ERIE COUNTY LEGISLATURE

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The Erie County Legislature
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My Honorable Colleagues,

Attached to this letter you will find a report published in rebuttal to a study by the Rockefeller Institute titled *The Cost of Labor Law 240 on New York's Economy and Public Infrastructure* that was cited to justify the passage of a resolution on March 13, 2014, in favor of changes to Labor Law 240, otherwise known as the Scaffold Law.

At the session where the resolution in favor of amending the Scaffold Law was passed by Legislators Loughran, Dixon, Hardwick, Lorigo, Mills, Morton, and Rath, I requested that the resolution be sent to committee to benefit from further debate, and more importantly to give time for the report cited to be reviewed and refuted.

Sincerely,

Patrick Burke

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FATALLY FLAWED

Why the Rockefeller Institute's Scaffold Law Report **Doesn't Add Up**

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Fatally Flawed:
Why the Rockefeller Institute's Scaffold Law Report Doesn't Add Up

New York State's Labor Law §240 (commonly known as the Scaffold Law) helps keep workers safe by holding employers and owners liable if unsafe conditions at their worksites result in injuries or death of workers working at an elevation. The law is crucial: falls from elevations kill more than one-third of all construction workers killed at work, by far the leading cause of on-the-job deaths in the industry.

The construction industry has been trying for years to water down New York's critical protections of workers' health and safety. Most recently, those lobbying to weaken New York's worker safety laws have trumpeted the findings of a report published by the Rockefeller Institute and funded by the so-called New York Civil Justice Institute, which paid $82,800 to commission the report and is a poorly-disguised front group for the right-wing Lawsuit Reform Alliance of New York.

The Cost of Labor Law 240 on New York's Economy and Public Infrastructure takes a far-fetched approach: blaming New York's strong safety laws for allegedly causing more accidents. Professor Richard W. Hurd, Professor and Associate Dean at the Cornell University School of Industrial and Labor Relations, called this argument "counterintuitive," asking, "If employers are financially liable for injury and death, would they not be more likely to invest in safety?"[1]

Common sense tells us that industry hazards, not worker protection laws, cause injuries on the job. A look at the evidence confirms this. The October 2013 report *Fatal Inequality,* published by the Center for Popular Democracy, starkly illustrates how important the Scaffold Law is because of the ongoing rates of injury in construction in New York and, notably, how the risks are disproportionately borne by immigrant workers and workers of color.

CPD's review of investigations of construction site accidents involving a fatal fall from an elevation by the federal Occupational Safety & Health Administration ("OSHA") revealed this disproportionate impact:

- In 60% of those fatalities, the worker was Latino and/or immigrant, disproportionately high for their participation in construction work.
- In New York City, 74% of fatal falls involved Latino and/or immigrant workers.
- Narrowing further, 88% of fatal falls in Queens and 87% in Brooklyn involved Latinos and/or immigrants.
- 86% of Latino and/or immigrant worker fatalities from a fall from an elevation in New York involved a non-union employer.

These statistics make clear that New York cannot afford to weaken its Scaffold Law. While federal safety and health laws do apply to construction, they are simply not enough. Understaffed because of inadequate funding, OSHA is unable to inspect a significant number of construction, demolition, and building rehabilitation sites active at any one time in the state. And, when OSHA does inspect a construction site, the monetary penalties imposed for violations are so small that employers can see them as just an incidental cost of doing business. Further, OSHA almost never pursues criminal penalties, even for egregious and willful violations that are directly linked to a worker's death.

1 Richard Hurd, "Opinion: Study Suggesting N.Y. Scaffold Law Causes Injuries Misuses Statistical Techniques," *Insurance Journal*, March 15, 2014.

Meaningful worker protection requires putting responsibility where it belongs: on the employers and site owners who control the worksite and can ensure proper protective equipment, training, and safety measures are provided and followed. This is precisely what New York's Scaffold Law does.

The Rockefeller study tries to distract from the common sense importance of New York's law with analysis full of flaws and misstatements. Below, we detail a number of the key flaws that debunk the report's incredible assertion that New York's scaffold law, not industry hazards, cause worker injuries.

The Rockefeller Institute's Report Is Fundamentally Biased.

- The report was commissioned by the New York Civil Justice Institute, a front group specifically set up by the right-wing Lawsuit Reform Alliance of New York to funnel money for their cause, while still giving the report the legitimacy of the Rockefeller Institute at the State University of New York. The NYCJI did not exist prior to the release of this report. According to the SUNY-Albany Division for Research, NYCJI paid $82,800 to commission the report.[2]

- Notably, the NYCJI is housed at the same office as the Lawsuit Reform Alliance, which has worked for years to weaken laws that make it possible for plaintiffs to assert their rights against abusive landlords, employers, and other powerful interests.[3] The LRA itself has frequently been criticized as being a front group for the construction industry and other corporate interests.

The Report Confuses Correlation with Causation.

- The report claims that the Scaffold Law *causes* high worker injury rates. This is a classic mistake – confusing correlation with causation. This claim is based on the differences in worker injury rates in selected construction sub-sectors and non-construction industries (such as warehousing and transportation) in New York and comparing those differences with the nation as a whole.[4] The authors assert that these differences are greater in New York and attribute these greater differences *entirely* to the Scaffold Law. As explained in more detail below, there is simply *no basis* to conclude that the Scaffold Law is the cause of these differences. Indeed, the authors provide no justification for comparing injury rates in construction with injury rates in less hazardous industries, or using those differences as a proxy for the impact of the Scaffold Law.

