

CONSTRUCTION FILING AMENDMENTS

2005 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Michael T. Morley

Senate Sponsor: Thomas V. Hatch

LONG TITLE

General Description:

This bill makes changes to mechanics' liens.

Highlighted Provisions:

This bill:

- ▶ addresses exemptions from preliminary notice requirements;
- ▶ addresses final completion of an original contract;
- ▶ addresses certificates of compliance;
- ▶ defines terms;
- ▶ clarifies how the State Construction Registry is to be indexed;
- ▶ requires the division to comply with Title 63, Chapter 38, Budgetary Procedures

Act, when setting fees for the database;

- ▶ provides that actions in connection with a filing to the database are not

adjudications within the meaning of Title 63, Chapter 46b, Administrative

Procedures Act;

- ▶ clarifies that the division is not responsible for monitoring the timeliness of filings;
- ▶ establishes provisions for addressing delinquency of payment of a filing fee for a

filing to the database;

- ▶ allows the division to make rules establishing the form of submission of an alternate

filing;

- ▶ provides that the archiving of a notice filed with the database may occur no earlier

than the later of:

- one year after the filing of a notice of completion;

- two years after the last filing activity if no notice of completion is filed; or
- one year after a filing is cancelled;
- ▶ provides that data submitted to the database by a governmental entity is classified under Title 63, Chapter 2, Government Records Access and Management Act, by the division;
- ▶ clarifies the required content of a notice of commencement filed for a project where no building permit is required;
- ▶ provides that a person requesting a notice of filings for a project is responsible for the accuracy of an e-mail address, mailing address, or the telefax number to which notice is requested to be sent;
- ▶ provides that a designated agent need only send the notice to the provided e-mail address, mailing address, or telefax number, whether or not the notice is actually received;
- ▶ modifies the time within which a subcontractor or supplier must file a preliminary notice;
- ▶ clarifies that a preliminary notice filed for one construction project applies to all labor, service, equipment, and material for that construction project;
- ▶ addresses requirements for a qualified beneficiary's recovery from the Residence Lien Recovery Fund; and
- ▶ makes technical changes.

Monies Appropriated in this Bill:

None

Other Special Clauses:

This bill provides retrospective operation.

Utah Code Sections Affected:

AMENDS:

14-1-20 (Superseded 05/01/05), as last amended by Chapter 30, Laws of Utah 2004

14-2-5 (Superseded 05/01/05), as last amended by Chapter 30, Laws of Utah 2004

38-1-7 (Effective 05/01/05), as last amended by Chapters 85 and 250, Laws of Utah 2004

38-1-11, as last amended by Chapters 42, 85 and 188, Laws of Utah 2004

38-1-27 (Effective 05/01/05), as repealed and reenacted by Chapter 250, Laws of Utah 2004

38-1-30, as enacted by Chapter 250, Laws of Utah 2004

38-1-31 (Effective 05/01/05), as enacted by Chapter 250, Laws of Utah 2004

38-1-32 (Effective 05/01/05), as enacted by Chapter 250, Laws of Utah 2004

38-1-33 (Effective 05/01/05), as enacted by Chapter 250, Laws of Utah 2004

38-1-37 (Effective 05/01/05), as enacted by Chapter 250, Laws of Utah 2004

38-11-204, as last amended by Chapter 42, Laws of Utah 2004

63-56-38.1 (Superseded 05/01/05), as last amended by Chapter 30, Laws of Utah 2004

REPEALS:

38-1-38, as enacted by Chapter 188, Laws of Utah 2004

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

Section 1. Section **14-1-20 (Superseded 05/01/05)** is amended to read:

14-1-20 (Superseded 05/01/05). Preliminary notice requirement.

(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 as prescribed by Section 38-1-27, except that this section does not apply:

(a) to a person who is in privity of contract with the payment bond principal;

(b) to a person who contracts directly with the payment bond principal;

~~[(b)]~~ (c) to a person performing labor for wages; or

~~[(c)]~~ (d) if a notice of commencement is not filed as prescribed in Section 38-1-27 for the project or improvement for which labor, service, equipment, or material is furnished.

