

**ELECTRONIC FILING OF PRELIMINARY
LIEN DOCUMENTS**

2004 GENERAL SESSION

STATE OF UTAH

Sponsor: Michael T. Morley

LONG TITLE

General Description:

This bill modifies the Mechanics' Lien statute and enacts provisions for on-line filing of notices of commencement, preliminary notices, and notices of completion.

Highlighted Provisions:

This bill:

- ▶ addresses preliminary notice requirements;
- ▶ addresses notice of claim requirements;
- ▶ requires the Division of Occupational and Professional Licensing to contract for the creation and maintenance of a construction notice registry;
 - ▶ requires the notice registry to be accessible for filing and reviewing notices of commencement, preliminary notices, and notices of completion;
 - ▶ provides for alternative filing;
 - ▶ requires that electronic notification and hard-copy printing of electronic receipts be provided;
 - ▶ requires the division to establish by rule the fees for filing;
 - ▶ creates requirements for filing notices;
 - ▶ requires the assignment to each construction project of a unique project number which identifies each construction project;
 - ▶ provides requirements for the content of a notice of commencement;
 - ▶ provides penalties for failure to file notices in a timely manner;
 - ▶ provides penalties for abuse of the construction notice register;
 - ▶ provides that the state is not liable;

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- ▶ provides that construction notice does not impart notice for specified purposes;
- ▶ addresses applicability of sections on the basis of when a construction project is commenced;

- ▶ requires a sunset review by July 1, 2008; and
- ▶ makes technical changes.

Monies Appropriated in this Bill:

None

Other Special Clauses:

This bill provides a severability clause.

This bill provides an effective date.

This bill provides a coordination clause.

Utah Code Sections Affected:

AMENDS:

14-1-20, as enacted by Chapter 271, Laws of Utah 1989

14-2-5, as enacted by Chapter 271, Laws of Utah 1989

38-1-7, as last amended by Chapter 223, Laws of Utah 1999

63-56-38.1, as enacted by Chapter 271, Laws of Utah 1989

ENACTS:

38-1-30, Utah Code Annotated 1953

38-1-31, Utah Code Annotated 1953

38-1-32, Utah Code Annotated 1953

38-1-33, Utah Code Annotated 1953

38-1-34, Utah Code Annotated 1953

38-1-35, Utah Code Annotated 1953

38-1-36, Utah Code Annotated 1953

38-1-37, Utah Code Annotated 1953

63-55-238, Utah Code Annotated 1953

REPEALS AND REENACTS:

38-1-27, as last amended by Chapter 229, Laws of Utah 2001

Be it enacted by the Legislature of the state of Utah:

Section 1. Section **14-1-20** is amended to read:

14-1-20. Preliminary notice requirement.

Except [~~persons who are in privity of contract with a payment bond principal or except~~] for persons performing labor for wages, any person furnishing labor, service, equipment, or material for which a payment bond claim may be made under this chapter shall provide preliminary notice to the [~~payment bond principal~~] designated agent as prescribed by Section [~~38-1-27~~] 38-1-32. Any person who fails to provide this preliminary notice may not make a payment bond claim under this chapter. The preliminary notice must be provided prior to commencement of any action on the payment bond.

Section 2. Section **14-2-5** is amended to read:

14-2-5. Preliminary notice requirement.

Except [~~subcontractors who are in privity of contract with a payment bond principal or except~~] for persons performing labor for wages, any person furnishing labor, service, equipment, or material for which a payment bond claim may be made under this chapter shall provide preliminary notice to the [~~payment bond principal~~] designated agent as prescribed by Section [~~38-1-27~~] 38-1-32. Any person who fails to provide this preliminary notice may not make a payment bond claim under this chapter. The preliminary notice must be provided prior to commencement of any action on the payment bond.

Section 3. Section **38-1-7** is amended to read:

38-1-7. Notice of claim -- Contents -- Recording -- Service on owner of property.

