

SUMMARY OF MECHANICS' LIEN LAW

FOR ARIZONA

With Changes for 2013

Section Contents—Pre-lien Notice(s)

- Name of Notice
- Who Must Use This Notice
- When
- How to Serve
- Verified or notarized?

Section Contents—Mechanic's Lien

- Who is Entitled to a Lien?
- When to File/Record
- Where to File/Record
- How to Serve
- Amount of Lien
- Property Subject to the Lien
- Furnishing Information
- Verified or Notarized
- Priorities
- Lien Release Bond
- Miscellaneous Issues

Section Contents—Lawsuit to Foreclose Lien

- Introduction
- When
- Where to File
- Arbitration
- Need a Lawyer?

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.

This means in this State you will be writing down dates for at least three documents: a) Preliminary 20- Day Notice; b) Mechanic's Lien; and c) 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: Preliminary 20-Day Lien Notice

**Who Must Use
this Notice:**

Unlike other states which require a Pre-Lien Notice to be served only by subcontractors and suppliers, Arizona requires all claimants, whether general, sub, supplier, or laborer, to serve the Pre-Lien Notice.

When:

See **Time Deadlines** table below. The Pre-Lien Notice must be served no later than 20 days after the claimant has first furnished labor, services, materials, machinery, fixtures, or tools to the project. Remember, there is no such thing as a premature Pre-Lien Notice, so it is recommended you send these out early. One way is to simply send them out as soon as you have your contract signed, so you do not forget. If you

do forget, you can always serve the Pre-Lien Notice late, but you get a Mechanic's Lien only for the labor and materials furnished for the 20 days immediately before sending out the Pre-Lien Notice and for labor and materials furnished thereafter.

How to Serve: By mail. There is some uncertainty in the wording of the statute. It states that the Notice may be served: "by first class mail with certificate of mailing, registered or certified mail, addressed to the person . . ." Does this mean you have to serve by two mailings, including first class mail with a certificate of mailing and certified? Probably not, since this would be the only state in the nation requiring double mailings. The better interpretation is that you have the option of **either** certified mail or first class mail with a certificate of mailing. One of the benefits of the latter form of service is that no one can refuse it because the mail is delivered even though the recipient does not sign for it. Arizona law also requires that after you serve the Notice, you get a "Proof of Service". This comes either from a signature of acknowledgment by the addressee (the person you sent the Notice to) at the bottom of the Pre-Lien form or a separate Proof of Service that you sign showing that you did the proper mailing. Service by this form of mailing is considered complete as of the date of mailing.

The Notice must be in writing. State law pre-determines its content and you must include certain mandatory language.

You are required to serve the general contractor, owner, and construction lender.

You can make an estimate of the amount of your contract to be inserted in the Pre-Lien Notice and you are protected up to 120% of the amount. If your services exceed that amount, you must file a supplemental Notice. This is the only state that has such a requirement and it can be quite a nuisance at times. For example, it is not uncommon to have change orders during the course of construction which exceeded that percentage. Unfortunately, you must re-serve a new Notice as soon after as possible. Use the Supplemental Preliminary Notice on this site.

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 covers design professionals, such as architects, engineers, and surveyors. For these design professionals to qualify, they must have a written agreement with the owner or a written or oral contract with the architect, who in turn has a written agreement with the owner. The person performing hauling services is entitled to a lien, but this does not apply to a common carrier. A person furnishing groceries used to feed miners may also file a lien. One furnishing machinery to a job site is entitled to a Mechanic's Lien if it becomes a permanent part of the construction, but not if it is simply machinery on a "standby basis" which does not permanently improve the property. A lien is also allowed for rental equipment supplied to construction or mining projects. Other specialized companies are also entitled to a lien, including hoisting companies, work on domestic vessels, cutting wood, logs, or ties, constructing waterways, excavations, and work on mines.

Material or equipment suppliers who have a contract with another supplier are not entitled to a lien. Obviously, unlicensed contractors do not receive a Mechanic's Lien. Further, a design professional must also have a Certificate of Registration and be properly licensed to receive a lien.

