

California Statutory Payment Remedies for Construction

San Diego CFMA

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by Kevin R. Carlin, Esq.

www.carlinlawgroup.com

CARLIN LAW GROUP, APC (619)615-5325

Introduction

- Preliminary Notices, Payment Releases, Mechanic's Liens, Notices of Lis Pendens, Stop Notices, and Payment Bond Claims are great tools for construction participants to ensure they are paid for their work.
- In 2012, California legislation updated statutes relating to these notices and claims, as well as Retention and Prompt Payment Requirements. For those who haven't updated their forms and notices, now is the time to do so. Failure to know and comply with these requirements can result in a forfeiture of statutory payment remedies.

Disclaimer

- This presentation is a summary overview of the statutes for information only and is NOT complete or legal advice. Many important details and nuances have been over simplified or omitted in consideration of time restraints for today's program. Consultation with your construction attorney for a detailed explanation and compliance with these requirements is **STRONGLY** advised!!!

Preliminary Notice

- Now simply called a Preliminary Notice rather than a “20-Day Preliminary Notice.”
- Requirements for a Private Works Preliminary Notice requirements can be found in new Civil Code sections 8034, 8100 et seq., and 8200 et seq. (previously Civil Code section 3097).
- Requirements for a Public Works Preliminary Notice can be found in the new Civil Code sections 8034, 8100 et seq., and 9300 et seq. (previously Civil Code section 3098).

Preliminary Notice

- SHOULD be filed soon after contracting to perform work or commencing work, as the claimant may only pursue statutory remedies for work performed in the period starting 20 days prior to **service** of notice. Bottom line: Serve your Preliminary Notice Early!
- A notice is still not required by those providing labor for wages on a project or an express trust fund.
- Employees of parties you contract with below you in the construction food chain can file claims even though you have paid their employer. To prevent this, get your subs to sign releases confirming payment to employees and indemnify you for claims by their employees.

Who Must File Private Works Preliminary Notices Per Civil Code §§8200-8216

- If you do not have a direct contract with project owner and want to enforce a Mechanic's Lien, Stop Notice or Payment Bond claim, you must file. Notice must be given to the following persons:
 - (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
- The statutes also require those contracting directly with the owner of the private project to serve a Preliminary Notice on project lenders in order to have Stop Notice rights.

Contents of All Preliminary Notices Per Civil Code § 8102

- (a) Notice under this part shall, in addition to any other information required by statute for that type of notice, include all of the following information to the extent known to the person giving the notice:
- (1) The name and address of the owner or reputed owner.
 - (2) The name and address of the direct contractor.
 - (3) The name and address of the construction lender, if any.
 - (4) A description of the site sufficient for identification, including the street address of the site, if any. If a sufficient legal description of the site is given, the effectiveness of the notice is not affected by the fact that the street address is erroneous or is omitted.
 - (5) The name, address, and relationship to the parties of the person giving the notice.
 - (6) If the person giving the notice is a claimant:
 - (A) A general statement of the work provided.
 - (B) The name of the person to or for whom the work is provided.
 - (C) A statement or estimate of the claimant's demand, if any, after deducting all just credits and offsets.

Requirements for Private Works Preliminary Notices Per Civil Code §8202(a)

- At time of contracting, subs should review the general contract and get the names and addresses of all parties above them in the food chain.
- All Preliminary Notices must have a “Notice to Property Owner” which must repeat verbatim the language required by statute. Note that if the owner thereafter fails to give notice to claimants of the Notice of Completion, the claimants have 90 days from actual completion to record their Mechanic’s Lien. (Otherwise, Lien must be filed within 30 days of Notice of Completion.)

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 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

- The Preliminary Notice can be (but is not required to be) recorded with the County Recorder. The Recorder is then required to advise a preliminary notice claimant when Notice of Completion is recorded, but the County Recorder has **no liability** for failure to give notice to the claimant of the recording of the Notice of Completion.
- Record the Preliminary Notice on “property on which the work of improvement is situated, including as much space about the work of improvement as is required for the convenient use and occupation of the work of improvement.”

