

NEW YORK CONSTRUCTION LAW UPDATE

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LIEN RELEASE DOS AND DON'TS

If you are in the construction industry chances are at some point in time you have either asked for a lien release or been asked to sign a lien release, also known as lien waivers. But do you take the time to actually read the lien release to see what it is? If not, you should - all releases are not created equally.

A lien release usually comes up when it is time to make payment. Whether you are an owner paying a general contractor or a general contractor paying a subcontractor or supplier, lien releases are key to the payment process. The lien release essentially says that the contractor or supplier has been paid for his, her or its services and waives the right to file a mechanic's lien against the property. Because of the consequences of signing a lien waiver or a lien release you should make sure you do it right.

The first thing you should do is read the release. Specifically, look for the following:

1. Does it refer to the correct project?
2. Is the time period referenced in the lien the period for which you are receiving payment and waiving your lien right?
3. Is the release/waiver a partial lien waiver or a final lien waiver?
4. Is the amount you have been paid correct?
5. Are the names of the parties correct?
6. Is the release conditional on payment or unconditional?

A final lien waiver means that you have been paid in full and are forever waiving any right to file a mechanic's lien against the project. A partial lien waiver means that you have received a partial payment, or are receiving a partial payment, and that you waive the right to file a mechanic's lien for that particular portion the labor or materials that you provided.

Determining whether the lien release you are signing is a final or partial lien waiver can sometimes be difficult. Often the document will have a title as either "Partial Lien Waiver" or "Final Lien Waiver" but, even if it does, read it. Regardless of the title, make sure that the document actually says that you are doing what you think you are doing. If it is final, that is what the release should say. If it is partial, it should say that.

An important tip, which seems self evident, is to make sure you actually are paid before you sign the release. In almost all instances the lien release or the lien waiver says that you are acknowledging receipt of payment and are waiving your right to the mechanic's lien. If you have not been paid, don't sign! Now, of course there are situations where payment will not be released until you sign and provide the lien waiver. A simultaneous exchange is acceptable. You hand the lien waiver to the person that is paying you and they in turn hand you a check. Simple enough.

If you are not paid first, or simultaneously with the exchange of the waiver, you should try to sign a document known as a "conditional" lien waiver or a "conditional" lien release. The conditional lien waiver includes language that limits the effectiveness of the waiver to the extent of payment actually received. If you are offering a conditional lien waiver expect a fight. Owners and general contractors don't like them. More importantly, banks don't like them. So if your project is financed through a construction loan it is possible that the conditional waiver will not be accepted because disbursements under the construction loan will not be made until lien waivers are received.

One final note, remember that in New York, a pre-lien waiver is void against public policy. That means that when you start the project nobody can require you to waive your right to file a mechanic's lien before you actually provide the labor and materials. If they do, the waiver is void. That does not mean you should sign the pre-lien waiver anyway. Explain that the lien waiver is void and that you will not waive your right to file a mechanic's lien until you are paid for your services.

Even though lien releases and lien waivers are common in the construction industry they are still important legal documents. As with any legal documents, I strongly suggest that you consult with legal counsel before signing a mechanic's lien waiver or a mechanic's lien release. Often it only takes a few minutes for an experienced construction attorney to review the waiver, make any necessary changes and get it back to you. The small cost for the review can save you a lot of time and money down the line.