

## **Shut Down of Construction Projects Due to Covid-19 Shelter-in-Place and Stay at Home Orders May Trigger Your Time to Server or Record Stop Notices and Mechanic's Liens.**

As San Francisco, San Mateo, Alameda, Contra Costa Marin and Santa Clara Counties, along with the City of Berkeley have issued an update on March 31<sup>st</sup> to the joint San Francisco Bay Area Shelter-in-Place Orders, it is clear that most construction projects, with the exception of public works, infrastructure and low income housing projects, will be forced to shut down. These shutdowns of construction projects, both large and small, public, or private, may trigger the deadlines for recording mechanic's liens and serving Stop Notices even though the projects may restart. The length of the stoppage of work is what must be considered. This article will address some of these timing issues.

### ***Who is eligible to record a claim of Mechanic's Lien or serve a public works stop notice claim?***

Only certain parties are able to take advantage of the lien laws. In order to qualify, the prospective claimant must, generally: (1) perform services, provide labor or provide materials to the project; (2) the services, labor or materials which were supplied must be used or consumed in the project; and (3) the owner or his representative (e.g. general contractor) must authorize the services or materials.

### ***What are the prerequisites for a claim of Mechanic's Lien or serve a public works stop notice claim?***

Service of a 20-day Preliminary Notice is a prerequisite for a valid claim of Mechanic's Lien or public works stop notice claim. A 20-day Preliminary Notice must be served on the project owner, project construction lender (if any), and general contractor if you are a (1) Subcontractor; (2) Sub-Subcontractor; (3) Material supplier; or a (4) Design professional.

In general, any person performing labor for wages, and contractors in direct contract with the project owner do not need to serve a 20-day Preliminary Notice prior to recording a claim of Mechanic's Lien or serving a public works stop notice claim. However, if there is a construction lender for the project, a contractor, even if in direct contract with the owner, must serve a 20-day Preliminary Notice.

The notice must be served no later than 20 days after first furnishing the labor, services, equipment, or materials for which the lien is claimed. A notice can be served after the initial 20-day period, but the amount of the lien is limited to the labor, services, equipment, or materials furnished 20-days before the service of the notice and those furnished thereafter.

***When must a claim of mechanic's lien be recorded, or a public works stop notice claim be served?***

A claim of mechanic's lien or a stop notice claim must be recorded (in the case of lien claims) or served (in the case of stop notices) within 90 days of completion. Completion is defined by the Civil Code (Ca Civil Code §8180) as any of the following: (1) actual completion; (2) occupation or use coupled with cessation of labor; (3) cessation of work for a continuous 60-day period; (4) cessation of work for a continuous 30-day period plus recordation of a Notice of Cessation; (5) recordation of a Notice of Completion. In determining if the project is "complete" for the purposes of calculating your time to record your mechanic's liens, "completion" means actual completion and not substantial completion.

It is important to note that **recording a premature lien can make it unenforceable**. To enforce a mechanics lien claim, a direct contractor must first complete the contract work and then record the lien. However, there is an appellate court decision that states that a contractor who records a mechanic's lien upon the anticipatory breach of the project has completed its contract and therefore the recording of the mechanic's lien is not premature. Accordingly, under the current circumstances a contractor who has been thrown off the job due to a Shelter-in-Place order, or by other action by a government agency or project owner in response to Covid-19, who records a mechanic's lien has completed its contract and the mechanic's lien will not be premature.

***-- Timing if the project is not "Complete" and no Notice of Cessation or Notice of Competition has been Recorded.***

In the case of a 60-day continuous cessation of labor equals completion, the 90-day deadline for recording your lien claim or serving your stop notice claim starts at the conclusion of the 60-day continuous period of cessation of labor, as the conclusion of this period equals completion of the project. In essence this means that the time to record or serve your claim expires 150 days after your project is shut down due to the Shelter-in-Place orders, assuming the project remains shut down for 60 continuous days.

***-- Timing if the project is not "Complete" and the Owner has Recorded a Notice of Cessation or Notice of Competition has been served***

If there has been a 30-day continuous cessation of labor, and the project owner has recorded a Notice of Cessation of Labor or a Notice of Completion, the timing for recording a Mechanic's lien or serving a stop notice is significantly shortened. Recordation of the Notice of Cessation/Completion changes the deadlines to 60 days after the recordation of the notice for contractors in direct contract with project owners, and 30 days after the recordation of the notice for subcontractors.

All private project owners, other than residential homeowners of dwellings containing fewer than five units, must notify the original contractor and any claimant who has provided the

owner with a preliminary 20-day lien notice of the recordation of the Notice of Cessation within 10 days of recording the Notice. Such notice must be in writing and delivered either by personal delivery, or by registered or certified mail, express mail, or overnight delivery by an express service carrier. If notice of the recordation of the Notice of Cessation is provided, then the Notice of Cessation is ineffective to shorten the recording period.

