

SUMMARY OF MECHANICS' LIEN LAW
FOR FLORIDA
With Changes for 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 at least three documents: a) Notice to Owner; b) Notice to Owner/Notice to Contractor; 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

This state requires a Notice be sent out before the mechanic's lien is filed/recorded. For simplicity, this notice will be referred to as a "Prelien Notice". The basic information on this Notice is as follows:

Name of Notice: Notice to Owner or Notice to Owner/Notice to Contractor.

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. 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. Thus, it is common for suppliers of material and equipment, subcontractors, and sub-subcontractors to serve this notice. Laborers and design professionals are not required to serve the prelien notice.

When: See **Time Deadlines** table.

How to Serve: By certified mail. Most states provide that service is effective on the date of certified mailing, but not Florida. Only if you mail it certified within **40 days** of first furnishing your labor or materials, it is considered effective on the date of mailing. But unfortunately, this shortens the time. Another option is to personally serve the Notice, but this is almost never done and would frankly cause a lot of confusion and suspicion by the person you are serving. If you are running out of time, the best idea is to send the Notice standard overnight delivery or standard two day delivery (Fed X, UPS, Post Office Express, etc) because it would be considered served on the date of receipt.

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 **verified** notice is all that 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 includes, subcontractors, laborers and material/equipment suppliers with a contract with the owner, the general contractor, the subcontractor, or a sub-subcontractor. To qualify, one must be in the first four "Tiers" under the owner: 1) First Tier—persons who have a contract with the owner (general, supplier, sub, or laborer); 2) Second Tier—persons who have a contract with the general (supplier and sub); 3) Third Tier—persons who have a contract with a sub (sub-sub and supplier); 4) Fourth Tier—persons who have a contract with a sub-sub (sub-sub-sub and supplier). Although there is some uncertainty as to whether a sub-sub-sub can claim a lien, it would appear to be allowed since that person would be in the fourth tier.

Also included are design professionals, such as an architect, landscape architect, interior designer, engineer, surveyor, or mapper, as long as they have a direct contract with the owner. Florida also has a special provision for "subdivision improvers", meaning any persons who make the site suitable for construction, involving such work as grading, leveling, excavating, filling of land, drainage, off- and on-site utilities, as well as constructing streets, curbs, gutters and sidewalks.

Florida also has a special provision for companies that specially fabricate materials for a specific project, including manufactured-to-order items. There will be a lien even if they are not incorporated into the project if they were special ordered by the owner or agent, and the only reason they were not incorporated was the failure of that owner or agent. Other material suppliers (without a special order) will receive a lien only if the materials are incorporated or used in the construction. There is a rebuttal presumption that materials are incorporated if they were delivered to the job site.

A material or equipment supplier with a contract with another supplier is excluded (regardless of the tier). Nor, does a contractor or subcontractor not properly licensed.

Who Signs?: There had been some confusion in the law as to who can sign a mechanic's lien. As of July 01, 2007, the lien can be signed by any employee in your office or your attorney.

**When to File/
Record:**

Within 90 days of your final furnishing labor and materials on the project. As of July 1, 2007, the Florida statutes have been amended to further define what is meant by "final furnishing". This is the last work on the project (labor, material, or equipment) and does not include punch list or warranty work. In other words, if you're still working on the project doing base contract or change order work, it will be extended, but if you're going back to the site and redoing work that you had already performed, it would not extend the time. The date of issuance of the certificate of occupancy or the finalization of the building permit is not considered "final furnishing". This is because a building permit can be signed-off if you're still doing work on the property, such as painting, wall covering, carpeting, and other finish work. "Final furnishing" for rental equipment is the date the equipment was last on the job and available for use.

As of July 1, 2007, there is also been clarification as to what happens when the general contractor abandons the job or is terminated. If this happens, everyone, including the general contractor, subcontractors, and suppliers, have 90 days from the termination to record their liens. Unfortunately, there is no provision giving a subcontractor or supplier notice so be very careful. As soon as you find out there has been a termination or abandonment, determine the effective date, and then make sure the lien is recorded within that 90 day period—or better yet, earlier.

Where to

File/Record:

Record the mechanic's with the clerk of the court in the jurisdiction in which the construction is located. There is, of course, a court clerk in each Florida county. Note, however, that in some Florida counties, there is a recorder's office which is separate from the clerk of the court. If this is the case, the lien should be recorded with the county recorder's office.

How to Serve:

By certified mail. See the discussion above for service of the pre-lien notice.

