

### **Top 5 Construction Litigation Questions from Private Sector Owners, Contractors, and Suppliers**

Residential, commercial, industrial, and mixed-use construction rapidly expanded throughout Nevada during the past few years. The number of completed and proposed projects grew beyond most expectations, especially in light of uncertainties caused by the COVID-19 pandemic. However, recently the construction industry has been impacted by and may continue to experience impacts due to the residual effects of the pandemic, the war in Ukraine, inflation, and material availability and price escalation.



Construction Law and Litigation attorney [Phil Mannelly](#) prepared this Legal Update that answers five of the most common questions that private sector project owners, contractors, and suppliers ask when focusing on risk mitigation, litigation prevention, and preservation of legal rights. A comprehensive analysis of Nevada construction laws is also available in the "[Nevada Construction Law and Customs](#)" treatise published by *Thomson Reuters Practical Law* for which Phil is a contributory author.

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#### **Top 5 Questions**

1. Prompt Payment Due Dates and Penalties
2. Right to Withhold Payment and Penalties
3. Right to Stop Work and Terminate
4. Mechanics' Lien Timing
5. Statute of Limitations and Statute of Repose

#### **1. Prompt Payment Due Dates and Penalties**

Nevada statutes specify requirements for making timely payments and penalties for untimely payments on privately owned construction projects (NRS 624.606 to 624.630).

- **Due Date for Owner:** The owner must pay the prime contractor on or before the date payment is due according to the payment schedule in the written contract. If there is no written contract or the contract does not include a payment schedule, then the owner

must pay within 21 days after the date the prime contractor submits a payment request.

- ***Due Date for Prime Contractor or Higher-Tiered Contractor:*** If a contractor has a written contract with its subcontractor that includes a payment schedule, then the contractor must pay the subcontractor by the earlier of either (1) the date that the payment is due or (2) within ten days after the contractor receives payment for all or part of the work, materials, or equipment described in the subcontractor's request for payment. If there is no written contract or the contract does not contain a payment schedule, then the contractor must pay the subcontractor within the earlier of either (1) thirty days after the date the subcontractor submits the request for payment or (2) ten days after the contractor receives a payment for all or part of the work, labor, materials, equipment, or services described in the subcontractor's request for payment.
- ***Payment Penalty:*** An owner, contractor, or subcontractor that fails to comply with the prompt payment statutes must pay interest on the unpaid balance due at a rate that is the higher of either (1) the contract rate, if any, or (2) 4% plus the prime rate at the largest bank in Nevada on January 1 or July 1 immediately preceding the date the contract was entered into or on which the parties agreed to the terms of the contract if the contract is not written.

## **2. Right to Withhold Payment and Penalties for Improper Withholding**

Nevada has statutes that regulate the withholding of retainage on privately owned construction projects for contracts between an owner and prime contractor (NRS 624.609, NRS 624.610, NRS 624.620) and for contracts between a prime contractor and subcontractor (NRS 624.624, NRS 624.626).

- ***Authorized Withholding:*** A contract may authorize a private owner to withhold retention from payments to the prime contractor, but such retainage may not exceed 5% of the amount of the payment. Similarly, a contract between a contractor and its subcontractor may authorize the contractor to retain up to 5% of each payment due to the subcontractor. Additionally, provided the withholding party complies with the statutory notice requirements to withhold additional funds, an owner or higher-tiered contractor may withhold an amount equal to the sum of (1) any work, labor, or materials that has not been performed or furnished for which payment is being sought, unless the agreement otherwise allows or requires payment, (2) costs reasonably necessary to correct or repair work for which payment is sought but does not materially comply with the agreement to the extent such costs exceed 50% of the 5% retention withheld, and (3) an amount paid or required to be paid to a state agency or employee benefit trust fund for which the withholding party may reasonably be liable.

