

**SUMMARY OF ARKANSAS MATERIALMAN'S LIEN STATUTES
AND THE 2009 AMENDMENTS**

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WHO IS ENTITLED TO A LIEN?

Any contractor, subcontractor, or material supplier who supplies labor, materials or services in the construction or repair of an improvement to real estate, by virtue of a contract with the owner, proprietor, general contractor or subcontractor is entitled to a lien if he is not paid. By definition, a contractor is someone who contracts directly with the property owner; a subcontractor is a person who supplies labor or services pursuant to a contract with the contractor or someone in privity of contract with the contractor; a material supplier is a person who supplies materials goods, fixtures, or any other tangible item to the contractor, subcontractor, or someone in privity of contract with the contractor or subcontractor. Ark. Code Ann. § 18-44-107.

In 2009, the General Assembly specifically extended lien rights to architects, engineers, surveyors, appraisers, landscapers, abstractors and title insurance agents. Ark. Code Ann. § 18-44-105.

WHAT IS COVERED BY THE LIEN?

The improvement (such as a building or other structure) and up to one acre of land upon which the improvement is situated are subject to the lien. If the work performed or the materials supplied are for an improvement which covers more than one acre, the lien extends to the size of the improvement. Ark. Code Ann. § 18-44-101.

Privately owned property is subject to the lien. Publicly owned property is not subject to the lien, although the leasehold interest of a lessee is subject to the lien, whether the lease is on public or private property.

WHAT IS THE PROCEDURE FOR OBTAINING AND PERFECTING THE LIEN?

The lien laws (and more specifically, the notice requirements) differ depending on the type of project – residential or commercial.

A. Residential Projects

In order to properly file a lien on a residential project, the contractor or lien claimant must provide pre-construction notice to the owner (*i.e.*, before work begins or material is supplied) of the right to file a lien. Under the old law, this meant providing notice to the owner before any work began on the project. The new law provides that notice given after work starts on the project is effective for all lien claimants whose work begins after the notice is given.

The pre-construction notice required in residential contracts is referred to as the “Important Notice to Owner,” and it is found in Ark. Code Ann. § 18-44-115. The notice shall be conspicuous, worded exactly as stated in the statute, in all capital letters and set out in bold face type. The 2009 amendments changed the language of the Important Notice to Owner. Therefore, any pre-construction notice sent out after July 31, 2009 must be worded exactly as stated in the new law.

Either the contractor or a potential lien claimant can provide the pre-construction notice. However, the contractor is charged with the responsibility of giving the notice before any work begins on a residential project. This was true under the old law, but contractors often failed to give the notice. Contractors could still enforce their contracts with the owner through the direct sale exception, but subcontractors and material suppliers were left without any lien rights. Even worse, subcontractors and material suppliers had no way to enforce the contractor’s responsibility other than through criminal sanctions, and prosecutors refused to get involved in lien disputes. Therefore, contractors had very little incentive to provide the pre-construction notice under the old law.

Goodbye old law, hello new law!

Under the new law, a residential contractor who does not give the pre-construction notice cannot enforce its contract against the owner in law or in equity. This is worth repeating for emphasis: A residential contractor who does not give the pre-construction notice cannot enforce any aspect of its contract against the owner in law or in equity.

The pre-construction notice can now be given by personal delivery, in which case the signature of the property owner or his agent should be obtained, by certified mail, in which case the signature of the owner or agent on the return receipt will suffice, by process server, or by FedEx or UPS.

B. Commercial Projects

The pre-construction notice is not required for commercial projects. Instead, the lien claimant must provide “Notice to Owner and Contractor” within 75 days of the last date work was performed or materials supplied. Ark. Code Ann. § 18-44-115. As the title of the notice indicates, lien claimants must provide the 75-Day Notice to both the owner and the general contractor.

The 75-Day Notice must contain a description of the labor or materials furnished, the amount due, the name and address of the lien claimant, the name and address of the party failing to pay, and a description of the job site sufficient to identify it. Like the pre-construction notice, the 75-Day Notice must be conspicuous, worded exactly as stated in the statute, in all capital letters and set out in bold face type. The 2009 amendments changed the language of the 75-Day Notice. Therefore, any 75-Day Notice sent out after July 31, 2009 must be worded exactly as stated in the new law.

C. All Projects

At least 10 days before filing a lien, a lien claimant must give a written “Notice of Intent to File a Lien” to the property owner (and contractor, if applicable). Ark. Code Ann. § 18-44-114. Because the lien must be filed within 120 days of the last day that work was performed or materials supplied, a lien claimant must give this 10-Day Notice within 110 days of the last day work was performed or labor supplied. The 10-Day Notice must contain a description of the property (an address will suffice), the identity of the lien claimant, the identity of the person who has failed to pay, and the total amount due. This notice can be given to the property owner by personal service, certified mail, process server, or UPS or FedEx. It must be served on the owner or his authorized agent. If the owner refuses delivery or it comes back unclaimed, the lien claimant must immediately send the owner or the owner’s authorized agent a copy of the notice via regular mail, and the unopened original of the item marked unclaimed or refused shall be accepted as proof of service as of the post marked date of the item.

