

**ILLINOIS MECHANIC'S LIEN LAW**  
***With Changes Made in 2011***

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## General Notes

**Be Careful:** The courts consider a mechanic's lien to be a privilege and not a right. You receive its benefits only if you **strictly adhere** to the state law requirements. Bottom line: miss a deadline by one day and you have lost it. Unlike other areas of the law where you can argue equities, find technical exceptions, and lawful excuses, there is no forgiveness here. In this case, knowledge is not only power, it's a necessity.

In this state you will be writing down dates for as many as 4 documents: a) 60-Day Notice ("Subcontractor's Notice to Owner" on Residential Projects--given within 60 days of starting your work); b) 90-Day Notice ("Subcontractor's Notice of Intention to File Mechanic's Lien", which is 90 days from the date you last performed services); c) Mechanic's Lien; and d) Lawsuit to Foreclose the Mechanic's Lien. Write down all the deadlines in your calendar. Use a highlighter or red pen. If you have a staff, use a "fail safe" system by doubling up and putting it in their calendar also. This reminds you twice. The first calendar entry should be two weeks before the due date as a preliminary reminder.

On the second calendar entry, do a white lie to yourself. Put the due date as one week before it is actually due as insurance in case you get busy or need legal advice.

Time is money. You will waste a lot of valuable time running around and doing it at the last moment, as opposed to doing it early.

## PRELIEN NOTICE

Illinois requires as many as 2 notices to be sent out before the mechanic's lien is recorded. These 2 notices are set forth in separate sections below. The basic information on these notices is as follows:

### 60-Day Notice (Residential Projects Only)

**Name of Notice:** Subcontractor's Notice to Owner (60-Day Notice)

**What Kinds of Projects?:** The 60-Day Notice applies only to owner-occupied, single-family residences. By definition, it excludes commercial or industrial projects.

**Who Must Use  
this Notice:**

All contractors, subcontractors, laborers, and material/equipment suppliers who **do not** have a direct contract with the owner or the owner's agent. Included within the definition of "agent" is a construction manager or the spouse of the owner. For example, a general contractor with a direct verbal or written contract with the owner who acts as the prime is not required to give the Notice. The Illinois statutes define all persons who do not have a direct contract with the owner as "subcontractors" regardless of their license status or the type of work performed.

**When:**

See **Time Deadlines** table. Such notice is sent out even if there is no current delinquency. The lien claimant has 60 days from first furnishing labor or materials on the project to send out the notice. However, there is simply no reason to wait that long. It is recommended that the notice be sent out right after you start work. Remember that the owner is only obligated to pay the amount left on the contract between the owner and general contractor. Each time the owner pays the general before receiving such a notice, the amount of your lien rights is reduced. It is only when the owner receives this notice that they are obligated to hold back monies from the general. This prevents the owner from paying twice.

For example, assume there is a general contract with the owner for \$100,000. The good news is that you can send out a late notice and it is still valid. The bad news is your lien is reduced by the amount remaining under the prime contractor's contract. So, if only \$10,000 is payable under the contract between the general and the owner, and you are owed \$15,000 at the time of sending out the late notice, the most you could ever get on your lien is \$10,000.

**How to Serve:**

Serve by certified mail, return receipt requested. Certified mail is considered "served" at the time of it's mailing.

**Verified or  
Notarized?:**

A **verified** notice simply means you sign it and are representing the contents are true and accurate. A **notarized** notice is signed in front of a Notary Public or other official. A **notarized** and **verified** notice is required in this state.

## 90-Day Notice (Commercial and Residential Projects)

**Name of Notice:** Subcontractor's Notice of Intention to File a Mechanic's Lien (90-Day Notice). Fortunately, the same basic format and content is used for residential and commercial projects—in fact the notices are identical. The 60-Day Notice is given at the beginning of the project (within 60 days of first furnishing labor or materials), while the 90-Day Notice is given at the end of the project (within 90 days of last furnishing labor or materials).

**Who Must Use  
this Notice:**

All contractors, subcontractors, laborers, and material/equipment suppliers who **do not** have a direct contract with the owner or the owner's agent. Included within the definition of "agent" is a construction manager or the spouse of the owner. For example, a general contractor with a direct verbal or written contract with the owner who acts as the prime is not required to give the Notice. The Illinois statutes define all persons who do not have a direct contract with the owner as "subcontractors" regardless of their license status or the type of work performed.

The notice is required on both commercial and residential projects. In essence, it is like giving a warning shot before you file your mechanics lien. Hopefully, it will set up serious settlement negotiations so you do not have to file that lien.

