



Massachusetts Prompt Pay Law

“An Act to Promote Fairness in Private Construction Contracts”

c. 293 of the Acts of 2010, adding M.G.L. c.149 §29E

Signed into law – August 10, 2010 | Effective – November 8, 2010

SECTION 1(a): Clarifies the application of the law.

1. The new law applies to all contracts that are covered by the Mechanics Lien Law, M.G.L. c.254, which means it applies to owners, general contractors, subcontractors, sub-subcontractors and material suppliers.
2. It applies to all private construction, both residential and commercial, valued at over \$3 million or more, where there are written contracts in place. Residential projects of four units or less are excluded.

SECTION 1(b): Allows electronic communication to satisfy the requirement for communication “in writing”

SECTION 1(c): Requires that action be taken on periodic payment requests within a reasonable time.

1. First, it sets reasonable, “not to exceed” periods for each step in the payment process: 30 days for submission of an application for payment (starting 30 days after commencing work); 15 days for approval of the request; and 45 days for payment after approval. Additional details:
 - a. Submission of a payment application must occur at least 14 days after commencing performance.
 - b. The period for approval or rejection is extended by an additional 7 days per tier, cumulative for each tier below the owner, to allow sufficient time for the flow of paperwork up and down through multiple tiers.
 - c. Cumulatively the due date is no more than 90 days from the date work commenced, which now becomes the outer limit of time for payment under contracts with “pay when paid” clauses. This represents a significant improvement over current practice, where the timeframe is often open-ended.
2. Equally significant, are provisions to prevent delays:
 - a. Payment requests not approved or rejected within the 15 day period are deemed approved (but only conditionally), allowing them to continue toward payment.
 - b. Payment requests approved conditionally may be subsequently rejected at any time up until the date payment is due. This is a key provision as it assures plenty of opportunity for corrective action if problems are discovered with the payment request prior to the time payment is due. This alleviates any need to delay payment decisions.
3. Finally, it provides due process for handling of rejections:
 - a. It requires that rejection of any payment requests must be in writing; include a detailed explanation of the factual and contractual basis for rejection; and be certified as made in good faith.
 - b. Rejected requests are to be handled through the normal dispute resolution process, but the law requires a waiting period before commencing that process, to allow opportunity to resolve the problem through normal means. However, contracts cannot require a waiting period longer than 60 days.

SECTION 1 (d): Sets up a process for change orders that is similar to that for regular payments, and is likewise designed to keep the decision process moving so that change orders can more quickly be included in the normal payment application process. Specifically:

1. It sets a reasonable “not to exceed” time for approval or rejection of a written request for a change increasing the contract price: the later of 30 days after commencing performance of the change order work, or 30 days after submitting the request. Similar to new provisions in Section (c), it includes an additional 7 days per tier, cumulative for each tier below the owner, for the approval or rejection of the change request.
 2. It has similar provisions to avoid delays:
 - a. A change order request not approved or rejected within the 30 day period shall be deemed approved (but only conditionally), allowing the contractor to include the change order amount in his next application for periodic progress payment.
 - b. Change order requests approved conditionally may subsequently be rejected at any time up until the date payment is due. Again, this is a key provision, allowing plenty of time for corrective action. At no time is payment required for rejected (i.e., unapproved) change orders.
 3. Finally, it requires that rejection of change order requests be in writing and be made in good faith, to preserve the integrity of the process. Rejected requests are to be handled through the normal dispute resolution process. As in Section (c), there is a required waiting period of not more than 60 days before commencing that process.
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SECTION 1(e): Sets strict limitations on when condition-precedent or “pay if paid” provisions can be used to avoid responsibility to pay when payment has not been first received from a third party.

1. It makes pay-if-paid provisions void and unenforceable except in two circumstances:
 - a. Where non-payment by the owner is due to problems with the subcontractor’s work, and the subcontractor has failed to cure the problems within the notice period. Pay-if-paid *cannot* be used when non-payment is due to problems with the general contractor’s work.
 - b. Where the owner is insolvent (the situation of greatest concern), or becomes insolvent within 90 days of the payment request, BUT only if the general contractor has:
 - 1) Filed a lien at the start of the project, after commencing performance but prior to submitting the first payment application.
 - 2) Maintained the lien and did not dissolve it; filed a statement of amount due; and filed a civil action to enforce the lien.
 - 3) Pursued all reasonable legal remedies to obtain payment.
2. It specifies the steps an aggrieved party must take before legally challenging whether the non-paying party has pursued all reasonable legal remedies to obtain payment. The aggrieved party must:
 - a. First make a written inquiry on the legal remedies pursued; and
 - b. May pursue a challenge only if there is either no response after 10 days, or if there is a response, but the aggrieved party has requested the non-paying party to pursue specific additional legal remedies, and such party has failed to do so.

3. While Section (e) does not prohibit pay-if-paid clauses outright, it significantly limits their application to the two situations described above. A subcontractor wishing to use pay-if-paid terms with its sub-subcontractors is similarly bound by these requirements and limitations.
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SECTION 1(f): Allows the right to stop work. It does not set specific terms for suspension and termination, however, nor deal with notice requirements or deadlines. Instead:

1. It states that nothing in a contract can require a person to continue performing work if not paid in a reasonable time: i.e., within 30 days of the date payment was due.
2. It does not allow suspension, however, if there is a dispute regarding the person's work, or, if the person defaults after approval of the payment.

In choosing to suspend, the person would be required to follow the notice provisions of his contract, but could not be held in breach of contract for taking this action, as is often the case now.

SECTION 1(g): Disallows any contract provision waiving rights under this law.

SECTION 2: Makes the law prospective, applying only to projects where the owner's contract is signed after the law takes effect.