Laborers are only required to serve the owner within 15 days of recording. Equipment and material suppliers who have a contract directly with the general contractor, need only serve the owner within 15 days of recording. If they have a contract directly with a subcontractor, they must serve within the same 15-day period, both the owner and the general contractor. If they are supplying to a sub-subcontractor, they must serve the owner, general contractor, and subcontractor.

Subcontractors who have a direct contract with the general contractor need only serve the lien within 15 days of recording upon the owner.

Sub-subcontractors must serve the lien on both the owner and the general contractor.

Design professionals and subdivision improvers need only serve the owner within 15 days of recording.

**Amount of
Lien:**

Primarily for unpaid labor, material, and equipment supplied. You cannot insert attorney's fees in the lien claim itself, but they can be recoverable as costs if you win later in court.

For general contractors, the lien can include interest from and after the due date. For all other persons who do not have a direct contract with the owner, they get interest only from the date of filing the mechanic's lien. The rate of interest for all persons is the amount stated in your contract, unless illegal, or if not so stated, the legal rate. For 2002, the legal rate in Florida is 9%.

The owner's liability on a mechanic's lien is limited to the contract price, plus or minus change orders or deletions. In other words, liens are only allowed for the balance under the contract. This means that if the owner pays the general, and

this does not filter down through to the subs and suppliers, the latter are out of luck. They would have no lien rights to the extent of those payments. If the owner has paid the general in full under the contract, they would only be able to sue the persons they have a direct contract with. However, in order to limit the liens, the owner is required to pay the general contractor under strict guidelines. To qualify as a proper payment, the owner must receive from the general contractor the following when making payment:

1. Waiver and release of lien upon progress payment from all potential lienholders who have timely served a Notice to Owner.
2. An affidavit from the general contractor prior to making payment that all potential lienholders have been paid, to the extent of the payment being made at that time. In other words, the general contractor has to certify that all the subs and suppliers have been paid **before** receiving payment from the owner. In California, for example, this is found to be unreasonable and the laws were changed so that a general contractor would not have to so certify until after receiving payment from the owner. However, Florida still makes this requirement.
2. At the time of final payment to the general contractor, requiring a Waiver and Release of Lien upon Final Payment. At the same time, the owner must receive a Final Contractor's Affidavit prior to making that final payment. This affidavit lists the names of the lienholders who have not been paid and by how much. The owner, after giving the general contractor 10 days' written notice, can then pay them directly and deduct the amounts from the general contractor.

If the owner does all this, he or she cannot be liable for a lien, except to the extent there is a balance owing under the contract with the general. If the owner makes all payments under the contract and satisfies all the requirements, no liens are possible, even if the general contractor has not paid the subcontractors or suppliers. If the direct contract between the owner and general contractor is less than \$2,500, there is no entitlement to a lien.

A owner has the right to request in writing to any sub or supplier ("Request for Sworn Statement of Account") that they give a detailed statement of the services performed and to be performed and all monies owned, together with payments made to date. It is important to respond to this in writing within 30 days, or the sub/supplier will lose all lien rights. On this web site is such a form titled: "Sworn Statement of Account".

The definition of "furnishing materials" was also amended on July 01, 2007. Under the old statute, you could place a lien for the rental value of your own tools, appliances, and machinery. Under the new law, it appears you can only charge for the reasonable rental value of equipment rented from others.

You can charge a reasonable rental value for equipment for the time it is on the site, whether or not it is being used continuously. In other words, when you rent equipment you pay for the time it is on site, regardless of how often you are using it. The only exception is an owner can send the leasing company a notice to pick up the equipment and two days later the rental equipment is considered no longer in use and subject to a lien. It appears that the reason for this new law is to prevent a mechanic's lien for the rental value of equipment that has been sitting idly on the site for a substantial period of time.

***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:***

Florida has a very precise statute requiring almost anyone on the job site to request and receive important information about the payments that are being made. This can be broken down under the following categories:

Request by Owner to Sub

The owner may request that a subcontractor provide information about their contract within 30 days. If the information is not given to the owner, that person may lose their lien rights. If you receive two or more such requests from the

owner, you need only serve one response if the information has not changed. Both the request and the response is on this web site.

Request by General Contractor to Sub

Only if the general contractor has taken out a payment bond, it may request that a subcontractor provide information about their contract within 30 days. If the information is not given to the general, a sub will lose their rights to make a claim against the payment bond (but will not lose their lien rights). If you receive two or more such requests from the general, you need only serve one response if the information has not changed. Both the request and the response is on this web site.

