



THE GREEN LAW GROUP
ATTORNEYS AT LAW

Construction, Business, Bankruptcy, & Employment Law Basics

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Knowledge is Power

“Ignorance of the Law Excuses No One”

The attorneys at The Green Law Group, LLP practice primarily in the areas of **construction**, **business**, **employment**, **bankruptcy**, and **real estate** law.

Please send your questions regarding this presentation to Scott Green at scott@thegreenlawgroup.com



FAIR WARNING

- ❑ The information contained in this presentation is **not** legal advice.
- ❑ The law changes constantly with new statutes and court rulings.
- ❑ For legal advice regarding California law and the facts of your particular case, consult with an attorney who has substantial experience in your area of concern.

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The Green Law Group, LLP

- ❑ Our first priority is to help our clients avoid legal pitfalls. We put this priority into action by sharing critical information about changes in the law with our clients and learning as much as we can about our clients' business operations because the more we know, the more we can help.
- ❑ When legal disputes can't be avoided, we work with our clients to develop a strategy to achieve their goals. We also encourage our clients to be proactive, to ask questions and stay fully engaged in the handling of their case until the matter is resolved because we know that the successful resolution of any legal dispute requires transparency and close collaboration with our clients.

The Green Law Group, LLP

One of the ways in which our firm is different than most is that we make the legal process more transparent and efficient by providing our clients with regular status reports, detailed descriptions of the work we perform, and electronic copies of all the documents we prepare for our clients or receive from others pertaining to our clients' matters. We also encourage our clients to be proactive by inviting their input in the handling of their cases and ensuring that they have the information they need to make informed business decisions regarding the management of their legal affairs.

Please visit our website at
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About Our Attorneys



Scott Green, Managing Partner

Scott is the founder and managing partner of The Green Law Group, LLP, the founder and CEO of Easy Law Construction Notices, a former member of the Board of Directors for the Tri-County District of the Associated General Contractors of California, the past president of the Moorpark Chamber of Commerce, a former member of the Advisory Board for the Boys and Girls Club of Moorpark, a member of the Ventura County Contractors Association and a member of the Los Angeles and Ventura County Bar Associations. Scott received his Juris Doctor degree in 1978 from the University of San Diego School of Law after attending four years of night classes and working in construction during the day. In 1979, Scott formed Hared Construction Company, Inc., a general contracting and painting company and worked there until 1988 as a field superintendent, office manager, corporate officer, and in-house counsel.

In 1985, Scott founded Easy Law, Inc. to help contractors and others in the construction industry **secure and collect what they earn**. Today, Easy Law is a national construction notice document preparation firm, (see www.easylawinc.com), providing preliminary notices, mechanics liens, stop payment notices, payment bond claims and other construction collection services to contractors, material suppliers, and construction professionals throughout the U.S.

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About Our Attorneys



Stephen M. Sanders

Stephen M. Sanders, P.C., Partner

Stephen has over 25 years of experience working in various capacities in the real estate industry. Before becoming an attorney, Stephen learned construction trades and real estate development in various family businesses and later became a residential and commercial construction manager working for private developers. Stephen is an ICC/ICBO Certified Residential Building and Electrical Inspector and a Construction Specifications Institute Certified Document Technician, familiar with AGC, Consensus and AIA trade documents and best project management practices for the construction industry. Stephen has managed construction projects ranging from simple residential remodels, new homes and structures, tenant improvements, to commercial projects with budgets up to 3 million dollars. Stephen is a California licensed general contractor (Lic. No. 931942) and real estate broker (Lic. No. 1863495).

Stephen specializes in business litigation, real estate development and construction law, and also practices in employment, and intellectual property law. Stephen is an accomplished university and Musician's Institute trained drummer and percussionist and a member of the Calabasas Rotary Club.

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About Our Attorneys



Jeff G. Coyner, Senior Associate

Jeff Coyner was admitted to practice law in California in 2004. Jeff was born and raised in Ventura. He graduated from the University of California, Davis with Bachelors of Science in Environmental Toxicology while competing as an all-conference decathlete for the Track and Field team. After graduating from Davis, Jeff worked for 9 years for Exxon and Valero Refining in environmental compliance. Jeff attended the Golden Gate University College of Law as a night student while working full time for Valero Refining. He graduated with Highest Honors and served as an associate editor for law review.

Jeff has represented businesses, governmental entities and individuals in a wide variety of matters including: real estate loan and personal guarantee disputes; real estate misrepresentation; construction defect; CERCLA environmental cost recover actions; environmental regulatory matters, insurance coverage; business litigation; and debt recover matters. He has experience litigating large scale environmental exposure and mass tort actions in both federal and state court. Jeff is a member of the Ventura County Bar Association.

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About Our Attorneys

Mike M. Khalilpour, Associate

Mike has been a member of the State Bar of California since 2009 and is admitted to practice before all Courts in the State of California and in the Central District of California's federal court. Mike has represented numerous businesses with identifying and implementing strategies to manage risk, protect against exposure, ensure regulatory compliance, and protect company assets. As a business litigator, Mike has been first chair in numerous trials, arbitrations and mediations involving complex business disputes, real estate and development disputes, securities fraud defense, protecting intellectual property, commercial debt collection, and judgment recovery.

Mike graduated from UC Irvine in 2004 with degrees in both Political Science and Economics. In 2009, Mike graduated in the top 5% of his class from Chapman University's Dale E. Fowler School of Law, where his academic achievements placed him on the Dean's List and earned him CALI Awards in Torts, Contracts, and Civil Procedure. While at Chapman, Mike was also the Managing Editor of the *Chapman Law Review* and the recipient of the William Stallworth Scholarship Award for Excellence. In 2011, Mike received his Masters of Law in Taxation (LL.M.), *with honors*, from the Georgetown University Law Center, focusing on the taxation of business entities and tax-free reorganizations.

Since 2019, Mike has been distinguished as a Super Lawyer Rising Star, an honor reserved for the top 2.5% of lawyers in Southern California. Mike is also a member of the Los Angeles County Bar Association, the Iranian-American Bar Association, and serves on the Board of Directors of PAND (Persian-American Networking Development) a non-profit organization devoted to helping Persian-Americans network and establish professional relationships.

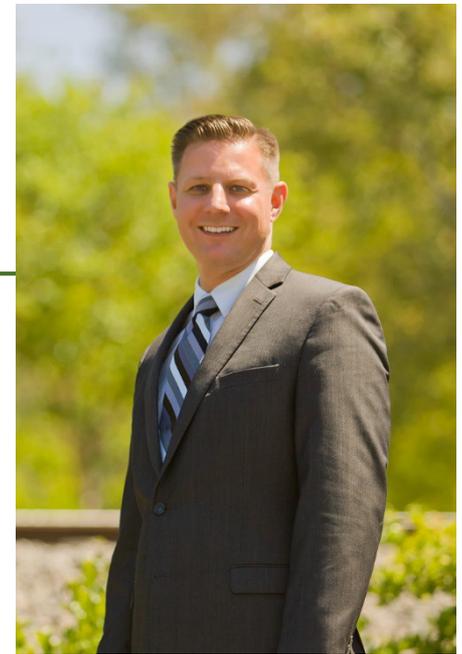
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About Our Attorneys

Matthew T. Bechtel, Associate

Matt Bechtel was admitted to practice law in 2008, and is admitted to practice in all California State and Federal courts. Matt is a civil litigator with extensive experience in ERISA (employee benefits) and general employment law. Matt has represented public entities, construction industry multiemployer (Taft-Hartley) benefit plans, and individual employees.



Matt currently represents clients in various business and employment contexts, including contracts, wage and hour compliance, prevailing wage, and wrongful termination.

In 2006, Matt completed his first year at Southwestern Law School at the top of his class, and transferred to U.C. Hastings College of the Law, where he graduated in 2008. Matt served as an editor of the U.C. Hastings Communications and Entertainment Law Journal, and was a recipient of a Best Brief award for the Snodgrass Moot Court Competition.

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About Our Attorneys



Nate Cade, Associate

After earning his Bachelor's of Science from Maryland's Frostburg State University in 2010, Nate served the public as a water systems technician for Anne Arundel County Maryland, and later as an Environmental Superintendent for nearby Charles County before pursuing a legal education. During his time in public works, Nate gained valuable experience in the construction industry, serving as Operations Liaison for several multi-million dollar utility construction projects.

Nate started working for The Green Law Group during his second year of law school, at Pepperdine University, and continued at the firm as an attorney after he was admitted to practice law in California in February of 2020. Nate specializes in handling construction payment disputes and employment law cases, and also helps the firm's corporate clients with a variety of business inquiries.

In his free time, Nate enjoys long road trips around the county with his wife, and restoring and showing classic cars.

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About Our Attorneys



Kirk Rodby, Attorney

Kirk Rodby earned his Bachelor of Science degree from California State University at Northridge in 1995 and went on to graduate magna cum laude from Tulane Law School. In 2002, he received his Master of Laws (LL.M.) degree in constitutional law from the New York University School of Law.

A member of the California Bar Association since 2006, Kirk is part of our Construction, Labor & Employment and Estate Planning practices.

Kirk has a life-long love of books and writing, and comes to The Green Law Group after serving in management at Barnes & Noble. He is a contributing author for the Constitutional Rights Foundation and a published author with his non-fiction work *The Dark Heart of Utopia*. His hobbies include music production and hiking.

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New in California

Construction Law – 2019 Update

- **Senate Bill 1465** requires that licensed contractors report in writing to the registrar within 90 days of the date that the licensee has knowledge of any civil action resulting in final judgment, executed settlement agreement, or final arbitration award in any action in which the licensee is named as a defendant or cross-defendant that meets specified criteria; including that the amount or value of the judgment, settlement payment, or award is \$1,000,000 or greater and that the action is the result of a claim for damages to a property or person allegedly caused by specified construction activities of a license on any part of a multifamily rental residential structure.
 - Awards that need to be reported to CSLB must meet all the following criteria:
 - The civil dispute that led to the award must have been filed in a civil court after January 1, 2019; and
 - The amount or value of the judgment, settlement, or arbitration award (after any investigations or repairs) must be \$1,000,000 or greater; and
 - The civil dispute must result from a claim for damages caused by a structural failure, or a risk of structural failure, of a load-bearing portion of a multifamily rental residential structure. (SB 1465 does not apply to lawsuits involving single-family homes); and
 - The action must be final
- It is possible for more than one contractor to be named in a civil suit. All licensed contractors named as defendants or cross-defendants must report to CSLB, unless found liable for less than \$15,000 of the award.

New in California Construction Law – 2019 Update

- ❑ Additionally, the insurer of a licensed contractor who is party to the final award that makes all or a part of a payment on the award must report that payment to CSLB within 30 days of the payment.
- ❑ If a licensed contractor fails to report a final settlement, judgment, or arbitration award that meets the criteria of SB 1465, the license may be disciplined.
- ❑ After January 2019, a form to report settlements to CSLB will be available on the CSLB website or by calling 800-321-2752. CSLB will accept a report of a settlement, judgment, or arbitration award that meets the criteria of SB 1465 from any party, but licensees and insurers must report such cases.
- ❑ Parties must Report the Following Information to CSLB:
 - The name and license number of the licensees;
 - The facts and dates of the reportable event;
 - The amount or value of the judgment, settlement payment, or arbitration award;
 - The title of the court action;
 - The court name;
 - The docket, case, or file number;
 - A copy of the settlement, judgment, or arbitration award;
 - (If any insurer) the amount paid by the insurer and the identity of the payee; and
 - Any additional information the reporting party believes would assist CSLB in reviewing the matter

New in California

Construction Law – 2019 Update

- **Senate Bill 721** establishes requirements for inspecting and repairing “exterior elevated elements,” which includes decks and balconies, for buildings with three or more multi-family dwelling units. Additionally, it establishes reporting and repair requirements, including timeframes, if it is found that repairs are needed.
 - This bill provides for application of civil penalties if building owners violate the requirements
 - This bill specifies who can complete the inspections and repairs:
 - A, B, and C-5 Licenses and specified experience requirements.

- **Senate Bill 1087** follows up on **Assembly Bill 1284**, which required the licensing and regulation of Property Assessed Clean Energy (PACE) program administrators by the Dept. of Business Oversight (DBO). Among other things, SB 1087 makes it unlawful to begin work under a home improvement contract if the property owner was not ultimately approved for the PACE financing applied for.

- **Assembly Bill 2705** increases the statute of limitations from one year to two years during which an unlicensed contractor can be prosecuted for failing to obtain workers’ compensation insurance for their employees.

New in California

Construction Law – 2019 Update

- **Assembly Bill 2138** prohibits an applicant from being denied a license solely because they have been convicted of specified crimes. It also authorizes a board to deny a license based on a conviction if it occurred within seven years from the date of application, regardless of the following:
 - Incarceration status;
 - Substantial relation to the qualifications, functions, or duties of the license; requires California sex offender registration; and
 - Felony crime directly and adversely related to the qualifications, functions, or duties of the license
- **AB 2138** further prohibits license denial if the applicant was pardoned, shows rehabilitation, or if the conviction was dismissed, and prohibits denial based on an arrest that resulted in anything other than a conviction. Boards will be prohibited from requiring an applicant to provide their criminal history and requires boards to produce annual reports about applicants with a criminal background to the Legislature and for public posting.

New in California Construction Law – 2018 Update

- ❑ Labor Code Section 218.7 effective as of January 1, 2018 mandates that for all private works contracts entered into on or after January 1, 2018, direct contractors (AKA general, prime and original contractors) will be jointly liable and responsible with their subcontractors for the payment of the subcontractors' wages and benefits.
- ❑ The law was sponsored by unions in an attempt to eliminate “under the table wage payments” by subcontractors by forcing direct contractors to “assume, and [be] liable for . . . unpaid wage, fringe or other benefit payment or contribution, including interest owed,” that subcontractors owe to their employees. The unions lobbied for this law by asserting that unscrupulous subcontractors pay tens of thousands of employees under the table and deprive the government of taxes and shortchange their employees by more than \$1.2 billion annually. This law passed despite vigorous opposition by the Building Industry Association (BIA) and the Associated General Contractors of California (AGC).
- ❑ To help protect direct contractors from liability, the new law authorizes direct contractors to demand payroll records from subcontractors and withhold payments to subcontractors in the event of a dispute (Labor Code § 218.7(f).) and requires unions to give direct contractors and subcontractors at least 30 days notice prior to filing suit.
- ❑ Section 7071.17 of the Business and Professions Code was amended to provide that when an unsatisfied judgment is issued against a license the qualifying individual or personnel of record on that license are prohibited from working in the same capacity on another license until that judgment is satisfied. This rule applies to the qualifying individuals or personnel of record who worked for a licensee during the timeframe covered by the judgment.

Lien Laws Standardized, Updated and Reshuffled

In 2012 California revised the mechanics lien laws to standardize the notice requirements and update some of the language in the statutes. For instance:

- ❑ The terms “general contractor,” “prime contractor,” and “original contractor” were replaced by the term “direct contractor.” A direct contractor is a contractor with a direct contractual relationship with an owner. See Civil Code §8018
- ❑ “Materialman” was replaced with “Material Supplier”
- ❑ “Stop Notice” became “Stop Payment Notice”
- ❑ “20-Day Preliminary Notice” was changed to “Preliminary Notice”



Mechanics Lien Statutes Reshuffled

- In addition to revising some of the mechanics lien statutes, several sections of the Civil Code have been renumbered:
 - General Provisions - Civil Code §§ 8000 to 8154
 - Private Works - Civil Code §§ 8160 to 8188
 - Public Works - Civil Code §§ 9000 to 9566

Contractors' License Law

Rule Number One: No License = No Money

THE FIRST RULE FOR A LICENSED CONTRACTOR

To be entitled to sue for compensation, a contractor must be “duly licensed” at all times during the performance of the work.

Business & Professions Code 7031

“**Duly licensed**” DOES NOT simply mean having the proper license for the type of work you are performing; e.g., you can be considered “unlicensed” if you fail to obtain or maintain workers’ compensation insurance, or perform work outside the scope of your license, or continue to act as the contracting party with an expired contractor’s license.

CSLB License

Requirements for Business Entities

- ❑ Corporations, limited liability companies and partnerships must use a licensed individual to qualify the business for a license. Individuals can act as a license qualifier by being a Responsible Managing Employee (RME), Responsible Managing Officer (RMO) or in the case of a limited liability company, a Responsible Managing Member (RMM).
- ❑ Business and Professions Code section 7068.1 states, in part that the person qualifying on behalf of an individual or firm shall be responsible for exercising that direct supervision and control of his or her employer's or principal's construction operations as is necessary to secure full compliance with the laws, rules and regulations relating to the construction operations.
- ❑ "Direct supervision and control" includes any one or combination of the following activities: supervising construction, managing construction activities by making technical and administrative decisions, checking on jobs for proper workmanship, or direct supervision on construction sites.
- ❑ If you are licensee qualifying a business for a license, make sure you are aware of all contracting activity and that your involvement in business operation meets the minimum state requirements.



Disassociation of a License Qualifier

- ❑ Contractors who obtain a license using an RMO, RME, or RMM as a qualifier for a license have 90 days after the date of disassociation of the qualifier to replace the qualifier. Upon failure to replace the qualifier within 90 days after the date of disassociation, the license will be automatically suspended or the classification removed. The statute provides limited exceptions for an additional 90 day extension, see B&P §7068.2 for details.
- ❑ Simply hiring a new RMO, RME, or RMM will not automatically requalify the license. An application to replace the qualifier must be filed with CSLB along with the application fee.

Fictitious Business Names (DBAs) Should be Registered with the CSLB

- ❑ In a limited exception to the general rule, a mechanics lien recorded using the contractor's DBA (fictitious name) was not invalid even though the licensed contractor did not list his DBA with the CSLB. **Ball vs. Steadfast-
BLK 196 Cal.App.4th 694**
- ❑ The best practice is to ensure that all business documentation, including stationary, contracts, invoices, and advertising materials reference the exact business name and license number as listed on the CSLB's license records, and to notify CSLB of any changes to DBA name, see B&P §7083 for details.



Licensing for LLCs

- ❑ Limited Liability Companies can apply for contractor licenses in California.
- ❑ The license requirements for an LLC are more onerous than they are for corporations and include a \$100,000 surety bond, which is in addition to the license bond for \$15,000 and a minimum of \$1,000,000 in general liability insurance.
- ❑ Note that the requirement for LLCs to post a \$100,000 bond may make LLCs more attractive litigation targets for plaintiff's attorneys.



Contractors Must Be Properly Licensed At All Times During Performance

- ❑ MW Erectors, Inc. v. Niederhauser Ornamental and Metal Works Co., Inc.
(2005) 36 Cal.4th 412, 425.
- ❑ A subcontractor was barred from collecting construction funds owed to it, despite the fact it was only improperly licensed for a short time during performance of its work on the project at issue. This case confirmed the requirement that contractors must be properly licensed “at all times” during contract performance.

Preparation of Shop Drawings Require a License

- ❑ *Great West Contractors, Inc. v. WSS Industrial Construction, Inc.*, 162 Cal.App.4th 581, 76 Cal.Rptr.3d 8 (2008)
- ❑ The court barred the corporation, WSS Industrial Construction, Inc. from recovering payment on a project because it completed shop drawings **before** it was properly licensed.
- ❑ This was notwithstanding the fact that the corporation's president and RMO held an individual license, and that it had not performed any physical work on the project before it received its license.



Shop Drawings

- ❑ WSS submitted an application for a contractor's license before it submitted a bid for steel construction work on August 28, 2001, to the general contractor, Great West Contractors, Inc. WSS signed the parties' subcontract on December 1, 2001, **but its license was not issued until December 21, 2001**. Prior to the issuance of its license, WSS had only prepared shop drawings, bought and delivered anchor bolts, and submitted a progress payment request. Nonetheless, the court found that WSS was unlicensed.
- ❑ Contractor's License Law required the corporation itself, using an RME or RMO as a qualifier, to be licensed at all times WSS performed services within the scope of the contract.

Consequences of Being Improperly Licensed or Unlicensed

Summary of Important Laws

- ❑ Not entitled to compensation, which means you cannot lien or sue to collect for unpaid work. ***Business & Professions Code § 7031(a);***
- ❑ Anyone who uses an unlicensed contractor may sue to recover all compensation paid to an unlicensed contractor. ***Business & Professions Code § 7031(b);***
- ❑ Potential criminal charges (misdemeanor plus fine of 20% of contract price or \$5,000, whichever is **greater** and 90 days in jail for repeat offenders) and Administrative Penalties. ***Business & Professions Code § 7028;***
- ❑ Rejection of bid for public works project – a bid submitted by an unlicensed contractor is considered nonresponsive and must be rejected by the public agency. ***Business & Professions Code § 7028.15(e);***
- ❑ An unlicensed contractor is exposed to treble damages up to \$10,000 plus attorneys' fees and costs. ***Code of Civil Procedure § 1029.8.***

Cal. Bus. & Prof. Code § 7031(b) Disgorge Amounts Previously Paid

- ❑ An unlicensed contractor is not merely barred from recovering any outstanding contract balance or damages, but it can be forced to “**disgorge**” or **GIVE BACK !** all amounts previously paid.
- ❑ A contractor must be licensed at all times, even if the nature of the acts performed while unlicensed may not, in and of themselves, require a license.
- ❑ So long as the scope of work in a contract requires a license, any act under that contract performed while unlicensed may require the contractor to reimburse all amounts paid -- not just those acts performed while unlicensed.



Substantial Compliance

The Expired License Bond Exception

- ***Business & Professions Code § 7031(e)*** provides for a very limited “substantial compliance” exception as a defense to contracting without a license. To invoke this exception, all of the following must apply:
 - Duly licensed as a contractor in California prior to the performance of the act or contract;
 - Acted reasonably and in good faith to maintain proper licensure;
 - Acted promptly and in good faith to reinstate his or her license upon learning it was invalid.

Automatic License Suspension

- ❑ CA B&P 7152.2: Failing to maintain or obtain workers' compensation insurance, if required, results in automatic suspension of license.
- ❑ *Business & Professions Code § 7125*: if you have workers, you must have workers' compensation insurance.
- ❑ Even if the CSLB doesn't catch the problem, the Court can deem you to be suspended at the time of non-compliance and, thus, unlicensed at time work was performed.

***** If you have employees, see the Employment Law for California Contractors section beginning on pg. 154**

Stricter Requirements for Workers' Compensation Insurance

- ❑ In accordance with Business and Professions Code § 7125.5, contractors who claim an exemption from workers' compensation insurance must either recertify the exemption, or abandon the exemption by providing a current and valid Certificate of Workers' Compensation Insurance, or a Certificate of Self-Insurance when they renew their license.
- ❑ Incomplete applications will be rejected; however, suspended licenses can be reactivated retroactively if the licensee provides the required documentation within 30 days after notification by the CSLB that their application has been rejected.

