

**CONSTRUCTION TRADE AMENDMENTS**

2017 GENERAL SESSION

STATE OF UTAH

**Chief Sponsor: D. Gregg Buxton**

House Sponsor: \_\_\_\_\_

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**LONG TITLE**

**General Description:**

This bill amends provisions related to the construction trade.

**Highlighted Provisions:**

This bill:

- ▶ defines terms;
- ▶ provides a maximum rate of interest for a lien filed against project property by a person without privity of contract with the owner-builder; and
- ▶ provides the director of the Division of Occupational and Professional Licensing discretion to determine if a claimant has met certain requirements to recover from the Residence Lien Recovery Fund.

**Money Appropriated in this Bill:**

None

**Other Special Clauses:**

None

**Utah Code Sections Affected:**

AMENDS:

**13-8-5**, as last amended by Laws of Utah 2012, Chapters 86 and 278

**38-1a-309**, as enacted by Laws of Utah 2012, Chapter 330

**38-1a-501**, as last amended by Laws of Utah 2014, Chapter 293

**38-11-204**, as last amended by Laws of Utah 2016, Chapter 238



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

30 Section 1. Section 13-8-5 is amended to read:

31 **13-8-5. Definitions -- Limitation on retention proceeds withheld -- Deposit in**  
32 **interest-bearing escrow account -- Release of proceeds -- Payment to subcontractors --**  
33 **Penalty -- No waiver.**

34 (1) As used in this section:

35 (a) (i) "Construction contract" means a written agreement between the parties relative  
36 to the design, construction, alteration, repair, or maintenance of a building, structure, highway,  
37 appurtenance, appliance, or other improvements to real property, including moving,  
38 demolition, and excavating for nonresidential commercial or industrial construction projects.

39 (ii) If the construction contract is for construction of a project that is part residential  
40 and part nonresidential, this section applies only to that portion of the construction project that  
41 is nonresidential as determined pro rata based on the percentage of the total square footage of  
42 the project that is nonresidential.

43 (b) "Construction lender" means any person, including a bank, trust company, savings  
44 bank, industrial bank, land bank, safe deposit company, private banker, savings and loan  
45 association, credit union, cooperative bank, small loan company, sales finance company,  
46 investment company, or any other financial institution that advances money to a borrower for  
47 the purpose of making alterations or improvements to real property. A construction lender  
48 does not include a person or entity who is acting in the capacity of contractor, original  
49 contractor, or subcontractor.

50 (c) "Construction project" means an improvement to real property that is the subject of  
51 a construction contract.

52 [~~(c)~~] (d) "Contractor" means a person who, for compensation other than wages as an  
53 employee, undertakes any work in a construction trade, as defined in Section 58-55-102 and  
54 includes:

55 (i) any person engaged as a maintenance person who regularly engages in activities set  
56 forth in Section 58-55-102 as a construction trade; or

57 (ii) a construction manager who performs management and counseling services on a  
58 construction project for a fee.

59           ~~[(d)]~~ (e) "Original contractor" ~~[has the same meaning as provided]~~ means the same as  
60 that term is defined in Section 38-1a-102.

61           ~~[(e)]~~ (f) "Owner" means the person who holds any legal or equitable title or interest in  
62 property. Owner does not include a construction lender unless the construction lender has an  
63 ownership interest in the property other than solely as a construction lender.

64           ~~[(f)]~~ (g) "Public agency" means any state agency or a county, city, town, school district,  
65 local district, special service district, or other political subdivision of the state that enters into a  
66 construction contract for an improvement of public property.

67           ~~[(g)]~~ (h) "Retention payment" means release of retention proceeds as defined in  
68 Subsection (1)~~[(h)]~~(i).

69           ~~[(h)]~~ (i) "Retention proceeds" means money earned by a contractor or subcontractor but  
70 retained by the owner or public agency pursuant to the terms of a construction contract to  
71 guarantee payment or performance by the contractor or subcontractor of the construction  
72 contract.

73           ~~[(i)]~~ (j) "Subcontractor" ~~[has the same meaning as]~~ means the same as that term is  
74 defined in Section 38-1a-102.

75           (2) (a) This section is applicable to all construction contracts relating to construction  
76 work or improvements entered into on or after July 1, 1999, between:

- 77           (i) an owner or public agency and an original contractor;  
78           (ii) an original contractor and a subcontractor; and  
79           (iii) subcontractors under a contract described in Subsection (2)(a)(i) or (ii).

80           (b) This section does not apply to a construction lender.

81           (3) (a) Notwithstanding Section 58-55-603, the retention proceeds withheld and  
82 retained from any payment due under the terms of the construction contract may not exceed 5%  
83 of the payment:

- 84           (i) by the owner or public agency to the original contractor;  
85           (ii) by the original contractor to any subcontractor; or  
86           (iii) by a subcontractor.

87           (b) The total retention proceeds withheld may not exceed 5% of the total construction  
88 price.

