

**ARKANSAS MECHANICS' LIEN LAW
WITH CHANGES MADE IN 2010**

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GENERAL NOTES

Be Careful: The courts consider a mechanic's lien to be a privilege and not a right. You receive its benefits only if you **strictly adhere** to the state law requirements. Bottom line: miss a deadline by one day and you have lost it. Unlike other areas of the law where you can argue equities, find technical exceptions, and lawful excuses, there is no forgiveness here. In this case, knowledge is not only power, it's a necessity.

In this State you will be writing down dates for at least five documents: a) Pre-Construction Notice to Owner on Residential Project (residential only), b) Notice of Intent to File a Lien (commercial and residential), c) Notice to Owner and Contractor (commercial only); d) Mechanic's Lien; and e) lawsuit to foreclose the mechanic's lien. Write down all the deadlines in your calendar. Use a highlighter or red pen. If you have a staff, use a "fail safe" system by doubling up and putting it in their calendar also. This reminds you twice. The first calendar entry should be two weeks before the due date as a preliminary reminder.

On the second calendar entry, do a white lie to yourself. Put the due date as one week before it is actually due as insurance in case you get busy or need legal advice.

Time is money. You will waste a lot of valuable time running around and doing it at the last moment, as opposed to doing it early.

PRELIEN NOTICE

This state requires Notices be sent out before the mechanic's lien is filed/recorded. For simplicity, these notices will be referred to as a "Prelien Notice". The basic information on these notices is as follows:

New Service Rules:

Notices (Pre-Construction Notice, Notice of Intent to Lien, and Notice to Owner and Contractor) were previously served by a process server, a Marshall, or by certified mail. Effective July 31, 2009, all notices may be served either by certified mail, FedEx, or UPS overnight. Frankly, certified mail is sufficient in almost all cases. Service may be made to an individual's business or residential address.

Affidavit of Notice:

As of July 31, 2007, the legislature has made a major change to the law. Previously, a general contractor or subcontractor simply served the required prelien notices and then followed-up by recording the mechanic's lien. The clerk never asked if you had previously served the prelien notices.

Under the new law, this has now changed. Pursuant to 18-44-117 the **clerk will refuse** to accept for filing your mechanic's lien if you do not show proof that the prelien notices have been served. That proof is in the form of an Affidavit of Notice which shows proof that the notices were served.

There are three ways you can serve such prelien notices: 1) having a process server or marshall/police officer serve for you, 2) you or someone else handing it to them, or 3) certified mail. Certified mail is the preferred method because it is simpler and less costly than a process server. If it is served by certified mail, there is no need to attach a separate proof of service--you simply staple the signed return receipt to the notice itself. If it is refused, simply make a copy of the returned envelope which shows it was refused, as written by the post office.

Pre-Construction Notice to Owner on Residential Project **(Residential Only)**

***Who Must Use
this Notice:***

Only the general contractor is required to give this notice to the owner. The general contractor is defined as any contractor (whether they have a general or subcontractor license) that has a direct contract with the owner. Most subcontractors and material suppliers are therefore not required to serve this notice (unless you have a direct contract with the Owner). However, if it is not given by the general contractor, no lien claimants, whether general contractor, subcontractor, or supplier can file their liens. It is therefore crucial it be sent by the general contractor. On the other hand, subcontractors and suppliers can, but are not required to, give the notice as well. But how does a subcontractor or supplier know whether the general contractor has sent the notice? In many cases you do not know. That is why Arkansas Statute 18-44-108 requires the general contractor to furnish to a subcontractor or supplier a certification from the owner that the notice has been sent and received. It is therefore a good idea to make this demand in writing to the general contractor to make sure the requirement has been fulfilled. The standard forms in use in this State may have a signature line for the owner and a certification by the general contractor that it was properly signed. You can simply request that be sent to you by the general contractor.

This notice does not have to be served if you are a material supplier with a contract directly with the owner. For example, if you are a plumbing supplier and the owner orders finished

plumbing fixtures directly from you for the project, and does not pay for same, there is no requirement of such a prelien notice for your purposes.

When: See **Time Deadlines** table. The statutes require the notice to be served before any contractor or supplier furnishes labor or materials. But what if the notice is served after work begins? The If you are a subcontractor coming later (for example a painter, floor covering contractor, or someone doing finish work) you are OK if the late served notice comes before you started your work.

New sanctions for failure to comply. As of July 31 2009, a and residential general contractor who does not give the required notice is forbidden to bring any action to collect monies owed under the contract. This is an extremely serious sanction and general contractor's should take all available steps to make sure the notices are served.

How to Serve: The owner is served by certified mail, return receipt requested. If it is refused, immediately send a copy first class mail. No return signature by the addressee is required. Alternatively, the general contractor can simply insert this notice into the contract with the owner and if that is the case, the separate service by certified mail is not required.

Verified or Notarized?: This prelien notice need not be verified or notarized. However, it is a good idea to get the owner to sign it acknowledging service.

