

LEGAL UPDATE

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CONSTRUCTION LAW UPDATE

ASSEMBLY BILL 456 & SENATE BILLS 189 & 190: MECHANICS LIENS

These changes became effective January 1, 2011 but will remain in effect as of January 1, 2012.

Civ. Code § 3084 amended to add a requirement that, prior to recording a mechanic's lien a "Notice of Mechanic's Lien" must be served on the owner or reputed owner of the property. The affidavit is required to show the name of the owner or reputed owner of the property, and the title or capacity in which the person or entity was served. A copy of the mechanic's lien must be enclosed with the Notice. The failure to serve the mechanic's lien with the Notice shall cause the mechanic's lien to be unenforceable as a matter of law. (As of July 2012: Civil Code § 8416).

Civ. Code § 3146 now requires, rather than allows, that within 20 days following the filing of an action to foreclose a mechanic's lien, a notice of pendency of action ("lis pendens") must be recorded. (As of July 2012: Civil Code § 8461).

Changes Effective July 1, 2012

New laws standardized the notice requirements relating to mechanics liens and the provisions are now going to be located at **Cal. Civ. Code §§ 8000 – 9566**. Much of the terminology has changed to for purposes of clarification and consistency within the Code. New waiver and release forms are included and must be used. **Civ. Code §§ 8132-8138**.

Civ. Code § 8132 includes new wording in the Conditional Waiver and Release on Progress Payment that it will not affect conditional releases previously given but have not been paid.

Civ. Code § 8422 clarifies when erroneous information may invalidate a lien claim. Generally, erroneous information does not invalidate the claim of lien. However, the claim may be invalidated as a result of erroneous information if the court determines that the claim of lien was made with intent to defraud or an innocent third party becomes owner after the lien was recorded but the lien was so deficient as to not put the third party on further inquiry in any manner. **Civ. Code § 8422 (b) (1)-(2)**.

There are also changes regarding completion. "Acceptance by the owner" is no longer included as a means of achieving completion. **Civ. Code § 8180**. Owners now have 15 days to record the Notice of Completion. **Civ. Code § 8182**. If there are multiple direct contractors, owners will be allowed to file separate Notices of Completion for each portion of the work completed. **Civ. Code § 8186**.

Preliminary notice requirements generally remain the same. However, a claimant with a direct contractual relationship with an owner or reputed owner is required to give preliminary notice **only** to the construction lender or reputed construction lender if one is in existence. **Civ. Code §8200(e)(2)**.

Mechanics lien release bonds are now only required to be equal to 125% of the claim, rather than the previous requirement of 150%. **Civ. Code § 8424(b)**.

There is a new procedure for judicially releasing liens. **Civ. Code § 8480**. An owner may not petition the court for a release order unless at least 10 days before filing the petition the owner gives the claimant written notice demanding that the lien be removed and stating the grounds for the demand. **Civ. Code § 8482**. Formal burden of proof requirements are created and the cap on attorney's fees for petition for a release is also eliminated. **Civ. Code § 8488**.

SENATE BILL 424: CONVERSION OF DESIGN PROFESSIONAL LIENS

Changes Effective July 1, 2012

A design professional may convert a recorded design professional lien to a mechanics lien if certain requirements have been met. **Civ. Code § 8319**.

SENATE BILL 392: CONTRACTOR'S LICENSES FOR LLCs

Before January 1, 2012

The Contractors State License Board ("CSLB") is required to begin processing applications by LLCs for contractor's licenses **before January 1, 2012**. Additional requirements apply to LLCs who wish to obtain a license. **Bus. & Prof. Code §§ 7071.6.5; 7071.19; 7065**.

SENATE BILL 293: PROMPT PAYMENT, PAYMENT BONDS, RETENTION

Changes Effective January 1, 2012

A prime contractor or subcontractor must pay each subcontractor not later than 7 days (prior law was 10 days) after receipt of each progress payment unless otherwise agreed in writing. **Bus. & Prof. Code § 7108.5**. This applies to both public and private contracts.

