



August 2010

MASSACHUSETTS ADOPTS A PROMPT-PAY LAW FOR PRIVATE CONSTRUCTION PROJECTS

Last week the Governor signed into law “Prompt-Pay” legislation (which will be known as M.G.L. c. 149 § 29E) that will significantly affect private construction projects in Massachusetts. These are some of the key aspects of the new law that you should know:

Effective Date: The law does not go into effect until November 8, 2010, and only affects contracts for a project where the owner’s contract is entered into on or after that effective date.

- **Contracts Affected:** The law applies to contracts for private construction projects with an original value of over \$3 million. Contracts for all tiers of the project are subject to the law, provided that the contract can be the basis for a mechanic’s lien pursuant to M.G.L. c. 254 §§ 2 or 4. This law does not apply to residential projects with four or fewer units, nor does it apply to public construction projects.
- **Pay-if-Paid Clauses:** Pay-if-paid clauses are now unenforceable except in these narrow circumstances: (1) the basis for the third party’s failure to pay the paying contractor is that the contractor seeking payment failed to perform and failed to cure timely (e.g., the owner has withheld payment from the general contractor because of the subcontractor’s failure to perform); or (2) the owner is “insolvent” and the party seeking to enforce the pay-if-paid clause has pursued its lien rights as prescribed by the law prior to submission of its first invoice. Note, these statutory requirements governing pay-if-paid clauses must be included in the written contract.
- **Payment Applications:** Contracts must contain reasonable time periods for the payment application to be submitted, approved or rejected, and paid. The law sets the outer limits of what time periods are considered “reasonable” for each step and those time periods increase for each lower tier of contractors. Critically, if the application is not timely approved or rejected, it is considered automatically approved. If the application is rejected in whole or in part, the rejection must be in writing, explain the basis for the rejection and the rejecting party must certify that the rejection was made in good faith.



If you have any questions about the issues addressed here, or any other matters involving Construction Law issues, please feel free to contact:

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- **Change Order Requests:** Contracts must contain a reasonable period for the approval or rejection of change order requests seeking to increase the contract amount (this does not apply to deduct change orders or changes requesting additional time). As with payment applications, the law sets the outer limits of what time periods are considered “reasonable” and those time periods increase for each lower tier of contractors. Again, if the change order request is not timely approved or rejected, it is considered automatically approved. If the change order request is rejected in whole or in part, the rejection must be in writing, explain the basis for the rejection and the rejecting party must certify that the rejection was made in good faith.
- **Effect of Overdue Payment:** If payment is more than 30 days overdue to any party, that party cannot be required to continue to work unless a dispute or default exists, and even under those circumstances, the party must receive written notice of the dispute or default and payment of all undisputed amounts.

This E-Blast is merely an overview intended to advise you of the key aspects of this new legislation. A review of the specific statutory requirements is required to ensure compliance. If you have any questions or would like assistance in modifying your form contracts to conform to the new law, please contact your attorney or a member of the Construction Law Group.

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