

MONTANA MECHANIC'S LIEN LAW 2018-2019

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Questions?

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General Notes

Be Careful: The courts consider a Montana 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 Montana you will be writing down dates for at least three documents: a) Notice of Right to Claim a Lien; b) Construction 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

Montana 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 of the Right to Claim a Lien.

Who Must Use this Notice: All Montana contractors, subcontractors, and material/equipment suppliers who **do not** have a direct contract with the owner or the owner's agent. Therefore, it is

required primarily for subcontractors on owner-occupied residential projects. 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. Here is a summary:

When the Notice is Not Required

- General contractors with a direct contract with the owner as to all kinds of projects--residential and commercial.
- Wage earners (employees of a contractor) or laborers.
- Commercial or industrial projects.
- Large multi-use dwellings (for example apartment buildings) that have five or more families.

When the Notice is Required

- Subcontractors and suppliers with no direct contract with the owner for a residential dwelling occupied by one to four families (for example a single family residence, duplex, triplex, and quadraplex).

When:

See the **Montana Time Deadlines** table. As to when the notice must be served, this depends on whether the owner has secured financing by taking a loan with a construction lender and whether the property is residential. For simplicity, the rules can be broken down as follows:

- (a) **OWNER-OCCUPIED RESIDENTIAL PROPERTY:** Subs and suppliers serve the prelien notice within 20 days of the date you first furnished labor or materials, whether or not there is a Construction Lender. An example would be a single family occupied residence.
- (b) **RESIDENTIAL PROPERTY OF ONE TO FOUR UNITS THAT IS NOT OWNER-OCCUPIED AND HAS A CONSTRUCTION LENDER:** Subs and suppliers serve the prelien notice within 45 days after first furnishing labor and materials. An example would

be new construction of a duplex which is not yet owner occupied by a family.

(c) **RESIDENTIAL PROPERTY OF ONE TO FOUR UNITS THAT IS NOT OWNER-OCCUPIED AND DOES NOT HAVE A CONSTRUCTION LENDER:**

Subs and suppliers serve the prelien notice within 20 days after first furnishing labor and materials.

It is recommended you send out the Montana prelien notices as soon as your contract is signed. This gets it out of the way and prevents you or your staff from neglecting to send it out in a timely manner. However, if you do send it out too late, you do not lose your lien rights. But, your mechanic's lien will only be good for the unpaid labor and services furnished within the 20- or 45-day period before service of the Notice, and everything in the future.

How to Serve:

Serve the owner by Certified Mail, Return Receipt Requested. The notice by Certified Mail is effective on the day it is mailed.

Serving the Montana prelien notice is a two-step process. The first step is to serve the owner. The second step is to file a copy with the Clerk and Recorder of the county in which the project is located within five days of serving the owner. For simplicity, you can file and serve the owner on the same day.

The Notice of Right to Claim a Lien is good for one year after filing. You can renew it for another one-year period by recording a Continuance of the Right to Claim a Lien in the Clerk and Recorder's office. However, there is really no reason to do so--file your lien well before that extension date to speed-up collection.

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. A prelien notice does not have to be ***verified*** or ***notarized***.

MONTANA MECHANIC'S LIENS

Name of Lien: Montana Construction Lien.

Who is Entitled to a Lien:

A mechanic's lien in Montana is primarily for general contractors, subcontractors, laborers, as well as material/equipment suppliers. But it also covers architects, engineers, and surveyors. Most states require that actual work be commenced before these design professionals get a lien, but not so in Montana. For example, an architect will get a lien for the mere preparation of plans even though the project never breaks ground. A lien is also allowed for such services as excavation, fill, grading, demolition, repair and removal of a structure, seeding, sodding, landscape operations, as well as surface or subsurface testing, boring, or soil analysis.

The following services are excluded for purposes of a lien: (a) mining or a contract for the removal of timber, gravel, soil, or things growing upon the land; (b) planting, cultivation, or harvesting of crops or the preparation of the soil for the planting of crops; and (c) removing materials from the site for sale. For example, services in the removal of gravel from a pit would not entitle one to a lien if this material is sold off-site.

When to File/Record:

See **Montana Time Deadlines** table.

Montana is one of the very few states in which there is a danger of filing a premature lien. In most states you can file a lien at any time after there is a balance due. But, in Montana, the lien will be invalid if it is filed before the claimant has "substantially furnished" the labor and materials that has been unpaid. The only exception is if someone wrongfully terminates your contract before that time. As you may imagine, this is fraught with difficulty because it is hard to define "substantial completion". A number of contractors have been trapped because of this technicality. On the other hand, there is no reason to unduly delay the filing--it is recommended that you file your lien within approximately 30 days of your completion.

Where to File/Record:

File with the County Clerk and Recorder of the county in which the project is located.