(1) [~~A~~] Except as modified in Section 38-1-27, a person claiming benefits under this chapter shall file for record with the county recorder of the county in which the property, or some part of the property, is situated, a written notice to hold and claim a lien within 90 days from the date:

(a) the person last performed labor or service or last furnished equipment or material on a

project or improvement for a residence as defined in Section 38-11-102; or

(b) of final completion of an original contract not involving a residence as defined in Section 38-11-102.

(2) The notice required by Subsection (1) shall contain a statement setting forth:

(a) the name of the reputed owner if known or, if not known, the name of the record owner;

(b) the name of the person by whom the lien claimant was employed or to whom the lien claimant furnished the equipment or material;

(c) the time when the first and last labor or service was performed or the first and last equipment or material was furnished;

(d) a description of the property, sufficient for identification;

(e) the name, current address, and current phone number of the lien claimant;

(f) the signature of the lien claimant or the lien claimant's authorized agent;

(g) an acknowledgment or certificate as required under Title 57, Chapter 3, Recording of Documents; and

(h) if the lien is on an owner-occupied residence, as defined in Section 38-11-102, a statement describing what steps an owner, as defined in Section 38-11-102, may take to require a lien claimant to remove the lien in accordance with Section 38-11-107.

(3) Notwithstanding Subsection (2), an acknowledgment or certificate is not required for any notice filed after April 29, 1985, and before April 24, 1989.

(4) (a) Within 30 days after filing the notice of lien, the lien claimant shall deliver or mail by certified mail a copy of the notice of lien to:

(i) the reputed owner of the real property; or

(ii) the record owner of the real property.

(b) If the record owner's current address is not readily available to the lien claimant, the copy of the claim may be mailed to the last-known address of the record owner, using the names and addresses appearing on the last completed real property assessment rolls of the county where the affected property is located.

(c) Failure to deliver or mail the notice of lien to the reputed owner or record owner precludes the lien claimant from an award of costs and attorneys' fees against the reputed owner or record owner in an action to enforce the lien.

(5) The Division of Occupational and Professional Licensing shall make rules governing the form of the statement required under Subsection (2)(h).

Section 4. Section **38-1-27** is repealed and reenacted to read:

38-1-27. Construction notice registry -- Form and contents of notice of commencement, preliminary notice, and notice of completion.

(1) As used in this section and Sections 38-1-30 through 38-1-37:

(a) "Database" means the Construction Notice Registry Database created in this section.

(b) (i) "Designated agent" means the third party the Division of Occupational and Professional Licensing contracts with to create and maintain the Construction Notice Registry Database.

(ii) The designated agent is not an agency, instrumentality, or a political subdivision of the state.

(c) "Division" means the Division of Occupational and Professional Licensing.

(d) "Program" means the Construction Notice Registry Database Program created in this section.

(2) Subject to receiving adequate funding through a legislative appropriation and contracting with an approved third party vendor who meets the requirements of Sections 38-1-30 through 38-1-37, there is created the Construction Notice Registry Database Program which shall:

(a) assist in protecting public health, safety, and welfare and promote a fair working environment;

(b) be overseen by the division with the assistance of the designated agent;

(c) provide a central repository for notices of commencement, preliminary notices, and notices of completion filed in connection with all privately owned construction projects as well as all state and local government owned construction projects throughout Utah;

(d) be accessible for filing and review of notices of commencement, preliminary notices, and notices of completion via the program Internet website;

(e) accommodate electronic filing of such notices as well as provide for alternate filing by U.S. mail, telefax, telephone, or any other alternate method as provided by rule made by the division in accordance with Title 63, Chapter 46a, Utah Administrative Rulemaking Act;

(f) provide electronic notification for up to three e-mail addresses for each interested person or company who requests notice from the construction notice registry as well as provide alternate means of notification for those persons who make alternate filings, including U.S. mail, telefax, or any other method as prescribed by rule made by the division in accordance with Title 63, Chapter 46a, Utah Administrative Rulemaking Act; and

(g) provide hard-copy printing of electronic receipts for individual filings evidencing the date and time of individual filings as well as the content of individual filings.