General Contractor's List of Subs and Suppliers

In 1995, there was a requirement that general contractors list all subcontractors and suppliers on the project. As imagined, it was quite a hassle for general contractors. To put teeth into the law, the statute indicated criminal charges could be brought for failure to comply, but no prosecutors took it seriously.

As of July 31, 2009 (Ark Code 18-44-108), if the general fails to compile such a list, any party who wishes to view it (typically the owner), can go to court and seek the issuance of a contempt citation to force compliance. The prevailing party in such action is also entitled to reasonable attorneys' fees. It is doubtful the owner would go to the time and expense of bringing such a lawsuit, but it is nevertheless available.

Notice of Intent to File a Lien
(Residential and Commercial)

Who Must Use

this Notice:

Everyone, including the general contractor, subcontractors, and material suppliers must serve this prelien notice.

When:

See **Time Deadlines** table.

How to Serve:

This must be served on the owner and general contractor (if you are a subcontractor or supplier with a contract directly with the general contractor) by certified mail, return receipt requested. If you are a sub-subcontractor or a supplier to a subcontractor, it is also a good idea to serve the subcontractor as well. If it is refused, immediately send a copy first class mail. No return signature by the addressee is required.

Verified or

Notarized?:

This prelien notice must be ***notarized*** but does not have to be ***verified***.

Notice to Owner and Contractor
(Commercial Only)

Who Must Use

this Notice:

Material suppliers and laborers. This notice is not required to be sent by general contractors and subcontractors.

When:

See **Time Deadlines** table.

How to Serve:

Serve the owner and general contractor by certified mail, return receipt requested. If it is refused, immediately send a copy first class mail. No return signature by the addressee is required.

Verified or

Notarized?:

The pre-lien notice need not be notarized or verified. A one-for-a great at some young and in one to you or nine Linda and for the aero to have

MECHANICS' LIENS

Name of Lien:

Verified Statement of Account and Claim of Lien

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

A mechanic's lien is primarily for general contractors, subcontractors, laborers, as well as material/equipment suppliers. But it also covers landscapers, architects, engineers, surveyors, appraisers, abstractors, title insurance agents, and those who repair equipment or machinery located on the project.

Unfortunately, equipment rental providers are not included within the statutory definition. Sub-subcontractors are entitled to a lien, but not third tier subcontractors (a subcontractor who has a contract directly with a sub-subcontractor). Only material suppliers who have a contract with the general contractor or subcontractor are entitled to a lien.

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

See **Time Deadlines** table.

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

Circuit clerk of the county where the project is located.

How to Serve:

After filing the verified Statement of Account and Claim of Lien, serve the owner (if you are a general) and the owner plus the general contractor (if you are a sub or supplier) by certified mail, return receipt requested. If you have a contract with a subcontractor, it is a good idea to also serve the subcontractor. If it is refused, immediately send a copy by regular first class mail. No return signature by the addressee is required.

***Amount of
Lien:***

Primarily for unpaid labor, material, and equipment supplied. Also includes interest and the \$3.00 filing fee paid to the clerk when the lien is filed. If the lien claimant is not paid within 20 days of sending out the mechanic's lien, and later becomes the successful party in a lawsuit to foreclose the lien, the lien claimant gets his or her attorney's fees paid by the other side. Lost profits, delay, and other "impact" damages are not recoverable.

***Property
Subject to
the Lien:***

A mechanic's lien applies only to private projects. No lien is allowed in public projects against government property. The lien attaches to the land upon which the work has been done as well as much as one acre surrounding the work. Liens can also

be placed on a boat or vessel. A lien can also attach to a tenant's interest in the property, including an interest in the lease and trade fixtures. But, it cannot go against the landlord's interest. Liens can also be filed against property owned by churches and non-profit, charitable organizations.

***Furnishing
Information:***

Upon request, the general should furnish others with information about the owner so the required notices and lien can be filled out properly. An owner, supplier, or subcontractor can request the general contractor or a subcontractor for information as to who was working on the job (the names of the persons and the amounts due each such person). This allows the owner to take the necessary steps to make sure everyone is paid. Subcontractors and suppliers can also demand that they receive a certification from the general contractor that the owner has received the **PRE-CONSTRUCTION NOTICE TO OWNER ON RESIDENTIAL PROJECT**. This information must be provided within 5 days of receipt of the demand.

***Verified or
Notarized?:***

A **verified** notice simply means you sign it and are representing the contents are true and accurate. A **notarized** notice is signed in front of a Notary Public or other official. A **verified** notice is all that is required in this state. The lien must be both **notarized** and **verified**.

Priorities:

A mechanic's lien has priority over all mortgages or encumbrances on the property, even if they were recorded before the work began. The only exception is a mortgage for construction funding. If this is recorded before work on the project begins, it has priority. On the other hand, if the construction mortgage is recorded after work begins, the mechanic's lien will have priority.

