

SOUTH DAKOTA MECHANIC'S LIEN LAW 2018-2019

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Questions?

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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 South Dakota you will be writing down dates for at least four documents: a) Notice of Project Commencement; b) Notice of Furnishing Labor or Materials; c) Mechanic's Lien; and d) the 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 (Sub-Subcontractors or Suppliers to a Subcontractor Only)

There are circumstances in which a sub-subcontractor or supplier to a subcontractor is required to file a prelien notice before the actual recordation of the mechanic's lien. The basic information on this notice is as follows:

Name of Notice: Notice of Furnishing Labor or Materials

When is this

Notice Required? This South Dakota notice is required *only* if the prime contractor has filed a Notice of Project Commencement, with the Registrar of Deeds of the County in which the project is located. You will know this has been done because the general contractor must also post the job site with a notice that this has been recorded. The notice at the job site is titled, "Location Notice". Unless there is both a recording of the Notice of Project Commencement and the posting of the Location Notice, there is no requirement to give this prelien notice.

**Who Must Use
this Notice:**

With most states, all subcontractors and suppliers, of whatever tier, are required to give a prelien notice. The rule is different in South Dakota in that only a sub-subcontractor or supplier to a subcontractor is required to give such a prelien notice. And, this is required only if the prime contractor has recorded the Notice of Project Commencement and posted the job site with the Location Notice. If such posting and recording is done, the failure to serve the prelien notice will prevent the later recording and enforcement of a mechanic's lien.

When: See **Time Deadlines** table. Within 60 days of your last furnishing labor and materials to the project.

How to Serve: Serve by certified mail, return receipt requested. Serve both the prime contractor who recorded and posted the Notice of Project Commencement as well as the owner of record.

**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. The notice need only be signed and does not have to be **verified** or **notarized**.

NOTICE OF PROJECT COMMENCEMENT

**When is this
Notice
Required?:**

This notice, titled, "Notice of Project Commencement", is not required but is recommended to be used by all general contractors. It is simply a notice which informs persons who work on the project that the work has begun. The owner and general contractor do not always know everyone who is working on the project, especially sub-subcontractors as well as suppliers to subcontractors. This forces them to notify the owner and general of their existence and how they much they are charging. Once the owner and general contractor know of these facts, they can take steps to prevent the filing of a mechanic's lien by these persons.

As a sub or supplier, you will not be served with a copy of the Notice of Project Commencement. But, you can go to the courthouse and pull a copy of it from the Registrar of Deeds. You will know it is recorded when you see the Location Notice posted at the site. It has important information about the project, including the name and address of the owner. That latter information is needed to fill out your prelien notice.

**How and When
To Serve:**

The notice must be filed with the South Dakota Registrar of Deeds within 30 days after starting the project. Additionally, a Location Notice must be posted at the job site stating that the general has filed such a Notice of Project Commencement with the county. There are no additional requirements of service, since the posting of the notice at the job site is deemed sufficient notification.

The effect of this notice is to force a sub-subcontractor or supplier to a subcontractor to serve the general and the owner a Notice of Furnishing Labor or Materials within 60 days of that company's furnishing the last of the work or materials to 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. The notice need only be signed and does not have to be **verified** or **notarized**.

SOUTH DAKOTA MECHANIC'S LIENS

***Who is Entitled
to a Lien:***

A South Dakota mechanic's lien is primarily for general contractors, subcontractors, laborers, as well as material/equipment suppliers. But it also covers companies that furnish light, power, and water; services on mining claims, oil or gas wells, or a spring; as well as services relative to construction for a railway, telegraph, telephone, electric light, or power line. Broadly speaking, it applies to companies or firms that provide construction services for a wide range of erection, alteration, repair, or removal of any building, bridge, fence, ditch, drain, reservoir, sidewalk, curb, gutter, paving, sewer, pipe, conduit, as well as grading and excavating.

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

See **Time Deadlines** table. Within 120 days after the last labor or materials are furnished for the overall project. 120 days begins to run upon completion of the overall project, and not the individual lien claimant's portion of the work. Thus, as long as there is some work being carried on to meet the requirements of the contract, the time does not begin to run. However, warranty or punch list items, which merely re-do what has already been installed, will not extend the time period. Nor will periodic testing or service calls extend the time.

