



## Alerts

### A Primer on Changes Made to the Texas Mechanic's and Materialman's Liens Act, Effective January 1, 2022

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*Hinshaw Alert*

In early June 2021, Governor Abbott signed into law House Bill 2237 (the Bill) that makes substantial changes to the law that establishes the requirement for mechanic's and materialmen's liens and bond claims in Texas.

We have prepared the following primer that provides an overview of the key changes—enacted under Chapter 53 of the Texas Property Code—including discussion of the impacts on contractors, subcontractors, and the attorneys who represent them.

#### When Will the Changes Go Into Effect?

The changes go into effect on January 1, 2022. It is important to note that these changes apply **only to an original contract** entered into with an owner on or after the effective date. If the original contract pre-dates January 1, 2022, then the prior version of the law will apply, even if the subcontractor's contract was signed after January 1, 2022.

#### What Are Some of the Changes to the Terminology?

The legislature defined new terms, revised existing terms, and combined other terms in an attempt to simplify Chapter 53 and make it more accessible to the layman. For example:

- **"Improvement" (Section 53.00.1(2)):** under the Bill this term is broadened, making its use more consistent throughout the Act, and putting the entire definition in one location;
- **"Purported Original Contractor" (Section 53.001(7-a)):** now encompasses an original contractor effectively controlled by the owner or one who was engaged by the owner without a good faith intention of the parties to perform as the contractor under the contract; and
- **"Reserve" (Section 53.057(f)):** has replaced "retain" and "withhold" throughout the Act, as those two phrases historically had been used inconsistently. Also, "retainage" has been changed to "reservation" or "reserved funds," when referring to the funds withheld by the owner. However, a claimant still has a "claim for unpaid retainage."

#### Attorneys

Kyle A. Ferachi

Stephanie Laird Tolson

#### Service Areas

Commercial Litigation



## What YOU Need to Know!

The Bill has substantive changes that **will** have an impact on perfecting and enforcing lien claims. This list is not exhaustive and only serves to highlight some of the more substantive changes:

1. **Method of Service of Notices Changed (Section 53.003(b)):** Under the original Act, all notices had to be delivered in person or sent via certified mail to be effective. Under the Bill, notices can be sent via certified mail or “any other form of traceable, private delivery or mailing service that can confirm proof of receipt.” However, certified mail will remain the preferred method, because it is effective upon “depositing or mailing.”
2. **Deadlines Extended by Weekends and Holidays (Section 53.003(e)):** While the overwhelming majority of the deadlines established under Chapter 53 land on the 15th day of the month, those deadlines were often shortened when the 15th landed on a weekend or holiday. Under the Bill, any deadline that falls on a weekend or holiday is extended to and includes the next business day.
3. **Design Professionals’ Lien Rights Expanded (Section 53.021(3)):** A licensed professional (architect, engineer, or surveyor) no longer has to have a direct contractual relationship with the owner in order to have lien rights. This revision grants lien rights to consultants such as HVAC designers, who previously did not have the ability to file a lien. In addition, landscapers are no longer required to have a written contract in order to assert a lien claim.
4. **Second Tier Subcontractors Have One Less Notice To Send (Section 53.056 – 53.057):** Second Tier Subcontractors just have the third month notice requirement. There is no longer a second month notice. **All subcontractors, regardless of tier, now have the same notice obligations.**
5. **New One-Year Statute of Limitations (Section 53.158(a)):** The statute of limitations is now one (1) year regardless of whether the project is commercial or residential. **This is a very significant change for commercial contractors who were previously subject to a two-year statute of limitations.** A foreclosure suit that is barred by limitations cannot be revived by a suit that is solely brought to discharge the lien on the basis that the limitations have expired.

## Conclusion

Despite the various clarifications in the Bill, there are problems with the timing for retainage lien claims. The Bill currently provides in Section 53.052 that a lien could be filed for retainage on the 15th day of the third month for residential projects or fourth month for non-residential projects after completion, termination or abandonment of the prime contract.

However, the Texas Legislature left intact Section 53.103, creating an apparent conflict, which provides that a claimant has a lien on the reserved funds if the claimant sends the required notices and “except as allowed by Section 53.057(d), files an affidavit claiming a lien not later than the 30th day after the earliest of the date: (A) the work is completed; (B) the original contract is terminated; or (C) the original contractor abandons performance under the original contract.”

So, what is the actual deadline? Is it the 15th day of the third month after completion, termination or abandonment by the original contractor or 30 days after the earliest of those events? Claimants are cautioned to treat the deadline for filing a retainage lien as on or before 30 days after the earlier of the date the contract is completed, terminated, or abandoned, under Section 53.057 (d) or (f), and always preceded (a-1) and (a-2) by a notice of retainage as required under Section 53.057. If claimants miss the 30 days after completion deadline, an argument can be made that the lien is still valid as long as filed within the deadline set in section 53.052.

Lien claimants, and those against whom liens are filed, are well advised to seek legal counsel to ensure compliance with the Texas Mechanic’s Lien Statute. Hinshaw can help you with that. Contact Stephanie Tolson or Kyle Ferachi.