Requirements for Public Works Preliminary Notice Per Civil Code §§9300-9306

Civil Code §9300

- (a) Except as otherwise provided by statute, before giving a stop payment notice or asserting a claim against a payment bond, a claimant shall give preliminary notice to the following persons:
 - (1) The public entity.
 - (2) The direct contractor to which the claimant provides work.
- (b) Notwithstanding subdivision (a):
 - (1) A laborer is not required to give preliminary notice.
 - (2) A claimant that has a direct contractual relationship with a direct contractor is not required to give preliminary notice.
- (c) Compliance with this section is a necessary prerequisite to the validity of a stop payment notice under this title.
- (d) Compliance with this section or with Section 9562 is a necessary prerequisite to the validity of a claim against a payment bond under this title.

Service Requirements for All Preliminary Notices

How to Serve

Civil Code §8106. Except as otherwise provided by statute, notice under this part shall be given by any of the following means:

- (a) Personal delivery.
- (b) Mail in the manner provided in Section 8110.
- (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.

Service Requirements for All Preliminary Notices

Where to Serve

Civil Code §8108. Except as otherwise provided by this part, notice under this part shall be given to the person to be notified at the person's residence, the person's place of business, or at any of the following addresses:

- (a) If the person to be notified is an owner other than a public entity, **the owner's address shown on the direct contract**, the building permit, or a construction trust deed.
- (b) If the person to be notified is a public entity, the office of the public entity or another address specified by the public entity in the contract or elsewhere for service of notices, papers, and other documents.
- (c) If the person to be notified is a construction lender, **the construction lender's address shown on the construction loan agreement** or construction trust deed.
- (d) If the person to be notified is a direct contractor or a subcontractor, the contractor's address shown on the building permit, on the contractor's contract, or on the records of the Contractors' State License Board.
- (e) If the person to be notified is a claimant, the claimant's address shown on the claimant's contract, preliminary notice, claim of lien, stop payment notice, or claim against a payment bond, or on the records of the Contractors' State License Board.
- (f) If the person to be notified is a surety on a bond, the surety's address shown on the bond for service of notices, papers, and other documents, or on the records of the Department of Insurance.

Service Requirements for All Preliminary Notices

Mailing Requirements

Civil Code §8110. Except as otherwise provided by this part, notice by mail under this part shall be given by registered or certified mail, express mail, or overnight delivery by an express service carrier.

Note: It is not necessarily required by statutes, but highly advisable to get proof of delivery. In any event, claimant must document the mailing for attachment to Proof of Service per Civil Code §8118.

When Complete

Civil Code §8116. Notice under this part is complete and deemed to have been given at the following times:

- (a) If given by personal delivery, when delivered.
- (b) If given by mail, when deposited in the mail or with an express service carrier in the manner provided in Section 1013 of the Code of Civil Procedure.
- (c) If given by 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 in a civil action, five days after mailing.

Service Requirements for All Preliminary Notices

Penalty for Failure to Serve

Per Civil Code §8216 and §9306, if the contract of any subcontractor on a particular work of improvement provides for payment to the subcontractor of more than four hundred dollars (\$400), the failure of that subcontractor...to give the notice provided for in this chapter, constitutes grounds for disciplinary action under the Contractors' State License Law.

Waivers & Releases

- Civil Code §§8122-8138 define and discuss waivers and releases after payment. All releases must follow the statutory language substantially or they will be null, void and of no force or effect.
- Under the statutes, Conditional Releases are given at the time of payment application and become effective after payment; subsequent payment applications should include a Conditional Release for the upcoming payment and Unconditional Release for past payments made.
- Releases are of claims through a specific date and in the amount of the requested payment – the date controls over the amount, so be sure to include **all** work performed through the given date in the payment application.

Mechanic's Liens

The California Constitution provides that mechanics, persons furnishing materials, artisans, and laborers of every class have a lien upon the property upon which they have bestowed labor or furnished material for the value of the labor done and material furnished. The California Constitution also requires the Legislature to provide, by law, for the speedy and efficient enforcement of those liens.

Even though not filed until after completion of work, these liens have priority over any encumbrance that attaches after or was not recorded at the time the work commenced.