(3) Persons interested in a construction project may request notice of filings related to the project. The database shall be indexed by owner name, original contractor name, project name, project address, parcel number, project number, and any other identifier that the division considers reasonably appropriate and established by rule, made in accordance with Title 63, Chapter 46a, Utah Administrative Rulemaking Act.

(4) (a) In accordance with Title 63, Chapter 46a, Utah Administrative Rulemaking Act, the division shall establish by rule the filing fees for notices of commencement, preliminary notices, notices of completion, and requests for notice, which fees may not exceed the amount reasonably necessary to create and maintain the database.

(b) The fees established by the division may vary by method of filing if one form of filing is more costly than other forms of filing.

Section 5. Section **38-1-30** is enacted to read:

38-1-30. Third party contract -- Designated agent.

(1) The division shall contract in accordance with Title 63, Chapter 56, Utah Procurement Code, with a third party to establish and maintain the database for the purposes established under this section, Section 38-1-27, and Sections 38-1-31 through 38-1-37.

(2) (a) The third party under contract under this section is the division's designated agent, and shall develop and maintain a database from the information provided by:

- (i) local government entities issuing building permits;
- (ii) original contractors;
- (iii) subcontractors; and
- (iv) other interested persons.

(b) The division and the designated agent shall design, develop, and test the database for full implementation on May 1, 2005.

(3) In accordance with Title 63, Chapter 46a, Utah Administrative Rulemaking Act, the division shall make rules and develop procedures for:

(a) the division to oversee and enforce this section, Section 38-1-27, and Sections 38-1-31 through 38-1-37; and

(b) the designated agent to administer this section, Section 38-1-27, and Sections 38-1-31 through 38-1-37.

(4) (a) The designated agent shall archive computer data files at least semiannually for auditing purposes.

(b) In accordance with Title 63, Chapter 46a, Utah Administrative Rulemaking Act, the division shall make rules to allow the designated agent, unless requested otherwise by an interested party for a particular project, to periodically archive and purge completed or inactive projects from the database:

(i) no earlier than one year after the day on which a notice of commencement is filed for a particular project; or

(ii) if no notice of commencement is filed, no earlier than two years after the last filing activity for a particular project.

(c) The division may audit the designated agent's administration of the database as often as the division considers necessary.

(5) The designated agent shall carry errors and omissions insurance in the amounts established by rule made by the division in accordance with Title 63, Chapter 46a, Utah

Administrative Rulemaking Act.

Section 6. Section **38-1-31** is enacted to read:

38-1-31. Building permit -- Construction -- Notice registry -- Notice of commencement of work.

(1) (a) For a construction project where a building permit is issued, within 15 days after the issuance of the building permit, the local government entity issuing that building permit shall input the data and transmit the building permit information to the database electronically via the Internet or computer modem or by any other means and such information shall form the basis of a notice of commencement.

(b) For a construction project where a building permit is not issued, within 15 days after commencement of physical construction work at the project site, the original contractor shall file a notice of commencement with the database.

(c) An owner of construction, a lender, surety, or other interested party may file a notice of commencement with the designated agent within the prescribed time set forth in Subsection (1)(a).

(d) If duplicate notices of commencement are filed, they shall be combined into one notice for each project. The designated agent shall assign each construction project a unique project number which identifies each construction project and can be associated with all notices of commencement, preliminary notices, and notices of completion.

(e) A notice of commencement is effective as to all work, materials, and equipment furnished to the construction project after the filing of the notice of commencement. A notice of commencement is effective only as to the work, materials, or equipment furnished to the construction project that is provided subsequent to the filing of the notice of commencement.

(2) The content of a notice of commencement shall include the following if available on a building permit:

(a) the name and address of the owner of the project or improvement;

(b) the name and address of the:

(i) original contractor; and

(ii) surety providing any payment bond for the project or improvement, or if none exists, a statement that a payment bond was not required for the work being performed;

(c) (i) the project address if the project can be reasonably identified by an address; or

(ii) the name and general description of the location of the project if the project cannot be reasonably identified by an address;

(d) a general description of the project;

(e) the parcel number of the real property upon which the project is to be constructed if the project is subject to mechanics' liens; and

(f) a legal description of the property on which the project is located if the project is subject to mechanics' liens.

