

## Construction Industry Update

### **New California Laws Significantly Change Construction Payment Forms & Requirements as of July 1<sup>st</sup>**

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*From bid protests and contract negotiations to claims for additional compensation and late payment penalties, the Carlin Law Group, APC, offers experienced and effective counsel on legal issues facing the construction industry from project bidding through close out and final payment.*

#### **Introduction**

Recent California legislation revamps and renumbers statutes relating to preliminary notices, payment releases, mechanics liens, payment bond claims, and prompt payment and retention requirements. Failure to know and comply with these new requirements can result in a forfeiture of your statutory payment remedies. In these challenging economic times, statutory payment remedies may be your only hope of getting paid if the party with whom you contract does not have the money to pay you. This article will summarize some of the key points and requirements of the new laws. You are encouraged to consult with a construction attorney to have your contracts, release forms, preliminary notices and mechanics liens reviewed and updated to ensure they comply with these new statutory requirements.

#### **Preliminary Notices in General**

As always, the new preliminary notice requirements still limit a claimant's ability to pursue statutory payment remedies for work performed more than 20 days prior to

service. Under Civil Code § 8216 and § 9306 it is grounds for disciplinary action under the Contractors' State License Law if a subcontractor with a contract value in excess of \$400 fails to give a preliminary notice as required. Bottom line: serve your preliminary notice early!

#### **Private Works Preliminary Notices**

Civil Code §§ 8200-8216 specify the current requirements for preliminary notices on private works of improvement. As always, if you want to enforce a mechanics lien, stop notice and/or payment bond claim and you do not have a direct contract with the project owner, you are required to timely and properly serve a preliminary notice on the following:

1. The owner or reputed owner.
2. The direct contractor or reputed direct contractor to which the claimant provides work, either directly or through one or more subcontractors.
3. The construction lender or reputed construction lender, if any.

Even if you do have a direct contract with the project owner, you are now required to serve a preliminary notice on any construction lender if you want to enforce a stop notice against that lender on a private project. Another new requirement for private works preliminary notices is Civil Code § 8202(a) which mandates the following language be included:

#### **NOTICE TO PROPERTY OWNER**

**EVEN THOUGH YOU HAVE PAID YOUR CONTRACTOR IN FULL**, if the person or firm that has given you this notice is not paid in full for labor, service, equipment, or material provided or to be

**New California Laws** (continued on page 2)

**New California Laws to Significantly Change Construction Payment Forms**

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provided to your construction project, a lien may be placed on your property. Foreclosure of the lien may lead to loss of all or part of your property. You may wish to protect yourself against this by (1) requiring your contractor to provide a signed release by the person or firm that has given you this notice before making payment to your contractor, or (2) any other method that is appropriate under the circumstances.

This notice is required by law to be served by the undersigned as a statement of your legal rights. This notice is not intended to reflect upon the financial condition of the contractor or the person employed by you on the construction project.

If you record a notice of cessation or completion of your construction project, you must within 10 days after recording send a copy of the notice of completion to your contractor and the person or firm that has given you this notice. The notice must be sent by registered or certified mail. Failure to send the notice will extend the deadline to record a claim of lien. You are not required to send the notice if you are a residential homeowner of a dwelling containing four or fewer units.

### Recording Preliminary Notices

While not required, you can record your preliminary notice with the County Recorder under Civil Code § 8214. The advantage of this is the County Recorder is supposed to advise you when Notice of Completion is recorded. This is important because Notice of Completion shortens the time you have to enforce your statutory payment remedies. However, recording a preliminary notice is not required and there is no liability to the County Recorder if it fails to give notice of the recording of the Notice of Completion to the preliminary notice claimant. Therefore, the best course of action is to not rely on the County Recorder and instead proceed with your statutory payment remedies as soon as you complete your work and you are not timely paid.

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\* NOTE: Due to the popularity of our seminars and limited space available, we regret we cannot provide refunds or credits with less than 72 hours advance notice of cancellation.

### Public Works Preliminary Notices

Civil Code §§ 9300-9306 specify the current requirements for preliminary notices on public works of improvement. As always, if you want to enforce a stop notice and/or payment bond claim and you do not have a contract with a party that has a direct contract with the project owner (now called a direct contractor), you are required to timely and properly serve a preliminary notice on the public entity that owns the project and the direct contractor.

### Service Requirements for All Preliminary Notices

Civil Code § 8106 specifies only the following methods are acceptable for serving a preliminary notice: (a) personal delivery; (b) mail per Civil Code § 8110 (registered or certified mail, express mail, or overnight delivery by an express service carrier - NOTE first class mail is not acceptable); or (c) leaving the notice and mailing a copy in the manner provided in Section 415.20

of the Code of Civil Procedure for service of summons and complaint in a civil action. Regardless of the manner of service, Civil Code § 8118 requires a Proof of Service Declaration be completed that verifies the Preliminary Notice was given in the manner required by Civil Code §§ 8100-8118. A Proof of Service Declaration should be completed at the same time as service and kept with your file copy of your preliminary notice. Civil Code § 8108 specifies where preliminary notices are to be served.