(2) Any person who fails to provide 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.

Section 2. Section **14-2-5 (Superseded 05/01/05)** is amended to read:

14-2-5 (Superseded 05/01/05). Preliminary notice requirement.

(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 as prescribed by Section 38-1-27, except that this section does not apply:

(a) to a person who is in privity of contract with the payment bond principal;

(b) to a person who contracts directly with the payment bond principal;

~~[(b)]~~ (c) to a person performing labor for wages; or

~~[(c)]~~ (d) if a notice of commencement is not filed as prescribed in Section 38-1-27 for the project or improvement for which labor, service, equipment, or material is furnished.

(2) Any person who fails to provide 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.

Section 3. Section **38-1-7 (Effective 05/01/05)** is amended to read:

38-1-7 (Effective 05/01/05). 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 of final completion of the original contract under which the claimant claims a lien under this chapter. For purposes of this Subsection (1), final completion of the original contract means:

(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 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 of intent to hold and claim a lien under Subsection (1); and

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

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

(i) repair work; or

(ii) warranty work~~[, or]~~.

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

(d) Notwithstanding Subsection (1)(a)(iii), final completion of the original contract does not occur if work remains to be completed for which the owner is holding payment to ensure completion of that work.

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

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

(ii) the name of the person:

(A) by whom the lien claimant was employed; or

(B) to whom the lien claimant furnished the equipment or material;

(iii) the time when:

- (A) the first and last labor or service was performed; or
- (B) the first and last equipment or material was furnished;
- (iv) a description of the property, sufficient for identification;
- (v) the name, current address, and current phone number of the lien claimant;
- (vi) the amount of the lien claim;
- (vii) the signature of the lien claimant or the lien claimant's authorized agent;
- (viii) an acknowledgment or certificate as required under Title 57, Chapter 3, Recording of Documents; and
- (ix) 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.

(b) Substantial compliance with the requirements of this Subsection (2) is sufficient to hold and claim a lien.

(3) (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.

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

Section 4. Section **38-1-11** is amended to read:

38-1-11. Enforcement -- Time for -- Lis pendens -- Action for debt not affected --

Instructions and form affidavit and motion.

(1) A lien claimant shall file an action to enforce the lien filed under this chapter within 180 days from the day on which the lien claimant filed a notice of claim under Section 38-1-7.

(2) (a) Within the time period provided for filing in Subsection (1) the lien claimant shall file for record with the county recorder of each county in which the lien is recorded a notice of the pendency of the action, in the manner provided in actions affecting the title or right to possession of real property, or the lien shall be void, except as to persons who have been made parties to the action and persons having actual knowledge of the commencement of the action.

(b) The burden of proof shall be upon the lien claimant and those claiming under the lien claimant to show actual knowledge.

(3) This section may not be interpreted to impair or affect the right of any person to whom a debt may be due for any work done or materials furnished to maintain a personal action to recover the same.

(4) (a) If a lien claimant files an action to enforce a lien filed under this chapter involving a residence, as defined in Section 38-11-102, the lien claimant shall include with the service of the complaint on the owner of the residence:

(i) instructions to the owner of the residence relating to the owner's rights under Title 38, Chapter 11, Residence Lien Restriction and Lien Recovery Fund Act; and

(ii) a form affidavit to enable the owner of the residence to specify the grounds upon which the owner may exercise available rights under Title 38, Chapter 11, Residence Lien Restriction and Lien Recovery Fund Act.

(b) The instructions and form affidavit required by Subsection (4)(a) shall meet the requirements established by rule by the Division of Occupational and Professional Licensing in accordance with Title 63, Chapter 46a, Utah Administrative Rulemaking Act.

(c) If a lien claimant fails to provide to the owner of the residence the instructions and form affidavit required by Subsection (4)(a), the lien claimant shall be barred from maintaining or enforcing the lien upon the residence.

