



## CONSTRUCTION LAW E-UPDATE

### NEW YORK LEGISLATIVE UPDATE: Who Knew?

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Over the past few sessions, the New York State Legislature has considered many significant amendments to New York statutes impacting the construction industry. This article summarizes changes that have actually become law, as well as other important proposals that were made, but not yet enacted.

#### I. ENACTED LEGISLATION

##### **Private Improvement Mechanic's Liens for Retainage**

Historically, a mechanic's lien on a private project must be served and filed within eight months from when the lienor last performed labor or furnished material on a project. For the early performing trades, this presented a significant problem concerning retainage being held against their account. For the early performing trades, such later payment for retainage is generally more than eight months after these trades have performed their last work or supplied their last material on the job. Therefore, their right to file a mechanic's lien for retainage may very well have long since expired.

An amendment to Section 10 of the Lien Law provides that a lienor can file a lien for its unpaid retainage within ninety days from when the retention should have been paid. It is important to note that this amendment applies only to retainage. It does not change the long-standing "eight-month rule" for any other payments due to a subcontractor or supplier.

##### **Time to File Payment Bond Extended to Conform to Rule for Filing Public Improvement Mechanic's Lien**

Under State Finance Law §137 (action against a payment bond), a beneficiary under the payment bond must commence action against the surety within one year from the date on which final payment under its contract became due. This section of the State Finance Law was amended to allow that any suit under the payment bond can be commenced within one year from the date on which the public improvement has been completed and accepted by the public owner. This is similar (but not the same as) to the rule governing the last date to file a public improvement mechanic's lien, which must be done within 30 days after "completion and acceptance" of the project by the public owner. This not only resolves any confusion the two different rules created, but also potentially extends the time to file an action on the payment bond to a later date since a public job might not be "completed and accepted" until long after all work is completed.

#### II. LEGISLATION THAT PASSED BY BOTH HOUSES; AWAITING GOVERNOR'S SIGNATURE

##### **Time to File Actions Against NYC School Construction Authority to Commence at "Denial" of Claim, Not at "Accrual of Claim"**

This important legislation amends §1744 of the Public Authorities Law, to bring it into conformity with §3813 of the Education Law.

In 1992, the New York State Legislature reformed the NY Education Law, §3813, to adjust the time period in which a claim must be made against school districts throughout New York State. The amended law requires claims to be filed

with school districts within three months “after the date for the amount claimed was denied.” This provides a clear, “bright-line” date when the statutory time to bring a claim starts to run.

However, §1744(2) of the Public Authorities Law, which governs the NYC School Construction Authority (“SCA”), was not similarly amended. Claims under the Public Authorities Law against the SCA must be commenced within three months after the claim accrued. “Accrual” is generally held to have occurred when a subcontractor’s damages are “ascertainable,” which is a very imprecise trigger point.

Indeed, several court decisions have held that a subcontractor was held to have lost its claim before it was even denied and the subcontractor first became aware there was a dispute. Upon the signature of Governor Cuomo, this legislative oversight will be corrected, so that the SCA will be treated the same as any school district which is building in the State of New York.

### III. PROPOSED LEGISLATION NOT YET ENACTED

#### Scaffold Law Reform

This proposed Legislation will provide for a “comparative negligence” standard of liability in construction accident cases, as opposed to the current “strict liability” standard set forth in Labor Law §240 which eliminates any defenses to liability for “fall-related” accidents. This reform is needed to create some sense of normalcy in the CGL-liability insurance market. New York, which is experiencing unacceptable and wholly unsustainable liability insurance premium increases, is the only remaining State not to have passed such legislation.

#### No Damage for Delay

This bill will eliminate no-damage-for delay clauses in public contracts in New York. Previously, this bill passed both houses of the Legislature, but was not signed by then Governor Pataki. Efforts continue to pass this legislation to outlaw no-damage-for-delay clauses so that owners cannot escape responsibility for their own impacts and interferences or breaches of their fundamental contractual obligation.

#### Retainage in Escrow Account

This legislation would require that retainage held on private construction projects in NYS (valued at more than \$150,000) be deposited into an interest-bearing escrow account for the benefit of those from whom retainage has been held.

#### Limitation on Change Orders

This legislation would establish a 10% threshold on the amount of pending change order or change directive work that can be imposed upon a contractor or subcontractor without processing same as change orders that can be billed and paid. When this threshold is reached, the contractor or subcontractor would not be required to perform new extra work under additional pending change orders or change directives until the current pending change orders/change directives are processed as approved, billable change orders.

#### Release of Retainage

This legislation would require state agencies to release retainage held pursuant to work performed by a subcontractor no later than 60 days from the completion and acceptance by the public owner of the subcontractor’s particular work. The intent of this year’s legislation is to get retainage held by the public owner into the pockets of contractors and subcontractors sooner than is currently the case. Retainage held on all construction projects has become an ever-increasing problem for subcontractors.

#### Prohibit “Continue-to-Work” Clauses

This legislation would forbid contract language requiring contractors or subcontractors to commence or continue unapproved or disputed work without any ability to bill or receive payment for same.

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