- Other problems with the report's statistical calculations and analysis were discussed in a recent piece in the *Insurance Journal* by Richard W. Hurd, Professor and Associate Dean at the Cornell University School of Industrial and Labor Relations. He wrote that the report "misused sophisticated statistical techniques and produced inaccurate results," and "erred particularly in the equations that serve as a foundation for the estimate of increased injuries supposedly caused by the Scaffold Law."[5] In a letter to the *Buffalo News*, Hurd went on to say that "The supposed 'significantly higher worker non-fatal injury rate' is an unfortunate byproduct of

2 SUNY-Albany Division of Research, "Accent on Research," Spring 2013 Newsletter, saved online at http://www.albany.edu/research/assets/springaccent2013.pdf

3 The two organizations share the same address, 19 Dove Street, Ste. 201, Albany NY 12210, and the same phone and fax numbers. See http://www.nycji.org/index.php/contact-nycji and http://www.nylawsuitreform.org/contact-us/

4 The construction subsectors are non-residential building construction, heavy civil construction, roofing, and residential building construction. The non-construction sub-sectors are manufacturing, transportation & warehousing, wholesale trade and utilities. No explanation is provided for why these particular subsectors were chosen to compare.

5 He added: "The report overlooks the fact that there was no change in the Scaffold Law during the period studied, but a change would be necessary to accurately utilize the differences-in-differences modeling approach they adopt," and, "There are technical problems with inappropriate application of differences-in modeling and results from clustering standard of errors that are totally inconsistent of this statistical tool." Professor Hurd concluded that the report "is simply wrong."

researcher error... [T]he significance that the authors have identified is ***almost certainly imaginary, and the results are unreliable.***" In sum, Professor Hurd concluded the report "***is simply wrong.***"

The Report Ignores Key Facts about New York State & the Construction Industry.

- Professor Hurd also noted that "the authors paid virtually no attention to institutional and demographic factors that impact injury rates" and "include no controls for any of them in their statistical modeling."[6]
- For example, when assessing New York's injury rates, the authors conveniently ignore the fact that New York typically has more at-height construction than any other state. This alone helps explain why New York might have a higher rate of injuries than some other states.
- The authors also fail to take account of the fact that New York construction workers are more likely to be union members, and that this in turn makes them more likely to report injuries, instead of suffering in silence. Similarly, the authors ignore the extent of *underreporting* in other states (especially those with low rates of unionization), which leads to artificially lower rates of injury outside of New York. Indeed, a 2007 study in the *Journal of Occupational and Environmental Health* demonstrated that underreporting is especially severe in the South. Because of injury underreporting, Texas has one of the lowest construction injury rates in the nation but one of the highest construction fatality rates (unlike non-fatal injuries, fatalities must be reported to the government). Such low-injury-rate states have artificially suppressed the US injury rate, which the paper nonetheless compares to the New York rate.

The Report Compares Apples & Oranges to Make a False Point.

- The authors selectively choose data from various years to compare (such as in Illinois) to achieve the results they want—a result that cannot be replicated when the full set of data is compared.
- The report compares apples and oranges with respect to insurance rate increases to make its erroneous point. For example, the report claims that insurance rates for public authorities have climbed because of the Scaffold Law, comparing rates from 2000-2004 to 2012-2014. However, the 2000-2004 figures do not include key divisions with large capital budgets, artificially depressing the rates of this earlier time frame. Notably, when the authors compare the same data sets over time for the Long Island/Metro North Rail Road, the data shows a *decline* in insurance rates.

The Report Uses Faulty Math to Claim Rising Rates & Lost Jobs.

- The authors claim that New York is experiencing soaring height construction insurance costs, but they do not have any actuarially-grounded data to back up their assertion that the Scaffold Law is to blame for higher premiums. In fact, insurers have refused to open such data up for public review, and oppose legislation introduced by Assemblyman Francisco Moya that would do so.
- The report claims the Scaffold Law has cost New York jobs. But the authors build on additional flawed calculations to reach this unsupported conclusion.[7]

6 Hurd, *Insurance Journal*.

7 The authors use a flawed analysis of the insurance costs of the Metropolitan Transit Authority, dramatically overstating the cost of the MTA's liability insurance, to make this point.

Conclusion: The Real Facts Are Clear.

New York's strong worker health and safety laws, such as the Scaffold Law, protect workers from unnecessary risk. And it is the inherently dangerous nature of construction at an elevation—not the laws designed to protect workers—that account for injuries on the job.

Any attempt to water down key worker protections will simply expose more workers, and their families, to unnecessary risk of injury. New York cannot afford to turn back the clock on protecting our workers or our public safety.

About the Authors

The **Center for Popular Democracy** (CPD) works in partnership with innovative community-based organizations, local and state networks, and progressive unions across the country to promote equity, opportunity, and a dynamic democracy. CPD supports partners in developing cutting-edge state & local policy that deliver tangible benefits to communities and also helps to build organization infrastructure and capacity so our partners can grow stronger and expand.

The **New York Committee for Occupational Safety and Health** (NYCOSH) is a membership organization of workers, unions, community-based organizations, and workers' rights activists. NYCOSH uses training, education, advocacy, and organizing to improve health and safety conditions in our workplaces, our communities, and our environment. Founded 35 years ago on the principle that workplace injuries, illnesses and deaths are preventable, NYCOSH works to extend and defend every person's right to a safe and healthful workplace and community.