(3) Failure to file any notice of commencement for a construction project suspends the operation of:

(a) the preliminary notice provisions of Section 38-1-32; and

(b) the notice of completion provisions of Section 38-1-33.

(4) Electronic notice of the filing of a notice of commencement or alternate notice as prescribed in Subsection (1), shall be provided to:

(a) all persons who have filed notices of commencement for the project; and

(b) all interested parties who have requested such notice for the project.

(5) The burden is upon any person seeking to enforce the notice of commencement to prove that the notice of commencement is filed timely and meets all of the requirements in this section.

(6) At the time a building permit is obtained, each original contractor shall conspicuously post at the project site a copy of each building permit obtained for the project improvement.

Section 7. Section **38-1-32** is enacted to read:

38-1-32. Preliminary notice -- Subcontractor or supplier.

(1) (a) Within 20 days after commencement of its own work or the commencement of furnishing materials or equipment to a construction project, a subcontractor or supplier shall file a preliminary notice with the construction notice registry. A preliminary notice filed within the

20-day period is effective as to all work, materials, and equipment furnished to the construction project.

(b) If a subcontractor or supplier files a preliminary notice after the 20-day period prescribed by Subsection (1)(a), the preliminary notice becomes effective as of five days after the filing of the preliminary notice.

(c) Failure to file a preliminary notice within the 20-day period required by Subsection (1)(a) precludes a subcontractor or supplier from filing any claim for compensation earned for performance of work or supply of materials or equipment furnished to the construction project before the expiration of five days after the filing of a preliminary notice, except as against the person with whom the subcontractor or supplier contracted.

(d) The preliminary notice must be filed before a notice of lien may be filed with the county recorder pursuant to Section 38-1-7. The content of a preliminary notice shall include the following:

(i) the name, address, and telephone number of the person furnishing the labor, service, equipment, or material;

(ii) the name and address of the person who contracted with the claimant for the furnishing of the labor, service, equipment, or material;

(iii) the name of the record or reputed owner of the project or improvement;

(iv) the name of the original contractor under which the claimant is performing or will perform its work; and

(v) the address of the project or improvement or a description of the location of the project or improvement.

(2) (a) Electronic notification of the filing of a preliminary notice or alternate notice as prescribed in Subsection (1), shall be provided to:

(i) the person filing the preliminary notice;

(ii) each person that filed a notice of commencement for the project; and

(iii) all interested parties who have requested such notice for the project.

(b) The burden is upon the person filing the preliminary notice to prove that the

preliminary notice is filed timely and substantially meets all of the requirements of this section.

(c) Subject to Subsection (1)(d), a person required by this section to give preliminary notice is only required to give one notice for each project or improvement, which may include an entire structure or a scheme of improvements.

(d) If the labor, service, equipment, or material is furnished pursuant to contracts under more than one original contract, the notice requirements must be met with respect to the labor, service, equipment, or materials furnished under each original contract.

(3) (a) If a construction project owner, original contractor, subcontractor, or other interested person believes that a preliminary notice has been filed erroneously, that owner, original contractor, subcontractor, or other interested person can request evidence establishing the validity of the preliminary notice.

(b) Within ten days after the request described in Subsection (3)(a), the person or entity that filed the preliminary notice shall provide the requesting person or entity proof that the preliminary notice is valid.

(c) If the person or entity that filed the preliminary notice cannot provide proof of the validity of the preliminary notice, that person or entity shall immediately remove the preliminary notice from the database.

Section 8. Section **38-1-33** is enacted to read:

38-1-33. Notice of completion.