Thus, if you are a subcontractor working on a residential project, you will be serving two prelien notices: 1) the 60-Day Notice at the beginning of the project and 2) the 90-Day Notice at the end of the project. And, if you are a subcontractor working on a commercial project, you would only serve the 90-Day Notice.

**When:**

See **Time Deadlines** table. Within 90 days of the lien claimant's last conferring labor or materials upon the project. This is 90 days and not 3 months. To correctly count the number of days, start counting on the day following the last day services or materials were performed or supplied. In other words, if the last work was done on April 1<sup>st</sup>, start counting on April 2<sup>nd</sup>.

Time is not extended for warranty or "punch list" work in which you are merely re-doing services already performed. In some states, the time is extended for any services performed under the basic contract, no matter how small. Illinois is different. "Trivial and inconsequential" additional services do not extend the time. The extension only applies to "essential" work done to complete the base contract.

**How to Serve:**

Serve by certified mail, return receipt requested. Service should be made on 3 entities: 1) the owner; 2) mortgage lenders; and 3) the general contractor.

As to 1), it can be delivered to the owner or the owner's agent (construction manager), or even the project architect. As to 2), this usually applies to construction lenders. This means you will have to do some type of title search through the local "Recorder of Deeds" for the county in which the project is located, or a title company. Do not guess. Make sure you have the correct lender. As to 3), make sure the general gets a copy. Note that if the owner is a non-resident of the county where the project is located or cannot be found with reasonable diligence, the notice can simply be recorded with the Recorder of Deeds in the county of the project.

**Verified or Notarized?:**

A **verified** notice simply means you sign it and are representing the contents are true and accurate. A **notarized** notice is signed in front of a Notary Public or other official. A **notarized** and **verified** notice is required in this state.

## MECHANICS' LIENS

**Who is Entitled to a Lien:**

A mechanic's lien is primarily for general contractors, subcontractors, laborers, as well as material/equipment suppliers. But it also covers laborers, architects, land surveyors, engineers, superintendents, time keepers, asbestos removal contractors, demo contractors, persons who haul away debris, suppliers of appliances, carpeting contractors, landscaping contractors (original planting only), contractors installing electrical signs, persons raising or lowering homes, providers of construction management services, as well as services for water well drilling. Architects and engineers will receive a lien even if they only produce drawings or specifications, and do not visit the site or perform contract administration.

Lessors of earthmoving equipment do not get a lien. However, the rental of such machinery is subject to a lien in a public contract, but only for the value of the use of the equipment. Additionally, persons or entities excluded are those furnishing heat during construction, landscape maintenance, and persons or companies furnishing performance bonds, public liability and workers compensation, and telephone service.

In 2007, there was an amendment to the statutes covering the rental of equipment. Although the statute is somewhat unclear, it appears that it applies in the situation in which a contractor or subcontractor rents equipment to another contractor or subcontractor who then uses it on the job. In other words, if a general contractor has been renting a backhoe for certain period of time but is currently not using the equipment, it could then be rented to a subcontractor who is doing the utilities. The work of the sub, including the rental value of the equipment, would be subject to a lien.

***When to File/  
Record:***

See **Time Deadlines** table.

As to subsequent purchasers or lien holders: Within 4 months of completion of the overall project. In other words, when the last person or company did any work on the project, whether by way of labor or materials. If the lien is filed within the 4-month period, it is valid against later purchasers. For example, assume the project is completed on April 1<sup>st</sup> such that the 4-month period would expire August 1<sup>st</sup> and the contractor files timely on July 20<sup>th</sup>. The owner sells the property on May 1<sup>st</sup>. Because the lien is timely, it binds the subsequent purchasers. The same rule would apply if a judgment or mortgage was placed on the property on May 1<sup>st</sup> – it would be subject to the lien.

The time to file a lien is extended for “extra or additional work”. This appears to apply only to change orders and not warranty work. If this occurs, the lien claimant may file the lien within 4 months of completion of the extras.

As to the owner who has a contract for the construction: Within two years of completion of the overall project. If there is additional work, within two years of completion of the extras.

***Where to  
File/Record:***

With the Recorder of Deeds for the county in which the project is located.

***Service:***

Under new law **effective January 1, 2010**, and only as to general contractors performing work on an owner occupied residential project, there is now a statutory requirement of service of a copy of the lien. Within ten days of filing, the general contractor must serve the homeowner by personal service or certified mail.

If timely notice is not given and as a result the homeowner suffers “damages” before the notice is given, the lien is reduced to the extent of the damages. A definition of “damages” is not specified.

It is noteworthy that the damages do not refer to customary construction damages as to, for example, defective construction, the cost to hire an alternative contractor, costs to complete, delay damages, and the like. It is only damages as a direct result of not receiving a copy of the lien.