When to File/Record:

See **Time Deadlines** table.

Where to File/Record:

County Recorder of the county in which some or all of the property being constructed is located.

How to Serve:

Within a reasonable time after recording the Mechanic's Lien, the owner of the property must be served with the lien. It is recommended the service be in the same manner as with the Pre-Lien Notice.

Amount of Lien:

Primarily for unpaid labor, material, and equipment supplied. If you have a contract directly with the owner, your lien can be for the entire unpaid amount under the contract, with change orders, and is not necessarily limited to the reasonable value of

the work performed. If you do not have a direct contract with the owner, you are only entitled to a lien for the “reasonable value” of your construction services. However, the amount of your contract is presumed to be evidence of the reasonableness of value. The definition of “reasonable value” is usually the amount another contractor would charge for similar work, with profit and overhead. You cannot include in your lien future profits for unperformed work. In other words, this would apply if you terminated wrongfully from the job and lost your profits for the balance of that job.

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

A mechanic’s lien applies only to private projects. No lien is allowed in public projects against government property. As to residential, “owner-occupied” property, there is no lien unless there is a written contract directly with the general and homeowner. If you are a sub or a supplier, inquire as to whether there is such a written contract before performing construction services. Liens also apply to the interest of a tenant. However, there is no lien against the owner’s interest if you have a contract with the tenant, unless the tenant is required, under the terms of the lease, to make the improvements.

***Tenant
Improvement:***

For those contractors and suppliers who have a contract directly with a tenant, the recurring question is whether you can record mechanics’ lien against both the tenant’s interest in trade fixtures as well as the actual real estate owned by the owner. Arizona Revised Statutes Section 33-981(A) answers the question by stating the lien may be against the owner’s interest when work is performed or materials furnished at the request (i.e. at the person’s “instance”) of the owner or its agent. In other words, if the landlord directs or requires the work to be done, his or her property can be subject to a mechanic’s lien. Note that the landlord’s mere knowledge or acquiescence is not sufficient.

This was clarified in the recent case of *Wang Electric Inc. vs. Smoke Tree Resort, LLC* (Arizona Court of Appeals, July 13, 2012). The landlord both required and approved the tenant improvement work. It then claimed it was not subject to a lien, because the lease had a provision indicating no mechanics lien could be recorded against the landlord’s interest. The court held that such a provision would not pre-empt the landlord’s authorization to do the work, thereby making the tenant an

agent of the landlord.

**Furnishing
Information:**

The owner who receives either a Preliminary 20-Day Notice or a written request of a person intending to file such Notice must (Arizona Code Section 33-992.01 (I)), within 10 days after receipt, give that person a written statement containing accurate information as to the project, including the identification of the owner, the general contractor, and construction lender. This website has a form titled: "Arizona Request For Lien Information" which can be used to make that request.

This is an excellent way of securing that needed information. Many times, a subcontractor simply does not have enough information to fill out the notice. This requires the owner to furnish this information rather quickly.

It also gives you a way to verify the information in the Notice that you send out. If there are any inaccuracies, the owner must, within ten days of receipt, inform you of the correct information. You then have 30 days to send out a Supplemental Preliminary Notice.

**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.

Priorities:

A Mechanic's Lien attaches at the time construction service are **first** furnished by any person on the project. All liens arising under a single contract relate back to the time that first person performed work, and therefore, all lien claimants have equal priority. A construction lender has priority over the Mechanics' Lien claimants if it records its mortgage within 10 days after the commencement of the construction. If it is not done, the Mechanics' Liens have priority over that construction lender.

**Lien Release
Bond:**

A Mechanic's Lien will be discharged from the property upon the recording of a surety bond equal to 1½ times the amount of the lien.

Prompt Pay Law

As of January 1, 2012, under Senate Bill 1375, there are a number of changes relating to prompt payment.

Definitions:

Final completion. The earlier of: 1) completion of all terms of the general contractor's agreement with the owner or 2) finalization of the building inspection permit.

