

Mechanic's Lien Checklist (CO)

A Practical Guidance® Checklist by
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This checklist outlines the basic requirements for recording a mechanic's lien in Colorado to secure payment for work performed; services rendered; or materials, labor, tools, or equipment furnished to a construction project. This checklist contains practical tips for those recording liens to ensure compliance with the statute.

Practitioners should read the checklist below, but also be sure to read and reread the statute regularly to ensure strict compliance with its rules because a failure to comply can result in a loss of lien rights. Colorado courts will liberally construe the remedial provisions of the mechanic's lien statute with an aim toward protecting those who provide value to construction projects, as long as those parties have strictly complied with the statutory requirements for perfecting and recording a mechanic's lien statement. See *Powder Mountain Painting v. Peregrine Joint Venture*, 899 P.2d 279, 281 (Colo. App. 1994) (the "mechanic's lien statute should be strictly construed with

respect to those acts necessary to perfect the lien and should be construed liberally as to the provisions of the statute that are remedial in nature," citing *Richter Plumbing & Heating, Inc. v. Rademacher*, 729 P.2d 1009 (Colo. App. 1986); *Everitt Lumber Co. v. Prudential Insurance Co.*, 660 P.2d 925 (Colo. App. 1983)).

Verify That the Potential Lien Claimant Has the Right to File a Lien

Parties Entitled to Record a Mechanic's Lien Statement

Contractors of every tier, architects, engineers, material suppliers, providers of temporary labor, laborers, and those who render skilled or professional services for construction projects of virtually any type have rights to file a mechanic's lien in Colorado to secure payment for their work, materials, or services, as long as they have done so at the insistence of the owner or an agent of the owner. See Colo. Rev. Stat. § 38-22-101(a). The contractor, and anyone in the chain of contractual privity with the owner, is considered the owner's agent for purposes of conferring lien rights upon a party by requesting that party's labor, services, tools, or equipment for a construction project. *Id.*; see *Brannan Sand & Gravel v. Santa Fe Land & Improvement Co.*, 138 Colo. 314, 332 P.2d 892, 895 (1958).

Contractual Requirements

Contracts need not be in writing to support a lien claim. See, e.g., *Meinhardt v. Investment Builders Properties Co.*, 518 P.2d 1376 (Colo. App. 1973). However, keep in mind that suppliers of materials must supply them specifically for the project in question; parties that generally sell materials without knowledge of where they are going to be used do not have lien rights. For example, a retail seller of nails who sells to a contractor for no particular project has no lien rights on a project where those nails might ultimately be used. Materials vendors should have invoices listing the property address and should track and keep delivery tickets to show that the materials were, in fact, delivered as directed by the party purchasing materials for the project.

Property Subject to a Lien

Mechanic's liens affect title and encumber the interest of the property owner when recorded. See Colo. Rev. Stat. § 38-22-105. The property owner can be a fee simple owner, lease holder, or someone who by contract is authorized to construct improvements on the property and the lien will extend to that person's interest. Id. Lessors or others who have not contracted for the work to be done and who want their interest in the property not to be subject to a mechanic's lien claim may post a notice of nonliability within five days after obtaining notice of the erection, construction, alteration, removal, addition, repair, or other improvement of property that his or her interest shall not be encumbered by any mechanic's lien. See Colo. Rev. Stat. § 28-22-105(2).

Conduct Preliminary Due Diligence

Prior to preparing the lien, the following preliminary due diligence should be performed to gather all relevant information and ensure accuracy of the lien:

- Ascertain the last date the lien claimant performed work or delivered materials to the project site (or to a contractually approved off-site storage location), and identify the date of completion of the project or whether the project remains ongoing.

Practice Pointer: If the last date of work was more than 90 days ago, it is highly advisable to immediately record a Notice Extending Time to File Lien Statement to provide potential protection in the event it takes too much time to get the lien together. See Colo. Rev. Stat. § 38-22-109(10). The Notice Extending Time only extends the time to four months after completion of the structure or other improvement or six months after the date of filing

the notice, whichever occurs first. Thus, if the project was completed more than four months prior, filing the notice will not provide additional time.

- Obtain the property address and legal description that is as accurate as possible.
- Obtain names and addresses from the contract and the secretary of state for the following parties:
 - Property owner
 - General contractor (if client is a subcontractor or vendor)
 - Any higher-level contractor with whom client contracted for work
 - Any project lender
- Obtain ownership and encumbrance report to confirm all parties with a record interest in the property, including:
 - Other subcontractors/vendors
 - Any project lender
 - Any easement holder

Practice Pointer: Perform a conflict check on all the above parties (repeat any time new parties arise).