Tighter Work Comp Insurance Requirement for Roofing Contractors

- ❑ C-39 Roofing contractors must still purchase workers' compensation insurance coverage even if they certify they have no employees. See Business and Professions Code § 7125.
- ❑ Workers' compensation insurers are required to report to CSLB if a licensee's policy is cancelled as the result of a premium audit or investigation, or a misrepresentation that results in harm to the insurer without reimbursement being made.

Wright v. Issak

(6th App. Dist., 2007) 149 Cal.App.4th 1116

- ❑ In 2007 Wright v. Issak shocked the construction industry by ruling that a licensed contractor who underreported payroll to its workers' compensation insurer was subject to an automatic retroactive suspension of its contractor's license, barred from suing to recover for work performed while unlicensed and could be compelled to return all compensation received from its customers while conducting business as an unlicensed contractor. (Ref., Business & Professions ("B&P") Code sections 7125.2, 7031(a) and (b).)
- ❑ Even if you hold a workers compensation policy, you may be considered as operating without a license if you willfully misrepresent your payroll information to your insurance provider.



Loranger v. Jones (C.A. 3rd, April 23, 2010)

- In May, 2010, Wright's impact was refined under Loranger v. Jones. Loranger concludes that automatic license suspension will not apply under circumstances where (a) the contractor can show it otherwise obtained and maintained workers' compensation insurance for its actual employees, and (b) there is no evidence to suggest that either unreported *de facto* employees or actual employees would not be covered. Loranger recognizes that sometimes, when a discrepancy is revealed or a mistake occurs in payroll reporting to workers' compensation insurance, the contractor should not be subject to strict liability and the impact of Wright.



Workers' Comp Fraud 10-Year Prison Sentence

- ❑ **SACRAMENTO** – One of the largest-ever premium insurance fraud cases in California ended with a sentence of 10 years in state prison and \$500,000 in restitution for southern California roofing and general contractor Michael Vincent Petronella. Petronella was convicted on 33 counts of insurance fraud, with an enhancement for aggravated white collar crime over \$500,000.
- ❑ His wife, Devon Lynn Kyle, spent two years in jail while her case was pending and was sentenced to 10 years of probation for joining her husband in committing \$30 million in workers' comp insurance premium fraud.
- ❑ The CSLB assisted the Orange County District Attorney's Office with the investigation.



Workers' Comp Fraud

- The Petronellas obtained insurance for their businesses through the State Compensation Insurance Fund (SCIF) in 2000. SCIF discovered fraud in 2006 after an employee fell from a roof and submitted a claim that listed the employer as Western Cleanoff, Inc., which had no CSLB license and was not insured by SCIF. SCIF reported the fraud, initiating the investigation, which discovered that between 2000 and 2008, the couple submitted fraudulent insurance claims and underreported millions in payroll. That led to Petronella's criminal conviction, as well as license suspension for failure to carry workers' compensation, and pending disciplinary action to revoke his contractor licenses.



Workers' Comp Fraud

- CSLB and its partners in state and local government, law enforcement, and the construction industry have intensified efforts to combat premium insurance fraud, including conducting hundreds of stings and sweeps year-round throughout the state. Governor Arnold Schwarzenegger signed a CSLB-sponsored bill into law that gave the CSLB unprecedented authority to immediately issue a “stop work order” to any licensed or unlicensed contractor that has not secured workers’ compensation insurance for employees. Failure to comply with the stop work order will result in misdemeanor charges, punishable by up to \$10,000 and/or up to 60 days in jail.

“Obtain and Maintain” Workers’ Compensation Insurance

- To avoid the harsh consequences of the Wright case, criminal prosecution, fines and the loss of your license, contractors with employees must (1) obtain and maintain workers’ compensation for their employees and those deemed to be employees as a matter of law, (2) accurately report their payroll to their workers’ compensation carriers, (3) take immediate action to correct any reporting mistakes, (4) obtain certificates of workers’ compensation insurance from subcontractors, (5) routinely verify license status and insurance status for subcontractors, and (6) verify that a subcontractor who reports “exempt” from workers’ compensation insurance with the CSLB isn’t merely trying to duck the requirement for workers’ compensation insurance to avoid covering its workers.

Unlicensed “Independent” Contractors are Employees

- ❑ Unlicensed subcontractors are deemed to be the employees of the person or company retaining them (Heiman v. Workers' Compensation Appeals Board (2007) 149 Cal.App.4th 724, 733-38).
- ❑ A contractor's failure to pay workers' compensation premiums for “deemed” employees may also result in the automatic and retroactive suspension of the contractor's license.
- ❑ Labor Code statute, section 2750.5, establishes a rebuttable presumption that a construction worker performing services for which a license is required or who is performing such services for a person who is required to obtain such a license is an employee rather than an independent contractor.

Preliminary Notices

Not Payment Insurance, but the Next Best Thing

WHEN THE JOB EXCEEDS \$400- sending a preliminary notice is legally required. The failure of a subcontractor to give a preliminary notice constitutes grounds for disciplinary action under the Contractors' State License Law. California Civil Code §8216.

❑ WHO-WHEN-HOW-WHY

■ ANYONE WITHOUT A DIRECT CONTRACT WITH THE OWNER

- ❑ **WHO-** Subs, Material Suppliers, Equipment Renters, etc.
- ❑ **WHEN-** Within 20 days of starting work, but better late than never. A late notice will still track back and support a claim for services provided 20 days prior to the mailing of the notice.
- ❑ **HOW-** Preliminary notices can be served (mailed) by express mail services like Federal Express, or UPS. Recommended practice is to use USPS certified mail with or without a return receipt.
- ❑ **WHY-** So you can “Secure and Collect What you Earn” with mechanics liens, stop payment notices and/or payment bond claims.

❑ **OWNER MUST PROVIDE A COPY OF A NOTICE OF COMPLETION BY CERTIFIED MAIL TO ANYONE WHO SERVED A PRELIMINARY NOTICE.**

Preliminary Notices

Civil Code §8102(a) - In addition to any other information required by statute all notices must include all of the following information to the extent known to the person giving the notice:

- ❑ The name and address of the owner or reputed owner.
- ❑ The name and address of the direct contractor.
- ❑ The name and address of the construction lender, if any.
- ❑ A description of the site sufficient for identification, including the street address of the site, if any. If a sufficient legal description of the site is given, the effectiveness of the notice is not affected by the fact that the street address is erroneous or is omitted.
- ❑ The name, address, and relationship to the parties of the person giving the notice.
- ❑ If the person giving the notice is a claimant:
 - A general statement of the work provided.
 - The name of the person to or for whom the work is provided.
 - A statement or estimate of the claimant's demand, if any, after deducting all just credits and offsets.

Notice is not invalid by reason of any variance from the requirements of this section if the notice is sufficient to substantially inform the person given notice of the information required by this section and other information required in the notice.



Preliminary Notices

- ❑ Civil Code § 8200(e)(2) requires direct contractors to serve construction lenders with a preliminary notice.
- ❑ A direct contractor shall make available to any person seeking to give preliminary notice the following information:
 - The name and address of the owner.
 - The name and address of the construction lender, if any

If one or more construction loans are obtained after commencement of a work of improvement, the owner shall give notice of the name and address of the construction lender or lenders to each person that has given the owner preliminary notice.



Preliminary Notices

- ❑ Preliminary notices are also required for payment bond claimants. See Civil Code §8612 and Civil Code § 9560 for the exception to the rule.
- ❑ Preliminary notices can be served (mailed) by express mail services like Federal Express, or UPS. Recommended practice is to use USPS certified mail with a return receipt.
- ❑ When a project has a construction lender, the owner/direct construction contracts must include the lender's preliminary notice information.

Preliminary Notices

Reputed Construction Lender

Under *Force Framing, Inc. v. Chinatrust Bank (U.S.A)* the court ruled that a subcontractor who served a 20-day preliminary notice relying upon inaccurate information in the "preliminary information" sheet furnished by the owner could still enforce a stop payment notice against the construction lender. The court ruled that a mechanics lien claimant acting in good faith is not required to search county records for construction lenders when it relies in good faith upon the preliminary notice information furnished by the owner.



Preliminary Notices

Reputed Property Owner

- In *Brown Co. v. Appellate Dept.* (1983) 148 CA3d 891, the court allowed the claimant to enforce a lien even though the preliminary notice was not sent to the owner but was instead sent to the prime (direct) contractor as the “reputed owner” in reliance on a statement by the prime (direct) contractor to the claimant.

Mechanics Lien Basics

- ❑ **SECURES YOUR CLAIM AGAINST THE PROPERTY YOU IMPROVED WITH YOUR LABOR AND/OR MATERIAL.**
- ❑ **MAY BE WIPE OUT IF LENDER FORECLOSES.**
- ❑ **NOTICE OF COMPLETION OR CESSATION:**
 - Must be recorded within 15 days of actual completion or cessation;
 - Reduces the time to record lien and/or serve a stop payment notice from 90 day down to 60 for GC's and 30 days for everyone else.
- ❑ **NOTICE OF NON-RESPONSIBILITY**
 - Must be posted and recorded within ten days of the owner's actual notice of the construction. Used by landlords on tenant improvement projects in an attempt to avoid liability for mechanics liens. However, a landlord who is "participating" in the construction by, for example, contributing to the cost of construction and/or by approving the construction plans may not be able to avoid liability for mechanics liens through the use of a Notice of Non-Responsibility.

Mechanics Liens

□ NINETY DAY STATUTE OF LIMITATIONS

- Mechanics liens are automatically null and void unless a suit is filed to foreclose the lien, or the lien is extended by a written and recorded agreement with the property owner within 90 days of the date the lien was recorded.
 - Liens can be recorded for up to 90 days after the actual completion of the entire project.
 - The scope of the entire project may be determined by reference to the scope of work in the owner/direct contract.
 - Mechanics lien release bonds have been reduced from 150 to 125% of the claim amount. See Civil Code § 8424.
 - Civil Code §§ 8480-8488 changes the procedures used to petition for the removal of a stale mechanics lien and removes the cap on recovery of attorneys' fees. Included in these new procedures is a requirement that at least 10 days before petitioning for a release of a lien the owner gives the claimant notice and a demand that the lien be released.



Notice of Mechanics Lien Mandatory Requirement

Warning - Failure to comply with the notice requirement means that your lien will be unenforceable as a matter of law.

California Civil Code § 8416 requires mechanics lien claimants to serve the property owner or reputed owner with a document entitled **Notice of Mechanics Lien** and record the Notice and an affidavit with the county recorder where the property is located as evidence that the Notice was properly served.

Failure to properly serve and record the **Notice of Mechanics Lien** will cause the mechanics lien to be unenforceable.

Notice to Property Owner

Civil Code §8416

□ **NOTICE OF MECHANICS LIEN ATTENTION!**

Upon the recording of the enclosed MECHANICS LIEN with the county recorder's office of the county where the property is located, your property is subject to the filing of a legal action seeking a court-ordered foreclosure sale of the real property on which the lien has been recorded. That legal action must be filed with the court no later than 90 days after the date the mechanics lien is recorded. The party identified in the mechanics lien may have provided labor or materials for improvements to your property and may not have been paid for these items. You are receiving this notice because it is a required step in filing a mechanics lien foreclosure action against your property. The foreclosure action will seek a sale of your property in order to pay for unpaid labor, materials, or improvements provided to your property. This may affect your ability to borrow against, refinance, or sell the property until the mechanics lien is released. **BECAUSE THE LIEN AFFECTS YOUR PROPERTY, YOU MAY WISH TO SPEAK WITH YOUR CONTRACTOR IMMEDIATELY, OR CONTACT AN ATTORNEY, OR FOR MORE INFORMATION ON MECHANICS LIENS GO TO THE CONTRACTORS'**

STATE LICENSE BOARD WEB SITE AT www.cslb.ca.gov.

Mechanics Lien

Civil Code § 8416

- A claim of Mechanics Lien must be in a written statement, signed and verified by the claimant or by the claimant's agent, containing all of the following:
 - A statement of the claimant's demand after deducting all just credits and offsets.
 - The name of the owner or reputed owner, if known.
 - A general statement of the kind of labor, services, equipment, or materials furnished by the claimant.
 - The name of the person by whom the claimant was employed or to whom the claimant furnished the labor, services, equipment, or materials.
 - A description of the site sufficient for identification.

Proof of Service

Civil Code §8416

- ❑ A Mechanics Lien must have a proof of service affidavit completed and signed by the person serving the Notice of Mechanics Lien.
- ❑ A "proof of service affidavit" is a sworn statement by the person making the service, showing the date, place, and manner of service and facts showing that the service was made in accordance with Civil Code §8416. The affidavit shall show the name and address of the person or persons upon whom a copy of the mechanics lien and the Notice of Mechanics Lien was served, and, if appropriate, the title or capacity in which he or she was served.

A Failure to Comply Invalidates the Lien - Civil Code §8416

- The Mechanics Lien and the Notice of Mechanics Lien described in this section shall be served on the owner or reputed owner. Service shall be made as follows:
 - 8416(c)(1): For an owner or reputed owner to be notified who resides in or outside this state, by registered mail, certified mail, or first-class mail, evidence by a certificate of mailing, postage prepaid, addressed to the owner or reputed owner at the owner's or reputed owner at the owner's or reputed owner's residence or place of business address or at the address shown by the building permit for the work, or as otherwise provided in section 8174.
 - 8416(c)(2): If the owner or reputed owner cannot be served by this method, then the copy of the claim of mechanics lien may be given by registered mail, certified mail, or first-class mail, evidence by a certificate of mailing, postage prepaid, addressed to the construction lender or to the original contractor.

Failure to serve the copy of the claim of Mechanics Lien, including the Notice of Mechanics Lien, as prescribed by this section, shall cause the claim of Mechanics Lien to be unenforceable as a matter of law.

Design Professional Lien

No later than 90 days after a design professional knows or has reason to believe that the property owner is not going to commence with the project, the design professional may record a *design professional lien* even though construction on a project has not commenced if (1) a building permit has been pulled, (2) the design professional has a written contract with the property owner and (3) 10 days prior to recording a lien the design professional sends a written payment demand letter to the property owner via certified mail. A *design professional lien* expires once construction starts.

Civil Code § 8319 provides that a *design professional* may convert a recorded *design professional lien* to a mechanics *lien* if all of the following requirements are met:

- ❑ (1) The *design professional lien* expires (pursuant to § 8306);
- ❑ (2) The *design professional lien* remains fully or partially unpaid;
- ❑ (3) Within 30 days of the expiration of the *design professional lien*, the *design professional* records a mechanics *lien* for the amount of the unpaid *design professional lien*;
- ❑ (4) The recorded mechanics *lien* states that it is a converted *design professional lien* but shall be recorded and enforced as a mechanics *lien*, except the *design professional* need not provide a preliminary notice to enforce this mechanics *lien*.
- ❑ This mechanics *lien* shall be effective as of the date of recordation of this mechanics *lien* and shall be given priority pursuant to the provisions of [Section 8450](#).
- ❑ See Civil Code § 8319 for details.

Bonded Stop Payment Notice

- **RECORD A LIEN & SERVE A BONDED STOP PAYMENT NOTICE BECAUSE:**
 - A construction lender's foreclosure will generally wipe out mechanics lien claim, however it will not defeat a bonded stop payment notice.
 - A Bonded Stop payment notice attaches to the undisbursed funds in the construction loan account and with limited exceptions, requires the lender to set aside 125% of stop payment notice amount from the construction loan to secure the claim and pay **attorneys fees** if you successfully sue to enforce the claim.

Stop Payment Notices

- ❑ **FOR PRIVATE PROJECTS WITH A CONSTRUCTION LENDER YOU NEED A BONDED STOP PAYMENT NOTICE.**
 - Bonding companies require financial information and collateral for bonds.
 - In the event a lawsuit is filed to enforce a bonded stop payment notice, the prevailing party is entitled to an award of attorneys' fees.
 - Owner financed projects do not require stop payment notice bonds.
- ❑ **PUBLIC PROJECTS DO NOT REQUIRE A BOND FOR A STOP PAYMENT NOTICE.**
- ❑ **CONSIDER A PAYMENT BOND CLAIM ON PUBLIC PROJECTS WHENEVER YOU SERVE A STOP PAYMENT NOTICE.**

Bond Claims

□ PAYMENT BONDS

- Benefits subcontractors, suppliers and other potential claimants who would otherwise qualify to record a mechanics lien.

□ PERFORMANCE BONDS

- Requires the bonding company to hire another contractor to finish the project in the event the direct contractor defaults on or breaches the owner/direct contract.

□ LICENSE BONDS

- All licensed contractor have to obtain a contractor's license bond or post collateral with the CSLB in the amount of \$15,000 which is available for claims by consumers and others for "willful" violations of contractor license law.
- License bond claimants must prove a willful or intentional violation of the contractors' license law before a claim will be paid.
- Small Claims Court actions against license bonds sureties are limited to a maximum recovery of \$2,500.00.
- Unpaid license bond claims may result in contractor license suspension by the CSLB.

Payment Bond Claim Notice Requirements

In accordance with Civil Code § 9560, if the *preliminary notice* was required to be given, see Civil Code §8612, by a person who has no direct contractual relationship with the contractor, and who has not served a preliminary notice, that person may enforce a claim by giving written *notice* to the surety and the *bond* principal within 15 days after recordation of a *notice* of completion. If no *notice* of completion has been recorded, the time for giving written *notice* to the surety and the *bond* principal is extended to 75 days after completion of the work of improvement.

The Payment Bond Notice will not apply in either of the following circumstances:

- ❑ (1) All progress payments, except for those disputed in good faith, have been made to a subcontractor who has a direct contractual relationship with the general contractor to whom the claimant has provided materials or services.
- ❑ (2) The subcontractor who has a direct contractual relationship with the general contractor to whom the claimant has provided materials or services has been terminated from the project pursuant to the contract, and all progress payments, except those disputed in good faith, have been made as of the termination date.



Payment Bond Claims

- ❑ Unpaid claimants cannot record a mechanics lien against a public project. The requirement for the posting of payment bonds, is a substitute for the right to record a mechanics lien.
- ❑ Direct contractors on state and local public works projects over \$25,000 must post payment bonds to protect subcontractors, materials suppliers, equipment renters and other potential unpaid claimants who provided labor, materials and/or services to the project.



Public Project Payment Claims

- ❑ **CANNOT RECORD A MECHANICS LIEN AGAINST PUBLIC PROPERTY**
- ❑ **PRELIMINARY NOTICES**
 - Preliminary notices are not required by claimants on Public projects with a contract with the Direct Contractor.
 - However, use the “Keep it Simple” rule and reduce the chance of inadvertently losing your rights to secure payment and make it your standard operating procedure (SOP) to serve preliminary notices via certified mail, with or without return receipt requested, at the outset of every project, public or private as soon as you sign a contract.



Public Projects

❑ NO BONDS FOR STOP PAYMENT NOTICES ON PUBLIC PROJECTS

Unlike Stop Payment Notices to construction lenders on private projects, Stop Payment Notice bonds are not required to secure claims against the remaining construction funds on a public project.

❑ CONTRACTOR LISTING LAW:

Listed subcontractor cannot be removed from a public works project without the subcontractor's agreement or without notice and a hearing. If a hearing is requested, claimants are encouraged to be represented by counsel and to have a court reporter present to record the testimony because the hearing will be handled like a trial the outcome of which will be binding if not appealed.

Public Projects

□ FEDERAL PROJECTS - MILLER ACT BOND CLAIMS

Claims for payment on Federal public works projects are handled differently from payment claims against state or local public works projects. Direct contactors on Federal projects are required to post what is called a “Miller Act” payment bond as security for unpaid claimants on their projects. To initiate a claim against a Miller Act Bond on a federal project the claimant has to send a “Ninety-Day-Preliminary Notice” to the direct contractor mailed via certified mail within 90 days of the last delivery of service, materials and/or equipment to the project by the claimant.

Federal law does not allow stop payment notices or mechanics liens on Federal Projects.



Public Projects

□ Prompt Payment Statutes

- Notwithstanding any other law, a direct contractor or subcontractor on state or local public works projects is obligated to pay to any subcontractor, not later than **seven days** after receipt of each progress payment, the respective amounts allowed the contractor on account of the work performed by the subcontractors, to the extent of each subcontractor's interest therein. In the event that there is a good faith dispute over all or any portion of the amount due on a progress payment from the direct contractor or subcontractor to a subcontractor, then the direct contractor or subcontractor may withhold no more than 150 percent of the disputed amount.
- **Public** - Any contractor who violates this section shall pay to the subcontractor a penalty of 2 percent of the amount due per month for every month that payment is not made. In any action for the collection of funds wrongfully withheld, the prevailing party shall be entitled to his or her attorney's fees and costs.
- This section shall not be construed to limit or impair any *contractual*, administrative, or judicial remedies otherwise available to a contractor or a subcontractor in the event of a dispute involving late payment or nonpayment by a contractor or deficient subcontract performance or nonperformance by a subcontractor.
- See Public Contract Code §10262.5 for details.
- See Business and Professions Code §7108.5 for private projects.

Public Projects

□ Works Contract Damages

- New Law - AB 552 Provides that a public works contract entered into on or after January 1, 2016, that contains a clause expressly requiring a contractor to be responsible for delay damages is not enforceable unless the delay damages have been liquidated to a set amount and identified in the public works contract.

□ Prevailing Wages

- A program has been established to monitor and enforce prevailing wage requirements on public works projects that receive state bond funding. This program has a special role in ensuring public works construction workers are promptly paid the proper prevailing wage rates to help maintain a level playing field for contractors who comply with the law. Information about this program can be found at www.dir.ca.gov/cmuc.
- The definition of “public works” has been expanded by statute and case law so more projects require prevailing wages.
- **Public Works Registration Fee** – Since March 2015, if you are bidding or performing public works projects you **must be registered** with the Department of Industrial Relations (DIR)



Public Projects

- **Prevailing Wages Cont'd – 2 New Laws**
- **AB 219- Public Works Concrete Delivery**
 - Expands the application of prevailing wage to the hauling and delivery of ready-mixed concrete to any state or local public works project effective July 1, 2016.
- **AB 852- Public Works Prevailing Wages**
 - Expands the application of prevailing wage to include construction, alteration, demolition, installation, or repair work done under private contract on a project for a general acute care hospital when the project is paid for with the proceeds of conduit revenue bonds that were issued on or after January 1, 2016.