Request by Sub to Owner

This is an important right that many subcontractors never exercise. It gives you a good opportunity to find out what is going on between the owner and general contractor, including how much and when payments have been made. This is important because many times a general contractor will indicate that payments cannot be made to a sub because payments have not been received by the owner. This “smokes out” such a statement. So, a subcontractor may request information about the owner’s contract, including the amounts and dates of all payments, the cost to complete, and the amount of the original contract, within 30 days. If the information is not given, the owner loses their right to secure attorney’s fees in any latter litigation. Both the request and the response is on this web site.

As to all these requests, if you refuse to provide the information or intentionally submit false information, you can be sued for damages. And, the receiving party has a right to rely on this information, unless they have actual knowledge to the contrary.

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 ***verified*** notice is all that is required in this state. Florida requires the lien to be ***notarized***.

Priorities:

Owners are required to record a Notice of Commencement and post a copy at the job site before the work starts (except for work done by surveyors, design professionals, or subdivision improvement contractors). This means that all liens relate back and take priority as of the date of the recording of this notice. This means that if the construction lender records its mortgage after this notice, it will be second in priority. If the mortgage is recorded before the notice, then the lender has priority. Every person's lien relates back to the date of recording of the Notice of Commencement, even if you perform your work later in the project. The only exception is that design professionals and subdivision improvers have their liens attach only when they are actually recorded. If no Notice of Commencement is recorded, the mechanics' liens attach as of the time of recording each lien.

As between lien claimants, payment is made in the following order of priority: 1) laborers; 2) all persons other than the general contractor; and 3) the general contractor. If there is not enough money to go around for everyone, persons in each class shall be paid in full before the payment to the subsequent class. If there is not enough to go around for any one class, everyone shares pro-rata based on the amount of their lien.

**Lien Release
Bond:**

The owner, or any other interested person, may apply to the court to release the mechanic's lien by filing a surety bond or a cash deposit. The bond is equal to the face amount of the lien plus three years' interest at the legal rate, plus the greater of \$1,000 or 25% of the amount of the lien for court costs. Upon the filing of the bond or deposit, the clerk will mail a copy to each person who has a mechanic's lien so you know they have been released. Note, however, that such a bond or deposit is probably better than enforcing your lien through sale of the property, because you know there is money available when you get your judgment.

**Miscellaneous
Issues:**

**Definition of
"Completion":**

All lien claimants, whether general contractors, suppliers, laborers, or subcontractors, must file their mechanic's lien within 90 days of completing their work. For this reason the

definition of “completion” is crucial. Florida defines completion as the last day contract completion work is performed. To determine that date, you should exclude “call back”, “remedial”, “punch list”, or other corrective work. For material suppliers, the last date is the last time materials were delivered to the job site. For equipment suppliers, it is the last day the rental equipment was present on the job site.

**Notice of
Commencement:**

Owners must record a Notice of Commencement **before** the job starts. Under section 713.13, a certified or notarized copy of the Notice must also be posted at the site. Why is this important? Because it contains valuable information used by a contractor or subcontractor for a pre-lien notice and mechanic’s lien. The Notice contains: a legal and common description of the property; name and address of the owner; name and address of the general contractor; name and address of the construction lender; and the person who will receive notices (optional).

This is filed with the clerk of the court. Although not required, owners can also take out a payment bond. If they do so, they must also record a copy of the bond at the same time as the Notice of Commencement. By doing this, no liens can be filed against the project, and all claims have to be against the bond.

Only the owner is entitled to sign and file this form. By statute, the general contractor is not allowed to sign this Notice. Note also that if the work does not start within 90 days of recording, the notice is void. A new notice would have to be filed with the correct commencement date.

If a payment bond has been taken out by the general contractor, a copy of that bond is recorded along with the Notice. Both the Notice and the payment bond, if any, must also be posted at the job site in the form either of a certified or notarized copy.

If the Notice is recorded prior to recording the construction loan, all mechanic’s liens will take precedence over that construction loan in the event there is a foreclosure for nonpayment.

**Claim against
The Payment
Bond:**

There is another way for subcontractors and suppliers to get paid, other than filing a mechanic's lien. The owner may require the general contractor to furnish a payment bond from a surety company. This is like an insurance policy in that a subcontractor can make a claim against the bond in lieu of a lien and get paid directly by that surety company if the claim is perfected. It's almost like someone taking out an insurance policy for your benefit. If the owner demands that it be taken out and the general contractor agrees to perform the work, such a bond is mandatory. Of course, the general contractor could always refuse to do the job. Unfortunately, such bonds are not cheap and NationalLienLaw is not aware of any statistics showing how often a general contractors take out the payment bond.