(d) Judicial determination of the rights and liabilities of the owner of the residence under

Title 38, Chapters 1 and 11, and Title 14, Chapter 2, shall be stayed until after the owner has been given a reasonable period of time to establish compliance with Subsections 38-11-204(4)(a) and (4)(b) through an informal proceeding, as set forth in Title 63, Chapter 46b, Administrative Procedures Act, commenced within 30 days of the owner being served summons in the foreclosure action, at the Division of Occupational and Professional Licensing and obtain a certificate of compliance or denial of certificate of compliance, as defined in Section 38-11-102.

(e) An owner applying for a certificate of compliance under Subsection (4)(d) shall send by certified mail to all lien claimants:

(i) a copy of the application for a certificate of compliance; and

(ii) all materials filed in connection with the application.

(f) The Division of Occupational and Professional Licensing shall notify all lien claimants listed in an owner's application for a certificate of compliance under Subsection (4)(d) of the issuance or denial of a certificate of compliance.

(5) The written notice requirement applies to liens filed on or after July 1, 2004.

Section 5. Section **38-1-27 (Effective 05/01/05)** is amended to read:

38-1-27 (Effective 05/01/05). State Construction 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) "Alternate filing" means a filing made in a manner established by the division under Subsection (2)(e) other than an electronic filing.

(b) "Cancel" means to indicate that a filing is no longer given effect.

(c) "Construction project," "project," or "improvement" means:

(i) a specific project or improvement for which one building permit is issued; or

(ii) if no building permit is required, the improvement or work required by a contract between the owner and an original contractor under Section 38-1-2.

~~[(a)]~~ (d) "Database" means the State Construction [Notice] Registry [Database] created in this section.

~~[(b)]~~ (e) (i) "Designated agent" means the third party the Division of Occupational and

Professional Licensing contracts with to create and maintain the State Construction [Notice] Registry [Database].

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

~~[(e)]~~ (f) "Division" means the Division of Occupational and Professional Licensing.

(g) "Interested person" means a person who may be affected by a construction project.

~~[(d)]~~ (h) "Program" means the State 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 State Construction [Notice] Registry [Database] Program [which] that shall:

(a) (i) assist in protecting public health, safety, and welfare; and

(ii) 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]~~ by way of the program Internet website of:

(i) notices of commencement[;];

(ii) preliminary notices[;]; and

(iii) notices of completion ~~[via the program Internet website];~~

(e) accommodate;

(i) electronic filing of ~~[such notices as well as provide for]~~ the notices described in Subsection (2)(d); and

(ii) alternate filing of the notices described in Subsection (2)(d) 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) (i) 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~~]; and

(ii) provide alternate means of notification for [~~those persons~~] a person who [~~make~~] makes an alternate [~~filings~~] filing, 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 an individual [~~filings~~] filing evidencing the date and time of the individual [~~filings as well as~~] filing and the content of the individual [~~filings~~] filing.

(3) (a) [~~Persons interested in a construction project~~] An interested person may request notice of filings related to [~~the~~] a project.

(b) The database shall be indexed by:

(i) owner name[;];

(ii) original contractor name[;];

(iii) subdivision, development, or other project name, if any;

(iv) project address[;];

(v) lot or parcel number[;];

(vi) unique project number[;] assigned by the designated agent; and

(vii) 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~~] in collaboration with the designated agent.

(4) (a) In accordance with [~~Title 63, Chapter 46a, Utah Administrative Rulemaking Act,~~] the process required by Section 63-38-3.2, the division shall establish [~~by rule~~] the [~~filing~~] fees for [~~notices~~];

(i) a notice of commencement[;];

(ii) a preliminary [~~notices, notices~~] notice;

(iii) a notice of completion[; ~~and requests~~];

(iv) a request for notice[; ~~which fees may not exceed the amount reasonably necessary to~~

~~create and maintain the database.];~~

(v) providing a required notice by an alternate method of delivery;

(vi) a duplicate receipt of a filing; and

(vii) account setup for a person who wishes to be billed periodically for filings with the database.