Public Projects

- **Electronic Certified Payroll Reporting** - Effective January 1st, 2016, the CA Dept. of Industrial Relations (DIR) will be requiring all contractors performing public works jobs over \$1,000 to submit certified payrolls electronically through the DIR eCPR.
 - These payrolls must be submitted in XML format either through manual entry using the DIR online form or by using an easy upload.
 - *This requirement extends to all California public works jobs regardless of bid-ad date.*
 - FAQ: <http://www.dir.ca.gov/Public-Works/ecprfaq.html#Who>

- **Skilled Workforce Requirement** – Applies to design-build, best value and lease-lease back contracting. Contractors cannot be shortlisted unless requirements are being met.



Public Projects

5% Retention

- ❑ Applies to all *contracts* entered into on or after January 1, 2012, between a *public* entity and an direct contractor, between direct contractor and a subcontractor, and between all subcontractors, relating to the construction of any *public* work of improvement.
- ❑ “*Public* entity” means the state, including every state agency, office, department, division, bureau, board, or commission, the California State University, the University of California, a city, county, city and county, including charter cities and charter counties, district, special district, *public* authority, political subdivision, *public* corporation, or nonprofit transit corporation wholly owned by a *public* agency and formed to carry out the purposes of the *public* agency.
- ❑ The retention proceeds withheld from any payment by a *public* entity from the direct contractor, by the direct contractor from any subcontractor, and by a subcontractor from any subcontractor shall not exceed 5 percent of the payment.
- ❑ The statute contains exceptions that allow for increased retention, see Public Contract Code §7201 for details.



Public Projects

- Subletting and Subcontracting Fair Practices Act
 - As of July 1, 2014, direct contractors must include the CSLB license numbers of the subcontractors listed in their bids for public works projects.

New Definitions for Project Completion Dates

- ❑ Completion for Private Works as defined in Civil Code §8180 occurs upon (1) a continuous cessation of labor for 60 days, or (2) a Notice of Cessation is recorded anytime after a continuous 30 day cessation of labor, or (3) actual completion of the work of improvement, or (4) the project is occupied and used by the owner.
- ❑ Completion for Public Works as defined in Civil Code §9200 occurs at the earliest of the following times: (1) acceptance by the public agency, or (2) continuous cessation of labor for 60 days.

Slurry Seal, Inc. v. American Asphalt South, Inc., 2015 S.O.S. 1030

- ❑ Second-place bidder on a public works contract stated a cause of action for **intentional interference with prospective economic advantage** against the winning bidder by alleging that defendant was only able to obtain lowest bidder status by **illegally paying its workers less than the prevailing wage**, and that plaintiff would have obtained the contract otherwise.
- ❑ Court held that plaintiff can sustain his claim if he alleges he was the second lowest bidder and therefore would have otherwise been awarded the contract, because that fact gives rise to a relationship with the public agency that made plaintiff's award of the contract reasonably probable.

Update Notice and Statutory Release Forms

- ❑ In 2012, some of the notice requirements for Preliminary Notices, Mechanics Liens, Stop Payment Notices, Bond Claims, Notices of Completion and Cessation were standardized and relocated to Civil Code §§ 8100 – 8118. These statutes outline who needs to get notice, when and how.
- ❑ The Statutory Waiver and Release forms were also modified. The new requirements are listed in Civil Code §§ 8120 – 8138.
- ❑ The requirements for Notices of Completion were also changed. See Civil Code § 8182. Owners have 15 days instead of 10 to record a Notice of Completion and can record separate notices for work performed by multiple direct contractors. See Civil Code § 8186. On public projects, completion occurs on acceptance, so if a public agency delays “acceptance” the time for serving a Stop Payment Notice and/or a Payment Bond Claim will be extended.

Statutory Releases

- **CONDITIONAL PROGRESS RELEASE –Civil Code §8132**
 - Releases all stop payment notice, lien rights, and bond claim rights through the date of the release.
 - Pending change orders and retention are not released.
- **UNCONDITIONAL PROGRESS RELEASE - Civil Code §8134**
 - Releases rights unconditionally even if not paid.
- **CONDITIONAL FINAL RELEASE - Civil Code §8136**
 - Evidence of payment combined with a conditional release creates an unconditional release.
- **UNCONDITIONAL FINAL RELEASE - Civil Code §8138**
 - Don't sign if you haven't been paid in full.

NOTICE: THIS DOCUMENT WAIVES RIGHTS UNCONDITIONALLY AND STATES THAT YOU HAVE BEEN PAID FOR GIVING UP THOSE RIGHTS. THIS DOCUMENT IS ENFORCEABLE AGAINST YOU IF YOU SIGN IT, EVEN IF YOU HAVE NOT BEEN PAID. IF YOU HAVE NOT BEEN PAID, USE A CONDITIONAL WAIVER FORM.



Conditional Progress Payment Releases

The Wrong Date Can Cost You

- ❑ Tesco Controls, Inc. v. Monterey Mechanical Co. (2004) 124 CA4th 780
- ❑ A claimant who executes a conditional waiver and release on a progress payment waives all lien, stop payment notice, or bond claim rights for labor, services, equipment, or materials furnished before the “through” date stated in the waiver if the claimant is paid the amount specified in the waiver.



Tesco Example

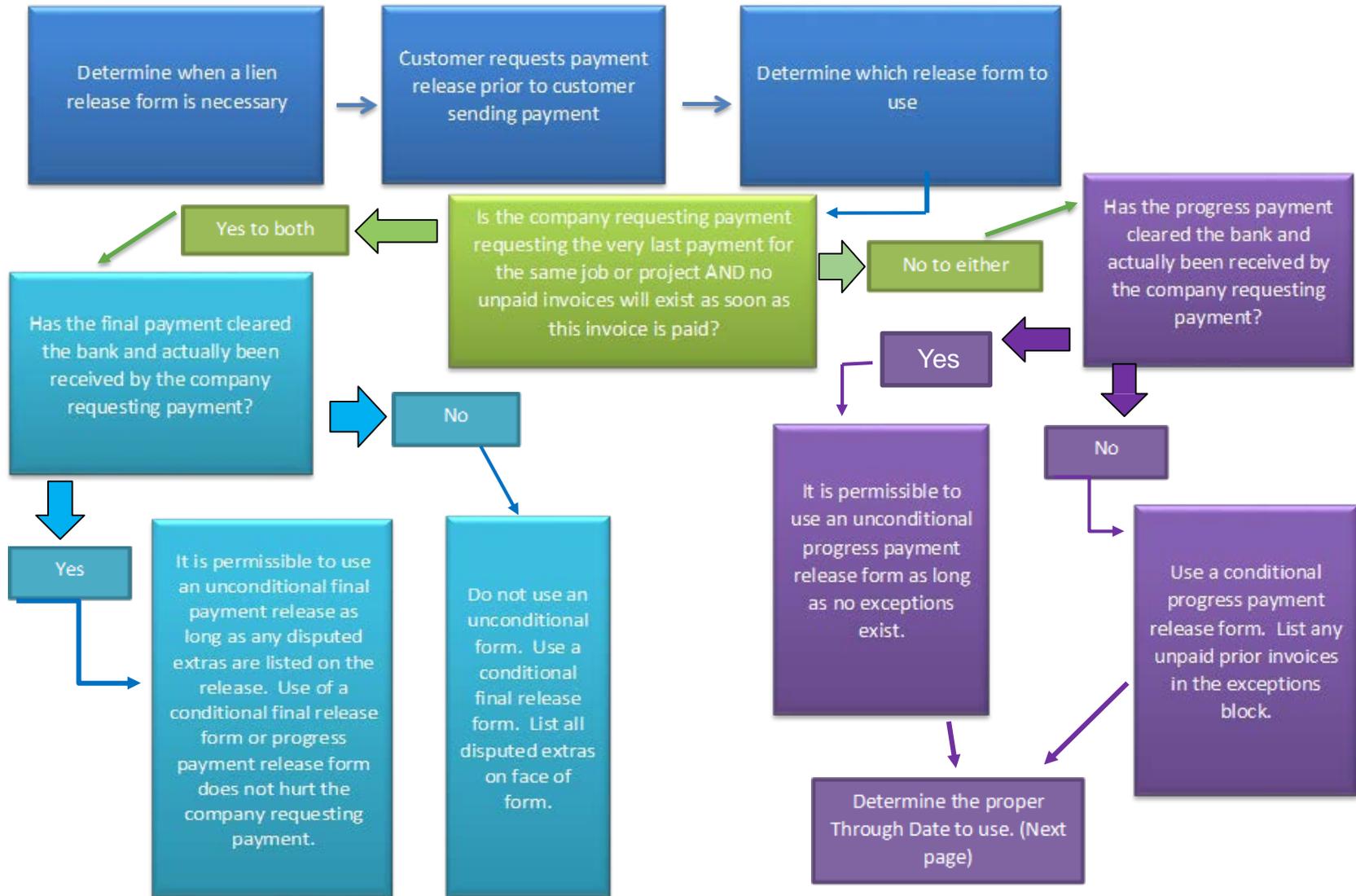
The date you use on a Conditional or Unconditional Progress Payment Release **must** match the date on which the amount being paid was earned so that you don't inadvertently provide someone with a release for more than what is being paid. For example, if you give your client a Progress Payment Release for work performed and/or materials delivered through March 15 in the amount of \$100,000 and your client can only pay you \$50,000 and asks you to provide them with a new release reflecting the partial payment, you must backdate the release to when your billing or job records reflect that \$50,000 was due instead of \$100,000. If you don't backdate the release for the lesser amount then the release will operate to release your lien, stop payment notice and bond rights **through the date** on the release even if you have not been paid in full for the work performed through that date.

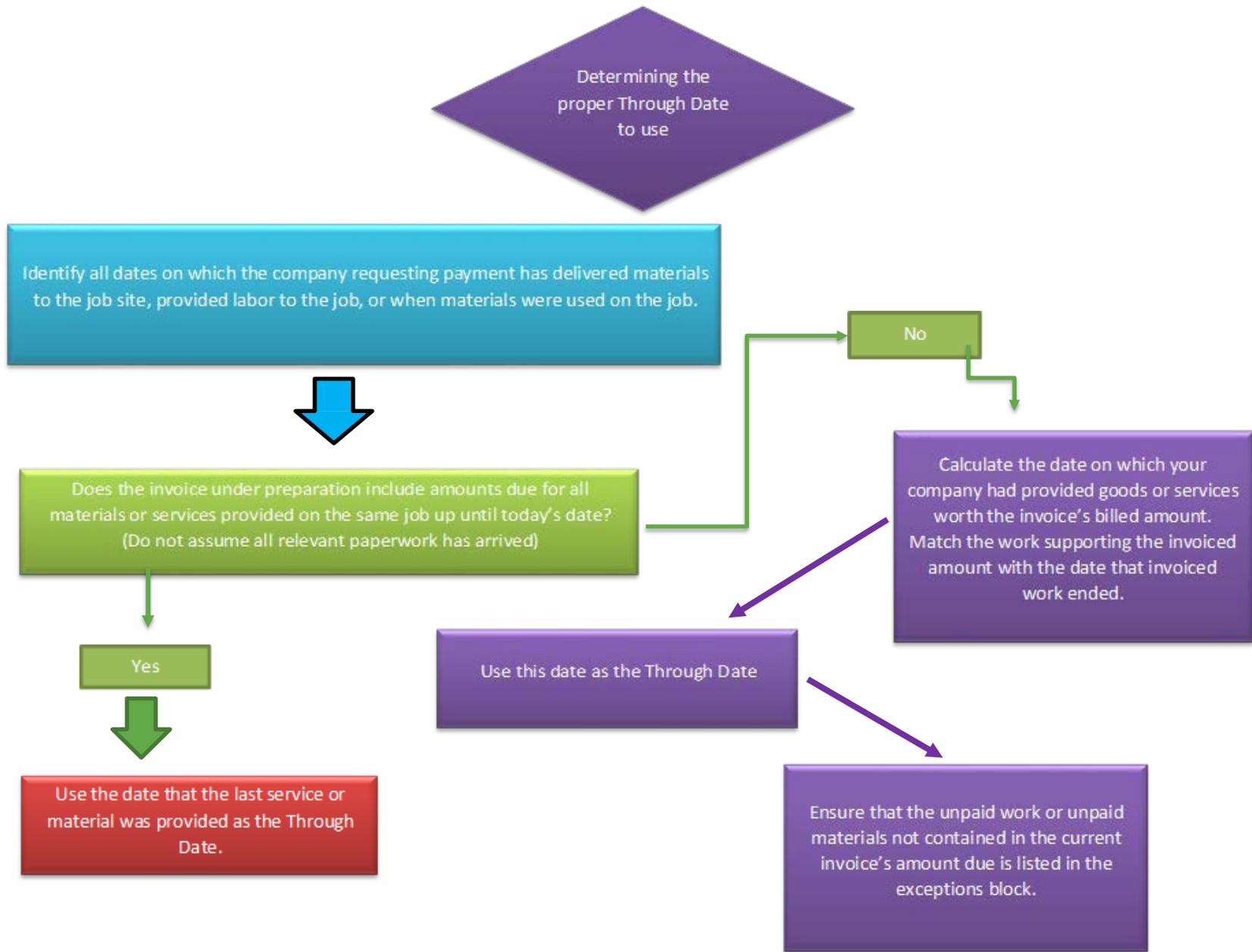


Tesco

Tesco Controls, Inc. filed suit to enforce a stop payment notice and payment bond claim on a public project for \$194,762.00 and lost because it submitted a conditional progress payment release for \$50,000.00 when, based upon the materials it had supplied to the project through the date on the release, it was owed \$244,762.00. The court ruled that the \$50,000 payment wiped out Tesco's stop payment notice and bond claim rights through the date on the release.

Lien Release Flowchart





Conditional Waiver and Release on Progress Payments

CONDITIONAL WAIVER AND RELEASE ON PROGRESS PAYMENT

NOTICE: THIS DOCUMENT WAIVES THE CLAIMANT'S LIEN, STOP PAYMENT NOTICE, AND PAYMENT BOND RIGHTS EFFECTIVE ON RECEIPT OF PAYMENT. A PERSON SHOULD NOT RELY ON THIS DOCUMENT UNLESS SATISFIED THAT THE CLAIMANT HAS RECEIVED PAYMENT.

Identifying Information
Name of Claimant: _____
Name of Customer: _____
Job Location: _____
Owner: _____
Through Date: _____

Conditional Waiver and Release
This document waives and releases lien, stop payment notice, and payment bond rights the claimant has for labor and service provided, and equipment and material delivered, to the customer on this job through the Through Date of this document. Rights based upon labor or service provided, or equipment or material delivered, pursuant to a written change order that has been fully executed by the parties prior to the date that this document is signed by the claimant, are waived and released by this document, unless listed as an Exception below. This document is effective only on the claimant's receipt of payment from the financial institution on which the following check is drawn:
Maker of Check: _____
Amount of Check: \$ _____
Check Payable to: _____

Exceptions
This document does not affect any of the following:
(1) Retentions.
(2) Extras for which the claimant has not received payment.
(3) The following progress payments for which the claimant has previously given a conditional waiver and release but has not received payment: Date(s) of waiver and release: _____ Amount(s) of unpaid progress payment(s): \$ _____
(4) Contract rights, including (A) a right based on rescission, abandonment, or breach of contract, and (B) the right to recover compensation for work not compensated by the payment.

Signature
Claimant's Signature: _____
Claimant's Title: _____
Date of Signature: _____

Visit <http://cslb.ca.gov/> to find waiver forms ^{7/1/12}

Unconditional Waiver and Release on Progress Payments

UNCONDITIONAL WAIVER AND RELEASE ON PROGRESS PAYMENT

NOTICE TO CLAIMANT: THIS DOCUMENT WAIVES AND RELEASES LIEN, STOP PAYMENT NOTICE, AND PAYMENT BOND RIGHTS UNCONDITIONALLY AND STATES THAT YOU HAVE BEEN PAID FOR GIVING UP THOSE RIGHTS. THIS DOCUMENT IS ENFORCEABLE AGAINST YOU IF YOU SIGN IT, EVEN IF YOU HAVE NOT BEEN PAID. IF YOU HAVE NOT BEEN PAID, USE A CONDITIONAL WAIVER AND RELEASE FORM.

Identifying Information

Name of Claimant: _____
Name of Customer: _____
Job Location: _____
Owner: _____
Through Date: _____

Unconditional Waiver and Release

This document waives and releases lien, stop payment notice, and payment bond rights the claimant has for labor and service provided, and equipment and material delivered, to the customer on this job through the Through Date of this document. Rights based upon labor or service provided, or equipment or material delivered, pursuant to a written change order that has been fully executed by the parties prior to the date that this document is signed by the claimant, are waived and released by this document, unless listed as an Exception below. The claimant has received the following progress payment:

\$ _____

Exceptions

This document does not affect any of the following:

- (1) Retentions.
- (2) Extras for which the claimant has not received payment.
- (3) Contract rights, including (A) a right based on rescission, abandonment, or breach of contract, and (B) the right to recover compensation for work not compensated by the payment.

Signature

Claimant's Signature: _____
Claimant's Title: _____
Date of Signature: _____

Visit <http://cslb.ca.gov/> to find waiver forms ^{7/1/12}

Conditional Waiver and Release on Final Payment

CONDITIONAL WAIVER AND RELEASE ON FINAL PAYMENT

NOTICE: THIS DOCUMENT WAIVES THE CLAIMANT'S LIEN, STOP PAYMENT NOTICE, AND PAYMENT BOND RIGHTS EFFECTIVE ON RECEIPT OF PAYMENT. A PERSON SHOULD NOT RELY ON THIS DOCUMENT UNLESS SATISFIED THAT THE CLAIMANT HAS RECEIVED PAYMENT.

Identifying Information	
Name of Claimant:	
Name of Customer:	
Job Location:	
Owner:	

Conditional Waiver and Release	
This document waives and releases lien, stop payment notice, and payment bond rights the claimant has for labor and service provided, and equipment and material delivered, to the customer on this job. Rights based upon labor or service provided, or equipment or material delivered, pursuant to a written change order that has been fully executed by the parties prior to the date that this document is signed by the claimant, are waived and released by this document, unless listed as an Exception below. This document is effective only on the claimant's receipt of payment from the financial institution on which the following check is drawn:	
Maker of Check:	
Amount of Check: \$	
Check Payable to:	

Exceptions	
This document does not affect any of the following:	
Disputed claims for extras in the amount of: \$	

Signature	
Claimant's Signature:	
Claimant's Title:	
Date of Signature:	

7/1/12

Visit <http://cslb.ca.gov/> to find waiver forms

Unconditional Waiver and Release on Final Payment

UNCONDITIONAL WAIVER AND RELEASE ON FINAL PAYMENT

NOTICE TO CLAIMANT: THIS DOCUMENT WAIVES AND RELEASES LIEN, STOP PAYMENT NOTICE, AND PAYMENT BOND RIGHTS UNCONDITIONALLY AND STATES THAT YOU HAVE BEEN PAID FOR GIVING UP THOSE RIGHTS. THIS DOCUMENT IS ENFORCEABLE AGAINST YOU IF YOU SIGN IT, EVEN IF YOU HAVE NOT BEEN PAID. IF YOU HAVE NOT BEEN PAID, USE A CONDITIONAL WAIVER AND RELEASE FORM.

Identifying Information
Name of Claimant:
Name of Customer:
Job Location:
Owner:

Unconditional Waiver and Release

This document waives and releases lien, stop payment notice, and payment bond rights the claimant has for all labor and service provided, and equipment and material delivered, to the customer on this job. Rights based upon labor or service provided, or equipment or material delivered, pursuant to a written change order that has been fully executed by the parties prior to the date that this document is signed by the claimant, are waived and released by this document, unless listed as an Exception below. The claimant has been paid in full.

Exceptions
This document does not affect any of the following: Disputed claims for extras in the amount of: \$

Signature
Claimant's Signature:
Claimant's Title:
Date of Signature:

Visit <http://cslb.ca.gov/> to find waiver forms ^{7/1/12}



Easy Law Construction Notices

Easy Law Construction Notices was established in 1985 by Scott Green, the managing partner for The Green Law Group, LLP, to help contractors and others in the construction industry “**Secure and Collect what they Earn**” with professionally prepared preliminary notices, mechanics liens, stop payment notices, bond claims and collection letters.

Sign up for free at www.easylawinc.com

What to Do and When to Do It To Secure your Right to Payment

Protect Your Right To Secure and Collect What you Earn with a Preliminary Notice

**Reference:
(Civil Code §8200)**

Note:

Licensed contractors are subject to possible disciplinary action by the Contractors License Board if they fail to provide Preliminary Notice information to potential claimants or fail to give Preliminary Notices on all projects where the amount of their contract is \$400 or more.

Procedures and Time Limits:

Give Preliminary Notice to the property owner or public agency, the direct contractor, and the construction lender (if applicable) no later than 20 days after the first day you supply labor and/or materials to the project.

Better Late than Never:

A late Preliminary Notice may still be effective and is better than no Preliminary Notice.

Better be Safe than Sorry:

Make it your standard practice to mail your Preliminary Notices via certified mail return receipt requested on the same day you enter into a new contract.



Claimants' Time Chart

Mechanics Liens

Claimants other than Direct Contractors Reference:

(Civil Code § 8414)

Note:

A claimant other than a direct contractor may not enforce a lien unless the claimant records a claim of lien within the following times: (a) After the claimant ceases to provide work. (b) Before the earlier of the following times: (1) Ninety days after completion of the work of improvement.
(2) Thirty days after the owner records a notice of completion or cessation.

Procedures and Time Limits:

Record Mechanics Liens with the County Recorder in the county where the project is located within 30 days after recordation of Notice of Cessation or Completion, or if a Notice of Completion or Cessation has not been recorded, within 90 days after project completion.

Best Practice:

Don't wait until the last day to record your Mechanics Lien, or take any other action to secure your right to payment.

Claimants' Time Chart

Mechanics Liens for Direct Contractors

Direct Contractor

Reference:

(Civil Code §8412)

Note: A Direct Contractor may not enforce a lien unless the contractor records a claim of lien after the contractor completes the direct contract, and before the earlier of the following times: (a) 90 days after completion of the work of improvement; or (b) 60 days after the owner records a notice of completion or cessation.

Procedures and Time Limits:

Record Mechanics Liens with the County Recorder in the county where the project is located within 60 days after the date a Notice of Completion or Cessation is recorded or, if a Notice of Completion or Cessation has not been recorded, within 90 days after the completion of the project.

