



Is your building at risk? Owners need to thoroughly address insurance considerations

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Building owners who undertake construction projects often operate under a false sense of security regarding the potential consequences of an accident occurring during the work performed. Some owners fail to obtain any insurance. Some require their contractors and subcontractors to procure insurance and never check to make sure that insurance is obtained in an adequate amount. Other owners are satisfied merely to see that their contractors have obtained insurance but never check to make sure whether the insurance procured excludes some or all of the risks which could cause them to face significant exposure. Many owners operate under the assumption that the proper insurance is in place, only to experience an avalanche of disclaimers once an accident occurs, potentially leaving them subject to personal exposure. This article will address some of the dangers owners face when they fail to thoroughly address insurance considerations, as well as how such dangers can be avoided.

New York has extremely stringent laws protecting construction workers. The most draconian of these statutes is Labor Law section 240(1), which holds owners, contractors, and their agents strictly liable for failing to provide adequate safety devices to workers engaged in construction, renovation and excavation work. Comparative negligence is not an affirmative defense to the statute, meaning that, once a violation is found, the plaintiff cannot be blamed at all for his own accident. Only if the plaintiff's own culpability rises to the level of being the sole cause of the accident can the plaintiff be prevented from prevailing under the statute, although this is often an extremely difficult burden for a defendant to establish.

The law has had a drastic effect on the legal and insurance professions in New York. Over the years, the powerful plaintiff's lobby has fended off efforts to curtail or eliminate the statute. Additionally, many New York regulated insurance companies have severely reduced, if not ceased, their practice of writing liability policies for construction contractors.

A careful building owner will ask a contractor to produce proof of liability and workers' compensation insurance. The contractor should in turn have its subcontractors protect the owner and the contractor itself. This insurance can protect an owner against liability in case a worker or other person is injured. Given the severe penalties imposed by the Labor Law, and in light of today's litigious society, especially during an economic downturn in which people are even more inclined than usual to sue, a small sum saved on insurance could cost owners their entire company, as well as their assets. When the economy sours, some contractors try to conserve dollars by hiring inexperienced and less expensive workers, using inferior building supplies, and failing to provide adequate supervision. This often causes a decrease in the quality of the work, delays in the completion of the work, and more work-related injuries. Therefore, it is imperative for an owner to be even more vigilant that the proper insurance is in place so that its assets are not wiped out.

One of the most effective ways in which an owner can allocate the risks of personal injury damages on a work site to its contractors and subcontractors is to require contractors and subcontractors to name owner as an additional insured under their policies. This affords the owner the same rights under the contractor's and subcontractor's policies as the latter have. Being named an additional insured is an effective way of ensuring that you do not have to pay legal fees and damages which typically arise from work related accidents.

Sometimes a properly insured general contractor hires a subcontractor which is not adequately insured. Of course, if the subcontractor does not have insurance to contribute towards a settlement, the owner and general contractor will need to contribute more towards the settlement.

The typical scenario involving a worksite accident arises when a subcontractor's employee is hurt on the job. Because an employee cannot sue his employer because the suit would be barred by New York's Workers' Compensation Law, he sues the owner and general contractor instead. The owner and general contractor are then left to defend the action and face potential damages for the workers' lost wages, medical expenses, and pain and suffering. If the subcontract with the injured worker's employer required the employer to acquire commercial general liability insurance naming the owner and general contractor as additional insureds, then the owner and general contractor will likely have significant protection from the financial burdens of the situation. The Court of Appeals has even held that, under such circumstances, the subcontractor's general liability policy will be primary to the policies of the general contractor and the owner. Only where the subcontractor's policy does not cover the particular occurrence, or the legal fees or damages exceed the dollar amount limit of the policy, will the owner's or general contractor's general liability policy have to pay. Additionally, the coverage provided by the additional insured endorsement may be unaffected by the shares of fault of the parties involved.

The terms of the subcontract must clearly require the type and scope of additional insured coverage necessary to protect the owner from the potential damages. The policy containing the additional insured coverage and the documentation evidencing it must also be clear and proper to ensure that the owner has received the coverage required by the subcontract. Very often, owners will be satisfied merely to obtain a certificate of insurance indicating that a contractor or subcontractor has named it as an additional insured when, in reality, such coverage was not in place. The law is well settled that a certificate of insurance is merely some evidence of insurance but is not conclusive proof of coverage. Therefore, an owner cannot be satisfied with just the certificate but must obtain the complete policy containing all declarations, endorsements and exclusions.

Given the risks that can befall an unwary owner, it is crucial for every owner which hires a contractor to have an experienced attorney and insurance broker review its contract and subcontracts and your contractor's and subcontractor's insurance policies to ensure that it has proper status as an additional insured in the event of a work place accident.

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