

The Implications of Construction Lien Waivers

By Cotney Construction Law



As a contractor, do you know the difference between the multiple types of lien waivers and the risks associated with each one? Lien waivers are a common, if not universal practice in the construction industry between parties with a financial relationship. In practice, lien waivers are beneficial to all parties because they not only build trust but also make the financial relationship between the parties more efficient. However, there are different types of lien waivers and a contractor can unknowingly waive certain rights and remedies for getting paid if they do not know what they are signing. Before signing a lien waiver, it is important to know the difference between the multiple types as well as the legal implications from signing these documents.

A lien waiver is an enforceable and legally binding document that states the claimant, such as a contractor, subcontractor, or supplier, has received payment for the agreed upon service or materials and thus waives any rights to file a mechanic's lien on the property. Lien waivers benefit the party making the payment (usually the owner) because the lien waivers act as proof that they submitted payment and ensure that they do not have to pay twice on a project. Lien waivers benefit the party receiving payment (usually the contractor) by speeding up the payment process and thus the waivers create a more streamlined and efficient payment process for all involved.

There are generally two types of lien waivers: conditional and unconditional waivers. A conditional lien waiver states that a party waives its lien rights only after they have received payment. This type of waiver does not go into effect until the predetermined condition (payment) is fulfilled. This type of lien waiver allows for more protections for contractors and puts the owner on notice that the contractor has not actually been paid. On the other hand, an unconditional lien waiver is considered absolute and considered effective as soon as it is signed. Thus, unconditional lien waivers are considered riskier for contractors and subcontractors, and since they are effective immediately when signed, problems can arise if payment does not go through or a check is bounced after the waiver is signed.

Both types of lien waivers can be further broken down into two subcategories: waivers on final payment and waivers on progress payments. A lien waiver for final payment is used when the contractor has been paid the total contract price in one lump sum or it could be used for the last payment in a progress billing contract. Either way, this type of waiver states that both parties have satisfied their responsibilities under the contract and are paid up. A lien waiver for progress

payments is issued and signed when the contractor is paid an agreed portion of the total amount of the contract, usually for the amount of work that has been completed up to that point. This type of waiver is typically submitted with every invoice and allows the contractor to keep their mechanic's lien rights for work that has yet to be completed. The retainage amount that the owner keeps until the end of the project also creates a tricky situation for lien waivers. In order to preserve one's lien rights to retainage, a contractor can specifically exclude retainage from the lien waiver with a statement to that effect.

It is extremely important for lien waivers to be thoroughly reviewed because mistakes on a lien waiver can be costly. Thus, before signing any lien waiver, contractors should carefully review the waiver to understand what type of waiver it is and what rights they will be waiving. It is also essential that the contractor ensures the date on the lien waiver matches the date of work to be paid, especially for lien waivers for progress payments. Additionally, and most obviously, it is important to check, recheck, and triple check that the party has been paid the correct amount after all costs have been taken into effect because once the lien waiver is signed, contractors might be out of luck if there was an error in the payment amounts. Finally, some states have statutes governing lien waivers, so you will want to check if the state where the project is located has any statute, and if so, ensure that the lien waivers are in accordance with the statute. If another party has supplied/drafted the lien waiver, it is important for you to independently verify that it complies with any relevant state or local statute.

Since lien waivers are becoming an integral part of almost every payment transaction in the construction industry, it is important to understand the implications of the document you are signing. Liens are arguably one of contractors' most important tools for getting paid on the project so signing away this statutory right should not be taken lightly.

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Cotney Construction Law is an advocate for the roofing industry and serves as General Counsel for NRCA, FRSA, NWIR, RT3, TARC, WSRCA and several other roofing associations. For more information, visit www.cotneycl.com.