- Gather necessary documents, including the following items:
 - Copies of all written contracts and change orders relating to the work
 - Copies of the client's payment ledger to show amounts billed and paid
 - Copies of any lien waivers signed by the client
 - Copies of any payment bond recorded on the property
 - For vendor liens, confirm that:
 - All invoices show the property address of project and demonstrate the destination of the goods was known at time of sale
 - All delivery receipts, bills of lading, delivery photos, etc. have been gathered
 - Review the property descriptions and gather plat maps, Google Earth photos, or other evidence to ensure accuracy with respect to the property to lien.
 - Review the contract for any address designated for notices and mail a Notice of Intent to File a Lien Statement to that address and to the registered agent address on file with the secretary of state.
 - Inquire about any back charges known to the client or claims that may be asserted against it in the event

of litigation. These do not need to be deducted from the lien amount if they are disputed, but it is good to know if these exist because they could diminish any ultimate recovery.

Limitations on Lien Rights

Review the amount of the lien claim for any of the following, which should typically be removed from the lien amount and instead, if appropriate, pursued under a breach of contract remedy:

- Double-counting
- Nonlienable items such as attorney's fees or penalties
- Charges unrelated to the work
- Credits that should be applied to the amount owed
- Charges that might fall under a prior valid lien waiver

Practice Pointer: Consider whether valid consideration was provided for any lien waivers, and whether exclusions or exceptions to scope of lien waiver apply.

- Inconsistencies with the documents casting doubt on the lien amount
- Charges for idle crew time or delays that do not equate to additional value bestowed on the property
- Accrued interest or late fees

Practice Pointer: Although calculated interest should be excluded from the lien claim amount, include in the lien statement that the amount claimed is subject to interest (at the statutory rate or the rate specified in the contract, if the contract provides a rate). The contract rate can be higher or lower and will control; the 12% statutory rate is a default when the contract is silent. Keep in mind, for jobs with no written contract, if there have been prior paid invoices on the project that state an interest rate, that rate may be considered the contract rate.

Ensure that there have been no periods where all work on the entire project stopped for three months. This constitutes "abandonment" and is the equivalent of project completion under the statute with respect to lien rights and deadlines. See Colo. Rev. Stat. § 38-22-109(7). This is true even if the project subsequently resumes.

Practice Pointer: Inform the client of the option to send a Notice to Disburser in lieu of or in addition to the lien, especially if lien rights are limited due to conditions above. A Notice to Disburser prevents the owner from issuing payment to the general contractor or any other contractors or materialmen on the project without holding back the amount owed to the claimant. See Colo. Rev. Stat. § 38-22-126.

Plan for Critical Dates and Deadlines

Strict compliance with the statutory deadlines is crucial to maintaining a valid lien claim. These deadlines are as follows:

- The deadline to record a lien is four months (not 120 days) after the last work performed or last material delivered by the lien claimant. The four months may equal 120 days, but the statute is stated in months.
- A Notice of Intent to File a Lien must be sent to the owner of the property and the general contractor at least 10 days prior to recording the lien statement with the county clerk and recorder.

Practice Pointer: Calendar the date to send the Notice of Intent via certified mail, return receipt requested, 11 days prior to the lien recording deadline.

- The deadline to file a lien foreclosure action is six months after project completion.

Practice Pointer: In an abundance of caution, calendar the lien foreclosure deadline for six months after the date of the lien claimant's last work. This can be adjusted if the date of completion of the project as a whole is determined with certainty to be a later date.

Prepare and Serve a Notice of Intent to File a Lien Statement

Prior to recording a Lien Statement, a Notice of Intent to File a Lien Statement must be served upon the owner (or reputed owner / owner's agent) of the property and the principal or prime contractor (or its agent) at least 10 days prior to filing the lien statement with the county clerk and recorder. See Colo. Rev. Stat. § 38-22-109(3).

Service/Mailing

The Notice of Intent must be served either (1) by personal service or (2) by registered or certified mail, return receipt requested, addressed to the last known address of the recipients. Affidavits of service or mailing of the notice of intent must be recorded along with the lien statement. See Colo. Rev. Stat. § 38-22-109(3).