(b) The fees allowed under Subsection (4)(a) may not exceed the amount reasonably necessary to create and maintain the database.

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

(d) Notwithstanding Subsection 63-38-3.2(2)(c), the division need not submit the fee schedule for fees allowed by this Subsection (4) to the Legislature until the 2006 General Session.

(e) The division may provide by contract that the designated agent may retain all fees collected by the designated agent except that the designated agent shall remit to the division the cost of the division's oversight under Subsection (2)(b).

(5) (a) The database is classified as a public record under Title 63, Chapter 2, Government Records Access and Management Act, unless otherwise classified by the division.

(b) A request for information submitted to the designated agent is not subject to Title 63, Chapter 2, Government Records Access and Management Act.

(c) Information contained in a public record contained in the database shall be requested from the designated agent.

(d) The designated agent may charge a commercially reasonable fee allowed by the designated agent's contract with the division for providing information under Subsection (5)(c).

(e) Notwithstanding Title 63, Chapter 2, Government Records Access and Management Act, if information is available in a public record contained in the database, a person may not request the information from the division.

(f) (i) A person may request information that is not a public record contained in the database from the division in accordance with Title 63, Chapter 2, Government Records Access

and Management Act.

(ii) The division shall inform the designated agent of how to direct inquiries made to the designated agent for information that is not a public record contained in the database.

(6) The following are not an adjudicative proceeding under Title 63, Chapter 46b, Administrative Procedures Act:

- (a) the filing of a notice permitted by this chapter;
- (b) the rejection of a filing permitted by this chapter; or
- (c) other action by the designated agent in connection with a filing of any notice permitted by this chapter.

(7) The division and the designated agent need not determine the timeliness of any notice before filing the notice in the database.

(8) (a) A person who is delinquent on the payment of a fee established under Subsection (4) may not file a notice with the database.

(b) A determination that a person is delinquent on the payment of a fee for filing established under Subsection (4) shall be made in accordance with Title 63, Chapter 46b, Administrative Procedures Act.

(c) Any order issued in a proceeding described in Subsection (8)(b) may prescribe the method of that person's payment of fees for filing notices with the database after issuance of the order.

Section 6. Section **38-1-30** is amended 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~~[-]; and~~

(c) the form of submission of an alternate filing.

(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~~[-]~~.

(c) A project shall be archived no earlier than:

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

(ii) if no notice of ~~[commencement]~~ completion is filed, ~~[no earlier than]~~ two years after the last filing activity for a ~~[particular]~~ project~~[-]; or~~

(iii) one year after the day on which a filing is cancelled under Subsection 38-1-32(3)(c) or 38-1-33(2)(c).

~~[(c)]~~ (d) 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 7. Section **38-1-31 (Effective 05/01/05)** is amended to read:

38-1-31 (Effective 05/01/05). Building permit -- Construction -- Notice registry -- Notice of commencement of work.

(1) (a) (i) 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]~~ building permit application and transmit the building permit information to the database electronically ~~[via]~~ by way of the Internet or computer modem or by any other means and such information shall form the basis of a notice of commencement.

(ii) For the purposes of classifying a record under Title 63, Chapter 2, Government Records Access and Management Act, building permit information transmitted from a local governmental entity to the database shall be classified in the database by the division notwithstanding the local governmental entity's classification of the building permit information.

(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]~~ person may file a notice of commencement with the designated agent within the ~~[prescribed]~~ time ~~[set forth in Subsection]~~ prescribed by Subsections (1)(a) and (b).

(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]~~ that:

(i) identifies each construction project; and

(ii) can be associated with all notices of commencement, preliminary notices, and notices of completion.

(e) (i) A notice of commencement is effective as to all ~~[work, materials, and equipment]~~ labor, service, equipment, and material furnished to the construction project after the filing of the notice of commencement.

(ii) A notice of commencement is effective only as to the ~~[work, materials, or equipment]~~ labor, service, equipment, and material furnished to the construction project that is provided subsequent to the filing of the notice of commencement.