Within 120 days of the last date that labor was performed or materials were supplied and at least 10 days after furnishing the “Notice of Intent to File A Lien” to the owner (and contractor, if applicable), the lien claimant must file a “Verified Statement of Account and Claim of Lien” with the circuit clerk of the county where the project is located. This is the actual lien document, and filing this is what gives lien claimants the right to foreclose the lien. The “Verified Statement of Account and Claim of Lien” must be notarized and must contain a description of the property (need legal description), the amount due, the identity of the property owner, an affidavit of notice, and the identity of the lien claimant. The affidavit of notice must contain a sworn statement evidencing compliance with the notice and non-resident notice requirements located at Ark. Code Ann. §§ 18-44-114 through 18-44-116; a copy of each notice given must be attached to the affidavit. Ark. Code Ann. § 18-44-117. Copies of invoices or statements should be attached to the “Verified Statement of Account and Claim of Lien” as well.

Finally, after filing the “Verified Statement of Account and Claim of Lien,” the lien claimant must give notice of the lien to the owner of the property or the party failing to pay, by personal service, certified mail, process server, or UPS or FedEx. If the lien claimant does not receive full payment within 20 days of the date of mailing this notice, and if it prevails in the enforcement of the lien, it shall be awarded its attorney’s fees.

SUMMARY OF THE PROCEDURE

- Residential:
1. Pre-construction Notice (“Important Notice to Owner”)
 2. Contractor is responsible for providing the pre-construction notice to the owner before any work begins. If the contractor fails to give the notice, it is completely barred from enforcing its contract against the owner.
 3. Lien claimants may also give the pre-construction notice. Under the new amendments, pre-construction notice given after work starts on the project is effective for all lien claimants whose work begins after the notice is given.
 4. 10-Day Notice prior to filing the lien (“Notice of Intent to File a Lien”) must be given to the owner and contractor. Since the lien must be filed within 120 days of the last day on which work was performed or material supplied, the 10-Day Notice must be given no later than 110 days from the last day work was performed or materials supplied.
 5. File lien (“Verified Statement of Account and Claim of Lien”) with the circuit clerk within 120 days of last day work was performed or materials supplied.
 6. Provide notice of the lien to the owner or the party failing to pay.
 7. If the lien claimant is not paid within 20 days of providing the notice, and if it prevails in enforcing the lien, it shall be awarded its attorney’s fees.
- Commercial:
1. 75-Day Notice (“Notice of Owner and Contractor”)
 2. 10-Day Notice prior to filing the lien (“Notice of Intent to File a Lien”) must be given to the owner and contractor. Since the lien must be filed within 120 days of the last day on which work was performed or material supplied, the 10-Day Notice must be given no later than 110 days from the last day work was performed or materials supplied.
 3. File lien (“Verified Statement of Account and Claim of Lien”) with the circuit clerk within 120 days of last day work was performed or materials supplied.
 4. Provide notice of the lien to the owner or the party failing to pay.
 5. If the lien claimant is not paid within 20 days of providing the notice, and if it prevails in enforcing the lien, it shall be awarded its attorney’s fees.

SIGNIFICANT 2009 CHANGES

1. Greater ability to discover information about the project. Ark. Code Ann. § 18-44-108 now provides a cause of action for owners, banks and subcontractors against contractors who refuse to list parties that have performed work or provided materials and the amount owed to each. Prior to the 2009 amendments, the only enforcement mechanism was a criminal charge, which provided little assistance since prosecutors did not want to become involved in lien cases.

2. Modernizing service. Ark. Code Ann. §§ 18-44-114 and 115 now allow modern third-party delivery services (*i.e.*, UPS and FedEx) and also clarify circumstances where a private process server may be used.

3. Failure to give pre-construction notice (residential projects). This is probably the most significant (and potentially the most controversial) change of any of the 2009 amendments. Ark. Code Ann. § 18-44-115 now provides that a contractor who fails to give the pre-construction notice on residential contracts cannot enforce its contract against the owner in law or in equity.

4. Effectiveness of pre-construction notice provided after work begins. Under the new amendments, pre-construction notice given after work starts on the project is effective for all lien claimants whose work begins after the notice is given. Ark. Code Ann. § 18-44-115.

5. New language in the notices. Ark. Code Ann. § 18-44-115 changed the language of the pre-construction notice (residential) and the 75-Day Notice (commercial). Both the pre-construction notice and the 75-Day Notice must be conspicuous, worded exactly as stated in the statute, in all capital letters and set out in bold face type. The 2009 amendments changed the language of the respective notices. Therefore, any notice sent out after July 31, 2009 must be worded exactly as stated in the new amendment. Update your forms!

6. Challenging a lien. The new amendments provide a summary procedure for someone to protest a lien. The new amendments further provide that such a protest “shall be heard as expeditiously as the business of the circuit court permits.” Ark. Code Ann. § 18-44-118. The hope is that the new amendments provide a quick and cost effective way to challenge improper or frivolous liens. Ark. Code Ann. § 18-44-118 provides form language for a “notice of intention to discharge lien” that must be included with the protest. The new amendments also reduce the amount of the bond necessary to challenge a lien from “double” the amount of the lien down to just the amount of the lien.

7. Notice of assignment of lien rights. The property owner must receive actual notice of the assignment of lien rights within 30 days of the assignment. Ark. Code Ann. § 18-44-113.