Substantial completion. The earlier of 1) when the owner can use and occupy the property for its intended purpose (whether actually occupied or not) or 2) filing of the certificate of occupancy.

What Kinds of Projects?

These new rules as to progress draws, final payment, and retention, apply to all commercial and industrial projects. They also apply to a residential project, but only if the following provision appears on the front page of any billing or estimate in clear and conspicuous type between the general contractor and owner:

“NOTICE TO OWNER OF APPLICABILITY OF ARIZONA PROMPT PAY ACT (NOTICE REQUIRED BY ARIZONA REVISED STATUTES SECTION 32-1129.07)

ATTENTION: YOUR OBLIGATIONS TO PAY YOUR CONTRACTOR ARE SUBJECT TO THE ARIZONA PROMPT PAY ACT. THAT ACT IS SET FORTH IN SECTION 32-1129, ARIZONA REVISED STATUTES, AND SECTIONS 32-1129.01 THROUGH 32-1129.07, ARIZONA REVISED STATUTES. THE FULL TEXT OF THE STATUTES ARE AVAILABLE AT YOUR LOCAL PUBLIC LAW LIBRARY OR THE INTERNET. UNDER THAT ACT, YOU HAVE THE RIGHT TO WITHHOLD ALL OR A PORTION OF A PAYMENT TO A CONTRACTOR FOR A VARIETY OF REASONS, INCLUDING DEFECTIVE CONSTRUCTION WORK THAT HAS NOT BEEN CORRECTED. HOWEVER, IN ORDER TO DO SO, YOU MUST ISSUE A WRITTEN STATEMENT SETTING FORTH IN REASONABLE DETAIL YOUR REASONS FOR WITHHOLDING PAYMENTS WITHIN FOURTEEN (14) DAYS AFTER THE DATE YOU RECEIVE A BILLING OR ESTIMATE. IF YOU FAIL TO ISSUE THE WRITTEN STATEMENT WITHIN THAT PERIOD, THE BILLING OR ESTIMATE WILL BE DEEMED APPROVED. ONCE THE BILLING OR ESTIMATE IS DEEMED APPROVED, YOU MUST PAY THE BILLING OR ESTIMATE WITHIN SEVEN (7) DAYS. GENERALLY, YOU ARE LIMITED BY THE ACT TO WITHHOLDING ONLY AN AMOUNT THAT IS SUFFICIENT TO PAY THE DIRECT COSTS AND EXPENSES YOU REASONABLY EXPECT TO INCUR TO PROTECT YOU FROM LOSS FOR WHICH THE CONTRACTOR IS RESPONSIBLE. YOU ARE ENCOURAGED TO READ THE ACT IN FULL TO KNOW YOUR OBLIGATIONS AND RIGHTS. B. FOR THE PURPOSES OF THIS SECTION, "DWELLING" AND "OWNER-

OCCUPANT" HAVE THE SAME MEANINGS PRESCRIBED IN SECTION 33-100."

General Contractors

Progress Payments:

Under Code Section 32-1129.01, unless the billing cycle is changed, statements are submitted on a 30 day cycle. The general submits a "timely" (meaning shortly after the completion of the billing cycle) bill to the owner. The owner then must pay the general within 7 days of receipt and after finding the bill to be "approved and certified."

When is a bill considered approved? Automatically within 14 days after the owner receives a billing, if there is no objection. If there is an objection, the owner must submit a written statement with "reasonable detail" outlining the reasons for not approving the bill, which may include the following (32-1129.01(D)):

1. Unsatisfactory job progress,
2. Defective construction work or materials not remedied,
3. Disputed work or materials,
4. Failure to comply with other material provisions of the construction contract,
5. Third party claims filed or reasonable evidence that a claim will be filed,
6. Failure of the contractor or a subcontractor to make timely payments for labor, equipment and materials ,
7. Damage to the owner, or
8. Reasonable evidence that the construction contract cannot be completed for the unpaid balance of the construction contract sum. or a reasonable amount for retention. The owner is deemed to have received the billing or estimate when the billing or estimate is submitted to any person designated by the owner for the receipt of these submissions or for review or approval of the billing or estimate.