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

~~[(a)]~~ (i) the name and address of the owner of the project ~~[or improvement]~~;

~~[(b)]~~ (ii) the name and address of the:

~~[(i)]~~ (A) original contractor; and

~~[(ii)]~~ (B) 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)]~~ (iii) (A) the project address if the project can be reasonably identified by an address; or

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

~~[(d)]~~ (iv) a general description of the project; and

~~[(e)]~~ (v) the lot or parcel number, and any subdivision, development, or other project name, 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.]~~

(b) The content of a notice of commencement need not include all of the items listed in Subsection (2)(a) if:

(i) a building permit is issued for the project; and

(ii) all items listed in Subsection (2)(a) that are available on the building permit are included in the notice of commencement.

(3) ~~[Failure to file any]~~ If a notice of commencement for a construction project [suspends the operation of] is not filed within the time set forth in Subsections 38-1-31(1)(a) and (b), the following do not apply:

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

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

(4) (a) [Electronic] Unless a person indicates to the division or designated agent that the person does not wish to receive a notice under this section, electronic notice of the filing of a notice of commencement or alternate notice as prescribed in Subsection (1), shall be provided to:

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

~~[(b)]~~ (ii) all interested ~~[parties]~~ persons who have requested such notice for the project.

(b) (i) A person to whom notice is required under Subsection (4)(a) is responsible for:

(A) providing an e-mail address, mailing address, or telefax number to which a notice required by Subsection (4)(a) is to be sent; and

(B) the accuracy of any e-mail address, mailing address, or telefax number to which notice is to be sent.

(ii) The designated agent fulfills the notice requirement of Subsection (4)(a) when it sends the notice to the e-mail address, mailing address, or telefax number provided to the designated agent whether or not the notice is actually received.

(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]~~ the building permit obtained for the project ~~[improvement]~~.

Section 8. Section **38-1-32 (Effective 05/01/05)** is amended to read:

38-1-32 (Effective 05/01/05). Preliminary notice -- Subcontractor or supplier.

(1) (a) (i) A subcontractor or supplier shall file a preliminary notice with the database within the later of:

(A) [Within] 20 days after commencement of its own work or the commencement of furnishing [materials or equipment] labor, service, equipment, and material to a construction project~~[, a subcontractor or supplier shall file a preliminary notice with the construction notice~~

registry.]; or

(B) 20 days after the filing of a notice of commencement.

(ii) A preliminary notice filed within the [20-day] period described in Subsection (1)(a)(i) is effective as to all [work, materials, and equipment] labor, service, equipment, and material furnished to the construction project, including labor, service, equipment, and material provided to more than one contractor or subcontractor.

(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] day on which the preliminary notice is filed.

(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] labor or service or supply of materials or equipment furnished to the construction project before the expiration of five days after the late filing of a preliminary notice, except as against the person with whom the subcontractor or supplier contracted.

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

(ii) The content of a preliminary notice shall include the following:

[(†)] (A) the name, address, and telephone number of the person furnishing the labor, service, equipment, or material;

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

[(†††)] (C) the name of the record or reputed owner of the project [or improvement];

[(††††)] (D) the name of the original contractor under which the claimant is performing or will perform its work; and

[(†††††)] (E) the address of the project [or improvement] or a description of the location of the project [or improvement].

(2) (a) (i) [Electronic] Unless a person indicates to the division or designated agent that the person does not wish to receive a notice under this section, electronic notification of the filing

of a preliminary notice or alternate notice as prescribed in Subsection (1), shall be provided to:

~~[(i)]~~ (A) the person filing the preliminary notice;

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

~~[(iii)]~~ (C) all interested ~~[parties]~~ persons who have requested such notice for the project.

(ii) A person to whom notice is required under Subsection (2)(a)(i) is responsible for:

(A) providing an e-mail address, mailing address, or telefax number to which a notice required by Subsection (2)(a) is to be sent; and

(B) the accuracy of any e-mail address, mailing address, or telefax number to which notice is to be sent.