Best Practice:

Don't wait until the last day to record your Mechanics Lien or take any other action to secure your right to payment.

Claimants' Time Chart

Enforcing Mechanics Liens

Filing Suit to Foreclose on a Mechanics Lien

Reference:

(Civil Code § 8460)

Note: The property owner and the claimant can enter into an agreement to extend the time to file suit to enforce a lien past the 90 day deadline, but in no event greater than 1 year from completion of the work of improvement.

Procedures and Time Limits:

File suit to foreclose lien within 90 days of recording the lien, otherwise the lien will automatically become null and void and unenforceable.

Best Practice:

Consider the cost of litigation and attempt to work out a compromise even if it includes discounting your claim in order to avoid having to file suit. If you file suit, include all the claims you have, including breach of contract against your customer and determine in advance if you have the ability to recover your attorneys' fees if you win.

Claimants' Time Chart

Lis Pendens – Litigation Pending

After Filing Suit to Foreclose on a Mechanics Lien

Reference:
(Civil Code §8461)

Note: Without a recorded Lis Pendens subsequent purchasers of the property against which a Mechanics Lien is recorded may not be subject to a judgment foreclosing the Lien. The Lis Pendens encumbers the property whereas a Mechanics Lien alone does not.

Procedures and Time Limits:

Record a Lis Pendens with the County Recorder immediately after filing a lawsuit to foreclose a lien.

Best Practice:

While the statute allows the Lis Pendens to be recorded up to 20 days after filing suit, the best practice is to record the Lis Pendens immediately after the suit is filed.

Claimants' Time Chart

Payment Bond Claims

Making Payment Bond Claims on Public Projects

Reference:

(Civil Code §8612)

Note:

The winning party in a lawsuit to enforce a Payment Bond Claim is entitled to recover their attorneys' fees from the losing party. Payment Bonds are not common on private projects.

Procedures and Time Limits:

If a Preliminary Notice was required, but not provided, give written notice to the payment bond surety and the bond principal within 15 days after recordation of a Notice of Completion. If a Notice of Completion has not been recorded, the time for giving written notice is extended to 75 days after completion of the project.

This exception will not apply if: (1) all progress payments, except for those disputed in good faith, have been made to a subcontractor to whom the claimant has provided materials or services; (2) the subcontractor the claimant has provided materials or services to has been terminated from the project and all progress payments, except those disputed in good faith, have been made as of the termination date.

Best Practice:

Give Preliminary Notice on every project as soon as you enter into a new contract.

Claimants' Time Chart

Enforcing Payment Bond Claims

Enforcing Payment Bond Claims on Public Projects

Reference:
(Civil Code §9558)

Procedures and Time Limits:

On public projects file suit within 6 months after the period within which Stop Payment Notices must be filed.

Note:

If you miss the cut off to file suit to enforce a Payment Bond claim, you may still have time to file suit for Breach of Contract. The statute of limitations to file suit for breach of a written contract is four years from the date of breach and two years from the date of breach of an oral contract.

Claimants' Time Chart

Stop Payment Notice – Private Project

Making a Private Project Stop Payment Notice Claim

Reference:

(Civil Code §8508)

Note: A Stop Payment Notice to a construction lender must be bonded. A Stop Payment Notice on an owner financed project does not require a bond.

Procedures and Time Limits:

Send Bonded Stop Payment Notice by certified mail to the construction lender prior to expiration of lien recording period.

Best Practice:

The Stop Payment Notice is a claim on “undisbursed” funds in the construction loan account. If you wait too long to make your claim, the funds may be gone.

Claimants' Time Chart

Stop Payment Notice – Private Project

Enforcing a Private Works Stop Payment Notice Claim

Reference:

(Civil Code §8550)

Note: If a claimant does not file suit to enforce a Stop Payment Notice, the Notice ceases to be effective and the funds will be released.

Procedures and Time Limits:

File lawsuit no sooner than 10 days from service of Stop Payment Notice and no later than 90 days after the expiration of the time a Stop Payment Notice may be served.

Best Practice:

Within five days after filing a lawsuit to enforce payment of the claim, the claimant must give written notice of the lawsuit to the persons to whom the stop payment notice was given.

Claimants' Time Chart

Stop Payment Notice – Public Project

Making a Public Project Stop Payment Notice Claim

Reference:
(Civil Code §9356)

Note: Include \$10.00 with your request and the public agency will send you a copy of the Notice of Completion, Cessation or Acceptance.

Procedures and Time Limits:

Send a Stop Payment Notice by certified mail to the public agency, addressed to the person responsible for disbursing funds for the project within 30 days of recordation of Notice of Completion, Acceptance or Cessation. If a Notice of Completion or Cessation has not been recorded, serve the Stop Payment Notice within 90 days after Completion or Cessation.

Best Practice:

Also secure your right to payment with a Payment Bond Claim.

Claimants' Time Chart

Stop Payment Notice – Public Project

Enforcing a Public Works Stop Payment Notice

Reference:
(Civil Code §9502)

Procedures and Time Limits:

File lawsuit no sooner than 10 days after service of Stop Payment Notice and no later than 90 days from expiration of period within which Stop Payment Notices must be filed.

Best Practice:

Combine Stop Payment Notice and Payment Bond claims with a claim for breach of contract in the same lawsuit.

Keep in mind that the prevailing party in a lawsuit to enforce a Payment Bond claim is entitled to recovery their attorneys' fees. This is great if you win, and not so good if you lose.

Claimants' Time Chart

After Filing Suit - Notice of Proceedings

Stop Payment Notice Claimants

Reference:

(Civil Code §8550) and
(Civil Code § 9504)

Procedures and Time Limits:

Serve Notice of Proceedings within 5 days after filing lawsuit on the same people and in same manner as you served the Stop Payment Notice.

Note:

The Notice of Proceedings is meant to give prompt notice to the holder of the construction funds to prevent disbursement after a lawsuit is filed until a judgment is rendered.

Claimants' Time Chart

Federal Projects – Miller Act Claims

Making a Claim on a Federal Works Project

Reference:

(Miller Act, 40 U.S.C. § 3133)

Note:

A supplier to a supplier cannot make a Miller Act Bond Claim.

Procedures and Time Limits:

Send a Miller Act Notice by certified mail to the direct contractor and the contractor you contracted with within 90 days from your last delivery of labor or materials to the project.

Best Practice:

Second tier claimants should send a generic pre-lien notice to the direct contractor at the outset of their participation and request joint checks.

Claimants' Time Chart

Enforcing Miller Act Bond Claims

Enforcing a Claim On a Federal Works Project

Reference:

(Miller Act 40 U.S.C. § 3133,
Capehart Act 42 U.S.C.1594)

Note:

Federal projects include military bases, post offices, and other federally owned property.

Procedures and Time Limits:

File suit no sooner than 90 days from claimant's last labor or materials and no later than 1 year from the claimant's last day of work.

Best Practice:

Before filing suit to enforce your claim make sure that you have created a strong paper trail (contract documents, invoices, statements, collection letters) to support your claim and consider offering a discount in exchange for a prompt payment to avoid the need for litigation.

Claimants' Time Chart

Contractor License Bond Claims

License Bonds

Reference:

(Business and Professions Code
§7071.11)

Note:

Before filing suit to enforce a license bond claim, send a demand letter to the license bond surety with support for your claim.

Sureties are required to investigate all claims in good faith and will give notice to the contractor.

Procedures and Time Limits:

File suit within 2 years after expiration of license period.

Best Practice:

Successful license bond claims require proof that the licensee willfully violated some provision of contractor's license law. The failure to pay contractual obligations when due does not generally support a successful license bond claim.

Small Claims Court Attorneys Not Allowed

- ❑ Create a “paper trail” in support of your position with a reasonable payment demand letter before filing your claim laying out the facts in support of your position.
- ❑ Consumers and businesses owned by individuals can file claims for up to \$10,000 twice per year, thereafter the maximum amount is \$2,500.
- ❑ Corporations, Limited Liability Companies and other entities cannot ask for more than \$5,000 twice per year, thereafter the maximum amount is \$2,500.
- ❑ Only defendants can appeal and many of them do. Attorneys are allowed for the hearing on the appeal.
- ❑ www.courtinfo.ca.gov/selfhelp/smallclaims



Contractor Warranty

- What warranty is a contractor required to provide under California Law?
 - There are three basic warranties that are now law in California
 - The one-year warranty – New construction & remodels
 - The four-year warranty – All contractors / all jobs
 - The ten-year warranty – structural defects



Contractor Warranty

- The one-year warranty – New construction and remodels
 - The standard “one year expressed limited warranty” also known as the “Fit and Finish warranty” is an industry standard and a California law (CA CIVIL CODE 900), and is considered an implied warranty
 - Even though the state has adopted a standard of the warranty, a **written warranty is always better**
 - With a one-year written or implied warranty you are required to file a complaint within the one-year period

Contractor Warranty

- The four-year warranty – All contractors / all jobs
 - A licensed contractor is required to give a warranty on all items installed under his/her license to be free from defective installation including, but not limited to the local codes and manufacturer's installation requirements for up to four years after the completion of a job.
 - The claim may be entered on any defect, either known or unknown, and discovered within the four-year period.
 - A licensed contractor can be held liable for repairs and damages caused by the defective installation. A licensed contractor who fails to meet the minimum installation requirements can be sued in a court of law and a complaint can be filed with the CSLB

Contractor Warranty

- Ten-year warranty – Structural defects
 - A licensed contractor and/or engineer on record is required to provide a warranty on certain engineered components that they are to be free from engineering defects, miscalculation or omissions.
 - Such defects could be site stability, the integrity of the foundations, site retaining walls, roof framing, etc. ...
 - These defects could be considered Latent defects.
 - Latent Defects are defects which lay dormant and are undiscoverable without certain expertise or disaster
 - Such Latent defects may include foundation settling, excessive sagging of beams or other framing which may be undersized, unusual site movement, etc.



Contractor Warranty

- Filing a complaint
 - You are required to notify the contractor in writing and allow him to inspect, evaluate and make an offer to repair or settle the claim.
 - If the contractor refuses to respond to your claim or does not offer a reasonable settlement or repair within a reasonable time frame, you may then consider legal action.



Contractor Warranty

- Filing a complaint
 - Legal action can include:
 - Small Claims court if the amount is under the limit of \$5,000.00 to \$10,000.00 (depending on the claim)
 - Or you can pursue civil damages and contact a construction defect attorney
 - Another option is contacting the California State License Board
 - If you file a complaint against a licensed contractor within the legal deadline, the CSLB has the authority to investigate the complaint
 - If the contractor is unlicensed, the CSLB may not be able to help.



Contractor Warranty

- Filing a complaint
 - For more information about filing a complaint with the Contractors State License Board:
 - Visit CSLB's website at www.cslb.ca.gov
 - Call CSLB at 1-800-321-CSLB (2752)
 - Write CSLB at
P.O. Box 26000
Sacramento, CA 95826



Contractor Warranty

- What if the contractor fails to repair the defect or pay settlement once I get a judgment or order?
 - If a licensed contractor fails to pay a civil penalty, or to comply with an order of correction or an order to pay a specified sum (either by court order or by CSLB action) a suspension of his license per the CALIFORNIA BUSINESS AND PROFESSIONS CODE SECTION 7090.1 may occur.

Contractor Warranty

- What is a “Contractor’s License Bond?”
 - A contractor’s bond guarantees both job completion and payment of all labor and materials.
 - All contractors are required to have a minimum \$15,000.00 bond.
 - Some bonds are designed to protect you from substandard work that does not comply with local building codes.
 - Check with the CSLB if you wish to file a complaint against a licensed contractor and pursue a contractor’s bond for reimbursement of a judgment.

Business Law

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Construction Contracts

The Good, The Bad, The Ugly

Contracts Allocate Responsibility and Risk

- ❑ 1. Oral Agreements = Disputes = Lawyers = \$\$\$
- ❑ 2. Read and understand every contract before signing.
- ❑ 3. When you review a proposed contract circle what you don't understand or agree with and start your negotiations by asking the drafter to explain or delete any provisions you question.
- ❑ 4. If an agreement is not in writing, it may be difficult or impossible to enforce and in some cases, illegal.
- ❑ 5. Look for and avoid "DEAL KILLER" provisions in proposed contracts. A DEAL KILLER is a provision that should cause you to pass on the agreement unless the provision is deleted or modified.
- ❑ 6. The best contract, is one you write to protect your own interests.



Essential Elements of a Contract

To prove that a contract was created, all of the following must exist:

1. That the contract terms were clear enough that the parties could understand what each was required to do;
2. That the parties agreed to give each other something of value [a promise to do something or not to do something may have value]; and
3. That the parties agreed to the terms of the contract.

Any duress, false statements, undue influence or unconscionable dealings could make a contract illegal and void.

Contracts Should be Custom Tailored for Each Project

BNI Forms- Building News Industry

www.bnibooks.com

Builder's Book Store in Canoga Park

www.buildersbook.com

AIA (American Institute of Architects)

www.aia.org

Associated General Contractors of California

www.agc-ca.org

Construction Owner Association of America

www.coaa.org

Custom Drafted Contracts

www.thegreenlawgroup.com

Contract Terms & Conditions

COMMON CONTRACT PROVISIONS

1. PAY IF PAID & PAY WHEN PAID

Pay if Paid clauses, are phrased so that the direct contractor is never obligated to make payment to its subcontractors if it never receives payment from the owner. Courts have held these clauses to be void and unenforceable for over twenty years. If a contract has such a provision, the law gives the direct contractor a reasonable amount of time to pay.

Because of this, contracts often have Pay When Paid clauses, that will offer a definition for the reasonable length of time the direct contractor has to pay the subcontractors in the event the owner does not pay.

However, on April 17, 2020, the 4th District Court of Appeal held that a Pay When Paid provision was unenforceable when the owner and direct contractor were engaged in an ongoing dispute, because it unreasonably delayed accrual of payment bond rights for an indefinite period of time.

Contract Terms & Conditions

COMMON CONTRACT PROVISIONS

1. PAY IF PAID & PAY WHEN PAID, Continued

The provision that the Court of Appeal held was unenforceable in the case of *Crosno Construction, Inc. v. Travelers Casualty & Surety Co. of America* (Apr. 17, 2020) is copied below

If Owner or other responsible party delays in making any payment to Contractor from which payment to Subcontractor is to be made, Contractor and its sureties shall have a reasonable time to make payment to Subcontractor. 'Reasonable time' shall be determined according to the relevant circumstances, but in no event shall be less than the time Contractor and Subcontractor require to pursue to conclusion their legal remedies against Owner or other responsible party to obtain payment, including (but not limited to) mechanics' lien remedies.

Contract Terms & Conditions

COMMON CONTRACT PROVISIONS

2. Alternative Dispute Resolution (ADR)

a. Mediation/Arbitration

Usually no discovery, jury or appeal - depends on the terms included in the arbitration clause in contract.

b. In addition to filing a demand for arbitration, to foreclose a mechanics lien claimants must file a lawsuit to prevent the 90 day statute of limitations from expiring and request a stay of litigation in order to proceed to arbitration.

c. After an arbitration award is rendered, the prevailing party has to petition the court to confirm the award in order to obtain an enforceable judgment.



Contract Terms

NO DAMAGES FOR DELAY-TIME EXTENSIONS ONLY

May be able to argue for disruption, interference or hindrance damages based on the following:

1. Job was bid as a “production” job, but was scheduled in stages and out of production sequence;
2. Owner and/or general contractor changed the sequence of construction;
3. Parties have an “implied duty of cooperation,” meaning that neither party should act or fail to act so as to prevent the other party from exercising its rights and/or performing its contractual obligations; and
4. Create disruption increased costs.

Contract Terms

4. CONTINUING WORK IN THE FACE OF DISPUTE

- a. An example of a “deal killer” contract provision is one which requires a contracting party to continue performance even if required progress payments are not made.

5. ATTORNEYS’ FEES PAID TO PREVAILING PARTY

- a. Estimated range for attorneys’ fees and court costs to take a case to trial \$25,000 to \$250,000.
- b. Before you file suit, ask your attorney for an estimated litigation budget and an evaluation of your downside risks if you lose – litigation doesn’t come with a guarantee. If you lose, you could be ordered to pay the court costs incurred by your opponents and their attorneys’ fees in addition to any damages awarded against you.



Contract Terms

6. CHANGES MUST BE APPROVED IN WRITING

a. DO NOT FORGET REQUESTS FOR TIME EXTENSIONS IN YOUR CHANGE ORDERS.

b. IF YOU DON'T GET A TIME EXTENSION WITH A CHANGE ORDER, YOU MAY BE PENALIZED FOR DELAYING THE COMPLETION OF THE PROJECT.

7. NOTICE REQUIREMENTS

a. YOU MAY LOSE YOUR CLAIM IF YOU DO NOT GIVE NOTICE AND CREATE A PAPER TRAIL FOR:

1. Owner or contractor caused delay
2. Disruption
3. Acceleration
4. Constructive change orders
5. Create a “paper trail” to support your position



Contract Terms

❑ Termination for Convenience

Doesn't require a reason to terminate contract. These provisions commonly provide for payment for work and materials completed to date and in the pipeline, but don't generally include payment for lost profits.

You could have your contract terminated for convenience, and still be sued for breach of contract. A party who terminates a contract for convenience doesn't waive their right to make a claim for damages based on the contract or on negligence. If your contract is terminated for convenience, create a strong paper trail to support your position regarding your performance on the project prior to termination.

❑ Termination for Cause

Best practice is to provide specific notice and an opportunity to cure before terminating a contract for cause because the terminating party has the burden of proving that the termination was justified.



Contract Terms

Get Copies of Incorporated Documents

Subcontracts often incorporate by reference the general conditions, plans, specifications, addenda, and modifications in the owner/direct contract. Incorporated documents are often defined in a contract as “Contract Documents.” Before you sign a contract that incorporates Contract Documents, get copies of the Contract Documents and review them to make sure that they don’t adversely impact your contract obligations because the terms and conditions in the incorporated Contract Documents will become an enforceable part of your contract agreement when you sign the contract.

For example, a subcontract may incorporate the terms of another contract with a provision for liquidated damages which will may expose you to liquidated damage penalties.

Sample Contract Terms & Conditions

- 1. Plans and Specifications:
 - CONTRACTOR shall provide, at OWNER's expense, a plan and scale drawing showing shape, size, dimensions, and construction and equipment specifications for residential improvement.
- 2. Substantial Commencement of Work:
 - Failure by the CONTRACTOR without lawful excuse to substantially commence work within 20 days from the approximate date specified in this CONTRACT when work will commence is a violation of the Contractors State License Law.
- 3. Joint Control:
 - If CONTRACTOR is required to furnish joint control, CONTRACTOR shall not have any financial or other interest in the joint control.
- 4. Change Orders in Writing:
 - No extra work or change order work shall be required to be performed without prior written authorization of the person contracting for the construction of the residential improvement. Any change order forms for changes or extra work shall be incorporated in, and become a part of the contract.
- 5. Release for Payments:
 - Unless CONTRACTOR is required by OWNER to furnish a performance and payment bond, lien and completion bond, bond equivalent, or joint control approved by the Registrar of Contractors covering full performance and completion of the CONTRACT and the bonds or joint control is furnished by the CONTRACTOR, or when the parties agree for full payment to be made upon or for a schedule of payments to commence after satisfactory completion of the PROJECT, the CONTRACTOR shall, upon satisfactory payment being made for any portion of the work performed, prior to any further payment being made, furnish to the OWNER a full and unconditional release from any claim or mechanics' lien pursuant to Section 3114 of the Civil Code, for that portion of the work for which payment has been made.

Sample Contract Terms & Conditions

- 6. Labor and Material Charges:
 - CONTRACTOR shall pay for labor, equipment and material delivered to the job by CONTRACTOR and consumed in the PROJECT, but is excused by OWNER from this obligation for any labor, equipment and materials for which the OWNER is in arrears in making progress payments to CONTRACTOR.
- 7. CONTRACT, Plans, Specifications and Permits:
 - The PROJECT will be constructed according to such plans and specification that have been submitted to and approved by the responsible public agency. OWNER will obtain and pay for all required building permits and any assessments and changes required by any government agency relating to the PROJECT. The CONTRACT, plans, and specifications are intended to supplement each other. In case of conflict, the specifications shall control over the plans, and the provisions of this contract shall control both.
- 8. Change Orders:
 - Should OWNER, construction lender, or any public body or inspector direct any modification or addition or deletion to the work covered by this CONTRACT, the cost shall be added to or deducted from the CONTRACT price. For the purpose of this paragraph, “cost” is defined as the cost of extra contractors, labor, materials, and equipment, plus 15% if “cost” for overhead and profit. Requests for Change Orders shall be in writing, but CONTRACTOR is entitled to be paid for extra work whether reduced to writing or not. OWNER is entitled to a contract price reduction in overhead and profit because of a credit change order. Expenses incurred by CONTRACTOR because of unusual or unanticipated subsurface ground conditions or because of other unanticipated and unknown conditions (including, but not limited to, removal of toxic waste, asbestos, or material containing asbestos, or toxic waste) shall be paid for by OWNER as extra work. CONTRACTOR shall promptly notify OWNER of latent physical conditions at the site differing materially from those ordinarily encountered and generally recognized as inherent on work of the character provided for in this CONTRACT. Any expense incurred due to such condition shall be paid for by OWNER as extra work.

Sample Contract Terms & Conditions

- 9. Allowances:
 - If the CONTRACT price includes allowances, and the cost of performing the work covered by the allowance is less than the allowance, then the CONTRACT price shall be decreased accordingly. Unless otherwise provided by this contract or requested by OWNER in writing, CONTRACTOR shall use his own judgment in accomplishing work covered by an allowance. If OWNER requests that work covered by an allowance be accomplished in such a way that the cost will exceed the allowance, CONTRACTOR shall comply with OWNER's request, provided that OWNER agrees, in writing, to pay for the additional cost as extra work.
- 10. Delay:
 - CONTRACTOR shall be excused for any delay in completion of the CONTRACT for any unanticipated cause outside of CONTRACTOR's control. OWNER shall be responsible for any delay damages CONTRACTOR incurs as a result of an unreasonable and unexcused delay by OWNER. Time for completion of the PROJECT will be extended by OWNER caused delays.
- 11. Completion and Occupancy:
 - OWNER hereby appoints CONTRACTOR as OWNER's attorney in fact for the sole purpose of signing and recording a Notice of Completion on behalf of OWNER.
- 12. Right to Stop Work:
 - If OWNER does not make timely payments in accordance with this CONTRACT, CONTRACTOR shall the right to stop work. CONTRACTOR may keep the job idle until all payments due are received. The time for completion of the PROJECT will be extended one day of work for each day work is stopped per this section. A late charge of 5% of the past due amount, plus interest at the rate of 2% per month shall accrue on all past due amounts. Failure by OWNER to make payment within 15 days of the due date shall constitute a material breach of this CONTRACT.