(1) (a) Upon final completion of a construction project, an owner of a construction project, an original contractor, a lender that has provided financing for the construction project, or surety that has provided bonding for the construction project, may file a notice of completion with the database. Final completion, for purposes of this Subsection (1), shall mean:

(i) if as a result of work performed under the original contract a permanent certificate of occupancy is required for such work, the date of issuance of a permanent certificate of occupancy by the local government entity having jurisdiction over the construction project;

(ii) if no certificate of occupancy is required by the local government entity having jurisdiction over the construction project, but as a result of the work performed under the original

contract an inspection is required for such work, the date of the final inspection for such work by the local government entity having jurisdiction over the construction project; or

(iii) if with regard to the work performed under the original contract no certificate of occupancy and no final inspection are required by the local government entity having jurisdiction over the construction project, the date on which there remains no substantial work to be completed to finish such work on the original contract.

(b) Notwithstanding Section 38-1-2, where a subcontractor performs substantial work after the applicable dates established by Subsections (1)(a)(i) and (ii), that subcontractor's subcontract shall be considered an original contract for the sole purpose of determining:

(i) the subcontractor's time frame to file a notice to hold and claim a lien under Subsection 38-1-7(1); and

(ii) the original contractor's time frame to file a notice to hold and claim a lien under Subsection 38-1-7(1) for that subcontractor's work.

(c) For purposes of this section, the term "substantial work" does not include:

(i) repair work;

(ii) warranty work; or

(iii) work for which the project owner is not holding payment to ensure completion of that work.

(d) (i) Electronic notification of the filing of a notice of completion or alternate notice as prescribed in Subsection (1)(a), shall be provided to:

(A) each person that filed a notice of commencement for the project;

(B) each person that filed preliminary notice for the project; and

(C) all interested parties who have requested notice for the project.

(ii) Upon the filing of a notice of completion, the time periods for filing preliminary notices stated in Section 38-1-27 are modified such that all preliminary notices shall be filed subsequent to the notice of completion and shall be filed within ten days from the day on which the notice of completion is filed.

(e) A subcontract that is considered an original contract for purposes of this section shall

not create a requirement for an additional preliminary notice if a preliminary notice has already been given for materials and labor furnished to the subcontractor who performs substantial work.

(2) (a) If a construction project owner, original contractor, subcontractor, or other interested person believes that a notice of completion has been filed erroneously, that owner, original contractor, subcontractor, or other interested person can request evidence establishing the validity of the notice of completion.

(b) Within ten days after the request described in Subsection (2)(a), the person that filed the notice of completion shall provide the requesting person proof that the notice of completion is valid.

(c) If the person that filed the notice of completion cannot provide proof of the validity of the notice of completion, that person shall immediately remove the notice of completion from the database.

Section 9. Section **38-1-34** is enacted to read:

38-1-34. Abuse of database -- Penalty.

(1) A person abuses the database if that person records a notice in the database:

(a) without a good faith basis for doing so;

(b) with the intent to exact more than is due from the project owner or any other interested party; or

(c) to procure an unjustified advantage or benefit.

(2) A person who violates Subsection (1) is liable to the owner of the construction project, an original contractor, a subcontractor, or any interested party who is affected by the notice for twice the amount of the actual damages incurred by such party or \$2,000, whichever is greater.

Section 10. Section **38-1-35** is enacted to read:

38-1-35. State not liable.

(1) The state and the state's agencies, instrumentalities, and political subdivisions are not liable for any errors in receiving, recording, maintaining, and reporting any notices or information in the database.

(2) The designated agent shall:

(a) not be entitled to the liability limitations provided by this section; and

(b) maintain a liability insurance policy in an amount set by rule.

Section 11. Section **38-1-36** is enacted to read:

38-1-36. Construction notice does not impart notice.

The filing of a document in the database is not intended to give notice to all persons of the content of the document within the meaning of Section 57-3-102 and does not constitute constructive notice of matters relating to real property to purchasers for value and without knowledge.

Section 12. Section **38-1-37** is enacted to read:

38-1-37. Application of Section 38-1-27 and Sections 38-1-30 through 38-1-36.

(1) Section 38-1-27 and Sections 38-1-30 through 38-1-36 in effect as of May 1, 2005 shall apply to construction projects commenced on or after May 1, 2005.

(2) A construction project commenced before May 1, 2005 is subject to the provisions of this chapter in effect prior to May 1, 2005.

Section 13. Section **63-55-238** is enacted to read:

63-55-238. Repeal dates, Title 38.