(iii) The designated agent fulfills the notice requirement of Subsection (2)(a)(i) when it sends the notice to the e-mail address, mailing address, or telefax number provided to the designated agent whether or not the notice is actually received.

(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]~~ material 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 from the person who filed the preliminary notice 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]~~ does not provide proof

of the validity of the preliminary notice, that person or entity shall immediately [~~remove~~] cancel the preliminary notice from the database in any manner prescribed by the division pursuant to rule.

Section 9. Section **38-1-33 (Effective 05/01/05)** is amended to read:

38-1-33 (Effective 05/01/05). Notice of completion.

(1) (a) (i) 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.

(ii) Final completion, for purposes of this Subsection (1), shall mean:

~~[(i)]~~ (A) 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)]~~ (B) 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)]~~ (C) 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; or

(ii) warranty work~~[, or]~~.

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

(d) Notwithstanding Subsection (1)(a)(ii)(C), final completion of the original contract does not occur if work remains to be completed for which the owner is holding payment to ensure completion of the work.

~~[(d)]~~ (e) (i) [Electronic] Unless a person indicates to the division or designated agent that the person does not wish to receive a notice under this section, 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]~~ persons who have requested notice for the project.

(ii) A person to whom notice is required under Subsection (1)(e) is responsible for:

(A) providing an e-mail address, mailing address, or telefax number to which a notice required by Subsection (1)(e) is to be sent; and

(B) the accuracy of any e-mail address, mailing address, or telefax number to which notice is to be sent.

(iii) The designated agent fulfills the notice requirement of Subsection (1)(e)(i) when it sends the notice to the e-mail address, mailing address, or telefax number provided to the designated agent, whether or not the notice is actually received.

~~[(ii)]~~ (iv) 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)]~~ (f) 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]~~ the labor, service, equipment, and material 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 from the person who filed the notice of completion 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]~~ does not provide proof of the validity of the notice of completion, that person shall immediately ~~[remove]~~ cancel the notice of completion from the database in any manner prescribed by the division pursuant to rule.

Section 10. Section **38-1-37 (Effective 05/01/05)** is amended to read:

38-1-37 (Effective 05/01/05). Application of Section 38-1-27 and Sections 38-1-30 through 38-1-36.

(1) Except as provided in Subsection (3), 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]~~ for which a notice of commencement is filed on or after May 1, 2005.

(2) A construction project ~~[commenced]~~ for which a notice of commencement is filed before May 1, 2005 is subject to the provisions of this chapter in effect prior to May 1, 2005.

(3) (a) Section 38-1-27 and Sections 38-1-30 through 38-1-36 in effect as of May 1, 2005, shall apply to a construction project for which a notice of commencement is filed on or after November 1, 2005 involving a residence, as defined in Subsection 38-11-102(22).

(b) For a construction project for which a notice of commencement is filed before November 1, 2005 involving a residence, as defined in Subsection 38-11-102(22), the law in effect on April 30, 2005 shall govern.

Section 11. Section **38-11-204** is amended to read:

**38-11-204. Claims against the fund -- Requirement to make a claim --
Qualifications to receive compensation -- Qualifications to receive a certificate of
compliance.**