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

Registrar of Deeds of the county in which the property is located. For construction on railways, telephone, telegraph, electric, light, or power lines, the mechanic's lien should be filed with the Secretary of State.

How to Serve:

Under South Dakota statutes 44-9-17, prior to recording the mechanic's lien, the lien claimant should serve the owner, by Certified Mail, Return Receipt Requested, with a copy of that lien. The statute simply states "before" the lien is filed. Apparently this is an effort to notify the owner before recording, but this is mere wish fulfillment. By the time the owner gets a copy in the mail, the lien has already been recorded. Does this literally mean the day before? Apparently so.

In turn, a copy of the Post Office receipt for such mailing is to be attached to the Lien Statement when filed in the office of the Registrar of Deeds.

Itemization of Lien

Caution. Important note. With most states, you can get away with stating the unpaid balance with a brief description of the labor and materials furnished. Not South Dakota. It has strict rules in requiring a **detailed itemization** of the amount of lien.

A good example is the recent case of *Dakota Craft, Inc. v. Gary Severson* (South Dakota Supreme Court 7-09). Another example of how courts don't have a clue as to how an actual construction project is conducted. Citing previous cases, it held there must be the following excruciatingly detailed information set out in the lien: 1) inclusive dates of a conferring labor and materials, 2) a full description of the labor or services performed, 3) a full description of all materials and equipment rental items, 4) the cost of the labor and materials, as well as 5) labor hours and labor rates. Finding this information was missing as to some segments, it struck down large portions of the mechanic's lien.

The reasoning is that the owner must be appraised of exactly what was performed and for how much, so they can evaluate the South Dakota lien and decide whether payments is to be made. Are you serious? Especially as to larger projects, the owner has already been appraised of these facts, through the plans, specifications, contract documents, attachments, and detailed itemize billings. Why penalize the contractor if this has to be re-stated all over again in the lien?

For example, the court found the following description to be insufficient: "Brick, mortar, sand, and freight for \$1,252.06." It apparently wished the contractor to itemize exactly how many bricks and sacks of mortar. It did carve out an exception if you are constructing an "entire project" in which it was not required to itemize labor and materials. But that is exactly what happens every time you enter into a lump sum contract, as opposed to time-and-materials or cost-plus. Those contracts do not require itemization and frankly, it is confidential the labor classifications, hourly rates, raw cost, and profit and overhead.

The lesson? Even though it makes little sense, it is best to fall in line and itemize as much as you can. It is recommended you seek legal advice as to each specific case.

Recommendation? On larger jobs, it is highly recommended you have either a Schedule of Values attached your contract or a job cost ledger. And, make your invoices as detailed as possible. When it comes time to file your lien, you can simply "cut and paste" that data as an attachment to the lien.

**Amount of
Lien:**

Primarily for unpaid labor, material, and equipment supplied. The lien also includes 10% simple interest payable from and after the date of filing the mechanic's lien.

**Property
Subject to
the Lien:**

A South Dakota mechanic's lien applies only to private projects. No lien is allowed in public projects against government property. The lien not only attaches to the real estate (dirt) as well as the improvements, but also against the funds available for payment. For example, a mechanic's lien by a subcontractor will have the effect of attaching the funds that would normally be paid from the owner to the general contractor. Note also that non-profit or charitable organizations are also subject to such a lien.

**Tenant Improvement
Work:**

If you perform tenant improvement work, realize under South Dakota Section 44-9-4, the landlord--owner may post in a conspicuous place on the premises (and keep it so posted) a Notice of Non-Liability within 5 days of knowledge of the construction. If so posted, the landlord's property interest will not be subject to the mechanic's lien.

Does that mean if the landlord does not do the posting or does it late, a lien may be filed against his or her interest? The statute is silent on this point. But remember, Section 44-9-2 is very strict in stating there will be no liens on an owner's property for tenant work.

**An Owner Can Pay
A Sub Directly:**

Many states have case law to the effect that when a subcontractor/supplier files a lien, the owner can withhold amounts to satisfy it from the balance owed the general contractor. In this State it is codified by statute (44-9-11). It states if a subcontractor files a lien, the owner then notifies the general and if that person does not dispute it in writing within 15 days, the owner can pay the sub directly and deduct it from moneys owed the general. Obviously, the

dispute would have to be in good faith and not simply a way to get around paying the sub.