How much can the owner withhold? Only the "direct costs and expenses" incurred as a result of the alleged failure to perform (32-1129.01(E)). There can no longer be withholding for some undefined reason or as an overkill. For example, if the progress draw is \$10,000 and the actual cost to repair defects is \$2,000, the sum of \$8,000.00 must be remitted.

Final Payment:

Within 7 days of receipt of the general contractor's final and approved billing, final payment must be made. The same rules as to the definition of "approval" and how much can be withheld, as described above, apply.

Retention:

Within 7 days of substantial completion, the owner must pay the general contractor the agreed-upon retention. The only exception is if the owner objects to the dispersal of the retention as follows:

Whole Retention Withheld: Only if there is a failure of the general contractor to “complete a material requirement of the construction contract “. This must be something that is major and significant.

Partial retention withheld: The owner can only withhold 1½ times the direct costs and expenses allegedly required to remedy any defects. The balance must be remitted to the general contractor.

The general contractor may submit a supplemental bill if any reason given by the owner for nonpayment “has been removed”.

Subcontractors and Suppliers

Progress Payments:

The sub or supplier submits a “timely” (meaning shortly after the completion of the billing cycle) bill to the general contractor. The general will then pay the sub within 7 days of receipt and finding the bill to be “approved and certified.” The same rules as to the definition of approval and what may be withheld, applicable between the owner the general contractor, apply here.

As an additional ground for withholding, the general contractor may do so if payment has been withheld from the owner. But only for the exact amount or percentage withheld by that owner. So, the general must make payment to the subs as to any portions not objected to by the owner. Hence, the general cannot withhold all monies to the sub just because there has been a partial objection by the owner.

Final Payment:

Within 7 days of receipt of the sub’s final and approved billing, final payment must be made. The same rules as to the definition of “approval” and how much can be withheld, as described above, apply. The general contractor must also send within 7 days a copy of any written objections made by the owner in not paying the general contractor.

Retention:

Within 7 days of substantial completion, the general

contractor must pay the subs the agreed-upon retention. The same rules above as to what constitutes approval and what can and cannot be withheld between the owner and general contractor generally apply.

Extended Payment

As seen above, progress, final, and retention payments and must be paid within 7 days of billing or completion. But there is an exception, although it is hard to achieve. There can be extended payment provisions, for example 14 days instead of 7, only if:

1. The contract specifies a different payment date in clear and conspicuous language, and
2. A legend, also in clear conspicuous type, is inserted on each page of the plans, working drawings, or bids and states:

“Notice of Extended Payment Provision

This contract allows the owner to make payment within ____ days after certification and approval of billings and estimates FOR PROGRESS PAYMENTS, WITHIN ____ DAYS AFTER CERTIFICATION AND APPROVAL OF BILLINGS AND ESTIMATES FOR RELEASE OF RETENTION AND WITHIN ____ DAYS AFTER CERTIFICATION AND APPROVAL OF BILLINGS AND ESTIMATES FOR FINAL PAYMENT.”

Alternate Billing Cycle

The “default” billing cycle for construction contracts in this state is every 30 days. If this is to be changed, there must be provisions in the written contract and the following legends (choose one) in clear and conspicuous type must appear on each page of the plans, working drawings, or bids:

“(Option 1) Notice of Alternate Billing Cycle

This contract allows the owner to require the submission of billings or estimates in billing cycles other than thirty days. Billings or estimates for this contract shall be submitted as follows:

(Option 2)
Notice of Alternate Billing Cycle

This contract allows the owner to require the submission of billings or estimates in billing cycles other than thirty days. A written description of such other billing cycle applicable to the project is available from the owner or the owner's designated agent at (telephone number or address, or both), and the owner or its designated agent shall provide this written description on request."

**Condos and
Subdivisions:**

The time period for filing a Mechanic's Lien runs from the time each unit in a subdivision is finished, as opposed to after the time in which the overall project is completed.

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: Six months after recordation of the Mechanic's Lien.

Where to File: In the courts of 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 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.
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.