- (1) To claim recovery from the fund a person shall:
 - (a) meet the requirements of either Subsection (4) or (7);
 - (b) pay an application fee determined by the division under Section 63-38-3.2; and
 - (c) file with the division a completed application on a form provided by the division accompanied by supporting documents establishing:
 - (i) that the person meets the requirements of either Subsection (4) or (7);
 - (ii) that the person was a qualified beneficiary or laborer during the construction on the owner-occupied residence; and
 - (iii) the basis for the claim.
- (2) To recover from the fund, the application required by Subsection (1) shall be filed no later than one year:
 - (a) from the date the judgment required by Subsection (4)(d) is entered;
 - (b) from the date the nonpaying party filed bankruptcy, if the claimant is precluded from obtaining a judgment or from satisfying the requirements of Subsection (4)(d) because the nonpaying party filed bankruptcy within one year after the entry of judgment; or
 - (c) from the date the laborer, trying to recover from the fund, completed the laborer's qualified services.
- (3) To obtain a certificate of compliance an owner or agent of the owner shall establish with the division that the owner meets the requirements of Subsections (4)(a) and (4)(b).
- (4) To recover from the fund, regardless of whether the residence is occupied by the owner, a subsequent owner, or the owner or subsequent owner's tenant or lessee, a qualified beneficiary shall establish that:
 - (a) (i) the owner of the owner-occupied residence or the owner's agent entered into a written contract with an original contractor licensed or exempt from licensure under Title 58, Chapter 55, Utah Construction Trades Licensing Act:

- (A) for the performance of qualified services;
 - (B) to obtain the performance of qualified services by others; or
 - (C) for the supervision of the performance by others of qualified services in construction on that residence;
- (ii) the owner of the owner-occupied residence or the owner's agent entered into a written contract with a real estate developer for the purchase of an owner-occupied residence; or
 - (iii) the owner of the owner-occupied residence or the owner's agent entered into a written contract with a factory built housing retailer for the purchase of an owner-occupied residence;
- (b) the owner has paid in full the original contractor, licensed or exempt from licensure under Title 58, Chapter 55, Utah Construction Trades Licensing Act, real estate developer, or factory built housing retailer under Subsection (4)(a) with whom the owner has a written contract in accordance with the written contract and any amendments to the contract;
- (c) (i) the original contractor, licensed or exempt from licensure under Title 58, Chapter 55, Utah Construction Trades Licensing Act, the real estate developer, or the factory built housing retailer subsequently failed to pay a qualified beneficiary who is entitled to payment under an agreement with that original contractor or real estate developer licensed or exempt from licensure under Title 58, Chapter 55, Utah Construction Trades Licensing Act, for services performed or materials supplied by the qualified beneficiary;
 - (ii) a subcontractor who contracts with the original contractor, licensed or exempt from licensure under Title 58, Chapter 55, Utah Construction Trades Licensing Act, the real estate developer, or the factory built housing retailer failed to pay a qualified beneficiary who is entitled to payment under an agreement with that subcontractor or supplier; or
 - (iii) a subcontractor who contracts with a subcontractor or supplier failed to pay a qualified beneficiary who is entitled to payment under an agreement with that subcontractor or supplier;
- (d) (i) unless precluded from doing so by the nonpaying party's bankruptcy filing within the applicable time, the qualified beneficiary filed an action against the nonpaying party to

recover monies owed to the qualified beneficiary within the earlier of:

~~[(A) an action against the nonpaying party to recover monies owed to the qualified beneficiary within 180 days from the date the qualified beneficiary last provided qualified services, unless precluded from doing so by the nonpaying party's bankruptcy filing within the 180 days after completion of services; and]~~

~~[(B) a notice of commencement of action with the division within 30 days from the date the qualified beneficiary filed the civil action if a civil action was filed as required by Subsection (4)(d)(i)(A);]~~

(A) 180 days from the date the qualified beneficiary filed a notice of claim under Section 38-1-7; or

(B) 270 days from the completion of the original contract pursuant to Subsection 38-1-7(1);

(ii) the qualified beneficiary has obtained a judgment against the nonpaying party who failed to pay the qualified beneficiary under an agreement to provide qualified services for construction of that owner-occupied residence;

(iii) (A) the qualified beneficiary has:

(I) obtained from a court of competent jurisdiction the issuance of an order requiring the judgment debtor, or if a corporation any officer of the corporation, to appear before the court at a specified time and place to answer concerning the debtor's or corporation's property;

(II) received return of service of the order from a person qualified to serve documents under the Utah Rules of Civil Procedure, Rule 4(b); and

(III) made reasonable efforts to obtain asset information from the supplemental proceedings; and

(B) if assets subject to execution are discovered as a result of the order required under Subsection (4)(d)(iii)(A) or for any other reason, to obtain the issuance of a writ of execution from a court of competent jurisdiction; or

(iv) the qualified beneficiary timely filed a proof of claim where permitted in the bankruptcy action, if the nonpaying party has filed bankruptcy;

(e) the qualified beneficiary is not entitled to reimbursement from any other person; and

(f) the qualified beneficiary provided qualified services to a contractor, licensed or exempt from licensure under Title 58, Chapter 55, Utah Construction Trades Licensing Act.

