



# Massachusetts Prompt Pay Law

“An Act to Promote Fairness in Private Construction Contracts”

c. 293 of the Acts of 2010, adding M.G.L. c.149 §29E

Signed into law – August 10, 2010 | Effective – November 8, 2010

## Application of the law

The Prompt Pay Law applies to all contracts that are covered by the Mechanics Lien Law, M.G.L. c.254; thus extends to owners, general contractors, subcontractors (all tiers) and material suppliers to contractors and subcontractors. As with the lien law, no party can be forced by contract to waive its rights under this law.

The law applies to all private construction, both residential and commercial, valued at \$3 million or more, where there are written contracts in place. Residential projects of four units or less are excluded. It applies only to projects where prime contracts with the owner were signed after the November 8, 2010 effective date.

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## Periodic Payment Requests

The law sets reasonable, “not to exceed” periods for each step in the payment process: 30 days for submission of an application for payment; 15 days for approval or rejection of the request; and 45 days for payment after approval. The time for each step can still be less, but cannot be more. The period for approval or rejection is extended by an additional 7 days per tier, cumulative for each tier below the owner, to allow sufficient time for the flow of paperwork up and down through multiple tiers.

Cumulatively, the payment due date is no more than 90 days from the date work commenced, which now becomes the outer time limit for payment under contracts with “pay when paid” clauses. This represents a significant change over current practice, where that payment timeframe is often undefined and open-ended.

The law has built-in incentives to avoid delays: Payment requests not approved or rejected within the 15 day period are “deemed” approved, allowing them to continue toward payment. Payment requests “deemed” approved, however, may still be rejected at any time up until the date payment is due. This is a key provision as it assures plenty of opportunity to reverse an approval if problems are discovered with the payment request prior to the time payment is due. This alleviates any need to delay payment decisions.

Finally, the law provides due process for handling rejections: Rejection of payment requests must be in writing; include a detailed explanation of the factual and contractual basis for rejection; and be certified as made in good faith.

Rejected requests are handled through the normal dispute resolution process, but the law requires a waiting period of not more than 60 days before starting that process, to allow opportunity to informally resolve the issue. Contracts can no longer require waiting until the end of the job to address the dispute.

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## **Change Orders**

The law sets up a similar process for change orders as for payment applications, and is likewise designed to keep the decision process moving so that change orders can more quickly be included in the normal payment application process.

It sets a reasonable “not to exceed” time for approval or rejection of a written request for a change increasing the contract price: 30 days after commencing performance of the change order work, or 30 days after submitting the request, whichever is later. It also includes an additional 7 days per tier, cumulative for each tier below the owner, for the approval or rejection of the change order request.

It has similar provisions to avoid delays: A change order request not approved or rejected within the 30 day period is “deemed” approved, allowing inclusion of the change order in the next application for payment. Change order requests “deemed” approved may still be rejected at any time up until the date payment is due. Again, this is a key provision, allowing plenty of time for corrective action. Payment is not required for properly and timely rejected change orders.

Likewise, rejection of change order requests must be in writing and certified as made in good faith, to, among other things, preserve the integrity of the process. Rejected requests are handled through the normal dispute resolution process, but there is a required waiting period of not more than 60 days before commencing that process.

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## **Condition Precedent or “Pay-if-Paid” Provisions**

The new law all-but-eliminates the use of condition-precedent or “pay if paid” provisions to avoid responsibility to pay downstream parties when payment has not been first received from an upstream third party.

It makes pay-if-paid provisions void and unenforceable except in two circumstances:

1. Where non-payment by the owner is due to problems with the subcontractor’s work, and the subcontractor has failed to cure the problems within the notice period. Pay-if-paid *cannot* be used when non-payment is due to problems with another party’s work (e.g., the work of the general contractor or another subcontractor).

2. Where the owner is insolvent (the situation of greatest concern), or becomes insolvent within 90 days of the payment request, but only if the general contractor has:
  - a) Filed a lien early in the project, after commencing performance but prior to submitting the first payment application;
  - b) Maintained the lien and did not dissolve it; filed a statement of amount due; and filed a civil action to enforce the lien; and
  - c) Pursued all reasonable legal remedies to obtain payment.

The law also specifies the steps an aggrieved party must take before legally challenging whether the non-paying party has pursued all reasonable legal remedies to obtain payment.

While the law does not prohibit pay-if-paid clauses altogether, it strictly limits them to the two situations described above. A subcontractor wishing to use pay-if-paid terms with its sub-subcontractors is similarly bound by these same requirements and limitations.

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### **The Right to Stop Work**

The law does not dictate the terms for suspension and termination of performance. It simply states that a contract provision requiring a person to continue performance if approved amounts are not paid within 30 days of the payment due date, is void and unenforceable, except if: (1) there is a dispute regarding the person's work; or (2) the person defaults after approval of a payment, provided the person has been notified of the default in writing (certified as made in good faith) and has been paid all amounts not attributable to the default.

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### **Miscellaneous**

Electronic form(s) of communication may be used for any communications required to be in writing under this statute.