The bond is for the amount of the original contract. A copy of that bond is attached to the Notice of Commencement and is both recorded and posted at the job site so you will know of its existence. Further, the general contractor must give all subcontractors a copy of the bond if requested. You can simply write or fax the general contractor a letter requesting a copy of the bond. If this is all done, the owner prevents any mechanics' liens against his or her property so that the only claims can be against the bond.

Who can make a claim against the bond? The general contractor cannot, but all subcontractors and sub-subcontractors and suppliers can.

How is the claim made? Simply use the Notice to Owner/Notice to Contractor form. Serve it within 45 days of first furnishing your labor and materials. In other words, you already have to send out that notice anyway for your lien rights so you're simply doing two things at once. As a result, you do not need a separate notice. If the Notice of Commencement with the bond attached was not originally recorded and posted at the job site, but instead was done later, you have 45 days to serve the Notice after you were informed of the existence of that bond. Technically, Florida statutes 713.23(1)c states that only sub-subcontractors are required to serve the Notice. But to be safe, especially since it is not always easy to determine if you are a subcontractor or a sub-subcontractor, it is recommended that all subcontractors serve the Notice.

Serve the owner and general contractor only--there's no need to serve the surety company in the beginning.

If you get to the end of the job and you have not been paid, your next step is to serve a Notice of Non-payment on the general contractor **and** the surety company within 90 days of last furnishing your labor and materials. Such a Notice is available on this web site. Although it appears to only be required by sub-subcontractors (713.23(1)c), it is still recommended to be served by all subcontractors, to be safe.

The last step is bringing a lawsuit against the general contractor and the surety company within one year of last furnishing your labor and materials.

Tenant Improvement Work:

When a contractor performs work for a tenant, there is customarily a battle between the property interest of the tenant and owner-landlord. The landlord almost always takes a position the lien cannot be against his or her interest and only against the tenants. The tenant's interest would consist of the value of the lease with trade fixtures. The contractor's main goal is to be paid; if a lien can be asserted against both the tenant and landlord's interest, so much the better. Florida has attempted to mediate these conflicting interests in Code Section 713.10.

Under previous law, landlords were allowed to include a provision in their lease prohibiting liens against their interest for work done by a tenant. To do so, the landlord recorded the lease or a short form/abstract in the county recorder's office, citing that such terms expressly prohibiting the lien. The recording contained the name and address of the landlord, a legal description of the property, the actual language in the lease prohibiting such a lien, and if recorded as to all units in a shopping center, for example, a statement that the majority of leases had such a provision. That was it. If done, the contractor would not be able to place a lien against landlord's interest.

Understandably, contractors were concerned they might be dealing with insolvent tenants and without the leverage of a lien against the landlord, they might never be paid. With pressure brought to bear on the Florida legislature, there he is now a change effective January 1, 2012 under new Code Section 713.10 (3).

Now, a contractor may make written demand on the owner-landlord for a copy of the provisions of the lease which prohibit the lien. The response must be signed under penalty of perjury. If response is not made within 30 days, the landlord's interest is subject to lien, even if the lease provides otherwise.

This legislation is unsatisfactory from the contractor's standpoint. First, it requires more paperwork. Secondly, the lien is valid only if the landlord neglects to respond within 30 days. Good luck on that one. Lastly, almost any landlord receiving such a notice will make sure they comply, thereby putting everyone in

the same position they were before. Additionally, landlords will probably go even further by requiring tenants to inform contractors of the provisions of the lease. By doing so, the contractor will have “actual knowledge” of those provisions— by law, whether or not the landlord responds within 30 days, the contractor’s knowledge then prevents imposition of the lien.

One thing it does do is give more options to the contractor. If the contractor knows there can be no lien on the owner’s interest, it may decide not to enter into the contract at all, or require further security or assurance from the tenant.

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 one year after recording your mechanic’s lien unless a Notice of Contest of Lien has been filed, which shortens the time to 60 days after this Notice of Contest of Lien has been filed with the court, or within 20 days after receipt of a

summons to show cause why the lien should not be enforced by suit or vacated. The way it works is an owner may file a complaint with the court which, in turn, issues a summons to the lienholder. The summons asks the lienholder to “show cause” within 20 days why the lien should not be canceled. The lienholder either files a lawsuit to foreclose the lien within that 20-day period or files a response to the Order to Show Cause. The effect is simply to speed up the process of filing a lawsuit to foreclose the lien. You will certainly know about this because you are required to be served by the owner.

Where to File: Liens for less than \$15,000 are filed in the county court in which the project is located. Liens for \$15,000 or more are filed in the circuit court.

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 for you to represent yourself because 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.