Contractual retention on public works projects are capped at 5% on all contracts entered into **after January 1, 2012** between a public entity and an original contractor, between an original contractor and a subcontractor, and between all subcontractors thereunder, relating to the construction of any public work of improvement. **Pub. Contract § 7201**. In no event shall the total retention proceeds withheld exceed 5 percent of the contract price. **Pub. Contract §7201(b)(1)**. Under limited circumstances, and if certain requirements are met, retention may exceed five percent. **Pub. Contract § 7201 (b)(3)-(4)**. This provision shall remain in effect only until January 1, 2016, unless extended. **Pub. Contract § 7201 (d)**.

Changes Effective July 1, 2012

Under current law, if a payment bond claimant failed to serve a preliminary 20-day notice, the claimant could still make a claim against a contractor's payment bond if they served a

notice on the payment bond within 15 days of recordation of the project's notice or completion or 75 days after completion (if no notice of completion is filed). However, on all contracts entered into **on or after July 1, 2012**, payment bond claimants *cannot* rely upon the later notice in either of the following circumstances: (1) All progress payments, except 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 the materials or services. (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 pursuant to the contract, and all progress payments, except those disputed in good faith, have been made as of the termination date. **Civ. Code § 8612.**

SENATE BILL 474: INDEMNITY AGREEMENTS

Changes Effective January 1, 2013

With respect to contracts with public agencies entered into after January 1, 2013, provisions that purport to require indemnification by subcontractors of general contractors for the latter's active negligence or willful misconduct are void and unenforceable. **Civ. Code § 2782.05 (a).** However, this section does not apply in certain circumstances, such as any wrap-up policy or program, the benefits or protections provided by any workers' compensation laws or governmental immunity laws, among other things. For a complete list of exceptions, see **Civ. Code § 2782.05 (b).**

Civ. Code § 2782(b)(2) deems void and unenforceable provisions in a contract entered into with a public agency which impose on any contractor, subcontractor or supplier of goods or services, or relieve the agency from, liability for the active negligence of the public agency. There are certain specified exceptions where this law does not apply. **Civ. Code § 2782(b);** see also **Civ. Code §§ 2782.1, 2782.2, 2782.5.** Construction contracts entered into with the owner of privately owned real property which purport to impose liability on any contractor, subcontractor, or supplier of goods or services, or relieve the owner from such liability to the extent of the active negligence of the owner or their employees are similarly void and unenforceable. **Civ. Code § 2782(c)(1).** However if a homeowner is performing a home improvement project on his or her own single family dwelling, then this section does not apply. **Civ. Code § 2782(c)(3).**

LABOR LAW UPDATE

SENATE BILL 684: WORKER'S COMPENSATION

Changes Effective July 1, 2012

Insurance Code § 11658.5 provides that an insurer that intends to use a dispute resolution or arbitration agreement in order to resolve disputes arising in California out of a worker's compensation insurance policy or endorsement issued to a California employer must disclose, contemporaneously with any written quote that offers to provide insurance coverage, that choice of law and choice of venue or forum may be a jurisdiction other than California and that these terms are negotiable between the employer and the insurer. The employer must also sign the disclosure, as evidence of receipt, when the employer accepts the offer of coverage. This new law applies to worker's compensation policies **issued or renewed on or after July 1, 2012.**

SENATE BILL 459: INDEPENDENT CONTRACTOR CLASSIFICATION

Changes Effective January 1, 2012

Any person or employer (which is broader than those defined by statute as "employers" and may include non-owners or managers) who willfully misclassifies an employee as an independent contractor may be liable for penalties ranging from \$5,000 to \$25,000 for each incident of willful misclassification, in addition to other penalties and fines permitted by law. **Labor Code § 226.8 (b).** If the Labor and Workforce Development Agency (LWDA) or a court determines that the person or employer has engaged in a pattern or practice of these violations then the fine increases to not less than \$10,000 and not more than \$25,000 for each violation. **Labor Code § 226.8 (c).** Public notification of violation is also required pursuant to the new law.

Labor Code § 2753 also provides that any person who, for money or other valuable consideration, knowingly advises an employer to treat an individual as an independent contractor to avoid employee status for that individual shall be jointly and severally liable with the employer if the individual is found not to be an independent contractor. However, this section does not apply to attorneys authorized to practice law providing legal advice in the course of the practice of law or to a person who provides advice to his or her employer.