This makes these potential damages very problematical. For example, assume the homeowner was in the process of selling a home, had no notice of the lien, and so closed escrow without that knowledge. Obviously, the homeowner will have to “make good” the lien now placed on the purchaser’s new residence, but does this constitute damages if the contractor has a valid claim and is entitled to receive compensation in any event? We will have to wait for court decisions.

We do know that the mere placing of the lien is not damages. For example, there would not be a cause of action for slander of title per se. Apparently there must be actual damages suffered, beyond the mere recording.

This new law does not apply to subcontractors. Thus, they would not have a requirement of giving notice to the owner of a mechanic’s lien. On the other hand, it would be somewhat foolish not to do so since an owner receiving a copy of mechanic’s lien is more inclined to deal with the situation and settle the claim.

Finally, the new law only applies to contracts entered into after January 1, 2010.

**Amount:**

Primarily for unpaid labor, material, and equipment supplied. It includes material delivered to the owner or the owner’s agent as well as merely being delivered to the construction project. In many states there is also a requirement that the material be incorporated into the project which is not a pre-requisite in Illinois.

There is an unresolved issue as to whether delay or “impact” damages can be included in the lien. These consequential damages are over-and-above the unpaid labor and materials and relate to extended overhead, lost profits, interruption expenses, overtime, and the like caused by the failure to perform by a general contractor or owner. The Illinois Mechanic’s Lien Act does not provided for these damages, however, there is some case law approving same. You should consult with a local attorney in this regard.

An owner may request a general contractor to provide a “Contractor’s Sworn Statement” which discloses the names and addresses of all subcontractors and the amounts to be paid to each. If you fail to serve a 90-Day Notice on the owner, all is not lost. You will still be entitled to file a lien, but it will be limited to the amounts stated by the general contractor in his or her sworn statement to the owner. In other words, limited to the amount you are alleged to be owed under that sworn statement. The Sworn Statement is required only on owner-occupied residential projects.

Attorney’s fees can also be assessed against the owner if that person “without just cause or right” does not pay the balance of the contract or extras. This means the owner withholding payment for a reason that is not well grounded in fact or law. But just because the owner loses later in court does not mean they will be liable for your attorney’s fees. If they assert a defense in good faith (for example, defective or untimely workmanship), they are protected even if you eventually win in court. On the other hand, if they fail to pay you for a legitimate reason, you would get those fees. But it cuts both ways – if you lose in such a proceeding, the owner gets it’s attorney’s fees if your lien claim was filed “without just cause or right”. Again, as long as the claim is made in good faith, you should be able to defeat the attorney’s fee request. If you have complied with all the requirements, but simply do not get as much as you wish at trial (offsets for back charges, etc.), you would have a decent chance of preventing those fees because you did not file the lien in an unwarranted manner.

***Property  
Subject to  
the Lien:***

A mechanic’s lien applies only to private projects. No lien is allowed in public projects against government property.

***Furnishing  
Information:***

Upon request, the general should furnish others with information about the owner so the required notices and lien can be filled out properly.

***Verified or  
Notarized?:***

A ***verified*** notice simply means you sign it and are representing the contents are true and accurate. A ***notarized*** notice is signed in front of a Notary Public or other official. A ***notarized*** and ***verified*** notice is required in this state.

***Priorities:***

As between the various lien claimants (contractors and subcontractors), no one gets a preference and there is a pro-

rata distribution upon sale of the property if there is not enough for everyone. The only exception is that persons claiming wages get top priority over the contractors.

As to the priority between a mechanic's lien claimant and a mortgage lender, Illinois has a special law that the lien claim attaches as of the date of the contract between the owner and general contractor. If the lien attaches before the mortgage loan is recorded, all contractors have preference. Assume that the contract between the owner and the general is signed on April 1<sup>st</sup> and the construction loan is recorded on April 5<sup>th</sup>. Even if the mechanic's lien is not recorded until July 15<sup>th</sup>, the lien would win over the mortgage loan because of the pre-dating of the original contract. Even if the lien is junior or subordinate to the mortgage, the lien claimants still get recovery based on the value of the improvements made to the property (which is a different law than in most states and more beneficial to the lien claimant).

***Miscellaneous  
Issues:***

***Subdivisions:*** Illinois allows a blanket or "project lien" to be placed on a subdivision. This especially applies if there is one contract covering all the units. You should seek competent legal counsel as to the timing and apportionment of such liens.

