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New York City's Local Law 196: New safety training requirements – causing confusion? - by Peter Simon

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In 2017, Local Law 196 (LL 196) was signed into law as part of the Construction Safety Act. LL 196 was heralded by the press, political groups and many stakeholders as an advancement in worker safety and amongst the most progressive municipal worker safety training laws in the U.S. The legislative intent of LL 196 was to reduce the thousands of NYC construction-related injuries and significant number of fatalities; according to the NYC Department of Buildings (DOB) recordkeeping, there were 36 fatalities between 2015 and 2017. There are numerous scientific studies that support the conclusion that increased safety training contributes to a reduction in accidents and fatal workplace injuries. Despite the well-intended spirit of LL 196, concerns and confusion have been ongoing as it relates to language in the law, proposed application of the law and which groups are exempt from receiving safety training under LL 196.

What is a worker? One of the most common questions being asked by stakeholders: what is a worker under LL 196? Unfortunately, LL 196 does not define the term “worker” in the text or plain language of the law (despite using the term “worker” over 45 times throughout the law). The lack of definition in the law has created a degree of uncertainty for many individuals because Federal OSHA and the New York State Department of Labor take a broad view of what constitutes a “worker” or “employee.” The Federal and NY State Departments of Labor tend to use the terms “employee” and “worker” interchangeably and as synonyms. Essentially, a worker is an employee that performs work for an employer.

In response to the lack of a defined term for “worker” in LL 196, the NYC DOB has released a series of DOB notices that give “examples” of types of individuals that DOB considers workers for the purposes of LL 196 training and those that would be exempt because they are not workers.

Many workers have commented that they do not fit into either list of examples and are confused as to whether they need LL 196 training. For example, consultants that do perform limited installation of materials or delivery persons that perform very specific site installation activities. Because of the potential for ambiguity and the cost-prohibitive nature of LL 196 violations (to the owner, permit holder and employer for a single worker), some stakeholders are having all their site workers take the training to reduce risk.

10-hour OSHA Requirement for “Major Buildings” Repealed

Prior to LL 196, section 3310.10.2 of the NYC Building Code required that all workers on major building sites had completed a 10-hour OSHA safety training course within the last 5 calendar years. The 10-hour OSHA training requirement was broadly enforced by DOB and all individuals on a major building site understood and were expected to have a current 10-hour OSHA card on their person if they were performing any work on the site; the standard and enforcement was clear. The 10-hour OSHA safety training requirement included groups like surveyors, special inspectors, security guards, construction managers, consultants and essentially all workers that could be exposed to safety hazards while on a construction site.

The passage of LL 196 repealed the standalone 10-hour OSHA requirement for workers under

3310.10.2 and caused a DOB paradigm shift on what it means to be a worker. Suddenly, under the LL 196 scheme, there are groups of workers on major buildings exempt from all minimum baseline safety training (including the 10-hour OSHA). This effect of LL 196 can be viewed as regressive, as at-risk individuals that are regularly involved in fatal incidents on construction sites have gone from a minimum 10-hour OSHA baseline safety training on major buildings, to being exempt from all baseline safety training (including 10-hour OSHA) on all construction sites in the five boroughs. A common concern is that the groups currently exempted from LL 196 safety training are the groups most in need of training, often due to their lack of experience and/or familiarity with onsite construction hazards.

Potential for Confusion in an Enforcement & Legal Setting?

Without a clear definition of the term “worker” in LL 196, there is potential for confusion, varied interpretation at the point of enforcement and during legal processes in the court system. If LL 196 training is not provided to an employee, it is foreseeable that a plaintiff’s lawyer will argue that the injured employee should have received LL 196 training and the failure to provide the required training resulted in the employee/worker’s construction site injuries. This situation is potentially messy for the permit holder, owner and employer as there is no clear definition or exemption in LL 196 for many workers. Relying on non-binding DOB fact sheets or press releases with expiration dates can create liability concerns in a court of law. DOB inspectors could be put in an uncomfortable position being forced to make judgment calls on whether training is required for a worker when no clear definition exists. A lack of clearly defined lines can lead to undesired inconsistency and subjectivity during enforcement, administrative and legal actions.

Should workers receive safety training irrespective of LL 196?

It is important to remember that other NYC safety training requirements are still in effect irrespective of LL 196 (DOB scaffold training cards, FDNY certificates of fitness etc.). Moreover, Federal Law requires the employer shall instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate any hazards or other exposure to illness or injury. 29 CFR 1926.21(b)(2). Notwithstanding LL 196’s shifting definition of “worker required to receive safety training,” all workers on construction sites should receive safety training that results in an ability for a worker to protect their safety, health and wellbeing.

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