89           (c) The percentage of the retention proceeds withheld and retained pursuant to a

90 construction contract between the original contractor and a subcontractor or between  
91 subcontractors shall be the same retention percentage as between the owner and the original  
92 contractor if:

93 (i) the retention percentage in the original construction contract between an owner and  
94 the original contractor is less than 5%; or

95 (ii) after the original construction contract is executed but before completion of the  
96 construction contract the retention percentage is reduced to less than 5%.

97 (4) (a) If any payment on a contract with a private contractor, firm, or corporation to do  
98 work for an owner or public agency is retained or withheld by the owner or the public agency,  
99 as retention proceeds, it shall be placed in an interest-bearing account and accounted for  
100 separately from other amounts paid under the contract.

101 (b) The interest accrued under Subsection (4)(a) shall be:

102 (i) for the benefit of the contractor and subcontractors; and

103 (ii) paid after the project is completed and accepted by the owner or the public agency.

104 (c) The contractor shall ensure that any interest accrued on the retainage is distributed  
105 by the contractor to subcontractors on a pro rata basis.

106 (d) Retention proceeds and accrued interest retained by an owner or public agency:

107 (i) are considered to be in a constructive trust for the benefit of the contractor and  
108 subcontractors who have earned the proceeds; and

109 (ii) are not subject to assignment, encumbrance, attachment, garnishment, or execution  
110 levy for the debt of any person holding the retention proceeds and accrued interest.

111 (5) Any retention proceeds retained or withheld pursuant to this section and any  
112 accrued interest shall be released pursuant to a billing statement from the contractor within 45  
113 days from the later of:

114 (a) the date the owner or public agency receives the billing statement from the  
115 contractor;

116 (b) the date that a certificate of occupancy or final acceptance notice is issued to:

117 (i) the original contractor who obtained the building permit from the building inspector  
118 or public agency;

119 (ii) the owner or architect; or

120 (iii) the public agency;

121 (c) the date that a public agency or building inspector [~~having~~] that has the authority to  
122 issue [~~its own~~] a certificate of occupancy does not issue the certificate but permits partial or  
123 complete occupancy [~~of a newly constructed or remodeled building~~] or use of a construction  
124 project; or

125 (d) the date the contractor accepts the final pay quantities.

126 (6) If only partial occupancy of a [~~building~~] construction project is permitted, any  
127 retention proceeds withheld and retained pursuant to this section and any accrued interest shall  
128 be partially released within 45 days under the same conditions as provided in Subsection (5) in  
129 direct proportion to the value of the part of the [~~building~~] construction project occupied or  
130 used.

131 (7) The billing statement from the contractor as provided in Subsection (5)(a) shall  
132 include documentation of lien releases or waivers.

133 (8) (a) Notwithstanding Subsection (3):

134 (i) if a contractor or subcontractor is in default or breach of the terms and conditions of  
135 the construction contract documents, plans, or specifications governing construction of the  
136 project, the owner or public agency may withhold from payment for as long as reasonably  
137 necessary an amount necessary to cure the breach or default of the contractor or subcontractor;  
138 or

139 (ii) if a project or a portion of the project has been substantially completed, the owner  
140 or public agency may retain until completion up to twice the fair market value of the work of  
141 the original contractor or of any subcontractor that has not been completed:

142 (A) in accordance with the construction contract documents, plans, and specifications;

143 or

144 (B) in the absence of plans and specifications, to generally accepted craft standards.

145 (b) An owner or public agency that refuses payment under Subsection (8)(a) shall  
146 describe in writing within 45 days of withholding such amounts what portion of the work was  
147 not completed according to the standards specified in Subsection (8)(a).

148 (9) (a) Except as provided in Subsection (9)(b), an original contractor or subcontractor  
149 who receives retention proceeds shall pay each of its subcontractors from whom retention has  
150 been withheld each subcontractor's share of the retention received within 10 days from the day  
151 that all or any portion of the retention proceeds is received:

152 (i) by the original contractor from the owner or public agency; or

153 (ii) by the subcontractor from:

154 (A) the original contractor; or

155 (B) a subcontractor.

156 (b) Notwithstanding Subsection (9)(a), if a retention payment received by the original  
157 contractor is specifically designated for a particular subcontractor, payment of the retention  
158 shall be made to the designated subcontractor.

159 (10) (a) In any action for the collection of the retained proceeds withheld and retained  
160 in violation of this section, the successful party is entitled to:

161 (i) attorney fees; and

162 (ii) other allowable costs.

163 (b) (i) Any owner, public agency, original contractor, or subcontractor who knowingly  
164 and wrongfully withholds a retention shall be subject to a charge of 2% per month on the  
165 improperly withheld amount, in addition to any interest otherwise due.

166 (ii) The charge described in Subsection (10)(b)(i) shall be paid to the contractor or  
167 subcontractor from whom the retention proceeds have been wrongfully withheld.

168 (11) A party to a construction contract may not require any other party to waive any  
169 provision of this section.