***Lien on Funds  
Due Original***

***Contractor:*** Subcontractors, laborers, and equipment/material suppliers get not only a lien on real estate, but also a lien on the funds due the original contractor. In other words, it "freezes" the monies that would normally be paid by the owner to the general. By definition, a general contractor has no such rights to freeze the funds.

***Written  
Contract:***

The Illinois Mechanic's Lien Act does not technically require a general or subcontractor to have a written contract. However, Illinois general law, known as the "statute of Frauds", requires a contract in most cases. This law requires a contract to be in writing if it involves over \$500 in goods supplied. Most materials supplied on a project well exceed this limitation. If not in writing, the contract could be

unenforceable which, in turn, could void your lien rights.

**Work Done  
After Service  
Of Initial  
90-Day Notice:**

Unfortunately, the 90-Day Notice only covers labor and materials furnished through the date of the notice. A later mechanic's lien is limited to that amount. In order to include additional amounts, for example, change orders after sending out the 90-Day Notice, one should send a new or amended notice without 90 days of completion of that additional work.

**Contractor's  
Sworn  
Statement:**

As stated above, the owner may request the general contractor to furnish a sworn statement (applies only to owner-occupied residential projects) disclosing the names, addresses, and amounts to be paid to contractors and suppliers. In fact, some owners request such a statement with each installment draw. If requested, the owner does not have to pay any more than the amount under the original general contract, and if this is done, can ignore lien claims for any further monies. Thus, if the owner requests such a statement and then pays the general contractor everything owed under the contract, the owner need not pay anything further. Such a rule applies even if the monies do not then filter down to the subcontractor. This prevents the owner from having to pay twice, although it is detrimental to subcontractors and suppliers.

**Warning to subs and suppliers:** It is just plain dangerous not to serve your preliminary notices. If you do not, and the owner makes payment to the general contractor after receiving a sworn statement, you will only receive the unpaid amount stated in that affidavit, even if more is owed (*Weather-Tite, Inc. v. University of St Francis*, ---N.E. 2<sup>nd</sup> 54, 228 Ill. 2<sup>nd</sup> 281 (Ill., 2008)).

However, if the owner does not request the sworn statement, it will be required to pay money to the lien claimants in excess of the contract amount.

Further, if the owner pays the general after receiving a "Subcontractor's Notice of Intent to File Mechanic's Lien", the owner does so at his or her risk and may have to pay twice. What the owner should do under such circumstances

is withhold the amount in that notice from the general contractor.

***Lien Waivers:***

There are 2 general lien waiver forms in effect in Illinois: 1) Partial Waiver of Lien; and 2) Final Waiver of Lien. The first applies to the waiver in connection with a progress draw. The second applies to the final payment. The forms commonly in circulation state that the contractor (sub or supplier) is acknowledging receipt of a payment. Logically, this can be relied upon by the owner and lenders who do not know otherwise. But what if the payment is not actually made to the person signing the release? Unfortunately, Illinois laws provides that the contractor waives it's lien rights if such a form is signed even if payment is not made, unless there is actual fraud by the general contractor or owner. If the general fraudulently induces a subcontractor to sign such a form and does not pay that person within 30 days, it could also be a misdemeanor. But actual fraud is hard to prove. Without having to open up an expensive escrow, one way is to have the project architect act as the escrow holder and make sure the money is received before a waiver is delivered. On the other hand, the Lien Act requires the general contractor to hold any funds from the owner as the trustee for the subcontractor or supplier. Failure to make those payments will subject the general to all damages sustained.

***Prompt Payment Act:***

2007 also saw a major change in how payments are made on a construction project. The new law only applies to commercial projects, residential subdivisions, and condominium projects. It does not apply to single-family residences or multifamily residences with less than twelve units in a single building.

The new law states that when a general contractor bills the owner, the billing is considered approved unless the owner within 25 days of receipt notifies the general in writing of the items disapproved. As to those items that are approved, payment must be made without delay.

If the owner fails to pay within fifteen days of the approval, interest would accrue at 10% per annum.

Likewise down the chain of command, if the general contractor receives payment from the owner or the

subcontractor receives payment from the general, each must pay its respective subs within fifteen days of receipt or the same 10% per annum interest will be assessed .

This is a welcome change and it is somewhat typical of the legislation in other states. But there is one more piece in the puzzle that is even more important: if a general or sub is not paid within the time periods above-described, and a seven day written demand is made for payment, followed by further nonpayment, one can suspend performance without penalty or risking breach of contract, until the payment is received.

***Home Repair:***

If you have a direct contract with a residential homeowner for over \$1,000, before you start any work, you are required to furnish a consumer rights pamphlet published by the Illinois Attorney General's Office titled: Home Repair: Know Your Consumer Rights." You can get the pamphlet by going to: [www.illinoisattorneygeneral.gov>site map/search>protecting consumers>publications and brochures>brochures and pamphlets](http://www.illinoisattorneygeneral.gov/site_map/search>protecting_consumers>publications_and_brochures>brochures_and_pamphlets).