### **Waivers & Releases for Payment**

Until now, Civil Code § 3262 contained the standard language to be used in conditional and unconditional waivers and releases given with requests for payment. Civil Code §§ 8132-8138 specify the new conditional and unconditional waiver/release language that must be given with requests for payment starting July 1, 2012. This language is different than the old language in Civil Code § 3262. Civil Code § 8124 requires all waivers and releases to be in substantially the form specified in Civil Code §§ 8132-8138 or else they are null, void and of no force or effect.

### **Mechanics Liens**

The California Constitution expressly grants to any person or company who furnishes labor, materials, equipment or services a lien upon the real property that is the subject of their work for the value they have provided. The Constitution requires the Legislature specify by statute the steps necessary for the enforcement of mechanics liens. As of July 1, 2012 the mechanics lien statutes require the following steps be taken by a claimant to enforce their lien:

1. Properly serve preliminary notice (if required)
2. Serve Notice of Mechanics Lien on owner prior to recording
3. Timely record mechanics lien
4. Timely file lawsuit to foreclose Mechanics Lien
5. Record Notice of Lis Pendens (pending lawsuit) within 20 days of filing lawsuit

### **Time to Record a Mechanics Lien**

The time requirement for serving and recording a mechanics lien is different depending on whether the claimant has a direct contract with the owner of the property subject to the lien. If the claimant is a direct contractor, Civil Code § 8412 requires them to record their lien after they complete their work and before the earlier of (1) ninety days after completion of the work of improvement; or (1) sixty days after the owner records a

notice of completion or cessation. If the claimant does not have a direct contract with the property owner, Civil Code §§ 8414 requires them to record their lien after they cease work on the project and before the earlier of (1) ninety days after completion of the work of improvement; or (2) thirty days after the owner records a notice of completion or cessation. However, as discussed below, recent legislative changes require the lien be served on the property owner before being recorded.

### **Contents of a Mechanics Lien**

Pursuant to Civil Code § 8416(a) a Mechanics Lien shall be a written statement verified under penalty of perjury containing all of the following information:

1. A statement of the amount owed after deducting all just credits and offsets;
2. The name of the owner or reputed owner of the property, if known;
3. A general statement of the kind of work furnished by the claimant;
4. The name of the person to whom the claimant furnished their work on the property;
5. A description of the property where work was performed sufficient for identification;
6. The claimant's address;
7. An affidavit showing the lien was served as required on all necessary recipient(s); and
8. The following statement, printed in at least 10-point boldface type:

### **NOTICE OF MECHANICS LIEN ATTENTION!**

Upon the recording of the enclosed MECHANICS LIEN with the county recorder's office of the county where the property is located, your property is subject to the filing of a legal action seeking a court-ordered foreclosure sale of the real property on which the lien has been recorded. That legal action must be filed with the court no later than 90 days after the date the mechanics lien is recorded.

The party identified in the enclosed mechanics lien may have provided labor or materials for improvements to your property and may not have been paid for these items. You are receiving this notice because it is a required step in filing a mechanics lien foreclosure action against your property. The foreclosure action will seek a sale of your property in order to pay for unpaid labor, materials, or improvements provided to your property.

This may affect your ability to borrow against, refinance, or sell the property until the mechanics lien is released.

BECAUSE THE LIEN AFFECTS YOUR PROPERTY, YOU MAY WISH TO SPEAK WITH YOUR CONTRACTOR IMMEDIATELY, OR CONTACT AN ATTORNEY, OR FOR MORE INFORMATION ON MECHANICS LIENS GO TO THE CONTRACTORS' STATE LICENSE BOARD WEB SITE AT WWW.CSLB.CA.GOV.

### **Service of a Mechanics Lien**

Civil Code § 8416(c) requires a copy of the mechanics lien, which includes the Notice of Mechanics Lien language reference above, be served prior to recording. The property owner or reputed owner is to be served at their residence, place of business or address shown on the building permit or recorded construction loan documents. If the owner or reputed owner cannot be served in the foregoing manner then a copy of lien may be given by registered mail, certified mail, or first-class mail, evidenced by a certificate of mailing postage prepaid, addressed to the construction lender or to the original contractor. Under Civil Code § 8416(d), service of the copy of the Mechanics Lien is to be done by registered mail, certified mail, or first-class mail, evidenced by a certificate of mailing postage prepaid, and is deemed complete at the time of the deposit in the mail. Failure to timely and properly serve a copy of the Mechanics Lien, including the above referenced Notice of Mechanics Lien language, shall cause the claim of Mechanics Lien to be unenforceable as a matter of law.

### **No More "Second Bite at the Apple" on Payment Bond Claims**

The recent legislative changes to California's statutory payment remedies reduced a claimant's ability to prevail on a payment bond claim if they did not timely and properly serve a preliminary notice. Previously, if a claimant did not timely or properly serve a preliminary notice (a prerequisite for some payment bond claimants) they could serve a written notice on the project payment bond surety within a short period after project completion and get a 'second bite at the apple.' General contractors did not like this because it put them at risk of having to pay again after having already paid based on Preliminary Notices and Lien Waivers/Releases.