***-- How can you find out if a Notice of Completion or Cessation has been recorded?***

Under Civil Code §8214, if a Preliminary 20-Day Lien Notice is properly filed with the County Recorder, that Recorder has the good faith duty to notify the filing party within five (5) days following recording of a Notice of Completion or a Notice of Cessation. This extra step of filing the Preliminary 20-Day Lien Notice with the Recorder in the county where the property is located, will assist the contractor in determining when a Notice of Completion is filed, so that the contractor can timely record his or her lien. However, the system is not fool proof since the County Recorder has no liability should it fail to notify the contractor that a Notice of Completion has been filed.

***What is the deadline to Enforce Payment Bonds?***

With very few exceptions, California public agencies require that the direct contractor for any project obtain a payment bond. While atypical, it is also possible that your private works project has a payment, and you should review your project to determine if there is a payment bond or not. Regardless of whether it is a public or private work, a claimant may pursue a claim on a Payment Bond if he is allowed to pursue a claim for a stop notice. The claimant must also give written notice to the surety and the bond principal within 15 days after recordation of a notice of completion, or if no notice of completion has been recorded, within 75 days after completion, whether actual or by operation of law, of the work of improvement. Assuming proper notice has been given, the deadline to make a claim against a payment bond is 6 months after the time in which a stop payment notice may be given. As such, determine when your deadline to serve your stop notice claim is as set forth above, and make any payment bond claim within 6 months of that date.

***When must you file suit?***

You must file suit on your mechanic's lien claims with 90 days of your recordation of your Mechanic's lien. Failure to file suit within this 90-day period invalidates your lien by operation of law. For stop notice claims, the deadline does not run from the date your stop notice is served, the deadline for filing suit on your stop notice claim is 90 days after the expiration of the time period in which to a stop notice can be served.

***What happens if the project restarts?***

If the project restarts prior to the expiration of 30 continuous days of cessation of labor followed by recordation of a Notice of Cessation, or 60 continuous days of cessation of labor,

then there is no completion and the time to record claims of mechanic's lien or serve stop notice claims will not start.

If, however, there are of 30 continuous days of cessation of labor followed by recordation of a Notice of Cessation, or 60 continuous days of cessation of labor, there is an appellate court decision that suggests that a subsequent completion of the project will not serve to extend the time in which to record claims of mechanic's lien or serve stop notice claims. In this case, when the project restarts, it will be considered a new project for the purposes of mechanic's liens and stop notices. As such, you should serve a new 20-day Preliminary Notice upon restart of a project that restarts after completion due to 30 continuous days of cessation of labor followed by recordation of a Notice of Cessation, or a 60 continuous days of cessation of labor. This new 20-day Preliminary Notice should be revised to estimate the value of the labor, services, materials, and equipment that will be provided going forward. If there have been any changes in ownership of the project, the general contractor or the construction lender, the new Preliminary Notice should be revised accordingly. In this case, you will need to separately and timely enforce your mechanic's lien and/or stop notice claims for that portion of the project that was completed by operation of law, and then serve and record any mechanic's liens or stop notices as necessary when the restarted project reaches actual completion.

### **Closing Comments**

In the current construction environment, if your project is shut down, it is important that you begin to track the cessation of work, and actively calendar the deadlines related to recordation and service of mechanic's lien and stop notice claims, and the deadlines for perfecting those claims and your payment bond claims by filing a lawsuit. The timely filing of either a mechanic's lien or a stop notice is the most important step to a contractor's recovery of its claim. The collection of this type of information, and the maintenance and updating of records supporting this information will always substantially increase the likelihood of the contractor prevailing in litigation concerning a project. In addition, a contractor will also increase his or her likelihood of preserving lien claims by using all sources of notification, such as the County Recorder, or even hiring an independent service bureau that will inform the contractor when a Notice of Completion and/or Cessation is recorded. Contractors should also reach out to legal counsel with any questions they may have regarding the effect of any cessation of work on their projects and the time limits such a cessation may trigger.

This article, ©2020, was written by William C. Last, Jr. and Patrick J. Whitehorn. Mr. Last is an attorney who has been specializing in Construction Law for over 40 years. In addition to belonging to a number of construction trade associations, Mr. Last holds a California "A" and "B" license. Mr. Last has been designated as a Super Lawyer and a *Fellow, Construction Lawyers Society of America*. Mr. Whitehorn has been practicing construction, and commercial litigation for over fifteen years. Both can be contacted at 415-793-7411 or 650-696-8350. A number of his past articles can be found on his website ([lhconstructlaw.com](http://lhconstructlaw.com)). This bulletin is published periodically to provide general information about

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