



CLM 2019 Construction Conference  
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**Navigating Minefields in New York Labor Law: Strategies for Minimizing Exposure and Case Resolution**

**I. Strategies for Minimizing Exposure in New York Labor Law cases**

**A. Understanding and Assessing the current landscape**

A changing landscape in New York Labor Law matters is having a seismic change in the handling of matters. Plaintiff counsel have been achieving record high verdicts and are spending more time, energy and money in their preparation of these matters. The preparation that they have been spending have seen the advent of cases that are much better prepared than ever with ever increasingly large number of experts in a very broad range of medical, economic and liability disciplines, the like of which have never before been seen. We will discuss how those in the front lines of this battle are adapting their own handling and defense of these matters in order to attempt from the verdicts being large and excessive.

***Increasing Settlement Values and Jury Verdicts***

The verdicts that are being rendered by juries in New York Labor Law matters are increasing in verdict values and frequency. Plaintiff's are focusing on this segment of their case portfolio as these matters typically combine past and future pain and suffering, past and future loss of wages, and past and future medical expenses. The combination of these six potential avenues of recovery make these matters the most potentially lucrative in the New York casualty field. The focus on all six types of potential recovery allow for the plaintiff to ask juries for absurdly large amounts of damages and to try to make them seem small and trivial to juries as well as grounded in expert testimony. It has become an ever increasingly challenging task to defend matters and requires the claims professionals and attorneys to become more proficient in a vastly larger number of disciplines.

### ***Decreasing Interest in Early Resolution***

There has been a recent trend wherein many top plaintiff law firms are forcing their New York Labor Law matters onto the courtroom steps and into trial prior to wanting to engage in meaningful settlement negotiations. This has led for it to become a challenge to claims professionals and attorneys to have the plaintiff agree to mediation prior to the commencement of trial of the matter. That the current state of litigation is coming to the current landscape has many causes. There is a combination of factors at play here including a landscape wherein many companies will pay more on the court room steps and a defense bar that is overall trying less and less matters thereby emboldening plaintiff counsel that believe their best offers may come at the trial phase as the defense will become fearful of a potential adverse outcome. It requires the smart interplay of insurance professional and defense attorney to ensure that the plaintiff will engage in mediation. It also requires coordination to ensure that all levels are participating if necessary, since there are now many towers of insurance that can have as many as 5 different insurance companies participating in a potential mediation on large New York Labor Law matters.

### ***Case Law is Trending Pro Plaintiff***

The cases in the field of New York Labor Law have been increasingly pro plaintiff. This includes decisions in the myriad issues that occur in these New York Labor Law cases regarding things such as liability, duties, economic loss, medical expense, wrongful death, loss of parental guidance. The New York judiciary has been consistently moving more towards the plaintiff side and increasingly more liberal in their decisions and actions. The juries are more increasingly siding with claimants and not much in favor of the defense. We are seeing more pro plaintiff decisions when it comes to the sustainability of damages concerning awards of pain and suffering, loss of earnings and medical expenses.

## **B. Mediation**

### ***Consolidation in the ADR Ranks***

All of the panelists are seeing a consolidation of mediators and plaintiffs seeking to utilize they believe understand the New York Labor Law landscape. This is leading to inordinate delay in ability to schedule matters for mediation and we are seeing delays of three to 5 months waits to schedule the mediators that the plaintiffs bar will agree to utilize in a potential mediation. This frequently wreaks havoc in the scheduling of the matter for trial as the Courts are increasingly weary of granting adjournments for all parties to engage in outside private mediation and are now more routinely just setting matters down for trial.

### ***Reluctance to Settle on Plaintiff Side***

There is a trend of plaintiff bar increasing the amounts they are seeking to settle NY Labor Law matters. There has been an inflation of demands and expectations for settlement. This is also manifesting itself at the mediation where plaintiffs are setting extremely high settlement numbers and will seek to not attend mediations unless introductory offers are made and that the excess levels of insurance will be attending the mediation and participating in a potential settlement.

Several of the top plaintiff firms are trying to say they will not attend unless and until the entire primary policy has been tendered and there is a recognition that excess insurance is at play. Additionally, plaintiff counsel has become much more aggressive in their fear tactics and by trying to reach out to higher levels of excess insurance from the outset in order to engage higher levels of excess insurance into applying pressure to the primary levels from the outset. The panel will discuss best practices in dealing with these scenarios and the tactics that the claims professionals and defense attorneys utilize in order to thwart plaintiff's tactics from derailing potential settlements.

We will also discuss and give perspective on what is the optimal team for mediation success. This will include what levels of insurance professional should attend, what other service providers should attend (i.e. structure settlement broker), defense attorney role and the importance of the mediation statement and submission.

### **C. Trials**

Jury verdict amounts rendered have been increasing at a large rate in 2019. The plaintiff bar has been focusing on increasing the numbers their experts are opining on that should be awarded in the economic arena. The plaintiff bar has also continued in their reliance on the reptile brain strategy in their jury presentation. The confluence of these factors is leading to increased jury anger directed at companies and insurance companies. The awards from the juries at the trial level are also starting to be sustained at increased amounts in the New York Appellate Divisions.

We will discuss what is being done to match the firepower of the top plaintiff firms from the claim's professional, insurance company and defense attorney perspective. This will also discuss what screening the top claims professionals are undertaking in order to select the right attorneys for their highest exposure New York Labor Law matters. We will also hear from defense attorney perspective what tactics and techniques are utilized when defending at mediation and trial versus adversaries that are utilizing the most up to date reptile tactics.