Sample Contract Terms & Conditions

- 13. Damage to PROJECT and Insurance:
 - OWNER will procure at OWNER's own expense and before the commencement of any work hereunder, property insurance with course of construction, vandalism, and malicious mischief clauses attached; such insurance to be in a sum at least equal to the CONTRACT price with loss, if any, payable to any beneficiary under any deed of trust covering the PROJECT. Such insurance shall name CONTRACTOR as an additional insured, and shall protect OWNER, CONTRACTOR, and construction lender as their interests may appear. OWNER shall also procure at OWNER's expense Builders All Risk insurance for claims against CONTRACTOR and CONTRACTOR's subcontractors for any and all damages caused by construction defects, or negligence. Said insurance shall name CONTRACTOR as an additional insured. Should the OWNER fail to do so, CONTRACTOR may, at his own discretion, procure such insurance as agent for and at expense of OWNER. In the event of a claim by the OWNER against the CONTRACTOR for construction defects, or negligence, OWNER's recovery shall be limited to the coverage afforded by the BUILDERS' All Risk insurance. Should OWNER fail to do so, CONTRACTOR may procure such insurance as agent for and at the expense of OWNER, but is not required to do so.
 - If the PROJECT is destroyed or damaged by an accident, disaster, or calamity, such as a fire, storm, flood, landslide, substance or earthquake, or by theft or vandalism, any work done by CONTRACTOR in rebuilding or restoring the PROJECT shall be paid for by OWNER as extra work under Section 8. CONTRACTOR will maintain in full force and effect a workers' compensation insurance policy. OWNER shall obtain and pay for insurance against injury to his own employees and persons under owner's direction and persons on the job site at OWNER's invitation. The insurance required by this provision shall remain in effect for as long as the CONTRACTOR has an insurable interest in the property and until the PROJECT is completed. If the PROJECT is destroyed or damaged by any insurable cause, then any work done by CONTRACTOR in rebuilding or restoring the PROJECT shall be paid for by OWNER as extra work under Section 8. CONTRACTOR will maintain workers' compensation insurance covering all CONTRACTOR's employees for the duration of CONTRACTOR's work on the PROJECT. OWNER shall provide workers' compensation insurance for OWNER's own employees and persons on the job site under OWNER's direction and/or invitation.

Sample Contract Terms & Conditions

- 14. Limitations on Claims:
 - No action or arbitration arising from or related to the CONTRACT, or the performance thereof, shall be commenced by either party against the other more than four years after the completion or cessation of work under this CONTRACT. This limitation applies to all actions of any character, whether at law or in equity, and whether sounding in CONTRACT, tort, or otherwise and includes, but is not limited to claims for construction defects, whether patent or latent.
- 15. Notice to Cure:
 - As a condition precedent before any action or arbitration can be brought by OWNER against CONTRACTOR or any of CONTRACTOR's subcontractors for any alleged construction defect, default under this CONTRACT, or any other claim for damages, OWNER must provide written notice to CONTRACTOR and an opportunity to cure. The written notice must specifically identify the nature and location of any claimed construction defects, and/or defaults under the CONTRACT. OWNER must provide CONTRACTOR with the written notice within 30 calendar days of discovery of the alleged defect or default, or any and all claims against CONTRACTOR for said defects and/or defaults are forever waived and barred. OWNER must permit CONTRACTOR 5 business days for the cure after that written notice from OWNER to CONTRACTOR is actually received by CONTRACTOR, to begin curing or addressing the alleged defects and/or defaults. Within the 5 day period, CONTRACTOR must either complete the corrections, or provide OWNER with a written schedule for completion within a reasonable period of time. In the absence of CONTRACTOR's compliance with the above, OWNER can employ any and all legal means to effect repairs and bring a claim against CONTRACTOR in accordance with Section 12 below. OWNER is exempt from the requirement allowing CONTRACTOR an opportunity to cure, but not the requirement of notice, for emergency repairs. An emergency repair is one which is reasonably believed to be necessary to prevent personal injuries, or the loss or destruction of property in excess of \$2500.

Sample Contract Terms & Conditions

□ 16. ARBITRATION OF DISPUTES:

- Any controversy arising out of or relating to the construction of the PROJECT referred to in this CONTRACT or regarding the interpretation of this CONTRACT is subject to arbitration with the American Arbitration Association in accordance with the Construction Industry Rules in effect at the time of the demand for arbitration. **As a condition precedent to arbitration, the parties must participate in mediation.** The mediation shall be held in accordance with the Construction Industry Rules of the American Arbitration Association. Should any party refuse to fully participate or neglect to appear for mediation, they will be barred from maintaining a claim or set-off against the other in arbitration. Any party who refuses to appear or participate in the arbitration proceedings will be subject to default in accordance with the American Arbitration Association rules then existing. Thirty days prior to the date set for the mediation, the parties shall make a good faith exchange of any and all documents, photographs, videos, etc., relating to the controversy between them. The mediator, in his or her sole discretion, shall have the power to order additional discovery of any sort allowed under California Law. The mediator may also hire independent experts to assist the mediation process. The cost of mediation, including experts, shall be borne equally by the parties.
- NOTICE: BY INITIALING IN THE SPACE BELOW YOU ARE AGREEING TO HAVE ANY DISPUTE ARISING OUT OF THE MATTERS INCLUDED IN THE “ARBITRATION OF DISPUTES” PROVISION DECIDED BY NEUTRAL ARBITRATION AS PROVIDED BY CALIFORNIA LAW AND YOU ARE GIVING UP ANY RIGHTS YOU MIGHT POSSESS TO HAVE THE DISPUTE LITIGATED IN A COURT OR JURY TRIAL. BY INITIALING IN THE SPACE BELOW YOU ARE GIVING UP YOUR JUDICIAL RIGHTS TO DISCOVERY AND APPEAL, UNLESS THESE RIGHTS ARE SPECIFICALLY INCLUDED IN THE “ARBITRATION OF DISPUTES” PROVISION. IF YOU REFUSE TO SUBMIT TO ARBITRATION AFTER AGREEING TO THIS PROVISION, YOU MAY BE COMPELLED TO ARBITRATE UNDER THE AUTHORITY OF THE BUSINESS AND PROFESSIONS CODE OR OTHER APPLICABLE LAWS. YOUR AGREEMENT TO THIS ARBITRATION PROVISION IS VOLUNTARY.
- WE HAVE READ AND UNDERSTAND THE FOREGOING AND AGREE TO SUBMIT DISPUTES ARISING OUT OF THE MATTERS INCLUDED IN THE “ARBITRATION OF DISPUTES” PROVISION TO NEUTRAL ARBITRATION.

Sample Contract Terms & Conditions

- 17. Attorneys' Fees:
 - If either party becomes involved in litigation or arbitration arising out of this CONTRACT or the performance thereof, the court or arbitrator in such litigation or arbitration, or in a separate suit, shall award reasonable costs and expenses, not including attorneys' fees, to the prevailing party. In awarding attorney fees, the court or arbitrator will not be bound by any fee schedule, but shall, if it is in the interest of justice to do so, award the full amount of costs, expenses, and attorneys' fees paid or incurred in good faith.
- 18. Clean-Up:
 - Upon completion of the work, CONTRACTOR will remove debris and surplus material from OWNER's property and leave it in a neat and broom-clean condition.
- 19. Ambiguity:
 - In the event that the language of this CONTRACT is determined to be ambiguous, the CONTRACT shall be construed as having been jointly drafted by the parties to it and not interpreted against either one as the drafter of the CONTRACT.
- 20. CONTRACT Documents:
 - The CONTRACT Documents consist of this Agreement, other documents listed in this Agreement and written modifications signed by the parties issued after execution of this agreement; these form the CONTRACT, and are as fully a part of the CONTRACT as if attached to this Agreement or repeated therein. The CONTRACT represents the entire and integrated agreement between the parties hereto and supersedes prior negotiations, representations, or agreements, either written or oral. If anything in the CONTRACT documents is inconsistent with this Agreement, this Agreement shall govern.



Sample Contract Terms & Conditions

- 21. Notice:
 - Any notice required or permitted under this CONTRACT, provided however that the parties addresses for written notices may be changed by delivery of a change of address notice given to the other party.
- 22. Bankruptcy:
 - If either party, or any alter ego of that party, becomes bankrupt, or makes an assignment for the benefit of creditors, the other party has the right to cancel this CONTRACT.
- 23. Additional Terms and Conditions:
 - Additional terms and conditions can be attached as addendum to this CONTRACT. All such addendum are hereby incorporated herein by reference and made a part of this CONTRACT.

Common Breach of Contract Allegations

1. Failure to make payment – must be a “material breach.”
2. Negligent performance – Could be cause for termination.
3. Change order disputes – leading cause of disputes.
4. Delay – Disruption – Acceleration (scheduling problems).
5. Defective plans and specifications – who hired the architect (Spearin Doctrine – 1918 Supreme Court Case – Owners warrant that their plans and specifications are “buildable”).
6. Failure to grant job site access – could be basis for delay damages.
7. Failure to respond to requests for information (RFIs).
8. Interference with the contractor’s performance (Means and Methods).
9. Failure to approve shop drawings – could be a basis for delay damages.
10. Failure to approve change orders – could be a basis for delay damages.
11. Failure to deliver owner-furnished equipment – Delay damages.
12. No Damage for Delay provisions – Very Common.
13. Wrongful termination – What conclusion does the paper trail support?
14. **What if you walk off the job? (Abandonment – CSLB Complaint)**



Breach of Contract

- ❑ **Walking off a job in a payment dispute may get you sued for abandoning the project**

Your customer may also file a complaint with the Contractors State License Board for abandonment which could result in disciplinary action and an order to pay compensation.

- ❑ **Damages for walking off without justification**

Could be based upon the cost for another firm to complete the balance of your contract on a time and material basis.



Be Proactive – Avoid Disputes

- A. Read your contracts, including any “incorporated” documents, and do not sign unless you understand and agree with the proposed terms.
- B. Begin each job with the realization that it might end up in court or arbitration and document significant events with confirming letters, photos and videos to create a “paper trail” to support your project performance.
- C. Serve preliminary notices on every job as soon as you sign the contract.
- D. Consider the use of **project management software.**



Proactive

- E. Get signed change order approvals that include payment terms and time extensions before you perform any extra work outside the scope of your contract.
- F. Secure payment claims with preliminary notices, mechanics liens, stop payment notices and/or bond claims.
- G. In the event of a dispute keep in mind that compromise settlement is almost always better than a lawsuit.
- H. File suit only as a last resort and only if you have the resources to take the case through trial or arbitration if necessary.
- I. Keep in mind that the parties who resolve their lawsuits favorably without having to go to trial are the ones who are the best prepared to win at trial.

Home Improvement Contracts

Business and Professions Code 7159

- In an effort to protect homeowners from unscrupulous contractors the California legislature drafted B&P § 7159 with strict consumer protection provisions that apply to residential remodeling projects, including multi-unit buildings.
- Among the many provisions in B&P 7159 are requirements for written contracts, down payment restrictions, start and finish dates, written change orders, specific achievement benchmarks for progress payments, a three day right of cancellation and a warning notice regarding mechanics liens.



Home Improvement Contracts (& the Lucky Contractor)

In *Hinerfeld-Ward, Inc. v. Lipian*, the court carved out a stunning exception to the requirement for written Home Improvement Contracts and allowed a general contractor to **enforce an oral Home Improvement Contract**. The court reasoned that the homeowners in the case were not the type of persons entitled to the consumer protections in B&P § 7159 because the project was: (1) a complex, high-end remodel on which the design continued to evolve over years of planning and construction; (2) the owners' architect and designer had extensive involvement in the project as their representative; and (3) the owners would be unjustly enriched if the contractor was denied recovery. The court also ruled that the contractor was entitled to an award of attorneys' fees and prompt pay penalties under Civil Code § 3260.1.

Home Improvement Contracts (Consumer Protection in Action)

Business and Professions Code §7159 – the Home Improvement Contract Statute requires Home Improvement Contracts to include **28** separate notices/provisions in each contract.

Samples of the required notices and provisions are on the following 13 slides.



Home Improvement Contract

This Home Improvement Construction Contract (“CONTRACT”) is dated

_____, 2011, as between _____
 (“**CONTRACTOR**”) CSLB License _____, and

 (“**OWNER**”).

The work will be performed by CONTRACTOR at:

 (“PROJECT”).

(Street Address) (City) (State) (Zip Code)

[Any Notices of Cancellation may be sent to CONTRACTOR addressed as follows:](#)

[Contractor](#)

[Attn](#)

Contractor’s address

[Description of the Project and Description of the Significant
Materials to be Used and Equipment to be Installed \(“WORK”\)](#)

(For additional space attached Addendum)



Required Home Improvement Contract Notice

NOTICE TO OWNER TO FILE A COMPLAINT

Contractors are required by law to be licensed and regulated by the Contractors State License Board, which has jurisdiction to investigate complaints against contractors if a complaint regarding a patent act or omission is filed within four years of the date of the alleged violation. A complaint regarding a latent act or omission pertaining to structural defects must be filed within 10 years of the date of the alleged violation. Any questions concerning the CONTRACTOR may be referred to the Registrar, Contractors State License Board, Post Office Box 26000, Sacramento, California 95826.

Required Home Improvement Contract Notices

- ❑ You have the right to require **CONTRACTOR** to have a payment and performance bond.
- ❑ You are entitled to a completely filled in copy of this **CONTRACT**, signed by both you and **CONTRACTOR**, before any work may be started.

OWNER(S)

- ❑ Dated: _____
- ❑ Signed: _____
- ❑ Dated: _____
- ❑ Signed: _____

Contractor

- ❑ Dated: _____
- ❑ Signed: _____
- ❑ Title: _____

Required Home Improvement Contract Notices

- ❑ **TERMS AND CONDITIONS***
- ❑ **QUALITY AND SCOPE OF WORK.** CONTRACTOR will furnish labor, materials, and equipment in accordance with the terms and conditions of this CONTRACT to construct and complete the WORK in a workmanlike manner.
- ❑ **PAYMENT TERMS.** Owner agrees to pay CONTRACTOR the CONTRACT PRICE in progress and retention payments as detailed herein. All payments are due within 7 days of billing and will bear interest at the rate of 1.75% per month from the date on which payment is due.
- ❑ **CONTRACT PRICE:** _____ \$
- ❑ **FINANCE CHARGE:** _____ \$
- ❑ **DOWN PAYMENT:** _____ \$
- ❑ **THE DOWN PAYMENT MAY NOT EXCEED \$1,000 OR 10 PERCENT OF THE CONTRACT PRICE, WHICHEVER IS LESS.**
- ❑ **SCHEDULE OF PROGRESS AND RETENTION PAYMENTS.**
- ❑ **AMOUNT LABOR AND/OR SERVICES TO BE PERFORMED AND/OR MATERIALS AND/OR EQUIPMENT TO BE SUPPLIED** (For additional space attached Addendum)
- ❑ **The schedule of progress payments must specifically describe each phase of work, including the type and amount of work or services scheduled to be supplied in each phase, along with the amount of each proposed progress payment. IT IS AGAINST THE LAW FOR A CONTRACTOR TO COLLECT PAYMENT FOR WORK NOT YET COMPLETED, OR FOR MATERIALS NOT YET DELIVERED. HOWEVER, A CONTRACTOR MAY REQUIRE A DOWN PAYMENT.**
- ❑ **RELEASE OF MECHANICS' LIENS.** Unless CONTRACTOR is required by OWNER to furnish a performance and payment bond, lien and completion bond, bond equivalent, or joint control approved by the Registrar of Contractors covering full performance and completion of the CONTRACT and the bonds or joint control is furnished by the CONTRACTOR, or when the parties agree for full payment to be made upon or for a schedule of payments to commence after satisfactory completion of the PROJECT, CONTRACTOR shall, upon satisfactory payment being made for any portion of the WORK performed, prior to any further payment being made, furnish to OWNER a full and unconditional release from any claim or mechanics' lien pursuant to Section 3114 of the Civil Code, for that portion of the WORK for which payment has been made

Required Home Improvement Contract Notices

APPROXIMATE START DATE. CONTRACTOR shall substantially commence WORK on approximately _____, _____, subject to permissible delays as defined in this CONTRACT. Demolition, removal, or delivery of materials or equipment to the job site constitutes substantial commencement of the WORK. Failure by CONTRACTOR without lawful excuse to substantially commence WORK within 20 days from the approximate date specified in this CONTRACT when WORK will commence is a violation of the Contractors State License Law.

APPROXIMATE COMPLETION DATE. CONTRACTOR shall substantially complete WORK on approximately _____, _____. Substantial completion means the completion of the PROJECT where the OWNER can occupy all or designated portions of the WORK for the purpose for which it was intended.

CANCELLATION NOTICES. The law requires that the contractor give you a notice explaining your right to cancel. Initial the checkbox if the contractor has given you a “Notice of the Three-Day Right to Cancel.”
(_____)

CHANGE ORDERS. No extra WORK or change order WORK shall be required to be performed without prior written authorization of the OWNER. Any Change Order forms for changes or extra WORK shall be incorporated in, and become a part of, the CONTRACT. OWNER is entitled to a CONTRACT price reduction equal to CONTRACTOR'S actual cost savings for Change Orders that result in credits, but is not entitled to a reduction in overhead and profit because of a credit Change Order. Expenses incurred by CONTRACTOR because of unusual or unanticipated subsurface ground conditions or because of other unanticipated and unknown conditions (including, but not limited to, removal of mold, toxic waste, asbestos, or material containing asbestos or toxic waste) shall be paid for by OWNER as extra WORK. CONTRACTOR shall promptly notify OWNER of latent or concealed physical conditions at the site differing materially from those ordinarily encountered and generally recognized as inherent in WORK of the character provided for in this CONTRACT. Any expense incurred due to such conditions shall be paid for by OWNER as extra WORK. OWNER agrees to extend the time to complete the PROJECT in the event that extra WORK is required to a date reasonably sufficient to permit CONTRACTOR to perform such extra WORK.

Required Home Improvement Contract Notices

NOTE ABOUT EXTRA WORK AND CHANGE ORDERS. Extra WORK and Change Orders become part of the CONTRACT once the order is prepared in writing and signed by the parties prior to the commencement of any work covered by the new Change Order. The order must describe the scope of the extra work or change, the cost to be added or subtracted from the CONTRACT, the impact on the schedule for completion of the work and the effect the order will have on the Schedule of Progress Payments. *The failure of the contractor to comply with this paragraph does not preclude the recovery of compensation for work performed based upon legal or equitable remedies designed to prevent unjust enrichment.*

JOINT CONTROL. If CONTRACTOR is required to furnish joint control, CONTRACTOR shall not have any financial or other interest in the joint control.

INSURANCE NOTICES. A notice concerning commercial general liability insurance is attached to this CONTRACT. A notice concerning workers' compensation insurance is attached to this CONTRACT.

LIST OF DOCUMENTS TO BE INCORPORATED INTO THE CONTRACT.

Required Home Improvement Contract Notices

Commercial General Liability Insurance (CGL) (*Carries, doesn't carry, or is self-insured*)

<Contractor's name here> carries commercial general liability insurance written by: _____ . You may call _____ at _____ - _____ to check CONTRACTOR's insurance coverage.

Workers' Compensation Insurance (*Carries or doesn't have employees*)

<CONTRACTOR's name here> carries workers' compensation insurance for all employees.

Required Home Improvement Contract Notices

Notice Regarding Change Orders

You, the buyer, may not require CONTRACTOR to perform extra or Change Order WORK without providing written authorization prior to the commencement of any WORK covered by the new Change Order. An extra WORK or a Change Order is not enforceable against you, as buyer, unless the Change Order also identifies all of the following in writing prior to the commencement of any WORK covered by the new Change Order: (i) the scope of WORK encompassed by the order; (ii) the amount to be added or subtracted from the CONTRACT; and (iii) the effect the order will make in the progress payments or the completion date. CONTRACTOR's failure to comply with the requirements of the foregoing does not preclude the recovery of compensation for work performed based upon legal or equitable remedies designed to prevent unjust enrichment.

Required Home Improvement Contract Notices

Information about the Contractors' State License Board (CSLB):

The CSLB is the state consumer protection agency that licenses and regulates construction contractors.

Contact the CSLB for information about the licensed contractor you are considering, including information about disclosable complaints, disciplinary actions and civil judgments that are reported to the CSLB.

Use only licensed contractors. If you file a complaint against a licensed contractor within the legal deadline (usually four years), the CSLB has authority to investigate the complaint. If you use an unlicensed contractor, the CSLB may not be able to help you resolve your complaint. Your only remedy may be in civil court, and you may be liable for damages arising out of any injuries to the unlicensed contractor or the unlicensed contractor's employees.

For more information:

Visit CSLB's Web site at www.cslb.ca.gov

Call CSLB at 800-321-CSLB (2752)

Write CSLB at P.O. Box 26000, Sacramento, CA 95826

Required Home Improvement Contract Notices

MECHANICS LIEN WARNING:

Anyone who helps improve your property, but who is not paid, may record what is called a mechanics' lien on your property. A mechanics' lien is a claim, like a mortgage or home equity loan, made against your property and recorded with the county recorder. Even if you pay your contractor in full, unpaid subcontractors, suppliers, and laborers who helped to improve your property may record mechanics' liens and sue you in court to foreclose the lien. If a court finds the lien is valid, you could be forced to pay twice or have a court officer sell your home to pay the lien. Liens can also affect your credit.

To preserve their right to record a lien, each subcontractor and material supplier must provide you with a document called a '20-day Preliminary Notice.' This notice is not a lien. The purpose of the notice is to let you know that the person who sends you the notice has the right to record a lien on your property if he or she is not paid. **BE CAREFUL.** The Preliminary Notice can be sent up to 20 days after the subcontractor starts work or the supplier provides material. This can be a big problem if you pay your contractor before you have received the Preliminary Notices. You will not get Preliminary Notices from your direct contractor or from laborers who work on your project. The law assumes that you already know they are improving your property. **PROTECT YOURSELF FROM LIENS.** You can protect yourself from liens by getting a list from your contractor of all the subcontractors and material suppliers that work on your project. Find out from your contractor when these subcontractors started work and when these suppliers delivered goods or materials.

Then wait 20 days, paying attention to the Preliminary Notices you receive.