Practice Pointer: Consider sending a cover letter with the notice seeking a settlement discussion within the 10-day waiting period.

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The Notice of Intent to File a Lien Statement should include the actual Lien Statement as well as the affidavits of service or mailing. Note, an affidavit attesting that service or mailing of the Notice of Intent was completed at least 10 days prior to filing the lien statement should be executed on the date the Lien Statement is recorded.

Prepare and Record the Lien Statement

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The Lien Statement must contain the following information:

- The name of the owner of the property (or if the owner is not known, a statement to that effect)
- The name of the lien claimant and the name of the person who furnished laborers or materials or performed the work for which the lien is claimed
- The name of the general contractor (when the lien is claimed by a subcontractor)
- A description of the property to which the lien applies
- A statement of the amount due or owing to the lien claimant

The Lien Statement must be signed and sworn by the lien claimant (or lien claimant's agent). A best practice is to have the lien statement signed by the lien claimant before a notary. Attorneys sometimes sign lien statements, but this practice is discouraged as it could make the attorney a material fact witness, and an attorney should not do this unless the attorney has sufficient information to swear to the accuracy of the amount claimed.

Recording

The Lien Statement must be recorded with the county clerk and recorder in the county where the property is located no later than four months after the lien claimant's last date of work. It is wise to include the Notice of Intent and affidavits with the filing so that all information required under Colo. Rev. Stat. § 38-22-109 is included in the recorded package. There are commonly used forms that include all required information, but there is not a statutorily required form.

Practice Pointer: Calendar a date 12 months from when the lien is recorded to record an Annual Affidavit attesting to the fact that the lien is still in place if you have not already filed a foreclosure suit. Failure to do so causes a lien to lapse after a year unless a foreclosure action has been commenced.

Foreclose the Lien

A lien foreclosure action must be filed within six months from the date the project is completed. See Colo. Rev. Stat. § 38-22-110. When preparing to file a lien foreclosure action, do the following:

- Obtain a litigation guarantee from a title company on the subject property.
- Name all parties on the litigation guarantee who claim an interest in the property as parties in the suit; the interest of anyone not named will not be extinguished by the foreclosure and that interest could affect the foreclosure sale or sale value.
- Attach the Lien Statement and proof of timely mailing of the Notice of Intent.
- Record a lis pendens the same day that you file the foreclosure lawsuit. Failure to record a lis pendens can result in loss of all lien rights and could constitute malpractice. See *Weize Co., LLC v. Colo. Reg'l Constr., Inc.*, 251 P.3d 489, 496 (Colo. App. 2010); *Daniel v. M.J. Development, Inc.*, 43 Colo. App. 92, 94, 603 P.2d 947, 949 (1979).

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Dan does more than just litigate. He learns his clients' industries to understand the multi-dimensional issues they face. Then he works to provide them with timely, practical advice, and results. As a member of the firm's Litigation Section, Dan focuses on construction and property rights matters, including contract disputes, delay claims, lien and bond claims (public and private), construction defect claims, quiet title actions, easement disputes, and condemnation. A strategic and enthusiastic litigator, Dan combines thorough preparation with crisp presentation to keep your case moving towards an efficient and effective resolution.

Dan also counsels and advises contractors regarding contract provisions, helps prepare and assess claims, and advises clients in the unmanned vehicles industry, including unmanned aircraft systems (drones). He works to resolve disputes prior to, and often without, litigation. Committed to his clients and their business concerns, Dan works hard to resolve disputes and be their advocate when litigation becomes necessary.

In his spare time, Dan likes fly-fishing, playing guitar, and coaching pole-vaulters.

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Jennifer is a member of the Trial Section, handling a wide range of commercial litigation matters. Jennifer focuses her practice on construction, development, and real estate related disputes, including contract rights and remedies, nonpayment actions, delay claims, lien and bond claims, and property rights issues. She has experience litigating complex construction defect matters involving single and multifamily residential as well as commercial and industrial construction projects.

Prior to joining Moye White, Jennifer worked for a boutique law firm focusing on the construction industry and the Denver office of a national firm, where she defended insurers and corporate clients on various civil litigation matters. Jennifer clerked for the Honorable Judge John Dailey of the Colorado Court of Appeals.

Outside of work, Jennifer enjoys skiing and hiking in Colorado and Wyoming, playing ice hockey, visiting family along the New England coast, and spending time with her husband, son, and dog.

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