#### **D. Strategies for Minimizing Exposure**

The plaintiff's bar has been becoming even more sophisticated in their preparation for the liability and damages portions of the trial. This has led to even more intensive pre-trial retention and preparation of experts from the plaintiff side including the proliferation in use of liability experts, medical experts, life care planning, vocational rehabilitation and economic experts.

##### **Liability Experts**

Liability experts are more frequently being used by plaintiff's attorneys to help prove violations of New York Labor Law sections 200, 240(1) and 241(6). In order to more adequately defend the matter against this onslaught for plaintiff summary judgement and for trial we are more frequently being tasked with retaining experts to defend against these types of experts on a routine basis. Best practices dictate that proper research is necessary to ensure retention of an expert that is familiar with construction means and methods and in the applicable subject matter.

##### **Medical Experts**

Plaintiff's are now more routinely claiming certain injuries that are more serious than the for many year typical back fusion surgery. The proliferation of newly alleged injuries now being routinely being claimed are CRPS (complex regional pain syndrome), TBI (traumatic brain injury), and psychological injuries.

These injuries are requiring the cultivation of medical experts to testify at trial with advanced specialization in neurology/pain management, psychology, neuro-radiology and neuro-psychiatry. It is also requiring attorneys and claims professionals to have a much more intimate knowledge of

We will discuss the new strategies that the panel is deploying in combating these experts. These include the proper selection of the right experts and credentials that you should be looking for when selecting the right experts to defend your important case. Additionally, we will discuss the increasing utilization of latest social media and investigative techniques that are leading to more success at the mediation and trial stages of matters in the New York Labor Law field.

### **Vocational Rehabilitation Experts**

New York Labor Law matters typically have a low skilled worker that is earning a high salary and benefit package due to the unionization and high wage scale of the construction benefits in the New York construction industry. This can routinely lead to an industry wherein workers are making well over \$ 100,000 dollars in annual wages and benefits that include health care and retirement benefits currently not enjoyed by most of the population in the United States. This leads to the plaintiff retaining in almost every New York Labor law matter a vocational rehabilitation expert that typically tests the plaintiff in differing batteries of tests and then matches the results of the tests, an in person interview and review of pedigree information and matches those results with a system that determines what occupations an individual is qualified to work in. This then becomes the basis for plaintiff's to frequently claims they can never return to work and if they can it is in a position that at a much more reduced salary and benefits than they were currently earning before their work site accident.

The proper defense of these matters now requires claims professionals and defense attorneys to have a much more intimate knowledge of this field and discipline than they had previously been tasked with. Experts must be properly vetted and selected in order to properly defend these matters. Curriculum vitae's must be reviewed as well as reviews of experts' prior testimonial history to ensure that they have a chance to defend the plaintiff formidable experts in this field. Additionally it is of extreme importance that this type of expert have valid certifications in the field of vocational rehabilitation and that they have been previously been qualified to testify as an expert and that they do have a practice that consists of work other than consulting for the purposes of testifying at trial.

In properly defending it is also important that the defense expert conduct all appropriate tests including in the proper language ( i.e. for foreign language speaking plaintiffs ), and when determining appropriate jobs they actually make sense and do not sound ridiculous to the jury when presented as a potential alternative employment opportunity with proper training.

### **Life Care Planner**

Most New York Labor Law matters involve serious physical injuries. The plaintiff routinely retains a life care planner in order to create a document including all future medical care costs. This is called a life care plan. A life care plan will typically include future medical care costs including costs for office visits, x-rays and diagnostic films, procedures, physical therapy, surgery, medicine, orthopedic devices, home health care aides and any other modality of treatment that they say is needed in the future care of the plaintiff within a reasonable degree of medical certainty. The plaintiff expert will almost assuredly utilize inordinately high numbers for treatment and will claim they

base them on their knowledge of medical costs in the New York metropolitan area which has among the highest costs in the United States for medical care and treatment.

The proper defense of these matters includes retaining a life care planner that has proper life care planning certification, has intimate familiarity with costs and has reviewed all the records so that they can have an adequate base to lay their conclusions upon. Medical doctors can also always be utilized as experts as they are the ultimate life care specialist and can always opine whether they feel treatment is or is not medically necessary within a reasonable degree of medical certainty.

### **Economist**

The most important expert in the plaintiff arsenal of super-sizing damages is the economist. They will take all the costs and projections of the life care planner and vocational rehabilitation specialist and add future growth rates to add the real big numbers on charts that juries like to look at while they are deliberating. The plaintiff economist extrapolates the numbers into the future using historical growth rates for earnings and health care costs in order to put ultimate numbers on these claims. Additionally, the economist will typically be the expert that discusses the average work life and life expectancy of the plaintiff.

The gold standard for defense is the retention of an expert economist in order to help prepare realistic economic damages assessments for the defense attorney and the claims professional. Additionally, the expert will also help the defense attorney prepare for the proper cross examination at trial of the plaintiff's expert economist.

Another strategy that needs to be closely coordinated between the claims professional and the defense attorney is whether the defense economist is to be called at trial or merely utilized for the preparation of cross examination. The reports of plaintiff and his or her experts need to be closely reviewed and a determination made on a case by case basis as to whether or not it is in the defense interests to call this expert at trial or not.

## **E. Strategies for Improved Case Resolution**

Mediation is an essential and important tool in the toolbox for achieving early resolution of matters on a cost effective basis in New York Labor Law litigation. It is crucial that you and your team have implemented a strategy that will allow for a pathway to success. We will discuss these techniques that include the selection of the proper mediator, the creation of the necessary mediation/trial team, and game planning of the mediation that will put you and your company in the best position to achieve resolution of the matter on the day of the mediation and not on the court house steps.