

CLIENT ALERTS

Have you taken steps to protect your construction lien rights during project suspensions?

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These are turbulent, unprecedented times. To curtail the spread of COVID-19, Governor Gretchen Whitmer first signed Executive Order 2020-21 on March 23rd, and extended the "Stay Home, Stay Safe" directive with Executive Order 2020-42 on April 9th. Upon review of the initial order and associated guidelines relative to construction activities, most project owners shut down private commercial construction projects. The speed at which projects came to a standstill left minimal time for construction teams to assess the full impact on Project scheduling, construction costs and the site. With the Stay Home directive set to expire April 30th, most contractors have been focusing on how to safely return to work, the availability of essential materials and readjusting schedules. Implementing those decisions, however, may be further delayed because Gov. Whitmer stated at her daily briefing on Wednesday she may impose a "short-term extension" of her stay-at-home order. She did not specify how many more days would be tacked onto her stay-home order, but speculation is the stay homes order may remain in place through the end of May.

When their projects shut down, many project owners suspended progress payments to contractors. On others, the Owners or General Contractors may just be slow in payment. Whatever the situation, contractors and subcontractors on private projects may be owed considerable amounts as of the suspension of the work. Some owners may seek to take advantage of the suspension and squeeze contractors owed progress payments for price concessions under threat of project termination. Other owners may decide not to complete the work because the anticipated demand for the finished project vanished with the impending economic downturn. Others may simply not economically survive the fall out of the pandemic. Regardless of the motive or reason, the possibility certainly exists that you may not return to the project to finish your contract or subcontract.

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Have you considered what happens to your construction lien rights if you are off the project for more than 90 days and the Owner terminates your contract or is otherwise in no position to allow work to recommence? To preserve and perfect your construction lien rights, the statute is clear that you must record your construction lien within 90 days of your last date of furnishing. In refusing to allow a late recorded lien, one court has said “What part of 90 days don’t you understand?”

Unfortunately, the Michigan legislature has not extended the deadline to file a construction lien, so if you are a contractor or supplier, and you are owed money in a commercial project, you **have only 90 days from the last time you (or your subcontractor) did work at (or provided labor/materials to) the project to file and record** the lien with the register of deeds of the county where the property is located. Even if some county clerk offices might be closed, some counties have mail drops or we can record the lien for you in those counties where e-recording is available. **If you miss this deadline, you cannot file a lien. Ever.** But be careful if you mail it. There could be delays at the clerk’s office in processing your lien, and if the clerk’s office does not record it and give it a Liber and Page number by the 90th day, you will be out of luck.

While many contracts contain provisions permitting the contractor to request the Owner to provide proof of its ability to finance the work, those assurances, even if given, mean nothing if the project or your contract is terminated and the 90 days to perfect your lien have passed. To obtain some additional comfort, for what it is worth, request the owner confirm its intention to complete the project once the stay-home orders have been lifted and construction may resume, and request the owner furnish reasonable evidence it has made financial arrangements to complete the project and fulfill the Owner’s obligations under the Contract. Even if received, those assurances do not extend the time for perfection of your construction lien rights.

We strongly encourage you to invoice for completed work and all known suspension costs you may have incurred, and then carefully monitor the time since you (or your subcontractor) last worked or provided materials to the project and that you **do not allow the 90 day period to go by without properly protecting your lien rights.** Do not just assume that the work will recommence and that your last date of furnishing under the contract has not yet occurred. We have developed an Interim Construction Lien tailored to protecting your construction lien rights for situations where a project is suspended before performance of your contract is complete and we are available to assist you in protecting your rights to a construction lien.

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