

How to Protect Your Organization Against Fall Protection Litigation

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Introduction

Fall hazards produce approx. 34% of construction deaths each year. Your organization may be one or two employees, or there may be hundreds or thousands locally or on the other side of the world. Because legal remedies vary greatly, we will discuss only United States litigation and incidents. Even then, federal and state statutes have some peculiarities which make each case unique. For example, West Virginia cases require a fall protection standard or regulation or recognized practice to bring a negligence lawsuit, and the general duty clause is not recognized; Pennsylvania cases however do not require this specificity.

Federal and State Regulations

Most companies recognize federal OSHA regulations enforced by Compliance Safety and Health Officers (CSHOs), based in regional and area offices and are mindful about possible citations, especially repeat citations. CalOSHA regulations are recognized by most businesses in the State of California. Offshore, the Jones Act applies to employer liability for sailors and crews and the U.S. Coast Guard or Minerals Management Service (MMS) have jurisdiction based upon mileage from the shore; the Federal Employers' Liability Act (FELA) or employer liability applies to railroad employees; the Mine Safety and Health Administration (MSHA) regulations apply to any property designated as a mine.

Voluntary Standards

Voluntary standards apply generally, such as:

- American National Standards Institute (ANSI) for safety standards,
- American Society for Testing and Materials (ASTM) for testing materials,
- American Society of Mechanical Engineers (ASME),
- National Fire Prevention Association (NFPA) for fire prevention, and
- Society of Automotive Engineers (SAE) for transportation.

These are usually more up-to-date than federal standards.

The International Building Code (IBC) applies in all states and is enforced by local inspectors, for buildings and structures for fire and electrical safety and also standards where building materials, such as steel (AISC), concrete (ACI), windows (AAMA), are used.

Your organization may typically have its own set of safety rules, including fall protection and confined space. Guidance for drawing up employer rules is generally based on ANSI standards and OSHA regulations. These must be updated periodically to stay current with advances in fall protection safety. As a guideline, equipment should be updated to new standards within two years. Construction companies are beginning to offer solutions to architects to solve recognized fall hazards, which then are left in place for the owner (e.g., roof hatch walk-in/walk-out systems and protection from skylight fall-through).

ANSI Z359 Standards

The greatest changes in fall protection have occurred with the ANSI standards Z359.1 and successor component standards, Z359.2 - .18, which are in various stages of completion. These include harnesses, lanyards, connectors (snaphooks), shock absorbers, anchorage connectors, horizontal lifelines, and SRLs with energy absorbers at the snaphook end. Contact ASSE for more information.

The first job is to be aware of the above facts in order to survive possible litigation. The second is to keep up to date with new equipment and withdraw old equipment from the field, which may be dangerous. For example, the Z359.1 standard requires snaphook gates of 3600 lbs strength in side and nose directions, compared with earlier standards that only required 220 lbs nose pressure (16× weaker). *Note:* The ANSI A10.32-2004 standard only requires 220 lbs gate strength and is totally obsolete at the time of writing due to technical and administrative inefficiencies. The larger hook, having only 220 lbs gate strength, can be manipulated by hand to displace the gate and is totally unsafe for use, in the author's opinion, when the hook may be used in incompatible ways.

OSHA Act Section 5(a)(2)

Beyond OSHA, which applies to employees and employer-controlled workers, is the OSHA multi-employer worksite policy based on the OSHA Act Section 5(a)(2), which establishes four types of onsite employer:

1. Creating employer,
2. Exposing employer,
3. Correcting employer, and
4. Controlling employer.

Each may be cited for its role in creating a dangerous fall condition or injury. The focus is usually on the controlling employer, who is the GC or CM and has already signed an agreement with the owner and is to be held accountable for the subcontractors who come on site.

Workers' Compensation

Workers' compensation is a mandatory trade-off in each state for a schedule of payments for a worker's injuries, along with a prohibition of a lawsuit by the injured employee against the employer. Some states have reached beyond this understanding, such as Ohio, West Virginia, and New Mexico, where a court

decides if the incident was foreseeably injurious, and whether the employer knew or should have known of the hazard but willingly allowed the exposure, knowing of the grave danger, and continued the exposure to the employee. In such a case, the incident was not an accident and the injured employee may sue the employer.

Ideas for a Fall Protection Program

To combat an array of fall dangers and possible sanctions, the employer should undertake a program for fall protection to avoid fall hazards: Here are some ideas for a program to reduce the possibility of fall protection litigation:

1. Eliminate recognized fall hazards on the architect's drawing board— Make a strong case as a contractor for removing the hazard by design, sequence, substitution or addition
2. Use barriers, such as proper guardrails, for most edges
3. Use PFAS (Personal Fall Arrest Systems):
 - Use RFIDs on components to keep track of inspection dates
 - Use SRLs with a shock absorber at hook end to survive sharp edges (Z359.14 (pending))
 - Use 3600 lbs minimum gate strength snaphooks to avoid hook disconnection ref: Z359.1-2007
 - Employ qualified persons (P.Es) to design all horizontal lifeline systems: OSHA 1926.502
 - Approve all anchors for PFAS connector compatibility (manufacturer's instructions)
 - Train users on descent devices for escape or rescue with back-up system
4. Use horizontal grab bars for all access handholds at height ,including walk-through portable and fixed ladder extensions for more safety at transitions

Training

The following types of training courses would be helpful in setting up and maintaining a fall protection program:

- Competent Person course training for fall protection superintendents and foremen
- Authorized Person training for crews (site-specific)
- Qualified Person course training to ensure engr'g reliability of anchors and horizontal lines

Resources

Ellis Fall Safety Systems, www.FallSafety.com

Ellis, J. Nigel. 2012. *Introduction to Fall Protection*. 4th Ed. Des Plaines, IL: American Society of Safety Engineers,

International Society for Fall Protection (ISFP), www.isfp.org