Mechanic's Lien Requirements

- Properly serve Preliminary Notice (if required)
- Serve Notice of Mechanic's Lien on owner
 - Serve BEFORE recording
- Timely record Mechanic's Lien
 - Be aware of any Notice of Completion or Cessation
 - Record on the property where the work is situated, “including as much space about the work of improvement as is required for the convenient use and occupation” of the work.
- Timely file lawsuit to foreclose Mechanic's Lien
 - File within 90 days of recording Mechanic's Lien
 - Name all parties with an interest in the property
- Record Notice of Lis Pendens (pending lawsuit) within 20 days of filing lawsuit

Time to Serve & Record a Mechanic's Lien

Civil Code §8412. A direct contractor may not enforce a lien unless the contractor records a claim of lien at some time after the contractor completes the direct contract and before the earlier of the following times:

- (a) Ninety days after completion of the work of improvement.
- (b) Sixty days after the owner records a notice of completion or cessation.

Time to Serve & Record a Mechanic's Lien

Civil Code §8414. A claimant other than a direct contractor may not enforce a lien unless the claimant records a claim of lien within the following times:

- (a) After the claimant ceases to provide work.
- (b) Before the earlier of the following times:
 - (1) Ninety days after completion of the work of improvement.
 - (2) Thirty days after the owner records a notice of completion or cessation.

Contents of a Mechanic's Lien

Civil Code §8416. (a) A claim of mechanics lien shall be a written statement, signed and verified by the claimant, containing all of the following:

- (1) A statement of the claimant's demand after deducting all just credits and offsets.
- (2) The name of the owner or reputed owner, if known.
- (3) A general statement of the kind of work furnished by the claimant.
- (4) The name of the person by whom the claimant was employed or to whom the claimant furnished work.
- (5) A description of the site sufficient for identification.
- (6) The claimant's address.
- (7) A proof of service affidavit completed and signed by the person serving a copy of the claim of mechanics lien pursuant to subdivision (c). The affidavit shall show the date, place, and manner of service, and facts showing that the service was made in accordance with this section. The affidavit shall show the name and address of the person or persons upon whom the copy of the claim of mechanics lien was served, and, if appropriate, the title or capacity in which he or she was served.
- (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 Mechanic's Lien

Under Civil Code §8416(c) and (d), “A copy of the claim of mechanics lien, which includes the Notice of Mechanics Lien,” must be served on the owner (or reputed owner) by registered mail, certified mail, or first-class mail addressed to the owner at the owner’s residence or place of business address. If unknown, check the address shown by the building permit on file with the authority issuing a building permit for the work. If service cannot be completed in this manner, serve a copy of the claim by registered mail, certified mail, or first-class mail addressed to the construction lender or to the original contractor. Service is complete at the time of the deposit of the mail.

WARNING: Under Civil Code §8416(e), failure to comply with these service requirements “shall cause the claim of mechanics lien to be unenforceable as a matter of law.”

Lien Release Bond

Civil Code §8424

- If the owner, direct contractor or subcontractor against whom the lien is filed wishes to remove the lien quickly, it may record a lien release bond.
- Bond must be in the amount of 125% of lien claim and is conditioned on payment of any judgment and costs the claimant recovers on the lien.
- Bond may be recorded before or after enforcement action is filed, and releases the real property from the claim and any lien enforcement action.
- An action on the bond must be commenced within six months of service of notice of the bond by the owner.

Filing the Mechanic's Lien Suit

- Civil Code §8460: an action to enforce the mechanic's lien claim must be filed within 90 days after recording of the claim of lien. Otherwise, the lien expires and is unenforceable.
- The time to file suit can be extended by an agreement "to extend credit" between claimant and owner under Civil Code §8460(b). The terms of the extension must be recorded within 90 days of the recording of the claim of lien. Claimant may file suit within 90 days from expiration of credit period, but must file within **one year** after actual completion of the project.
- Importantly, the statutory language suggests claimant may not file suit **during** the credit period – claimants must be certain not to extend credit beyond the one-year deadline and inadvertently bar their action.
- If claimant does not file suit within the time provided by §8460, the owner may petition the court for release of the lien without barring the owner from asserting any other causes of action. (Civil Code §8480.)

Stop Payment Notice

- Stop payment notices are available in both public and private works. Provisions are set out in Civil Code §§8500 et seq. [private works] and 9350 et seq. [public works]
- Procedure for stop payment notice is similar to that for preliminary notice. The notice must be signed and verified by claimant, and must provide a general description of the work, the total value of the work, and the amount claimed through the date of the notice. (Civil Code §§8502, 9352.)
- On receipt of stop payment notice, the paying party must withhold from the direct contractor sufficient funds to pay the claim stated in the stop notice. There are some exceptions in private works.