Under previous law, the failure to serve the pamphlet resulted in making your contract invalid as well as any possible mechanic's lien. The new law as of July 12, 2010 is less severe, simply giving the homeowner the right to sue the general contractor under the consumer fraud act.

## **LAWSUIT TO FORECLOSE LIEN**

***Introduction:***

Your lien is not valid forever. Because it directly affects the owner's title, it has a limited shelf life and must be enforced within a short period of time. That enforcement is done by filing a lawsuit to foreclose. Just like the time deadlines for a Pre-Lien or Mechanic's Lien, the courts strictly construe these time limits which are called statutes of limitation. Again, if you are literally one day late, the lien is ineffectual.

***When:***

Within 2 years of completion of the lienable work. Note this is different from other states in which the time begins to run after the recording of the mechanic's lien. In this case, it runs after completion of the project. However, the owner, or any other interested person, can make a written demand on lien claimant, by Certified Mail, to file suit within 30 days. If suit is not so brought, the lien is voided.

**Where to File:** In the county where the property is located.

**Arbitration:** Many construction contracts state that all disputes will be decided by binding arbitration, as opposed to a court proceeding by judge or jury. In fact, it has long been a tradition to do so in the construction industry. Arbitration is usually quicker and less costly, especially because it cuts down on expensive discovery. The decision is final and binding, with no right to appeal. You lose your right for a jury trial, but few contractors want that in the first place. You usually pick an experienced construction attorney or retired judge to hear the case in their conference room. It is just like a court proceeding with the same general rules of evidence, but more informal.

On the other hand, you can only foreclose your lien through a court proceeding, not arbitration. So, how do you keep your arbitration rights and at the same time preserve your lien rights? Simple. You bring a lawsuit to protect the lien and then immediately request the court to stay the court proceedings. When arbitration is done, you go back to court and turn the arbitration award into a judgment.

### **Need a Lawyer?**

In this country, every individual has the statutory right to represent themselves. This means they can prepare all necessary papers, appear at hearings, and actually try the case. In so doing, the court considers you to be acting either in "*pro se*" or "*pro per*". Before making this decision, consider the following factors:

1. You are a professional and thoroughly know the ins and outs of not only the construction industry but of the project itself. The best lawyer on his or her best day will probably not know more than 50% of what you know.

2. How is your public speaking abilities? If you are uncomfortable speaking to a group, you will even more uncomfortable in court or arbitration. You could be the "sharpest wit in town" but may not be able to present your arguments. Remember, appearing uncomfortable is perceived as having deficiencies in your case. People usually think that if you are not comfortable about your own facts, then they must not be that strong.

3. If the other side has a lawyer, you might want to think twice about representing yourself. You will certainly know the facts quite well, but you may be blindsided by legal technicalities.

4. You may also want to think twice if this is a really nasty and emotional case. In other words, if the other side is going for “blood”. Having a lawyer can shelter you from this emotional trauma. No matter how strong you are, lawsuits are taxing not only on your time, but on your physical and emotional energies.

5. If you have a good case in which you have complied with technicalities and performed good work, you are essentially engaging in a collection action. These actions are typically very simple because there are few defenses or defects alleged by the other side. It makes it easier to represent yourself--it is more a question of when and how much they will pay as opposed to whether you will win at all.

6. If you have a binding arbitration provision, you may consider representing yourself. These proceedings are much more informal and the arbitrator tends to give you more leeway. There are also fewer rules and not they are usually not quite as strict.

7. You could consider representing yourself but get advice along the way from a lawyer. It is much cheaper that way. On the other hand, the lawyer cannot watch over every move and you might slip up. Many times lawyers can also help you with preparing the forms, simply putting your name on the pleading. You can also bring in your lawyer at the end to actually try the case.

8. Judges and courts do not give legal advice. They only help you with what forms to use. However, clerks can be invaluable in steering you in the right direction as far as where to file, time limitations, the nature of the form or pleading, etc. But, remember when it comes right down to the ultimate advice, they cannot help you.

9. Judges usually treat you the same as an attorney which means they expect strict compliance with the rules. Although some judges give you more slack, don't count on it.

10. The biggest dilemma is whether you should hire an attorney for a smaller case, typically in the \$5,000 to \$10,000 range. You have to watch this because you may eat up that amount in attorney's fees. *You* never make money on lawsuits, only *lawyers* do. Try to settle for the best price you can get and move on.