(5) The requirements of Subsections (4)(d)(i), (ii), and (iii) need not be met if the qualified beneficiary has been precluded from obtaining a judgment against the nonpaying party or from satisfying the requirements of Subsections (4)(d)(i), (ii), and (iii) because the nonpaying party filed bankruptcy.

~~[(6) If a qualified beneficiary fails to file the notice with the division required under Subsection (4)(d)(i)(B), the claim of the qualified beneficiary shall be paid:]~~

~~[(a) if otherwise qualified under this chapter;]~~

~~[(b) to the extent that the limit of Subsection 38-11-203(4)(a) has not been reached by payments from the fund to qualified beneficiaries who have complied with the notice requirements of Subsection (4)(d)(i)(B); and]~~

~~[(c) in the order that the claims are filed by persons who fail to comply with Subsection (4)(d)(i)(B), not to exceed the limit of Subsection 38-11-203(4)(a);]~~

~~[(7)]~~ (6) To recover from the fund a laborer shall:

(a) establish that the laborer has not been paid wages due for the work performed at the site of a construction on an owner-occupied residence; and

(b) provide any supporting documents or information required by rule by the division.

~~[(8)]~~ (7) A fee determined by the division under Section 63-38-3.2 shall be deducted from any recovery from the fund received by a laborer.

~~[(9)]~~ (8) The requirements of Subsections (4)(a) and (4)(b) may be satisfied if an owner or agent of the owner establishes to the satisfaction of the director that the owner of the owner-occupied residence or the owner's agent entered into a written contract with an original contractor who:

(a) was a business entity that was not licensed under Title 58, Chapter 55, Utah Construction Trades Licensing Act, but was solely or partly owned by an individual who was licensed under Title 58, Chapter 55, Utah Construction Trades Licensing Act; or

(b) was a natural person who was not licensed under Title 58, Chapter 55, Utah Construction Trades Licensing Act, but who was the sole or partial owner and qualifier of a business entity that was licensed under Title 58, Chapter 55, Utah Construction Trades Licensing Act.

~~[(10)]~~ (9) The director shall have equitable power to determine if the requirements of Subsections (4)(a) and (4)(b) have been met, but any decision by the director under ~~[Title 38, Chapter 11,]~~ this chapter shall not alter or have any effect on any other decision by the division under Title 58, Occupations and Professions.

Section 12. Section **63-56-38.1 (Superseded 05/01/05)** is amended to read:

63-56-38.1 (Superseded 05/01/05). Preliminary notice requirement.

(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 as prescribed by Section 38-1-27, except that this section does not apply:

(a) to a person who is in privity of contract with the payment bond principal;

(b) to a person who contracts directly with the payment bond principal;

~~[(b)]~~ (c) to a person performing labor for wages; or

~~[(c)]~~ (d) if a notice of commencement is not filed as prescribed in Section 38-1-27 for the project or improvement for which labor, service, equipment, or material is furnished.

(2) Any person who fails to provide 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.

Section 13. **Repealer.**

This bill repeals:

Section **38-1-38, Lien notification.**

Section 14. **Retrospective operation.**

(1) The amendments to Section 38-1-37 (Effective 05/01/05) have retrospective operation to May 1, 2005.

(2) The amendments to Sections 14-1-20 (Superseded 05/01/05), 14-2-5 (Superseded 05/01/05), and 63-56-38.1 (Superseded 05/01/05) have retrospective operation to April 30, 2005.