Stop Payment Notice in Private Works

- A stop payment notice must be preceded by preliminary notice and must be given within the time for filing a notice of mechanic's lien claim. (Civil Code §8508.)
- Notice is given to owner, architect, or construction lender. A stop payment notice to a construction lender must be bonded. (Civil Code §§8506, 8532, 8534, 8536(b)(1).)
- On receipt, owner or lender must withhold from the direct contractor sufficient funds to pay the claim stated in the stop notice, unless the claimant is not the direct contractor and a payment bond was recorded. (Civil Code §§8522, 8536.)
 - Owner/lender must serve notice to claimant that it is not withholding funds along with a copy of the payment bond
 - Lender may also refuse to withhold funds if the stop notice is not bonded
- A party may obtain release of the funds withheld by giving the owner or lender a release bond by an admitted surety in the amount of 125% of the notice amount. (Civil Code §8510.)

Stop Payment Notice in Public Works

- A stop payment notice must be preceded by preliminary notice and must be given within 30 days after recording of a notice of completion, acceptance, or cessation. If no such notice is recorded, a stop payment notice must be given within 90 days after actual completion/cessation. (Civil Code §§9352, 9356.)
- The notice should be given to the director of the department awarding the contract, the disbursing officer with the duty to make payment, or the body by which the contract was awarded. (Civil Code §9354.)
- On receipt, the entity must withhold from the direct contractor funds sufficient to pay the stop notice claim amount. (Civil Code §9358.)
 - Entity may satisfy requirement by refusing to release funds in escrow
 - Entity may still make payments due to the direct contractor of amounts in excess of the stop payment notice amount plus reasonably anticipated interest and court costs
- Public entity has discretion to permit the direct contractor to give a release bond in an amount equal to 125% of the stop payment notice claim. Release bond surety is then jointly and severally liable to the claimant with payment bond sureties. (Civil Code §9364.)

Enforcement of Stop Payment Notice

- In both public and private works, an enforcement action may be filed any time after 10 days from the date the claimant gives the stop payment notice, but before 90 days after expiration of the time within which a stop payment notice must be given (not necessarily the time the notice was actually given). The stop notice becomes ineffective and any withheld funds are released if the claimant fails to commence an action within the time period prescribed. Claimant must give notice of the action to the owner or lender within five (5) days of commencement of the action. (Civil Code §§ 8550, 9502, 9504.)
- The prevailing party in a **private works *bonded*** stop payment notice enforcement action is entitled to attorney fees and prevailing claimant is entitled to interest at the legal rate from the date the stop notice is given. (Civil Code §§ 8558, 8560.)

Payment Bond Claims

- Claims on public works payment bonds must be brought within six months after stop notices must be served. (Civil Code §9558.)
 - Bond required on public works projects greater than \$25,000. (Civil Code §9550.)
 - Claimant need not give stop notice to public entity to prevail on payment bond claim against surety. (Civil Code §9564(a).)
 - Prevailing party is awarded reasonable attorney fees. (Civil Code §9564(c).)
- Claims on private works payment bonds must be brought within six months from actual completion of the project. (Civil Code §8610.)
 - Applies on private works projects where payment bond and general contract is recorded before commencement of work. (Civil Code §8600.)
- Claimant must have “provided work to the direct contractor either directly or through one or more subcontractors, pursuant to a direct contract.” (Civil Code §§8608(a), 9566(a).)
- Preliminary notice must have been provided except in a few specific circumstances – in such cases, notice must be provided to surety and bond principal in short order.

Notice on Payment Bond Claims

- A claimant may bring an action on the payment bond if the claimant served a Preliminary Notice. (Civil Code §§8612(a), 9560(a).)
- The 2012 legislation significantly reduced a claimant's "Second Bite at the Apple" if they have not served a Preliminary Notice. Previously a claimant who had not served a Preliminary Notice could give a written notice to surety and bond principal within 15 days of recordation of Notice of Completion or 75 days of actual completion if no Notice was recorded. (Civil Code §§8612(b), 9560(b).)
- Now, such notice is still possible, unless:
 - All progress payments, except for those disputed in good faith, have been made to a subcontractor to whom the claimant has provided materials or services; OR
 - 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
- Under such circumstances, the claimant may not enforce a claim on the payment bond. (Civil Code §§8612(c), (d); 9560(c), (d).)