Under the revised payment bond claim statute, a claimant who has not timely and properly served a preliminary notice may not recover against a payment bond if: (1) all progress payments, except for those disputed in good

faith, have been made to a subcontractor who has a direct contractual relationship with the general contractor to whom the claimant has provided materials or services; OR (2) the subcontractor who has a direct contractual relationship with the general contractor to whom the claimant has provided materials or services has been terminated from the project and all progress payments, except those disputed in good faith, have been made as of the termination date.

To obtain legislative support for their revision of a payment bond claimant's 'Second Bite' rights the general contracting community agreed to a revision of subcontractor prompt payment statutes and a reduction of the time by which general contractors are required to make undisputed payments from 10 days to 7. Under these prompt payment statutes general contractors are subject to a penalty of 2% of the unpaid amount for each month it is late unless there is a good faith dispute or the parties' written subcontract allows for more than 7 days for payment.

Another key provision of the 'Second Bite' legislation sought by the subcontracting community was reduced retention. Public Contract Code § 7201 now reduces retention from 10% to 5% between all California public entities and their direct contractors and passes this reduced retention on down to subcontractors. However, direct contractors are not obligated to offer reduced retention to their unbonded subcontractors if, prior to accepting subcontractor bids, they gave notice that subcontractor bonds would be required and the subcontractor did not provide them. Another caveat is that public agencies are not obligated to offer reduced retention to direct contractors if, prior to accepting bids, they make a finding that the project is complex and requires retention greater than 5%. ✂

### **\*\*\*Disclaimer\*\*\***

The foregoing article is a summary overview of recent legislative changes affecting the construction industry for informational purposes only and is NOT intended to be legal advice. Many important details and nuances have been over simplified or omitted in consideration of restraints for this article. Consultation with your construction attorney for a detailed explanation and compliance with these requirements is STRONGLY advised!!!



Articles courtesy of Cavignac & Associates Employee Benefits Department

## LIVE WELL, WORK WELL

### Save on Seasonal Style

In need of a wardrobe refresh but don't want to pay full price? Check out the following tips to discover how to dress for the summer season without breaking the bank.

- Buy your summer clothes nine months early. By shopping the sale racks at the end of summer you'll be able to save significant amounts on a new summer wardrobe. Store the clothes with the tags intact and be sure to save the receipt, that way if you go up or down a size you can get back what you paid for them.
- Summer is garage sale season and the perfect time to find a few gently-used items. Remember to negotiate with the owner; they may be willing to offer a reduced price if you are purchasing more than one item.
- Going to a consignment shop or second-hand store may be well worth the trip. The prices are almost always rock-bottom and are better organized than garage sales.
- Check out the lots of summer clothing on [www.ebay.com](http://www.ebay.com). Often times you can find large quantities of seasonal clothing in a single size for a small price.
- If you have growing children in your family, organize a clothing swap with your friends, family or in your neighborhood. Everyone can trade out their kids' outgrown clothes for larger sizes. You get rid of unneeded clothing and get a brand new wardrobe for your child—for free! ✨

### Outdoor Exercise: Getting the Right Gear

Transitioning from running indoors to outside? Prepare yourself for the outdoor elements by investing in the following three key pieces of equipment:

**New Shoes** – If your running shoes are worn out from a winter of running on the treadmill, look into ditching the old ones in favor of a new, water-resistant pair.

After you spend some time running on the hard asphalt and through puddles, your feet will thank you.

**A Running Pack** – If you plan on running long distances, make sure you get a light-weight running backpack or fanny pack. These packs can store a water bottle for a run in the sun, or rain gear in case the weather turns.

**Rain Gear** – If you don't have any already, consider picking up packable, water-resistant pants and jacket. That way you won't have to call off your run on account of rain. ✨

### Buying Organic: The Dirty Dozen

Want to go organic but not sure if it's worth the extra cost? For some types of produce, it almost certainly is. According to data from the U. S. Department of Agriculture (USDA), some types of produce are more susceptible to pesticides than others. The USDA found that some fruits and veggies without a tough, protective skin often contained residue from pesticides.

The "Dirty Dozen" are the 12 types of produce most likely to contain pesticides. To avoid chemicals, consider going organic when purchasing these fruits and vegetables:

- |                 |                         |
|-----------------|-------------------------|
| 1. Apples       | 7. Grapes               |
| 2. Celery       | 8. Sweet Bell Peppers   |
| 3. Strawberries | 9. Potatoes             |
| 4. Peaches      | 10. Blueberries         |
| 5. Spinach      | 11. Lettuce             |
| 6. Nectarines   | 12. Kale/Collard Greens |

### DID YOU KNOW

While most non-organic produce contain some amount of pesticide residue, a few types are fairly resistant. Onions, sweet corn, pineapples, avocados, asparagus and sweet peas have been found to have very small amounts of residue. ✨



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