- ***Final Release of Retainage:*** For contracts between owners and prime contractors, the final payment for the work of improvement, including retainage, is due within 30 days after (1) the owner or a person acting with the authority of the owner occupies or uses the work of improvement or (2) the work of improvement becomes available for its intended use, if the contractor has provided to the owner (A) a written notice of availability on or before the day it became available or (B) a certificate of occupancy from the building inspector or other authority.
- ***Penalties for Improper Withholding:*** The penalties for improper withholding of retainage are the same as those for the failure to make timely payments, including the right to stop work and terminate the contract.

### **3. Right to Stop Work, Right to Terminate, and Rights if the Contract is Terminated**

Nevada statutes governing right to stop work, right to terminate, and rights and remedies in the event of termination are found at NRS 624.610 and 624.626.

- **Right to Stop Work:** If payment is not timely made, a contractor or subcontractor may stop work after giving written notice to the party responsible for making the payment at least 10 days before stopping work. Additionally, subcontractors may stop work if more than 45 days have elapsed from the 25th day of the month in which the subcontractor applies for payment, even if (1) the higher-tiered contractor has not been paid and/or (2) the subcontract agreement has a pay-if-paid or pay-when-paid clause.
- **Right to Terminate:** For contractors and subcontractors, if the owner or higher-tiered contractor does not pay within 10 days after giving notice of intent to stop work and the contractor or subcontractor stops work, then the contractor or subcontractor may terminate the agreement by giving at least 15 days written notice. If the amount due is paid before the date of the termination in the written notice, then the contractor or subcontractor must not terminate the contract and must resume work.
- **Rights if the Contract is Terminated:** If the contract is terminated due to nonpayment, the contractor that terminates is entitled to payment for (1) cost of work performed through the date of termination for it and its lower-tiered subcontractors and suppliers, including overhead and profit, (2) balance of profit the contractor and its lower-tiered subcontractors and suppliers would have made had the job been completed, (3) interest and (4) reasonable costs, including court and arbitration costs, incurred by the contractor and its lower-tiered subcontractors and suppliers in collecting the amount due.

#### 4. Mechanics' Lien Timing

Nevada statutes establish specific requirements to preserve and enforce mechanics' lien rights and can be found in NRS Chapter 108.

- **Notice of Right to Lien:** A notice of right to lien must be served on the owner and prime contractor within 31 days of the lien claimant first performing work or furnishing labor or materials, unless the lien claimant has a direct contract with the owner or sells materials directly to the owner.
- **Notice of Intent to Lien:** On residential projects, a lien claimant must serve the owner and prime contractor with a notice of intent to lien at least 15 days before recording a lien.
- **Notice of Lien:** A lien must be recorded within 90 days after the latest of the following events: (1) completion of the work of improvement, (2) last delivery of material or furnishing of equipment by the lien claimant, or (3) last performance of work by the lien claimant. However, if a notice of completion is recorded, then a lien must be recorded within 40 days of recordation of such notice of completion.
- **Service of a Notice of Lien:** A recorded lien must be served upon the owner within 30 days of recording the lien.
- **Enforce Lien:** An action to enforce a lien must be commenced within 6 months of recordation of the lien.

#### 5. Statute of Limitations and Statute of Repose

- **Statute of Limitations** for filing claims are as follows:
  - *Breach of contract:* six years for written contracts, four years for oral contracts
  - *Breach of warranty:* six years for breach of express warranty, four years for breach of implied warranty
  - *Negligence (including professional malpractice):* two years for actions to recover for personal injury or wrongful death, three years for actions to recover for property damage
- **Statute of Repose:** The limitations period for an action against the owner, occupier, or any person performing or furnishing the design, planning, supervision, observation of construction, or construction of an improvement to real property is 10 years after the substantial completion of the improvement. The ten-year statute of repose does not

apply if the defect resulted from or was covered up by fraud.

Please contact Phil Mannelly with any questions. The information in this Legal Update does not, and is not intended to, constitute legal advice; instead, all content is provided for general informational purposes. Do not act or refrain from acting on information in this Legal Update without seeking professional legal counsel.