Protecting Liens In Bankruptcy

- Like all other actions, an action to enforce a mechanic's lien is automatically stayed during bankruptcy proceedings.
- To protect the lien, a claimant should file the enforcement action if it has not already done so, AND promptly file a notice in the Bankruptcy Court under 11 U.S.C.A. §546(b). That notice should be filed within the period required for commencement of the lien foreclosure action, in no event later than 90 days after the lien is recorded.
- Claimant may seek to have the automatic stay lifted for purposes of perfection of the lien claim. Actions should be pursued promptly after termination of bankruptcy proceedings or the automatic stay.
- After filing the 546(b) motion, claimant should stay in contact with the trustee in bankruptcy regarding permissible steps in pursuing the state court action.

Progress Payment Requirements

- An owner on a private works project must make progress payments to the general contractor within 30 days of receipt of the payment request unless otherwise agreed in writing. (Civil Code §8800.)
- The general contractor on any project must make progress payments to subcontractors within **seven (7)** days after receipt by the general contractor of a progress payment unless otherwise agreed in writing. (Bus. & Prof. Code §7108.5; Pub. Cont. Code §10262.5.)
 - On a Public Utility contract, payment must be made within 21 days of receipt of the progress payment by the general contractor from the utility. (Civil Code §8802.)

Progress Payment Requirements

- Failure to make prompt progress payments will result in charges of 2% per month in lieu of interest as well as recovery of attorney's fees and costs. The paying party also may not withhold from payment more than 150% of any amount that is disputed in good faith.
- A state or local agency must make progress payments to the general contractor within 30 days (39 for a state university) of receipt of an undisputed and properly submitted payment request. Interest accrues at a rate of 10% per year starting when payment is due or when a state agency improperly rejects a payment request. (Pub. Cont. Code §§10261.5, 10853, 20104.50.)

Progress Payment Retention

- The 2012 legislation changed Public Contract Code §7201 to reduce the retention held from progress payments by public entities from 10% to 5%. This reduced retention rate also applies to general contractors' retention from subcontractors' progress payments.
- General contractors are not obligated to offer reduced retention if, prior to accepting bids, the general contractor provided written notice that subcontractors would be required to provide bonds and the subcontractor does not provide a bond.
- Public agencies are not obligated to offer reduced retention if, prior to accepting bids, they make a finding that the project is complex and requires retention greater than 5%.

Retention Payment Requirements

- An owner on a private works project must release to the general contractor all retention within 45 days after the date of completion, unless the improvement will become the property of a public agency. (Civil Code §8812.)
- A public entity must release to the general contractor all retention within 60 days after the date of completion. (Pub. Cont. Code §7107.)

Retention Payment Requirements

- The general contractor must release to the subcontractor all retention within 10 days of receipt of retention funds from the owner on a private works project, or within 7 days of receipt of retention funds from a public entity. (Civil Code §8814, Pub. Cont. Code §7107.)
- Waiver of all of these provisions is against public policy. Failure to make prompt retention payments will result in charges of 2% per month in lieu of interest as well as recovery of attorney's fees and costs. The paying party also may not withhold from payment more than 150% of any amount that is disputed in good faith.

Federal Projects: Miller Act

- Payment bonds must be provided on federal construction projects greater than \$150,000 to ensure payment to subcontractors & suppliers.
- Second tier subcontractor/supplier with a claim for non-payment must serve notice of claim, including the amount of the claim with substantial accuracy, to the prime contractor by registered mail within 90 days of the last date on which the subcontractor performed labor or furnished equipment or materials. (40 U.S.C.A. §3133(b)(2).)
- Civil action under the Miller Act may be brought, in the name of the United States for the use of the claimant, in the U.S. District Court in the district where the contract was performed or executed, at any time after 90 days from the last date on which the subcontractor performed labor or furnished equipment or materials and before one year from that date. (40 U.S.C.A. §3133(b)(1),(3),(4).)