How to Serve: Serve each owner of record after filing and recording by Certified Mail, Return Receipt Requested. When you file the lien, you must certify to the County Clerk and Recorder that you have sent a copy to the owners.

Amount of Lien: Primarily for unpaid labor, material, and equipment supplied. There are special rules as to material and equipment suppliers. A Montana lien is valid only if the materials were intended to be used and incorporated into the project. The intent is shown either by a purchase order, delivery tag, bill of lading, or other evidence. There is also the requirement that the materials be used or incorporated into the improvements, including:

- A. Incorporated or consumed as normal wastage in construction operations.
- B. Specifically fabricated for incorporation into the project and not readily re-useable, even though not actually incorporated; or
- C. Used for construction or for operation of machinery used in construction and not remaining in the improvement, subject to deduction for the salvage value of the materials. Thankfully, delivery of the materials to the job site is presumed evidence that they were incorporated.

Your Montana mechanic's lien will be reduced by liens filed by other persons with whom you have contracted. So, if you are a general contractor and there are liens outstanding by subcontractors, your lien will be reduced proportionally unless these are paid-off.

Property Subject to the Lien: A Montana mechanic's lien applies only to private projects. No lien is allowed in public projects against government property.

If you have a contract with a tenant, you can attach the tenant's rights to the lease and even remove trade fixtures. There is a special rule in Montana that if property can be removed without material damage, the lien can be

foreclosed on that removable property as long as it is taken off the property within 45 days of the foreclosure sale. The landlord's interest will not be subject to the lien unless he or she entered into a contract for the improvements (personally or through an agent) or agreed to the improvements before they began.

***Furnishing
Information:***

If you are a sub or supplier, you can request the general to give you the information to fill out your prelien notice. This must be furnished within five days of your request.

Priorities:

Among the various Montana lien claimants, there is equal priority, regardless of when the services were performed or who filed the lien first. If the proceeds upon foreclosure are insufficient to pay everyone, there is a sharing pro-rata based upon the amount of each lien in relationship to the overall proceeds. In other words, everyone's lien, regardless of when it is filed, attaches when the first work is done to the property by any contractor. The exception is to architects, engineers, and surveyors. Their lien does not relate back to the date on which the project commences, but on the date they file their lien. For this reason, these design professionals should file their liens as soon as possible.

Between the mechanics' liens and the construction mortgage, most states give priority to the construction lender if they record their mortgage before the work commences. Not so in Montana. Under the theory that the construction adds value to the property, a mechanic's lien takes priority over such construction lenders regardless of when the mortgage is recorded.

As to other mortgages, liens, or encumbrances on the property, the mechanic's lien takes priority if the work was commenced before the recording of that interest. If it is recorded before the work begins, such lien holder would have priority.

***Lien Release
Bond:***

A Montana lien may be released by the owner on filing with the Clerk of the District Court a surety bond for 1-1/2 times the amount of the lien. This can either be in the form of a corporate surety bond or a cash deposit. You then continue

with your lien foreclosure action, and if you are successful, there will be recovery against the bond.

***Miscellaneous
Issues:***

***Definition of
Completion:***

Since a lien claimant only has 90 days after completion to file a lien, the definition of completion is crucial. Montana does not have any set rules as to that definition. For example, many states do not allow the time to extend because of call-back, warranty, or punch list work. Montana is different and, apparently, does allow the extension for any work which increases or enhances the value of the construction. But, the courts are not stupid. If you go back and do work just to extend the time frame to extend your lien, this will be disallowed by the court.

***Lien for Supplies or
Materials Furnished:***

If you are a Montana material supplier, you are entitled to a lien only for materials that are actually used and incorporated into the work of improvement under Montana Section 71-3-524. In other words, it is not enough merely to show delivery to the site. You would further have the obligation to show those materials have become part of the improvements, and were used for that purpose.

The other way to impose a lien is if the materials become part of the “normal wastage in construction operations”. So for example, if you supply lumber for the concrete form work on the foundations, obviously the lumber is not incorporated into the concrete foundations, but is used-up or wasted in the process.

A material supplier can also receive a lien for specially fabricated material that is not re-salable in the ordinary course of your business. This would apply even if the materials are not actually incorporated into the improvement.

Even fuel, lubricants and other such material can be the subject of a mechanic’s lien if they are used-up by the machinery at the site.

A Montana lien will apply for tools only if they were “purchased for use in the course of the particular improvement and have no substantial value after the completion of the improvement in which they were

used.” In other words, if you have a hammers and saws that are used up on the project, you cannot include this in your lien unless you had purchased them specifically for the project. Frankly, this makes little sense, because if those tools were used up, why wouldn't they be included, even if theoretically they could have been used on other projects?

LAWSUIT TO FORECLOSE LIEN

Introduction: Your Montana 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: File your lawsuit within two years of the filing of the construction lien.

Arbitration: Many Montana 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.

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Thank you for your business.