

# TEXAS LAWYER

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## A Construction Attorney's Guide to the New Lien Waivers

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This last session, the Texas Legislature enacted new statutes governing waiver and release of mechanic's and materialmen's liens. These statutorily created liens protect laborers and suppliers from nonpayment for work provided or material delivered on a construction project. They serve as a powerful tool. When perfected, a statutory lien attaches to the property and is subject to judicial foreclosure if payment is not made. This is true even when there is no privity of contract between the property owner and the lien claimant.

### CONSTRUCTION LAW

Naturally, securing waivers and releases of these statutory liens can be important to clients holding an interest in the property — property owners, lenders, investors and indemnifying parties. They generally want clear title and want to remove the threat of lien foreclosure. This new legislation, codified in Chapter 53, Subchapter L, of the Texas Property Code, identifies what construction industry attorneys need to know and do to make lien waivers and releases enforceable.

- *Conditional lien waivers.* Gone are the days of blanket lien waivers that laborers and suppliers signed before getting paid. This new legislation seeks to protect laborers and suppliers from waiving their statutory lien rights without first being compensated.

A person may not require an actual or potential lien claimant to execute an unconditional waiver and release for a progress payment or final payment amount unless that actual or potential lien claimant received payment in

that amount in good and sufficient funds. Consequently, the new legislation prohibits the practice of requiring laborers and suppliers to give up their statutory lien rights in exchange for being hired.

Under the new legislation, however, a lien claimant can be required to sign a conditional lien waiver or release, which is enforceable only up to the amount actually paid to the lien claimant. Moreover, the lien waiver or release is only effective when the recipient has properly endorsed the check representing payment, whether a single- or joint-payee check, and the bank on which the check is drawn has paid it. Counsel should gather evidence sufficient to show payment to the lien claimant for purposes of verifying the amount received and thus the extent of the waiver or release.

- *Model forms.* Fortunately, the Legislature has attempted to eliminate counsel's guesswork in drafting lien waivers or releases that comply with the new legislation. Texas Property Code §53.284 contains model forms. For a lien waiver and release to be enforceable, it must substantially comply with the statutory form that applies.

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There are four separate forms, each customized based on status of work completed and of payment: Conditional Waiver and Release on Progress Payment, Unconditional Waiver and Release on Progress Payment, Conditional Waiver and Release on Final Payment, and Unconditional Waiver and Release on Final Payment. The forms are short but appear to contain sufficient language to effectuate the intent of the new legislation: protecting laborers and suppliers.

Counsel should note that each form has its own nuances. Ensuring use of the correct form requires careful attention to the work and payment status concerning the lien claimant. The forms are not interchangeable.

Also, the unconditional waivers require a specific notice at the very beginning of the form. Such notice warns the lien claimant that the form waives rights unconditionally, and it states that the lien claimant has been paid for giving up those rights. It further advises the lien claimant to use a conditional release form if it has not been paid.

Although designed to protect laborers and suppliers, these forms also provide some protection to property owners and others with an interest in the property. Counsel should inform the client that the forms require the lien claimant to warrant that it has paid or will use the funds received to promptly pay in full all of its subcontractors. A lien claimant that does not make that payment or misrepresents that it already paid its subcontractors is vulnerable to suit for breach of warranty or even fraud. This would leave the lien claimant exposed to a claim for damages and potentially attorney's fees on the breach of warranty claim.

- *Dates and grace period.* The new legislation applies only to contracts executed on or after Jan. 1. It contains a grace period that construes as enforceable those waivers or releases made in attempted compliance with its new requirements. However, counsel should note that the grace-period provision expires on Aug. 31.

Counsel also should be aware that the new legislation relates to payment bonds, as well, and it contains a number of exemptions relating to the enforceability of a waiver or release in specific situations, such as an accord and satisfaction of an identified dispute or a settlement agreement in litigation. To best represent their clients, lawyers dealing in the construction industry must read the new legislation and be sure to use the new statutory forms. 



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