As between the persons who file mechanics' liens, it does not make any difference who files first. Everyone has the same priority, and if there is not enough to go around after foreclosure of the property, everyone shares "pro rata" based on the amounts of their liens.

***Lien Release
Bond:***

An owner can release the lien from the property by filing a surety bond for double the amount of the lien. This means you will continue as before with a lawsuit against the bonding

company but you will receive your money from the bonding company at the end of the process.

MISCELLANEOUS ISSUES

***Definition of
"Completion":***

The definition of completion is important because a mechanic's lien must be filed within 120 days of the last work you do upon the project. This means the last day you are furnishing labor or materials. Simply being on the job physically does not constitute work or labor done. Beware that Arkansas law has strict rules as to when the project is completed. It is usually defined as when it is substantially completed. This means that the time is not extended by going back and performing warranty work or "call-back" work (going back and fixing something you have already installed). The time may not be extended if you do work beyond the scope of the contract, including change orders. To be safe, file early.

***Signing Certified
Mail:***

We all know there is sometimes a problem with people not picking up their certified mail. The Arkansas statutes say you are safe as long as you properly send out the notice by certified mail, even if the person on the receiving end does not sign it.

LAWSUIT TO FORECLOSE LIEN

Introduction:

Your lien is not valid forever. Because it directly affects the owner's title, it has a limited shelf life and must be enforced within a short period of time. That enforcement is done by filing a lawsuit to foreclose. Just like the time deadlines for a Pre-Lien or Mechanic's Lien, the courts strictly construe these time limits which are called statutes of limitation. Again, if you are literally one day late, the lien is ineffectual.

When:

Within 15 months of filing the lien.

Where to File:

The Chancery Court of the county in which the property is located.

Arbitration:

Many construction contracts state that all disputes will be decided by binding arbitration, as opposed to a court

proceeding by judge or jury. In fact, it has long been a tradition to do so in the construction industry. Arbitration is usually quicker and less costly, especially because it cuts down on expensive discovery. The decision is final and binding, with no right to appeal. You lose your right for a jury trial, but few contractors want that in the first place. You usually pick an experienced construction attorney or retired judge to hear the case in their conference room. It is just like a court proceeding with the same general rules of evidence, but more informal.

On the other hand, you can only foreclose your lien through a court proceeding, not arbitration. So, how do you keep your arbitration rights and at the same time preserve your lien rights? Simple. You bring a lawsuit to protect the lien and then immediately request the court to stay the court proceedings. When arbitration is done, you go back to court and turn the arbitration award into a judgment.

Need a Lawyer?

In this country, every individual has the statutory right to represent themselves. This means they can prepare all necessary papers, appear at hearings, and actually try the case. In so doing, the court considers you to be acting either in “***pro se***” or “***pro per***”. Before making this decision, consider the following factors:

1. You are a professional and thoroughly know the ins and outs of not only the construction industry but of the project itself. The best lawyer on his or her best day will probably not know more than 50% of what you know.
2. How is your public speaking abilities? If you are uncomfortable speaking to a group, you will even more uncomfortable in court or arbitration. You could be the “sharpest wit in town” but may not be able to present your arguments. Remember, appearing uncomfortable is perceived as having deficiencies in your case. People usually think that if you are not comfortable about your own facts, then they must not be that strong.
3. If the other side has a lawyer, you might want to think twice about representing yourself. You will certainly know the facts quite well, but you may be blindsided by legal technicalities.

4. You may also want to think twice if this is a really nasty and emotional case. In other words, if the other side is going for “blood”. Having a lawyer can shelter you from this emotional trauma. No matter how strong you are, lawsuits are taxing not only on your time, but on your physical and emotional energies.

5. If you have a good case in which you have complied with technicalities and performed good work, you are essentially engaging in a collection action. These actions are typically very simple because there are few defenses or defects alleged by the other side. It makes it easier for you to represent yourself because it is more a question of when and how much they will pay as opposed to whether you will win at all.

6. If you have a binding arbitration provision, you may consider representing yourself. These proceedings are much more informal and the arbitrator tends to give you more leeway. There are also fewer rules and not they are usually not quite as strict.

7. You could consider representing yourself but get advice along the way from a lawyer. It is much cheaper that way. On the other hand, the lawyer cannot watch over every move and you might slip up. Many times lawyers can also help you with preparing the forms, simply putting your name on the pleading. You can also bring in your lawyer at the end to actually try the case.

8. Judges and courts do not give legal advice. They only help you with what forms to use. However, clerks can be invaluable in steering you in the right direction as far as where to file, time limitations, the nature of the form or pleading, etc. But, remember when it comes right down to the ultimate advice, they cannot help you.

9. Judges usually treat you the same as an attorney which means they expect strict compliance with the rules. Although some judges give you more slack, don't count on it.

10. The biggest dilemma is whether you should hire an attorney for a smaller case, typically in the \$5,000 to \$10,000 range. You have to watch this because you may eat up that amount in attorney's fees. *You* never make money on lawsuits, only *lawyers* do. Try to settle for the best price you can get and move on.