PAY WITH JOINT CHECKS. One way to protect yourself is to pay with a joint check. When your contractor tells you it is time to pay for the work of a subcontractor or supplier who has provided you with a Preliminary Notice, write a joint check payable to both the contractor and the subcontractor or material supplier. For other ways to prevent liens, visit the CSLB's Web site at www.cslb.ca.gov or call the CSLB at 800-321-CSLB (2752). **REMEMBER, IF YOU DO NOTHING, YOU RISK HAVING A LIEN PLACED ON YOUR HOME.** This can mean that you may have to pay twice, or face the forced sale of your home to pay what you owe.

Required Home Improvement Contract Notices

Notice of Three-Day Right to Cancel (*three day or seven day*)

You, the buyer, have the right to cancel this contract within three business days. You may cancel by e-mailing, mailing, faxing, or delivering a written notice to the contractor at the contractor's place of business by midnight of the third business day after you received a signed and dated copy of the contract that includes this notice. Include your name, your address, and the date you received the signed copy of the contract and this notice.

If you cancel, the contractor must return to you anything you paid within 10 days of receiving the notice of cancellation. For your part, you must make available to the contractor at your residence, in substantially as good condition as you received it, any goods delivered to you under this contract or sale. Or, you may, if you wish, comply with the contractor's instructions on how to return the goods at the contractor's expense and risk. If you do make the goods available to the contractor and the contractor does not pick them up within 20 days of the date of your notice of cancellation, you may keep them without any further obligation. If you fail to make the goods available to the contractor, or if you agree to return the goods to the contractor and fail to do so, then you remain liable for performance of all obligations under the contract.

I acknowledge receipt of this Notice of Three Day Right to Cancel

OWNER

Signed: _____

Dated: _____

Required Home Improvement Contract Notices

Notice of Cancellation

_____ Agreement Date

You may cancel this transaction, without any penalty or obligation, within three business days from the above date. If you cancel, any property traded in, any payments made by you under the contract or sale, and any negotiable instrument executed by you will be returned within 10 days following receipt by the seller of your cancellation notice, and any security interest arising out of the transaction will be canceled. If you cancel, you must make available to the seller at your residence, in substantially as good condition as when received, any goods delivered to you under this contract or sale, or you may, if you wish, comply with the instructions of the seller regarding the return shipment of the goods at the seller's expense and risk. If you do make the goods available to the seller and the seller does not pick them up within 20 days of the date of your notice of cancellation, you may retain or dispose of the goods without any further obligation. If you fail to make the goods available to the seller, or if you agree to return the goods to the seller and fail to do so, then you remain liable for performance of all obligations under the contract.

To cancel this transaction, mail or deliver a signed and dated copy of this cancellation notice, or any other written notice, or send a telegram to _____
_____ at _____ Attn: _____
_____ by **not later than midnight of (date)**
_____ to:

I hereby cancel this transaction.

OWNER:

Signed: _____

Dated: _____

Required HIC Change Order Form

PROJECT Address:

(Street) (City) (State) (Zip)

PROJECT Description:

The contract for the aforementioned project is hereby modified and amended as follows:
(DESCRIBE CHANGES REQUESTED)

It is mutually agreed that the contract price is INCREASED/DECREASED (circle one) by
\$ _____, as a PAYABLE/DEDUCTIBLE (circle one) in accordance with the terms of our
contract.

As a result of this change order, the time for completion of the aforementioned contract is hereby
extended by an additional _____ days.

This change order is incorporated into and governed by the aforementioned contract and is
incorporated therein Dated: _____

Submitted by Contractor:

By: _____



Pool Contracts

- In 1981 a California appellate court judge correctly observed that “consumer complaints . . . about swimming pool construction were proportionately higher than for other types of construction.” In fact, consumer complaints against residential pool contractors were so common that the California legislature with an assist from the State Contractors Licenses Board enacted provisions in the Business & Professions Code with the strictest contract requirements in the construction industry for residential pool contracts. Under Business and Professions Code Section 7167(a) for example, the legislature proclaimed that “[a]ny contract, the primary purpose of which is the construction of a swimming pool, that does not substantially comply with paragraph (4) or (5) of subdivision (c) [written requirements for providing releases and change orders] or paragraph (7), (8), or (9) of subdivision (d) of Section 7159 [written requirements for project description, down payments and progress payments], shall be void and unenforceable by the contractor as contrary to public policy.”
- King v. Hinderstein (1981) 122 Cal.App.3d 430, 439-440, fn. 16.



Pool Contracts

- With a limited exception for recovery based on reasonable value, residential pool contractors are the only contractors in California whose contracts are legally “void and unenforceable” if they fail to comply with the specific requirements in the Business & Professions code. In addition, Section 7168 of the Business and Professions code provides that “[i]n any action between a person contracting for construction of a swimming pool and a swimming pool contractor arising out of a contract for swimming pool construction, the court shall award reasonable attorney's fees to the prevailing party.” So, in a lawsuit between a homeowner and a pool contractor with a contract not in compliance with Section 7167(a), the homeowner is likely to win and recover attorney’s fees as the prevailing party.

Pool Contracts

- ❑ Pool contractors who want to limit the risk of legal pitfalls, might consider the following:
- ❑ Confirm that your C-53 license is active at all times during performance of work.
- ❑ Use written contracts that comply with the Business and Professions Code.
- ❑ Require property owners to sign your contracts before the start of construction.
- ❑ Get change orders signed by property owners before work is performed.
- ❑ Maintain workers' compensation and general liability insurance on every project.
- ❑ Only use licensed and insured subcontractors.
- ❑ Use written subcontracts that incorporate the terms of the owner/direct contract.
- ❑ Require owners to sign off on designs and specifications prior to construction.
- ❑ Create a strong paper trail to support your position in the event of a dispute.
- ❑ Use mediation provisions in your contracts to resolve disputes without litigation.
- ❑ Use project management software to help maintain project schedules.
- ❑ Provide outstanding performance and customer service.
- ❑ Add to this checklist and share it with the decision makers in your business.

10-Day Stop Work Order Civil Code Section 3260.2

- ❑ A Stop Work Order allows a general contractor on a private works project to stop working without liability for delays.
- ❑ Applies when the payment is “undisputed” and is more than 35 days late.
- ❑ Contractor provides the owner with a notice via certified mail and by posting a copy on the job.
- ❑ Notice states that unless the payment is made within 10 days work will be suspended.
- ❑ A Stop Work Order provides a direct contractor with some protection against delay damage claims from the owner and subcontractors.



Prompt Pay Laws for Contractors

Failure to pay undisputed progress payments and/or retention amounts within 30 days of receipt of payment or in accordance with the terms of the contract may subject an owner or general contractor to a penalty of 2% per month for the wrongfully withheld amounts and attorneys' fees. The safe harbor provision allows an owner and/or general contractor to hold 150% of amounts disputed in good faith.

The Prompt Payment Statutes are:

California Civil Code §§ 8810-8822 and 8830-8848 (retention)

Civil Code §8800-8802 (progress payments)

Business and Professions Code §7108.5 (private and public works projects)

See Taylor v. Van-Catlin Construction (2005) 130 Cal.App.4th 1061 for definition of prevailing party on the issue of "good faith" and the award of attorneys fees.

See United Riggers & Erectors, Inc. v. Coast Iron & Steel Co. (2015) holding that Civil Code Sec. 8814(c), which permits a contractor to withhold retention funds otherwise due a subcontractor in the event of a "good faith dispute" between the parties, only applies when the dispute is related to the retention itself.

See James L. Harris Painting & Decorating, Inc. v. West Bay Builders, Inc. (2015) S.O.S. 4146 holding that Under statutes requiring prime contractors to make prompt payments to subcontractors, trial court has discretion to determine there is no prevailing party and thus no fee shifting in an action. Trial court did not abuse that discretion in case where jury found both parties had failed to perform and thus did not award damages to either side.



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Bankruptcy Basics for Contractors

- ❑ A Chapter 7 bankruptcy can be filed by an individual or a business and results in the sale of all non-exempt assets for the benefit of creditors.
- ❑ Individuals can protect certain “exempt” assets from sale.
- ❑ A Chapter 13 bankruptcy is available to individuals who want to pay their debts over a 3 to 5 year period in accordance with a court approved payment plan.
- ❑ A Chapter 11 bankruptcy is designed for high worth individuals and businesses who need to reorganize and restructure their debts.



Bankruptcy Proof of Claim

- ❑ A bankruptcy begins when a debtor files a “Petition in Bankruptcy” in the Bankruptcy Court. Those to whom the bankrupt party owes money (“creditors”) will usually be listed as creditors of the bankrupt party on the schedules filed with the Petition in Bankruptcy. The Bankruptcy Court will generally send a “Proof of Claim” form to each of the creditors listed in the bankruptcy schedules filed by the debtor.
- ❑ Each of the creditors must then fill out and sign the Proof of Claim form and attach to the form appropriate documentary proof of the claim (contract, final unpaid invoices, mechanics liens, etc.).



Bankruptcy Stay Effect on Mechanics Lien Foreclosure Suits

U.S. Bankruptcy Code section 362 “automatic stay” provides that no state court lawsuit may be filed against a bankrupt party without first obtaining permission from the Bankruptcy Court. The *automatic stay* automatically prohibits the filing of a state court lawsuit to foreclose on the mechanics lien without first obtaining Bankruptcy Court approval.

In addition, any state court lawsuit already on file against the bankrupt party would be “*automatically stayed*” or put on hold.

Notice of Perfection of Mechanics Lien Bankruptcy Code §546(b)

U.S. Bankruptcy Code section 362's automatic stay prevents the filing of a state court suit to foreclose a mechanics lien after the filing of a bankruptcy petition. However, unless a lawsuit is filed within 90 days of its recording, a mechanics lien is automatically void and unenforceable. Fortunately, the Bankruptcy Code provides a method to protect mechanics liens rights without the need to file a state court foreclosure suit. Bankruptcy Code section 546(b) allows a creditor/claimant to file a "notice of perfection of lien" as an alternative to filing a state court foreclosure lawsuit provided that the notice is filed within 90 days of the recording date of the lien.

Re-Activate Your Suspended Contractor's License

One of the ways to re-activate a license which was suspended as a result of an unsatisfied civil judgment is to file a bankruptcy petition. If an individual or corporate licensee files a bankruptcy petition, federal bankruptcy laws require the CSLB and your creditors to immediately stop all collection efforts. When the CSLB is notified that you or your business has filed a bankruptcy petition, it must lift the license suspension and re-activate your license.



Chapter 11 Could Save Your Business

Chapter 11 is used to reorganize or liquidate a business, which may be a corporation, sole proprietorship, or partnership. Allowing a business to reorganize as opposed to closing it down preserves jobs, protects creditors and gives owners an opportunity to earn a return on their investments. A Chapter 11 Bankruptcy gives debtors:

- (1) the ability to continue operating their business;
- (2) protection from litigation;
- (3) an opportunity to reorganize the business;
- (4) the ability to restructure debts and repayment terms;
- (5) a chance to assume, assign or reject “executory” contracts and unexpired leases; and
- (6) the power to avoid and set aside pre-petition transactions.

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Employee or Independent Contractor

- ❑ Unless the person you hire has an active California contractors' license, they are presumed by law to be your employee.
- ❑ Factors to consider:
 - Specialized skills which require a license or other specialized training, that are distinct from your business
 - No direct supervision required
 - Agreement by task completion rather than hourly commitment
 - Do you supply the materials or tools to be used to complete the hired task
 - Consider the permanence and frequency of employment
 - Written contract does not control.
- ❑ Day laborers *are* employees.
- ❑ **Written job descriptions can help with workers' compensation audits and disputes over classification of employees.**
- ❑ When in doubt, check with your attorney because classification mistakes lead to bad and very expensive outcomes for employers in litigation.

Project Managers May be Exempt Employees

- Factors considered in determining an employee’s “primary duty” include, but are not limited to:
 - The relative importance of the exempt duties as compared with other types of duties;
 - the amount of time spent performing exempt work must be more than 50%;
 - the employee’s relative freedom from direct supervision;
 - the relationship between the employee’s salary and the wages paid to other employees for the kind of nonexempt work performed by the employee, and
 - exempt employees must be paid at least twice the minimum wage.

- Under Federal law, the amount of time spent performing exempt work is helpful, but not definitive, in determining an employee’s primary duty.

- Under California law, the time spent is a critical factor; an employee is “primarily” engaged in exempt duties only if they occupy more than half the employee’s work time.

Management Duties That May Qualify for Exempt Status

The “primary duties” of “management” of a business include but are not limited to:

- ❑ interviewing, selecting and training employees;
- ❑ setting and adjusting their rates of pay and hours of work;
- ❑ planning and directing their work, determining the techniques they use and apportioning work among them;
- ❑ controlling the flow and distribution of materials or merchandise and supplies;
- ❑ maintaining production or sales records for use in supervision or control;
- ❑ appraising employees' productivity and efficiency for the purpose of recommending promotions or other changes in status;
- ❑ handling employee complaints and grievances;
- ❑ disciplining employees;
- ❑ providing for the safety and security of the employees or the property;
- ❑ planning and controlling the budget; and
- ❑ monitoring or implementing legal compliance measures.

Non-Exempt Employees

- ❑ “Non-Exempt” employees are subject to state and federal overtime and mandated lunch and rest break rules.
- ❑ Non-Exempt employees must be paid overtime for any time over 8 hours in a day or 40 hours in a week.
- ❑ Employers are subject to penalties for non-compliance.
- ❑ Keep good records because employers have the burden of proving compliance with the labor laws.
- ❑ The California Labor Code allows employees to recover their attorneys’ fees from employers when they are the prevailing party in the event of litigation. However, winning employers cannot recover their attorneys’ fees against employees.

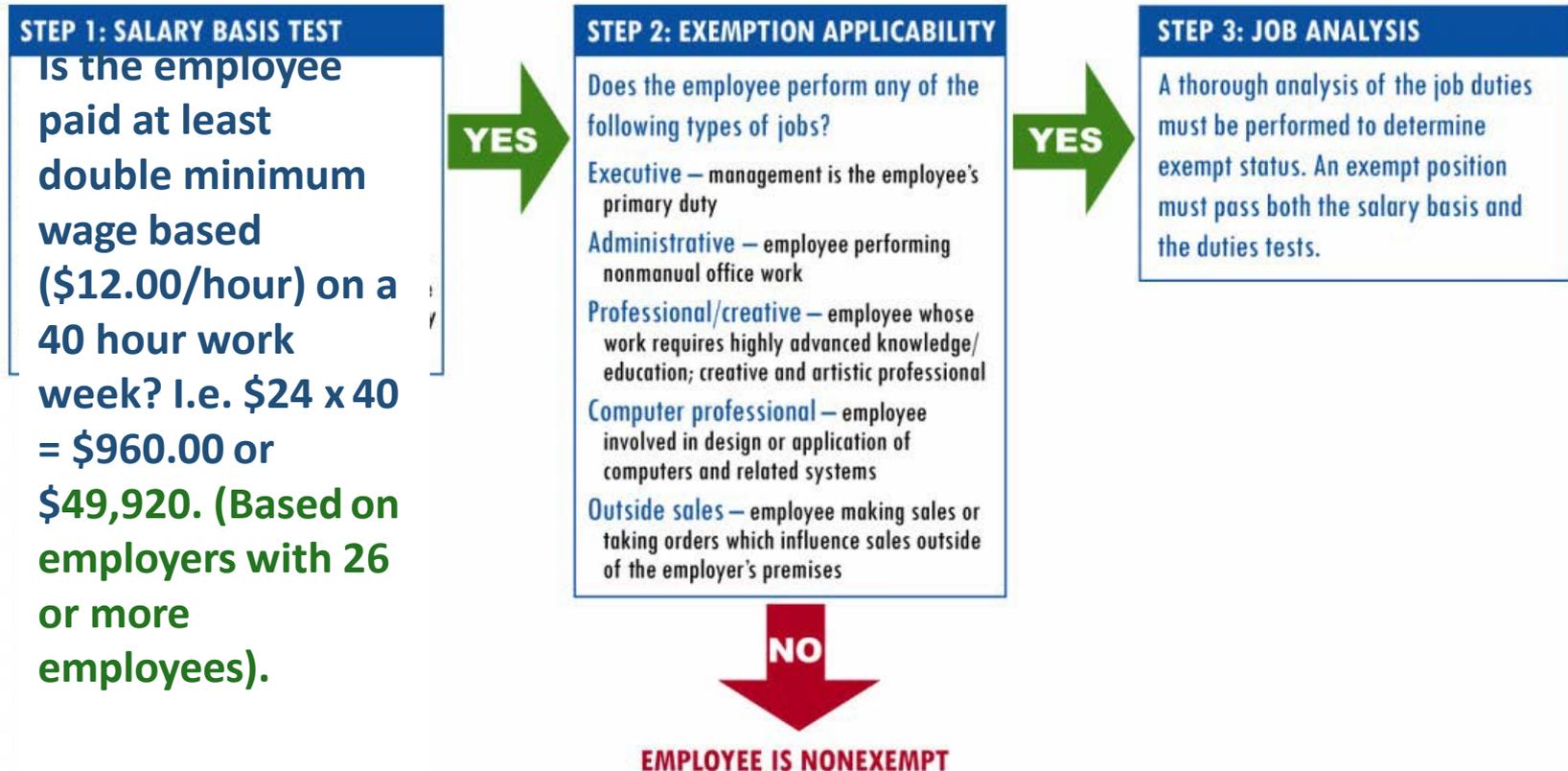
Liability for Misclassifying an Employee as an Independent Contractor

- ❑ Unpaid federal, state and local income tax withholdings and Social Security and Medicare contributions
- ❑ Unpaid unemployment insurance taxes, both to the federal government and to state governments
- ❑ Unpaid workers' compensation premiums
- ❑ Unpaid overtime compensation and/or minimum wages
- ❑ Unpaid work-related expenses
- ❑ Unpaid sick and vacation pay
- ❑ Labor Code § 226.8 makes it unlawful to intentionally classify an employee as an independent contractor
- ❑ Fines range from \$5,000 to \$15,000 for intentional misclassification

Wage and Hour Laws- Basic Concepts

- ❑ An “exempt” employee is someone who is not subject to state or federal labor code requirements for overtime pay or for required meal and rest breaks.
- ❑ A “non exempt” employee is someone who *is* subject to overtime, meal and break rules. Most employees are non-exempt.
- ❑ An employee may be exempt if he or she falls within a recognized exception for either an executive, professional, administrative or creative employee. A project manager and/or construction superintendent may fall within the exception for executive or administrative employees.
- ❑ A “bona fide executive” employee is an employee whose compensation is at least two times the minimum wage level and whose primary duty is management.
- ❑ The “administrative” exemption is for an employee whose “primary duty” is performing office or non-manual work directly related to the management or general business operations of the employer or the employer’s customers; and the employee’s primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.
- ❑ The regulations define “primary duty” as the principal, main, major or most important duty that the employee performs, “with the major emphasis on the character of the employee’s job as a whole.”

Salary Basis Test for Exempt Classification



Minimum wage is determined by the place the employee works. Los Angeles and other localities have local minimum wages that may be higher. For LA, as of January 1, 2019 it is \$12 for small employers and \$13.25 for large employers.

Schedule for California Minimum Wage Hikes

Schedule for California Minimum Wage rate 2017-2023.

Date	Minimum Wage for Employers with 25 Employees or Less	Minimum Wage for Employers with 26 Employees or More
January 1, 2017	\$10.00/hour	\$10.50/hour
January 1, 2018	\$10.50/hour	\$11.00/hour
January 1, 2019	\$11.00/hour	\$12.00/hour
January 1, 2020	\$12.00/hour	\$13.00/hour
January 1, 2021	\$13.00/hour	\$14.00/hour
January 1, 2022	\$14.00/hour	\$15.00/hour
January 1, 2023	\$15.00/hour	

Local Minimum Wage Requirements

- ❑ Several California cities have a minimum wage that exceeds the state amount – the law provides that the higher minimum wage applies in cases of conflict. The UC Berkeley Labor Center maintain a list of cities with minimum wage ordinances as of Jan. 1, 2019:
 - ❑ Belmont (\$13.50) Berkeley (\$15) Cupertino (\$15) El Cerrito (\$15) Emeryville (\$15.69 for 56 employees or more, \$15 for 55 or fewer employees)
 - ❑ Los Altos (\$15) Los Angeles (\$13.25 for 26 employees or more, \$12 for 25 or fewer) Malibu (\$13.25) Milpitas (\$13.50) Mountain View (\$15.65)
 - ❑ Oakland (\$13.80) Palo Alto (\$15) Pasadena (\$13.25 for 26 employees or more, \$12 for 25 or fewer) Redwood City (\$13.50) Richmond (\$15)
 - ❑ San Diego (\$12) San Francisco (\$15) San Jose (\$15) San Leandro (\$13) San Mateo (\$15) Santa Clara (\$15) Santa Monica (\$13.25 for 26 employees or more, \$12 for 25 or fewer) Sunnyvale (\$15.65)



Administrative Exemption

A person employed in an administrative capacity means any employee:

- Whose duties and responsibilities involve either:
 - The performance of office or non-manual work directly related to management policies or general business operations of his or her employer or his or her employer's customers (one of the key considerations is whether the employee is engaged in *production work* (i.e. producing sales) versus work that impacts company policy); or
 - The performance of functions in the administration of a school system, or educational establishment or institution, or of a department or subdivision thereof, in work directly related to the academic instruction or training carried on therein; and
- Who customarily and regularly exercised discretion and independent judgment; and
- Who regularly and directly assists a proprietor, or an employee employed in a bona fide executive or administrative capacity; or
- Who performs, under only general supervision, work along specialized or technical lines requiring special training, experience, or knowledge (i.e. licensed insurance agent); or
- Who executes, under only general supervision, special assignments and tasks; and
- Who is primarily engaged in duties which meet the test for the exemption (more than 50% of the time).



Executive Exemption

Under the relevant duties test, an “employee employed in a bona fide executive capacity” means any employee whose primary duty is:

- Management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof;
- who customarily and regularly directs the work of two or more other employees; and
- who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight.
- For example: a project superintendent who supervised two or more employees during a construction project and made recommendations to the project manager on employee advancement, firing and change of status qualified for the executive exemption.



California Fair Pay Act

- Determine whether multiple job titles that require substantially similar work, when viewed as a composite of skill, effort and responsibility, and which are performed under similar working conditions. The standards for determining if a job is “substantially similar” are unclear; however, employers should pay particular attention to positions with fine distinctions in titles and duties.
- *Here*, Bob and Jane do not do the same work when viewed as a composite of skill, effort, and responsibility because Bob is utilizing people management skills and construction project expertise, while Jane is using her ability to administer operational tasks. While both employees impact significant business operations, they are doing substantially different jobs.