Awfully vague. It is unfortunate the statute does not go further. For example, specify that a dispute must be itemized and specific as to any back charges and then only 150% of the disputed amount can be withheld with the balance paid to the sub-- which is industry standard.

***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*** lien is all that is required.

Priorities:

In relationship to other mortgages, judgments, or encumbrances, especially a construction lender, mechanics' liens take priority from the day on which the first actual and visible construction is performed on the property. If a construction lender records a mortgage after that date, it will be second in priority to any mechanics' liens which may be recorded. But, the work has to manifest some visible showing, such as grading, demolition, etc. If work actually is begun but it is not visible, the construction lender will have priority, even if it is recorded after the work begins. However, there is an exception in South Dakota which is greatly to the benefit of contractors or suppliers. A general, sub, or supplier may record with the Registrar of Deeds a Notice of Lien for Improvements\Notice of Contract which, in essence, states that a contract has been entered into for construction services prior to any visible work being commenced and if done, mechanics' liens will have priority over that lender's mortgage. This is a complicated area and you should seek competent legal advice if you have any further questions.

Lien Release:

Once a contractor/supplier has been paid, within 10 days after written demand from the owner, that person must release the lien. If not, you will be liable for all damages,

costs, expenses, and attorneys fees incurred, plus the sum of \$100.00.

Lien Release

Bond:

The owner, or any interested party, may remove a lien by filing an affidavit together with a bond for not less than twice the amount of the South Dakota lien. The bond is usually issued by a corporate surety company. Although the lien is removed from the record, the lien claimant will still proceed against the bonding company to prove it's claim.

Lien Waiver:

It is common in the construction industry for generals, subs, and suppliers to waive their lien rights in exchange for receiving a progress draw or a final payment. These lien waivers are usually signed before or at the same as receiving that payment. However, there are a multitude of problems that result, especially if one signs such a waiver and does not ultimately get paid. If an innocent third party relies upon the waiver, they might very well be able to insist it is effective, even if that payment had not been made.

South Dakota has come up with a good solution. For such a waiver to take effect, two things must happen: (1) a joint check be issued and signed by the joint payees; and (2) a separate lien waiver agreement signed. Unless both take place, the waiver is not effective. And, there is a further requirement that the back of the check state: (1) there is a separate waiver agreement to be signed; and (2) inconspicuous wording, that signing the joint check will amount to a waiver of a mechanic's lien claim.

But beware: if you sign the lien waiver and the joint check under the promise that the other payee will in turn, pay you, but this never occurs, you are out of luck. For this reason it is a good idea to go to the drawing bank and have two counter checks issued for the payees after the bank officer verifies there are sufficient funds.

WARNING: There is a separate law as to lien waivers for general contractors. Their lien rights can be waived even without such a separate waiver agreement or joint check. It can be waived simply by signing some form, document, or addendum after entering into the contract with the owner. Be careful what you sign.

Diversion: Under Section 44-9-13, any general contractor, subcontractor, or supplier who receives construction funds but, in turn, does not pay other industry professionals that are owed money because of a contract with them, for amounts over \$500, can be guilty of theft. However, there is no such violation if the withholding is made pending normal completion of the project.

LAWSUIT TO FORECLOSE SOUTH DAKOTA LIEN

Introduction: Your South Dakota 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: South Dakota has an extremely long statute of limitations. A lawsuit to enforce the lien can be brought within 6 years of the date on which the last labor or materials included in the Lien Claim were performed.

However, this almost never happens. The owner of the property can force the lien foreclosure lawsuit by making written demand ("Notice to Commence Suit and Force Mechanic's Lien") upon the lien holder. The lien holder must start the lawsuit within 30 days after notice or forfeit it's lien.

If the owner serves a written request ("Owner's Demand for Lien Amounts") to a lien claimant to furnish an itemized account of the mechanic's lien, the lien holder must hold-off suing to enforce until 10 days after such statement is furnished by the lien claimant. But, the owner's request must be made within 15 days after completion of the contract or it need not be honored.

Where to File: The Circuit Court of the county in which the project 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 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.

Prepared by:



Thank you for your business.