

# Construction Litigation Alert: Massachusetts Enacts "Prompt Payment" Legislation for Private Construction Contracts

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On August 10, 2010, Governor Deval Patrick signed into law “An Act Promoting Fairness in Private Construction Contracts.” See M.G.L. ch. 149, § 29E. This law is an important new regulation affecting payment terms on private construction projects. The law applies to owners, contractors, subcontractors, and lower tier subcontractors, and requires owners to pay contractors promptly and contractors, in turn, to pay subcontractors and suppliers promptly. In general, the new law requires contractors and subcontractors to submit applications for payment within thirty days of the end of the first calendar month occurring at least fourteen days after commencing work. Within fifteen days of the submission of the application for payment, the owner must approve or reject the application.<sup>1</sup> Payment must be made within forty-five days of approval of the payment application. The new law also sets timetables on the processing of proposed change orders, and requires approval or rejection within thirty days of the change order request or commencement of work, whichever is later.

Importantly, this new law applies *only* to construction projects that have an original contract price of \$3 million or more (but does not apply if such projects contain between one and four dwelling units). The new law also makes void and unenforceable “pay if paid” or “pay when paid” contract provisions that have, until today, conditioned payment from the contractor to the subcontractor on payment from the owner to the contractor.<sup>2</sup> Similarly, the new law makes contract provisions which purport to waive or limit any provisions of the new law void and unenforceable.

Contractors may seek to protect themselves from the implications of this new regulation by:

- Seeking financial assurances from the owner of the owner’s ability to fund large construction projects, both prior to contract execution and during construction (e.g., AIA A201 § 2.2.1);
- Exercising contractual rights to suspend or cease work in the event of slow payments (e.g., AIA A201 § 9.7); and
- Promptly exercising rights of payment under the Massachusetts Mechanics Lien statute (M.G.L. ch. 254).

Owners may protect themselves by:

- Approving or rejecting payment applications (in whole or in part) in writing “with the factual and contractual basis” for the rejection within fifteen days, and

certifying that the rejection was made in good faith; under the new law, a payment request which is neither approved nor rejected is deemed approved;

- Timely rejecting change orders where appropriate; a change order which has not been rejected or approved within thirty days is deemed approved; and
- Exercising contract provisions that permit the owner to request written evidence of a contractor's payment to subcontractors and suppliers (e.g., AIA A201 § 9.6.4 and § 9.6.5).

This law will be effective in ninety days (November 8, 2010) but does not apply to contracts entered into prior to that date.<sup>3</sup> As with other provisions under chapter 149, the attorney general shall enforce the provisions of the new legislation. Thirty-two other states have enacted similar "prompt payment" legislation, including New York (N.Y. Gen. Bus. Law. §§ 756, *et. seq.*), California (Cal. Bus. & Prof. Code § 7108.5, Cal. Civil Code §§ 3260-3201.1), and Connecticut (Conn. Gen. Stat. §§ 42-1581-42-158j). Washington, D.C., has "prompt payment" legislation for public construction contracts, but has not enacted similar legislation for private construction contracts (D.C. Code §§ 2-221.01 to 2-221.06).

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Mintz Levin will continue to monitor this new legislation as it is implemented. For assistance in this area, please contact a member of Mintz Levin's construction law practice group or a member of your client service team.

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## Endnotes

<sup>1</sup> This time period may be extended seven days for every tier below the prime contractor.

<sup>2</sup> "Pay when paid" provisions are still (if drafted carefully) enforceable on private contracts that are worth less than \$3 million. Such provisions are also still enforceable if the payor becomes insolvent within 90 days after the pay request is made *and* the party seeking to enforce the provision has filed a notice of contract and is pursuing all reasonable remedies to recover payment.

<sup>3</sup> Because this new law mandates that the required payment provisions are actually contained in applicable construction contracts, clients should be sure that their form construction contracts are revised to capture § 29E's requirements.

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*For assistance in this area please contact one of the attorneys listed below or any member of your Mintz Levin client service team.*

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