Alternative Workweek Schedule, ie. 4-tens

The Labor Code and IWC Wage Order – 16 (applicable to the construction industry) allow for an employer to adopt an alternative workweek schedule and avoid overtime obligations for hours worked beyond 8 in one day, but only up to 10 hours per day.

In order to adopt a workforce-wide alternative workweek schedule, the employees must vote, by secret ballot, to adopt the schedule by a two-thirds majority vote.

Additionally, the employer must send notice to the Department of Industrial Relations that the schedule has been adopted, and the results of the employee election.

An employer must explore any available reasonable alternative means of accommodating the religious belief or observance of an affected employee that conflicts with an adopted alternative workweek schedule.

For a checklist of steps to take to properly implement an alternative workweek schedule visit <https://www.calchamber.com/hrcalifornia/forms-tools/form/preview/alternative-workweek-checklist>

When You Hire Someone: Things to Think About

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Job Applications & Resumes

- Job Applications & Resumes
 - Always require a job application, even if a resume is submitted because:
 - Questions and topics covered in application are not covered in CV/Resume;
 - Allows comparison of application, resume, and interview responses for inconsistencies; and
 - Possible after-acquired evidence litigation defense;
 - “Ban the Box” - remove the criminal history question on applications;
 - Delay the background check (E-Verify) until later in the hiring process. For instance, you can include a requirement in the offer letter that they will need to pass a background check, provide proof of eligibility, and sign an arbitration agreement if hired.

Interviewing Job Applicants

- Interview Tips
 - Consider a Telephone Pre-Screen to:
 - Evaluate minimum criteria/basic job description;
 - Determine candidate's goals/why candidate applied for the job;
 - Evaluate "fit" for the job classification (skills, desired wages, job schedule, etc.);
 - Evaluate personality; and
 - "Off the cuff" responses.
 - Avoid Pitfalls During the In-Person Interview
 - Avoid topics about protected categories or possible discrimination issues (age, race, sex, marital status, disability, immigration status, criminal convictions, etc.);
 - Do not ask about prior workers' compensation claims or prior lawsuits against employers; and
 - Red flags raised by the mere question vs. employer's independent decision.

Interviewing

□ Interview Tips

■ Ask Reasons for Leaving Prior Jobs:

- Ask if the candidate has ever been terminated or asked to resign.
- May reveal red flags.
- Encourage honest responses.
- Explain that termination/forced resignation is not necessarily disqualifying.
- Do not allow candidate to change the subject, give a vague response, or avoid the topic. Get a direct response!
- Reserve questions about criminal history until after an in-person interview or after a contingent offer.
- Criminal records restrictions must be directly related to the job so that applicants' qualifications are individually assessed for each position.

Interviewing

- Interview Tips
 - Key Questions to Ask
 - Ask candidate to explain gaps in employment.
 - Ask candidate if any jobs have been excluded from application/resume and if so, why.
 - Ask for the name of candidate's direct supervisor and phone number at all prior positions.
 - Ask for at least 3 references – watch out for red flags.
 - Call all references provided, including former supervisors (even if not listed as a reference).
 - Verify that references listed are who the candidate says they are.

Social Media

- Use Social Media With Caution
 - Use Facebook, Twitter, LinkedIn, etc. sparingly, if at all.
 - Knowledge creates obligations and possible liability.
 - Protected categories
 - Political beliefs
 - Possible invasion of privacy, discrimination, negligent hiring issues
 - Never ask for a candidate's social media password.
 - Consider company policy on use of social media in hiring practices.
 - Designate non-decision maker to conduct research.
 - Make sure company policy is consistently applied.
 - Always provide candidate the opportunity to explain.

Background Checks

- Requirements Prior to Conducting Background Checks
 - The Federal Fair Credit Reporting Act and California law require employers to:
 - Inform the applicant that a consumer report/background check will be completed;
 - Obtain candidate's authorization;
 - Notify applicant if you will take adverse action before doing so, provide the applicant with a copy of the report and an opportunity to correct misinformation; and notify the applicant after you take adverse action.

E-Verify

- ❑ *E-Verify* is a voluntary federal system employers may use to verify that the employees they hire are authorized to work in the United States.
- ❑ New law prohibits employers from using E-Verify to check the status of an *existing employee or an applicant* before the applicant receives an offer of employment.
 - Exception: Unless required by federal law or as a condition of receiving federal funds.
- ❑ Confirmation of the right to work in the U.S. can be a condition stated in the job offer that the prospective employee can sign to provide permission.
- ❑ Risk: civil penalty of up to \$10,000 per violation. (See LC § 2814).

Job Offers

- Job Offers
 - Make initial offer clear and concise, set forth expectations, negotiate terms.
 - Follow-up with written offer that confirms negotiated offer, sets forth at-will employment.
 - Request (and ensure) that written offer is signed as acknowledged and returned to you; keep copy in personnel file/applicant file.

- Prepare Written Contract, if Applicable
 - Employment contracts should be fully executed prior to commencement of employment: always reflect at-will employment.
 - Written contract required for employees paid by commission. (Labor Code section 2751)
 - Contracts with non-exempt employees may provide for a fixed salary. (Labor Code section 515)



Arbitration Agreements

- ❑ **Arbitration Agreements** – avoid jury trials and potential class actions.
- ❑ Have the decision made by one educated experienced arbitrator rather than twelve random people who may be inclined to side with an employee over an employer.
- ❑ Include getting a signature on your arbitration agreement in your new hire check list as a pre-condition to hiring.
- ❑ Obtain signatures from existing employees to arbitrate employment disputes and avoid class actions.
- ❑ Please note that you must include an “opt out” provision in arbitration agreements for existing employees as they cannot be compelled to sign arbitration agreements.

Employee's First Day

- Employee's First Day of Employment
 - Get employee to sign acknowledgment of offer terms.
 - Get employee to sign employment contract, when applicable.
 - Provide new employee forms (W-4, I-9, personal physician designation, etc.).
 - Get copies of social security card, I.D. card, passport, etc.
 - Provide health insurance and benefits forms and paperwork.
 - Provide brochures re: workers' compensation, State Disability Insurance, Paid Family Leave, Sexual Harassment and Domestic Violence and Sexual Assault and Stalking
 - Provide employee handbook and Harassment, Discrimination and Retaliation Prevention policy and obtain signed acknowledgment of receipt immediately.
 - Employers must now provide information regarding California's paid sick leave in the wage information notice that must be given to nonexempt employees upon hire.
 - Explain work schedule, meal and rest periods, overtime policy, safety policy, sick leave, travel time policy, absenteeism and tardiness, and any other policies which may need clarification prior to starting work.

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Minimum Wage for 2019

- Employers must post California’s official Minimum Wage Order (MW- 2017) in a conspicuous location frequented by employees. The official notice includes the increase for January 1, 2019.
- California employers must provide each employee with an itemized statement, in writing, at the time wages are paid (Labor Code Section 226). The itemized wage statement must include all applicable hourly rates in effect during the pay period and the corresponding number of hours the employee worked at each hourly rate.

□ Rate (Jan. 1)	26 Employees or More	25 Employees or Less
□ 2019	\$12.00	\$11.00
□ 2020	\$13.00	\$12.00

EXCEPTION: Minimum wage in Los Angeles

□ 2019	\$13.25	\$12.00
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Minimum Wage

- Employers in California must provide nonexempt employees with a Wage and Employment Notice to Employee pursuant to Labor Code Section 2810.5. The written notice must be provided at time of hire and again within seven calendar days after a change is made to any information in the notice. Must include how Paid Sick Leave is administered. Among other things, employers are required to notify nonexempt employees, in writing, when there is any change to:
 - The employee's rate of pay;
 - Any overtime rates of pay; and
 - Any allowances, such as meal or lodging allowances, claimed as part of the minimum wage (Labor Code Section 2810.5).

California's Fair Pay Act

Labor Code § 1197.5

- ❑ General Rule: Men and women must receive equal pay for equal (or substantially similar) work.
- ❑ Disparities must be justified by education, training, and experience.
- ❑ Compensation based on seniority, merit and production remain acceptable.
- ❑ Public Works / Prevailing Wage jobsites: When employees report to a company office for a ride to the jobsite, and help with anything, travel time to and from a public works job site must be compensated, and travel time must be paid at prevailing wage.
- ❑ Take away: Review the compensation you pay to your employees who do substantially similar work, in each office or location. For example: Compare salaries and/or hourly pay, and the similarity of your employees' skill, effort, and responsibility of the work, and whether the work is performed under similar working conditions.

Labor Code Section 2810.3

How a General Contractor can become liable for a Subcontractor's Wage and Hour Violations

- ❑ Since Jan. 1, 2015, with limited exceptions, prime/general/direct contractors (“Prime Contractors”) may be liable for wage and hour claims from the employees of their subcontractors and for the payment of workers’ compensation premiums when their subcontractors fail to either comply with wage and hour laws or fail to provide workers’ compensation insurance coverage for their employees. Prime Contractors are liable for unpaid wages, even if they have paid their subcontractors in full.
- ❑ Also see Labor Code 218.7



Labor Code Section 2810.3

- This law applies to all businesses including Prime Contractors with 25 or more employees when they enter into subcontracts with contractors who have more than five employees who will be performing work “within the Prime Contractors usual course of business,” which means the Prime’s regular and customary work. Therefore, a Prime Contractor with a general contracting license might not be liable for the unpaid wages of a plumbing subcontractor, but would potentially be liable for the unpaid wages of a subcontractor with a “B” license whose scope of work included framing.



Labor Code Section 2810.3

- ❑ A written waiver between the Prime Contractor and its subcontractors is unenforceable by law which means that a Prime cannot contract around the law and avoid the risk of joint liability by including a provision in its subcontract making its subcontractors solely responsible for compliance with wage and hour, Cal Osha and workers' compensation laws. Contractual indemnity provisions however that require a subcontractor to reimburse the Prime Contractor for its costs and attorneys fees are permitted.
- ❑ The definition of "workers" under the law excludes workers properly classified as exempt, labor unions and apprenticeship programs.

Labor Code Section 2810.3

- ❑ The best protection for a Prime Contractor is to have a written contract that includes provisions requiring subcontractors to comply with Federal and State laws and to require subcontractors to provide performance bonds from reputable sureties with good ratings.
- ❑ Requiring subcontractors to provide performance bonds will increase project cost and limit the number of available subcontractors, but it should also significantly reduce the possibility of a subcontractor breach and a Prime Contractor's potential liability as a joint employer.
- ❑ Other practical steps Prime Contractors can take include obtaining multiple bids and avoiding the low bidders as the most likely to be cutting corners; requiring subcontractors to provide certified payrolls and releases signed by their employees attesting that they have been paid and obtaining insurance certificates for workers' compensation insurance.
- ❑ For more information on Joint Employer Liability see page 235

Travel Time Rules for Non- Exempt Employees

- ❑ General Rule: In the absence of a collective bargaining agreement, specific public works requirements or contract requirements, an employee's "normal" travel time to the first location is **not** considered to be "hours worked" and is therefore not compensable.
- ❑ "Hours Worked" is defined as: The time during which an employee is subject to the control of an employer, and includes all the time that the employee is "suffered" or permitted to work, whether required to do so or not. An employee's "normal" commute time is not compensable, however requiring the employee to report to the office before heading to a job site will make the travel time to the project compensable.
- ❑ Public Works / Prevailing Wage jobsites: When employees report to a company office for a ride to the jobsite, and help with anything, travel time to and from a public works job site must be compensated, and travel time must be paid at prevailing wage

Travel Time Rules

- Exceptions that require compensation:
 - Travel to the first job site is an “Unreasonable Distance” beyond the employee’s normal commute time.
 - A reasonable distance is determined by a factor test:
 - Nature of the employment;
 - Industry Standard;
 - What is the agreement between the employer and employee; and
 - What is the employee’s normal commute time.
 - For varied travel that extends beyond a “reasonable distance” the employee should be compensated for any time that exceeds his or her usual or normal commute. What’s a “normal” commute?
 - If the distance is unreasonable, the time can be paid at a lower hourly rate as long as it is at least minimum wage.
 - Travel time between job sites must be paid at regular rate of pay. If two rates of pay are used, the overtime rate is based on the blended average of the two pay rates.

Travel Time Rules

Exceptions that require compensation (Contd.):

- ❑ If the employee is required to deliver tools, materials or equipment to the job site, then the commute to the job site is work time and should be paid.
- ❑ If employees are required to report to the shop or any designated place before going to a job site, then travel from the shop to the job site is paid time and travel from the job site back to the shop is paid time.
- ❑ If catching a ride from the shop is voluntary, then the travel time to the first job may not be paid time if the travel falls within company guidelines or policy for a normal commute.
- ❑ Out of town travel time to and from a destination is paid time, less normal commute time.
- ❑ All necessary expenses incurred in connection with employment mandated travel must be reimbursed to employee. Labor Code section 2820.
- ❑ Note that the mileage reimbursement rate has been increased to \$.58 per mile, beginning January 1, 2019.
- ❑ Employees that are assigned to normally work from home are entitled to be paid for travel to the first job site.

Travel Time Rules

Company Vehicles:

- ❑ The fact that the company provides a vehicle for convenience doesn't absolutely require compensation for the "first" commute. Whether the first commute in a company vehicle is compensated depends upon how much control over the commute the employer exercises.
 - Is the employee required to drive the company vehicle?;
 - Could he use the company vehicle for personal use?;
 - Could he take passengers?;
 - Required to have cell phone turned on.

Best Practice:

- ❑ Have a **written drive time policy** and designate a "normal" drive time and distance for projects based on the average time and distance it takes to commute to project sites. Or determine "normal" drive time and distance based on the average time it takes for an employee to drive from his or her residence to a job site or shop.

WHEN IN DOUBT - PAY



Employee Vehicles

- When an employee is required to use his or her personal vehicle for work-related activities, the employer must reimburse the employee for expenses related to the use of the vehicle. (Labor Code §2802)
- If you routinely require employees to use their own vehicle for work, consider asking them to add you as an additional insured to their auto insurance coverage (you will have to reimburse them for a portion of their cost) and ask your insurance broker about coverage for “non-owned” autos.



PAGA CLAIMS

- ❑ The Private Attorneys General Act of 2004 (PAGA) authorizes an allegedly aggrieved employee to bring a civil action to recover specified civil penalties, that would otherwise be assessed and collected by the Labor and Workforce Development Agency, on behalf of the employee and other current or former employees.
- ❑ PAGA claims are similar to class actions in that they can be filed by a single current or former employee on behalf of other current and former employees with similar claims. However, unlike class actions PAGA claims are not subject to arbitration agreements that prevent the filing of class actions.



PAGA CLAIMS

- Under PAGA, an employer has the opportunity to cure certain alleged violations before a lawsuit is filed. However, there are also Labor Code violations that PAGA does not provide the employer with an opportunity to cure the alleged violation before a lawsuit is filed, such as violations under Labor Code Section 226, where an employer is required to provide an itemized wage statement (or paystub) containing very specific information, including but not limited to, wages, the inclusive dates of the pay period and the name and address of the legal employer.

Piece Work and Overtime

- ❑ Employers can require piece rate workers to redo defective work as long as they are paid at least the minimum wage for each hour worked.
- ❑ To calculate overtime for piece rate workers, first calculate the regular rate of pay. For example, work is paid \$10 per piece, completed 60 units and worked a total of 44 hours. Calculate the rate by dividing \$600 by 44 (the total hours worked) to determine the regular rate of \$13.64. Add the extra half-time for the overtime rate of \$27.27.
- ❑ Piece rate compensation is based on completing a particular task or making a particular piece of goods. Compensation for piece rate workers is based on units of production, instead of actual time worked and must be paid at no less than minimum wage rates.
- ❑ All wage and hour protections that apply to hourly workers also apply to piece rate workers.



Piece Rate

- ❑ Non-piece rate work (non-productive) time, such as time for rest breaks, safety meetings, or travel time, must be compensated separately at a rate equal to or greater than minimum wage.
- ❑ Employers should ensure that a written record is created to record all hours worked whether paid by piece or not.
- ❑ Meal and rest break compliance must be documented for piece rate workers as it must be for hourly workers.
- ❑ New law requires that paystubs must include a separate line-item for payment of non-productive time.
- ❑ Calculate overtime using a blended rate for piece work and non-piece work time.

On-Call and Standby Pay

- Under California law if an employee is “under your control” it is likely that you will have to pay him or her even if the employee is just waiting for something to happen that never occurs. Whether wages are due depends upon the a “factor” test.
 - Are the employees restricted to a location;
 - Is there ability to make calls restricted;
 - Is there a fixed time for employees to respond to calls;
 - Can an on-call employee easily trade his or her on-call responsibilities with another employee;
 - Can the employee engage in personal activities, if so to what extent;
 - What is the nature of the employment relationship and the industry practice; and
 - Are there any other limitations on the employee’s ability to use the time for his or her own benefit?

Written policies that don’t allow for compensation for on-call or standby time are not binding if the factor test demonstrates that the employee was under the control of the employer. Merely carrying a cell phone does not usually constitute hours worked, heavy call volume however, might.

When in doubt – pay.



Paid Sick Leave

Mandatory paid sick leave started in accordance with the Healthy Workplace/Healthy Families Act of 2014 took effect on July 1, 2015, and posting and notice obligations started as of January 1, 2015. Updated posters can be purchased from the California Chamber of Commerce and elsewhere.

EXTRA SICK PAY REQUIRED IN CITY OF LOS ANGELES

Effective July 1, 2017, all employers in the city of Los Angeles must provide a minimum of 6 days, or 48 hours of paid sick leave to their employees (double the state requirement).



Paid Sick Leave

- ❑ The Act provides for different options, but employers must provide at least 24 hours or three days of paid sick leave for each eligible employee to use per year.
- ❑ With limited exceptions, an eligible employee is someone who has worked in California for 30 or more days within a year from the commencement of employment.



Paid Sick Leave

- ❑ Allow employees to start using paid sick time on the 90th day of employment upon reasonable request. Paid sick leave can be front loaded or accrued.
- ❑ Show how many days of paid sick leave an employee has available either on a pay stub or other written document issued on payday.
- ❑ Keep records for at least 3 years.
- ❑ Accrued time under PTO (“Paid Time Off”) polices is considered wages and must be paid on termination.

Paid Sick Leave

- Three options to calculate:
 - Employee earns one hour of paid sick leave for every 30 hours worked. Employer may cap accrued and unused sick days at 48 hours or six days.
 - Employee receives at least 3 days or 24 hours of paid sick leave, paid leave, or paid time off at the beginning of each year. No carry over of unused sick time and requires a written policy.
 - Optional accrual method that provides employees with no less than 24 hours by the 120th day.
 - Employers are not required to provide additional three days of paid sick leave if an existing paid time off policy allows use of paid sick leave for all of the same purposes and conditions as required by the Act.

Deductions for Partial & Full-Day Absences of Exempt Employees

- While it's impermissible to deduct from the salary of an exempt employee for *partial-day* absences, it's generally acceptable to deduct from leave balances in connection with partial-day absences due to vacation or sickness and that such deductions wouldn't cause the loss of an employee's exempt status.

Family School Partnership Act

- School and Child Care Activities
 - Applies to employers who employ 25 or more employees at the same location
 - Employees who are parents of kids in grade school (K-12) or who have children in a licensed child day care, may, on “reasonable” advance notice, can be absent up to 8 hours per month (40 hrs/yr) to handle child care and school issues.
 - The Employer can ask for written proof that the employee participated in school or licensed child day care activities on a specific date and at a particular time.
 - The Employee must first use PTO, but can then also use unpaid time off.
 - This new law applies to collective bargaining agreements agreed to on or after January 1, 1995
 - Applies even if both parents are employees at the same location
- School Appearances Leave
 - Applies to all employers when parents need to appear at school when a child has been suspended

Penalties: Any employee who is discharged, threatened with discharge, demoted, suspended, or discriminated against for taking time off under this law is entitled to reinstatement and reimbursement for lost wages and benefits. Willful refusal to rehire, promote, or otherwise restore a determined eligible employee or former employee can result in civil penalty of three times the amount of the employee’s lost wages and work benefits.



Cell Phones, Texts, Email, & Other

- ❑ When employees must use their personal cell phones for work-related calls, Labor Code section 2802 requires the employer to reimburse them. Whether the employees have cell phone plans with unlimited minutes or limited minutes, the reimbursement owed is a reasonable percentage of their cell phone bills. (Cochran v. Schwan's Home Service)
- ❑ Cell phone calls, texts and e-mails to employees after hours can lead to a documented claim for overtime.
- ❑ Other: Recent legislation clarified that recovery periods taken to prevent heat illness must be counted as hours worked and are paid periods for which there cannot be any deduction from wages.

Prevailing Wage Requirements for Public Projects

- ❑ Payroll records on state and local public projects must be “certified,” that is, verified by written declaration made under penalty of perjury, that the information contained in the records is true and correct. (8 CCR § 16000.) The certification language is found on the back of the form furnished by the DLSE. Payroll records furnished to DLSE which are not certified are inadequate.
- ❑ Employer payments may be a credit against the obligation to pay the general prevailing wage rate of per diem wages. However, be careful to also comply with other laws such as mandatory paid sick leave that may be required in addition to the prevailing wage requirements.

HR Best Practices

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Pros and Cons For Employee Handbooks

□ Pros:

- Establishing uniform, well-defined employment policies.
- Convenient to communicate established employer standards to the workforce.
- Reduces the risk of employee lawsuits.

□ Cons:

- Disputes and dissatisfaction due to imprecise or incomplete language.
- Employees may not read it if it's too long, and management may not remember every single rule in the handbook.
- It needs to be updated regularly as laws and rules change.
- Prompting or supporting employee lawsuits.
 - Ex: If you have language in your handbook requiring progressive discipline policies such as issuing three warnings before terminating, you have to remember to follow it!



When in Doubt...

- Consult a qualified employment law attorney:
 - To answer questions regarding discipline, terminations, discrimination, or other issues as they arise;
 - As a preventative measure to avoid problems;
 - To draft employment contracts and policies;
 - With litigation questions.

Four Years Of Potential Liability For Employment Related Claims

- ❑ Employers are subject to claims for unpaid wages, unpaid overtime, and missed breaks and meal periods for up to 4 years from the date a lawsuit or demand for arbitration is filed.
- ❑ How many different employees have you had during the past 4 years?
- ❑ An employer with only 5 current employees could be an attractive target for a class action based on the number of total employees over the preceding four years.
- ❑ The Multiplier Effect - Fines, Penalties, Interest, Court Cost and Attorney's Fees – for each individual claim.

