst hundreds of pages of policy forms or sandwiched between innocuous provisions. For example, some insurers (notably State Farm) contain an Action Over exclusion within their additional insured endorsements. The wording, which appears unobjectionable at first, provides:

> Any insurance provided to the additional insured shall only apply with respect to a claim made or a "suit" brought for damages for which you are provided coverage.

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[8] N.Y. GEN. OBLIG. LAW § 5-324.

The problem is that the named insured (the subcontractor) does not have coverage for employee bodily injury suits due to the Employer's Liability exclusion.[9] As a result, the additional insureds likewise would not have coverage, resulting in a failure of risk transfer.

In New York, insurers have also found other creative ways to limit their labor law exposure without using an obvious "Action Over" exclusion title. Some examples include:

- *Work height exclusions*, which exclude coverage for bodily injury arising directly or indirectly out of the subcontractor's work performed above a specified height. At times, these exclusions might apply even more broadly to any projects which exceed a certain height or number of stories, regardless of whether the subcontractor is actually working in excess of that height.

- *Scope of work exclusions*, which bar coverage for bodily injury resulting from the specified types of work. It is often surprising to see subcontractor policies with exclusions related to the type of work they are hired to perform.

- *Defense within limits endorsements*, which provide that costs expended in defense of a claim erode the limit of liability. Put another way, the cost of defending the claim will be subtracted from the overall policy limit, e.g., the CGL policy has a total limit of $1 million in coverage, if it costs the insurer $200,000 to defend the claim, only $800,000 in coverage will remain to cover a verdict or settlement.

- *Sunset clauses*, which set a predetermined cut-off date for the policy to cease responding to claims. In the context of an action over a claim, the policy may shorten the time period for coverage of the worker's bodily injury claim to a period shorter than the statute of limitations.

III. RECOMMENDATIONS

Subtle Action Over exclusions is easily and often overlooked by the upstream parties, especially since it is common practice to only request the subcontractor's certificate of insurance and additional insured endorsements as proof of CGL coverage. Requiring full policies from subcontractors is one solution, although finding the resources and expertise to thoroughly review those policies may be a challenge for some. Owner/developers and GCs should call upon their trusted advisors to help them maintain appropriate, airtight indemnity and insurance requirements, evaluate subcontractor policies, assist with risk management techniques at the project, and develop other risk-shifting strategies.

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[9]It makes sense that the subcontractor should not have coverage for employee bodily injury suits. The employer should be providing workers' compensation benefits for its injured employees and should therefore be immune from suits brought by employees for bodily injuries.