Section 38-1-27 and Sections 38-1-30 through 38-1-37 are repealed July 1, 2008.

Section 14. Section **63-56-38.1** is amended to read:

63-56-38.1. Preliminary notice requirement.

Except [~~subcontractors who are in privity of contract with a payment bond principal or~~ ~~except~~] for persons performing labor for wages, any person furnishing labor, service, equipment, or material for which a payment bond claim may be made under this chapter shall provide preliminary notice to the [~~payment bond principal~~] designated agent as prescribed by Section [~~38-1-27~~] 38-1-32. Any person who fails to provide this preliminary notice may not make a payment bond claim under this chapter. The preliminary notice must be provided prior to commencement of any action on the payment bond.

Section 15. **Severability clause.**

If any provision of this chapter is held invalid or unconstitutional by a court of competent jurisdiction, the invalidity shall not affect the other provisions of this chapter which can be given effect without the invalid or unconstitutional provision.

Section 16. **Effective date.**

Except for Section 38-1-30, this bill takes effect on May 1, 2005.

Section 17. **Coordinating H.B. 136 with H.B. 20.**

It is the intent of the Legislature that if this H.B. 136 and H.B. 20, Construction Bonding Statutes, both pass that the Office of Legislative Research and General Counsel in preparing the Utah Code database for publication merge the amendments of these bills as follows:

(1) Section 14-1-20, effective May 1, 2005, shall read:

"14-1-20. Preliminary notice requirement.

~~[Except persons who are in privity of contract with a payment bond principal or except for persons performing labor for wages, any]~~

(1) Any person furnishing labor, service, equipment, or material for which a payment bond claim may be made under this chapter shall provide preliminary notice to the ~~[payment bond principal]~~ designated agent as prescribed by Section ~~[38-1-27.]~~ 38-1-32, except that this section does not apply:

(a) to a person performing labor for wages; or

(b) if a notice of commencement is not filed as prescribed in Section 38-1-31 for the project or improvement for which labor, service, equipment, or material is furnished.

(2) Any person who fails to provide ~~[this]~~ the preliminary notice required by Subsection (1) may not make a payment bond claim under this chapter.

(3) The preliminary notice required by Subsection (1) must be provided prior to commencement of any action on the payment bond."

(2) Section 14-2-5, effective May 1, 2005, shall read:

"14-2-5. Preliminary notice requirement.

~~[Except subcontractors who are in privity of contract with a payment bond principal or except for persons performing labor for wages, any]~~

(1) Any person furnishing labor, service, equipment, or material for which a payment bond claim may be made under this chapter shall provide preliminary notice to the [payment bond principal] designated agent as prescribed by Section [38-1-27:] 38-1-32, except that this section does not apply:

(a) to a person performing labor for wages; or

(b) if a notice of commencement is not filed as prescribed in Section 38-1-31 for the project or improvement for which labor, service, equipment, or material is furnished.

(2) Any person who fails to provide ~~[this]~~ the preliminary notice required by Subsection (1) may not make a payment bond claim under this chapter.

(3) The preliminary notice required by Subsection (1) must be provided prior to commencement of any action on the payment bond."

(3) Section 63-56-38.1, effective May 1, 2005, shall read:

"63-56-38.1. Preliminary notice requirement.

~~[Except subcontractors who are in privity of contract with a payment bond principal or except for persons performing labor for wages, any]~~

(1) Any person furnishing labor, service, equipment, or material for which a payment bond claim may be made under this chapter shall provide preliminary notice to the [payment bond principal] designated agent as prescribed by Section [38-1-27:] 38-1-32, except that this section does not apply:

(a) to a person performing labor for wages; or

(b) if a notice of commencement is not filed as prescribed in Section 38-1-31 for the project or improvement for which labor, service, equipment, or material is furnished.

(2) Any person who fails to provide ~~[this]~~ the preliminary notice required by Subsection (1) may not make a payment bond claim under this chapter.

(3) The preliminary notice required by Subsection (1) must be provided prior to commencement of any action on the payment bond."