Individual Liability for Wage and Hour Violations

- ❑ **Risk of Personal Liability for Owner, Directors, Officers, or Managing Agents**
 - ❑ **California Labor Code § 558.1 sections (a) and (b).**
 - ❑ **(a)** Any employer *or other person acting on behalf of an employer*, who violates, or causes to be violated, any provision regulating minimum wages or hours and days of work in any order of the Industrial Welfare Commission, or violates, or causes to be violated, Sections 203 [timely payment of wages at termination of employment], 226 [wage statement violations], 226.7 [cool down, meal and rest periods], 1193.6 [actions by Labor Commission], 1194 [actions by employees – including attorney’s fees and costs], or 2802 [reimbursement of employee necessary expenditures], may be held liable as the employer for such violation.
 - ❑ **(b)** For purposes of this section, the term "other person acting on behalf of an employer" is limited to a natural person who is an owner, director, officer, or managing agent of the employer, and the term "managing agent" has the same meaning as in subdivision (b) of Section 3294 of the Civil Code.

Individual Liability for Wage and Hour Violations

- ❑ **“A Fair Day’s Pay Act”**
- ❑ New law for 2016 - Intends to help employees who can’t collect judgments because their employers change their names (or purportedly, hide their assets). **Labor Code section 238, et seq.**
- ❑ If an employee gets a final judgment (or final arbitration award) against an employer, and if the judgment is not satisfied within 30 days:
 - The employer must cease to do business unless it acquires and files a bond with the Labor Commissioner; or
 - The employer must file a notarized copy of a payment agreement with the employee
 - If no bond or installment agreement is filed, the employee can ask the Labor Commission to issue a stop order, during which time, the employer must continue to pay all employees for up to 10 days.
- ❑ The Labor Commissioner can file a lien or levy against the employer or, following an investigation, a *successor employer* (an employer similar in operation and ownership to an the judgment debtor employer), which can lead to individual liability for the successor owner or anyone acting on the owner’s behalf.

Individual Liability for Wage and Hour Violations

- Successor Employer:
 - An employer similar in operation and ownership to an employer with an unsatisfied final judgment for unpaid wages:
 - (1) the employees of the successor employer are engaged in substantially the same work in substantially the same working conditions under substantially the same supervisors; or
 - (2) if the new entity has substantially the same production process or operations, produces substantially the same products or offers substantially the same services, and has substantially the same body of customers.
 - If an employer with an unsatisfied judgment opens a new business, the new business and/or a person acting “on behalf of an employer” may be liable.
- Risk of Liability:
 - Fined up to \$100,000
 - And, “failure of an employer, owner, director, officer, or managing agent of the employer to observe a stop order issued and served upon him or her pursuant to this section is guilty of a misdemeanor punishable by imprisonment in county jail not exceeding 60 days or by a fine not exceeding ten thousand dollars (\$10,000), or both.”



Posting Requirements

- Wage Order – <https://www.dir.ca.gov/iwc/wageorderindustries.htm>
- State and Federal Posting Requirements Lists
 - State <http://www.dir.ca.gov/faqworkplacepostings3.htm>
 - Federal <http://www.dol.gov/oasam/boc/osdbu/sbrefa/poster/matrix.htm>
- [Injury and Illness Prevention Program http://www.dir.ca.gov/dosh/etools/09-031/](http://www.dir.ca.gov/dosh/etools/09-031/)

CAL OSHA

Illness Injury and Prevention Plans

DO YOU HAVE AN UP TO DATE ILLNESS INJURY PREVENTION PLAN? DO YOU ENFORCE IT?

IF NOT, YOU ARE IN VIOLATION OF THE LAW AND YOU WILL BE FINED WHEN OSHA SHOWS UP FOR AN INSPECTION OR SUBJECT TO CRIMINAL PROSECUTION IF AN EMPLOYEE IS SERIOUSLY HURT OR KILLED.

THE CITY OF LOS ANGELES FILES CRIMINAL PROSECUTIONS WHEN A JOB SITE INJURY RESULTS IN DEATH OR SERIOUS INJURY.

FOR MORE INFORMATION – WWW.OSHADEFENSELEAGUE.COM



Workers' Compensation : Q & A

- 1. If an employee has used all of his/her modified work and is not released for full duty because of a workers' compensation injury, do I still have to offer light duty to the employee or modify his/her work schedule?** *While the employer may have met its workers' compensation obligations, an employer may still have an obligation to reasonably accommodate the employee under the Fair Employment and Housing Act (FEHA) and the Americans with Disabilities Act (ADA). Reasonable accommodations under FEHA and the ADA can include extended leaves, work schedule changes, and job modifications.*
- 2. If I offer modified work to an employee on workers' compensation, can the employee refuse the work because he/she does not like the job?** *Yes, the employee can refuse. Employees are not required to accept modified work. But there is a financial incentive for the employee to do so. The employee would receive at least 85 percent of his/her regular pay if he/she accepts modified work.*
- 3. Does workers' compensation apply even if the injury was not on company property, or if the employee was on a break or lunch on the property?** *For purposes of workers' compensation, an injury is deemed to be job-related when it arises out of employment and when it occurs in the course of employment. This is true even if the employee was not on your property, such as where the employee is at a conference or even working at home.*

Undocumented Employees and Drivers' Licenses

- ❑ In 2013, California enacted **AB 60**, which created new Vehicle Code section 12801.9, authorizing the Department of Motor Vehicles to issue an original drivers' license to a person who is unable to submit satisfactory proof that the applicant's presence in the US is authorized under federal law.
- ❑ AB 60 also amended the California Unruh Act (Civil Code section 51 *et seq.*) to prevent business establishments from discriminating against individuals who hold or present such driver's licenses.
- ❑ This law amends the Fair Employment and Housing Act to prohibit discrimination against an individual because he or she holds or presents a driver's license issued under CVC 12801.9. It adds the specification that national origin discrimination includes discrimination on the basis of possessing a driver's license issued under 12801.9.

Undocumented Employees and Drivers' Licenses

- ❑ It also makes it a Fair Employment and Housing Act violation for an employer or covered person to require a person to present a driver's license, unless possessing a driver's license is required by the employer and the employer's requirement is otherwise permitted by law.
 - CVC 12801.9 shall not be construed to limit or expand an employer's authority to require a person to possess a driver's license.
- ❑ Driver's license information obtained by an employer must be treated as private and confidential, and exempt from disclosure under the California Public Records Act, and shall not be disclosed to any unauthorized person or used for any purpose other than to establish identity and authorization to drive.

“Client Employers” Share Certain Legal Responsibilities with Labor Contractors (Labor Code § 2810.3)

- ❑ As of January 1, 2015, “Client Employers” will share with the labor contractor (temp employment agencies) all civil liability and legal responsibility for workers supplied by that labor contractor for:
 - The payment of wages;
 - The failure to secure valid workers compensation coverage; and
 - Compliance with OSHA safety requirements.

- ❑ Despite this shared responsibility, a worker must provide thirty-days notice of shared violations before he or she can file a civil action against the client employer.

- ❑ Extra steps to take when using temporary employment agencies:
 - Require that the agency provides an indemnity and defense agreement in the event of a claim or law suit for the agency’s act or omission.
 - Require that the agency proof of liability and worker’s compensation insurance, and to be named as an Additional Insured.
 - Keep records of wages, hours, meal and rest periods, safety meetings, etc.
 - Meet Cal/OSHA requirements for temporary employees by providing:
 - ❑ All training, safety and health programs, and supervision/enforcement needed by and for the workers
 - ❑ Investigate all incidents and make all corrective measures



“Client Employers”

- The new law is a significant departure from California’s common law joint-employer theory of liability. Under that approach, an employer could be liable for claims for unpaid wages of contracted workers only if a worker established that an actual employment relationship existed both with the labor contractor that employed the temp worker and with the company to which the worker was assigned to perform contracted services.



“Client Employers”

- ❑ Because of Section 2810.3, a company will be deemed jointly liable for certain violations along with its third-party labor contractor, regardless of the amount of actual control that the company exerts over contracted, leased or temp workers assigned to it.
- ❑ Liability for violating wage and hour requirements for “undocumented” workers passes to the Client Employer.

California Employment Law Extends to Undocumented Immigrants

- The California Supreme Court recently affirmed that the protections of California employment law are available to undocumented immigrants.
 - See *Salas v. Sierra Chemical Co.*
- SB 1818 provides that “[a]ll protections, rights, and remedies available under state law, except any reinstatement remedy prohibited by federal law, are available to all individuals regardless of immigration status who have applied for employment, or who are or who have been employed, in this state.” Cal. Lab. Code § 1171.5.

Harassment, Discrimination and Retaliation Prevention Policy

All harassment, discrimination and retaliation prevention language has now been combined into a single policy and updated to meet new mandatory requirements issued by the California Department of Fair Employment and Housing relating to the content of written prevention policies and also requiring confirmation of distribution of your policy

- ❑ Effective April 1, 2016, the California Fair Employment and Housing Council adopted amendments to its Fair Employment and Housing Act (FEHA) regulations. These reinforce state law that it's an employer's affirmative duty to take reasonable steps to prevent and promptly correct discriminatory and harassing conduct.
- ❑ The amendment rules now require all California employers to have a written discrimination, harassment and retaliation prevention policy that includes specific provisions. In addition to creating a prevention policy, employers must continue to distribute the mandatory sexual harassment pamphlet to all employees, as required by law.
- ❑ Employers must obtain signed confirmation of distribution of this new policy
- ❑ Cost to Defend a Discrimination Lawsuit – Lots of \$\$\$\$

- ❑ **Recommend Severance and Arbitration agreements and EPL (Employment Practices Liability) insurance to reduce exposure to liability.**



Examples of Prohibited Conduct

- ❑ Sexual harassment includes a broad spectrum of conduct, including harassment based on sex, gender, gender identity or expression, and sexual orientation. Examples of unlawful and unacceptable behavior include:
 - ❑ Unwanted sexual advances.
 - ❑ Offering an employment benefit (such as a raise, promotion or career advancement) in exchange for sexual favors, or threatening an employment detriment (such as termination or demotion) for an employee's failure to engage in sexual activity.
 - ❑ Visual conduct, such as leering, making sexual gestures and displaying or posting sexually suggestive objects or pictures, cartoons or posters.
 - ❑ Verbal sexual advances, propositions, requests or comments.
 - ❑ Sending or posting sexually related messages, videos or messages via text, instant messaging or social media.
 - ❑ Verbal abuse of a sexual nature, graphic verbal comments about an individual's body, sexually degrading words used to describe an individual and suggestive or obscene letters, notes or invitations.
 - ❑ Physical conduct, such as touching, groping, assault or blocking movement.
 - ❑ Physical or verbal abuse concerning an individual's gender, gender identity or gender expression.
 - ❑ Verbal abuse concerning a person's characteristics such as pitch of voice, facial hair or the size or shape of a person's body, including remarks that a male is too feminine or a woman is too masculine.



Complaint Procedure

- ❑ Employees or contract workers who feel that they have been harassed or discriminated against, or who witness any harassment or discrimination by an employee, contract worker, customer, vendor or anyone else who does business with the Company, should immediately report such conduct to their supervisor or the Human Resources manager.

- ❑ Do not allow an inappropriate situation to continue by not reporting it, regardless of who is creating the situation. No employee, contract worker, customer, vendor or other person who does business with this organization is exempt from the prohibitions in this policy. In response to every complaint, the Company will conduct an investigation and, if improper conduct is found, take appropriate corrective action.

- ❑ To the extent that an employee or contract worker is not satisfied with the Company's handling of a harassment or discrimination complaint, he or she may also contact the appropriate state or federal enforcement agency for legal relief.



Harassment Training

- ❑ California employers with at least five employees must provide sexual harassment prevention training and education to all supervisory employees and non-supervisory employees in California by January 1, 2020.
- ❑ Employers with at least 5 employees are required to train and educate all personnel in California in the prevention of sexual harassment with at least two hours of sexual harassment prevention training and education to all supervisory employees and at least one hour of such training to all non-supervisory employees in California, by January 1, 2020. Training and education must be provided once every two years thereafter, as specified under the new law.
- ❑ The anti-sexual harassment training may be conducted with other employees, as a group, or individually, and broken up into shorter time segments, as long as the two-hour requirement for supervisory employees and one-hour requirement for non-supervisory employees is reached.
- ❑ Employers who provide the required trainings after January 1, 2019, are not required to comply with the January 1, 2020, deadline.



Dept. of Fair Employment & Housing

- ❑ The DFEH must develop, obtain, and make available on its website the one-hour and two-hour anti-sexual harassment training courses for supervisory and non-supervisory employees. Employers may develop their own training platforms, as long as they comply with the law's requirements.
- ❑ The DFEH must make existing informational posters and fact sheets regarding sexual harassment prevention available to employers and to members of the public in English and other languages (as listed in the law) on the department's internet website.

Discipline and Standards of Conduct

- ❑ As an at-will employer, the Company may impose discipline whenever it determines it is necessary or appropriate. Discipline may take various forms, including verbal counseling, written warnings, suspension, demotion, transfer, reassignment or termination. The discipline imposed will depend on the circumstances of each case; therefore, discipline will not necessarily be imposed in any particular sequence. Moreover, at any time the Company determines it is appropriate, an employee may be discharged immediately.
- ❑ Every organization must have certain standards of conduct to guide the behavior of employees. Although there is no possible way to identify every rule of conduct, the following is an illustrative list (not intended to be comprehensive or to limit the Company's right to impose discipline for any other conduct it deems inappropriate). Keep in mind that these standards of conduct apply to all employees whenever they are on Company property and/or conducting Company business (on or off Company property). Engaging in any conduct the Company deems inappropriate may result in disciplinary action, up to and including termination.



Liability Risks for Employers when Employer-Sponsored Events Include Alcohol

- Employers face potential liability for property damage and/or personal injuries related to employee drinking at employer sponsored events. The types of potential claims include inappropriate sexual behavior, car accidents, and personal injuries.
- When employees are required, encouraged, or allowed by their employers to attend events where alcohol is served; the employer will generally be legally responsible for the actions its employees because the employees are acting within the course and scope of their employment. As such, employers may be jointly or separately liable for damages and injuries caused by or sustained by their employees at these events in the same way that they are liability for injuries and damages suffered or caused by their employees during their normal work days.

Liability Risks for Employers when Employer Sponsored Events Include Alcohol

- ❑ The fact that an employer event may be a fun holiday party for the benefit of employees doesn't limit the employers' potential liability for damage claims related to the consumption of alcohol. Unfortunately, the law doesn't draw a distinction based on the nature of the activity. In other words, the potential liability for damages related to alcohol use is the same whether the alcohol is served at a party or during the normal work day.
- ❑ If, for example, your company holds a holiday lunch at a nearby restaurant during work hours, and lets employees drive back to work after they have been drinking, it would likely be liable if an intoxicated employee hits a pedestrian on the way.
- ❑ A survey performed by Bloomberg BNA found that 69% of employers holding an office party in 2016 planned to serve alcohol. As reported in this article, 40% of respondents had seen or suffered a major indiscretion at a work-sponsored holiday event; a quarter admit to drinking too much; and 14% of respondents knew someone who had been fired because of behavior at an office party.

Potential Claims from Sponsored Events

❑ Workers' Compensation Claims

- Employers injured during a company sponsored event will likely be entitled to Workers' compensation insurance coverage for any injuries they sustain as a result of their participation in the event.

❑ Sexual Harassment Claims

- Alcohol use generally lowers inhibitions are lowered and could result in unwanted sexual attention which in turn might lead to employer liability.

❑ Steps You Can Take to Minimize Problems

- The safest course of action is to avoid or strictly minimize access to alcohol at company events, which means no open bars. If you're going to allow drinking, you may be able to reduce liability exposure but not eliminate it with the following steps:



Ways to Reduce Liability Exposure

- ❑ Make attendance at the event optional. This allows employees who are clean and sober, or who simply don't like drinking, to stay home if they wish. It also gives your company an argument that an overindulging employee's actions were not in the course and scope of employment, as it was not a required work event.
- ❑ Limiting the type of alcohol to beer and wine only.
- ❑ Use drink tickets or tokens to limit employee intake. For example, you might give each employee two drink tickets for the evening.
- ❑ Provide transportation home (by taxi or ride-sharing service) for any employee who needs or asks for it.
- ❑ Promptly investigate complaints about inappropriate behavior at work-related social events, and be prepared to discipline employees who behave inappropriately.

Employment Practices Liability Insurance (EPLI)

- ❑ Employment Practices Liability insurance can provide insurance coverage for wrongful termination, sexual harassment, discrimination, invasion of privacy, breach of contract, emotional distress, and wage and hour violations including the cost of defense which could easily be more than \$400,000 per lawsuit.
- ❑ Not all insurance policies are the same; read the fine print to see what's covered and what isn't.

Public Works / Prevailing Wage Registration with the DIR

- Beginning March 1, 2015, all contractors were required to register with the California Department of Industrial Relations in order to bid on public works projects.
- As of April 1, 2015, all contractors are required to be registered with DIR to be awarded a public works contract, even if the project did not go out to bid.

Dealing With Problem “At Will” Employees

- ❑ Do you have an employee manual?
- ❑ If so, has the employee violated any prohibited conduct?
- ❑ Do you have a progressive disciplinary procedure?
- ❑ Are you locked into providing a verbal warning or written warning?
- ❑ Or, can any violation result in discipline up to termination?
- ❑ Is the employee in a protected class? If so, termination requires good cause which is not a pretext to cover discrimination.

When You Fire Someone: Things to Think About

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- ❑ Consider State/Federal Laws 238
- ❑ How to Terminate 239
- ❑ Severance Pay Agreements... 241
- ❑ Release of Wage Claims... 242

Consider your Company Policies and Documents

- Review your Employee Handbook for policies which may limit your right to terminate, such as:
 - Progressive discipline policies (oral and written warnings);
 - Internal dispute resolution or arbitration policies; and
 - Termination policies requiring “just cause.”
- Review the written employment contract, if applicable
 - What limits does the contract place on your right to terminate?
 - If you have a system of progressive discipline (i.e. written warnings prior to termination), was the system followed in this case?
 - If a terminated employee was surprised by your action, you may be more likely to face litigation.

Consider State/Federal Laws Protecting Certain Classes of Employees

- Americans with Disabilities Act
 - Is the employee physically or mentally disabled?
 - If so, were attempts made to reasonably accommodate the employee's disability?
 - Were reasonable accommodation measures well documents?
- Pregnancy
 - Is the employee pregnant? Employees are entitled to four months off for pregnancy-related disabilities.
- Wage and Hour Requirements
 - Was the employee properly classified as exempt?
 - Any wage claims for overtime, missed breaks, etc.?
- Workers' Compensation
 - Has the employee filed a workers' compensation claim? Terminating an employee who has filed a claim, intends to file a claim, or has testified in a workers' compensation hearing could be considered illegal retaliation against an employee who exercised protected rights.

Consider State/Federal Laws Protecting Certain Classes of Employees

- Consider State/Federal Laws Protecting Certain Classes of Employees
 - Title VII / California's Fair Employment and Housing Act:
 - Is the employee being treated in the same manner as other employees in similar situations?
 - Have other employees been given more chances before being terminated for the same or similar reasons as this employee?
 - If so, are there legitimate, non-discriminatory reasons for treating this employee differently than other employees?
 - Retaliation:
 - Has the employee reported any illegal activity of the company to a state or federal agency? Even if the company is not in fact acting illegally, the termination could be seen as retaliation for "whistle-blowing."
 - Has the employee participated in any official investigation of the employer (i.e. wage or safety violation) or testified against the employer in an unemployment insurance or other hearing?
 - Is the termination in retaliation for the employee's exercise of protected personal rights, such as freedom of speech or political activity?

How to Terminate

- How to Say It
 - It is not necessary to give reasons at time of termination.
 - A short statement indicating that it is no longer in the best interest of the company to continue the employment relationship suffices.
 - When you do give a reason, state the reason for termination with utmost care.
 - An employee whose feelings are hurt or who feels slighted will be more likely to seek a wrongful termination suit.
 - Have employee's direct supervisor be the one to inform the employee, and have a member of the office management team or an attorney present as well.
- When to Do It
 - The timing of the termination should be immediate and carried out prior to the end of the work day if possible.



How to Terminate

- The Last Paycheck
 - All outstanding wages, salaries, expenses, and unused vacation pay owed to the employee must usually be paid immediately upon termination.
 - It is good practice to have the final paycheck available at the termination meeting to avoid claims of withholding pay.
 - It is improper to condition receipt of the final paycheck upon an agreement by the employee to waive their right to bring suit. The employee is already entitled to all wages earned as of the date of termination.
 - Severance Pay Agreement
 - An employer may offer the employee additional payment in exchange for the employee's written agreement to waive their right to bring a lawsuit for wrongful termination and related claims. Severance agreements should be drafted by an attorney to ensure compliance with the law.
 - The best way to offer a severance package is to “fire” the person first then offer them the severance package. This makes it clear that the severance package is “consideration” for the employees’ waiving their right to sue.



Severance Pay Agreements

- ❑ The idea behind a severance agreement is that an employee agrees to take something of value to which he is not otherwise entitled – additional compensation, benefits, or other consideration – in exchange for agreeing not to sue his employer.
- ❑ A severance agreement that includes a full release of claims is the only way an employer can be reasonably sure it won't be dealing with the terminated employee again.
- ❑ An employee who otherwise was not considering suing may get the idea in their head if they are offered a severance pay agreement.
- ❑ Important things to remember about severance pay agreements:
 - An employer cannot force an employee to sign one
 - Employee must be given a reasonable amount of time to consider it
- ❑ There are many important requirements to include in a severance pay agreement. Consult an experienced attorney before offering a severance agreement!



Release of Wage Claims – “Bona Fide” dispute required

- ❑ Under California Labor Code section 206.5, an employer may not require an employee to release a claim for “wages due” unless “payment of those wages has been made.” Not only is such a release “null and void,” but an employer who violates the statute is guilty of a misdemeanor.
- ❑ Pay owed amounts first; then get a signature on a written release drafted by an attorney.

The Green Law Group, LLP

One of the ways in which our firm is different than most is that we make the legal process more transparent and efficient by providing our clients with regular status reports, detailed descriptions of the work we perform, and electronic copies of all the documents we prepare for our clients or receive from others pertaining to our clients' matters. We also encourage our clients to be proactive by inviting their input in the handling of their cases and ensuring that they have the information they need to make informed business decisions regarding the management of their legal affairs.

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