170 Section 2. Section **38-1a-309** is amended to read:

171 **38-1a-309. Interest rate on lien.**

172 [~~Unless otherwise specified in a lawful contract between the owner-builder and the~~  
173 ~~person claiming a lien under this chapter, the interest rate applicable to the lien is the rate~~  
174 ~~described in Subsection 15-1-1(2).]~~

175 (1) Subject to Subsection (2), the interest rate that applies to a lawful contract for  
176 preconstruction service or construction work on or for a project property, or to a lien claimed  
177 under this chapter against the project property, is, unless otherwise provided in the lawful  
178 contract, the rate described in Subsection 15-1-1(2).

179 (2) If a person that claims a lien against project property under this chapter is not in  
180 privity of contract with the owner or owner-builder, the interest rate that applies to the person's  
181 lien may not exceed the rate described in Subsection 15-1-1(2).

182 Section 3. Section **38-1a-501** is amended to read:

183 **38-1a-501. Preliminary notice.**

184 (1) (a) A person who desires to claim a construction lien on real property shall file a  
185 preliminary notice with the registry no later than 20 days after the day on which the person  
186 commences providing construction work on the real property.

187 (b) Subject to Subsection (1)(c), a preliminary notice is effective as to all construction  
188 work that the person filing the notice provides to the construction project under a single  
189 original contract, including construction work that the person provides to more than one  
190 supervisory subcontractor under that original contract.

191 (c) (i) A person who desires to claim a construction lien on real property but fails to  
192 file a timely preliminary notice within the period specified in Subsection (1)(a) may, subject to  
193 Subsection (1)(d), file a preliminary notice with the registry after the period specified in  
194 Subsection (1)(a).

195 (ii) A person who files a preliminary notice under Subsection (1)(c)(i) may not claim a  
196 construction lien for construction work the person provides to the construction project before  
197 the date that is five days after the preliminary notice is filed.

198 (d) Notwithstanding Subsections (1)(a) and (c), a preliminary notice has no effect if it  
199 is filed more than 10 days after the filing of a notice of completion under Section 38-1a-507 for  
200 the construction project for which the preliminary notice is filed.

201 (e) A person who fails to file a preliminary notice as required in this section may not  
202 claim a construction lien.

203 ~~[(f) A preliminary notice that is filed with the registry as provided in this section is  
204 considered to be filed at the time of the first preliminary notice filing.]~~

205 ~~[(g)]~~ (f) If a preliminary notice filed with the registry includes the tax parcel  
206 identification number of a parcel not previously associated in the registry with a construction  
207 project, the designated agent shall promptly notify the person who filed the preliminary notice  
208 that:

209 (i) the preliminary notice includes a tax parcel identification number of a parcel not  
210 previously associated in the registry with a construction project; and

211 (ii) the likely explanation is that:

212 (A) the preliminary notice is the first filing for the project; or

213 (B) the tax parcel identification number is incorrectly stated in the preliminary notice.

214           ~~(f)~~ (g) A preliminary notice shall include:

215           (i) the name, address, telephone number, and email address of the person providing the

216 construction work for which the preliminary notice is filed;

217           (ii) the name and address of the person who contracted with the claimant for the

218 construction work;

219           (iii) the name of the record or reputed owner;

220           (iv) the name of the original contractor for construction work under which the claimant

221 is providing or will provide construction work;

222           (v) the address of the project property or a description of the location of the project;

223           (vi) the name of the county in which the project property is located; and

224           (vii) (A) the tax parcel identification number of each parcel included in the project

225 property;

226               (B) the entry number of a previously filed notice of construction loan under Section

227 [38-1a-601](#) on the same project;

228               (C) the entry number of a previously filed preliminary notice on the same project that

229 includes the tax parcel identification number of each parcel included in the project property; or

230               (D) the entry number of the building permit issued for the project.

231           ~~(i)~~ (h) A preliminary notice may include:

232           (i) the subdivision, development, or other project name applicable to the construction

233 project for which the preliminary notice is filed; and

234           (ii) the lot or parcel number of each lot or parcel that is included in the project

235 property.

236           (2) (a) Except as provided in Subsection (2)(b), the burden is upon the person filing the

237 preliminary notice to prove that the person has substantially complied with the requirements of

238 this section.

239           (b) A person has substantially complied with the requirements of this section if the

240 person files a preliminary notice that links, within the registry, to a preliminary notice filed by

241 an original contractor for the same construction project, using the entry number assigned to the

242 original contractor's preliminary notice.

243           (c) Substantial compliance with the requirements of Subsections (1)~~(f)~~(g)(iii) through

244 (vii) may be established by a person's reasonable reliance on information in the registry



245 provided by a previously filed:

246 (i) notice of construction loan under Section 38-1a-601;

247 (ii) preliminary notice; or

248 (iii) building permit.

249 (3) (a) Subject to Subsection (3)(b), a person required by this section to give  
250 preliminary notice is required to give only one notice for each construction project.

251 (b) If the construction work is provided pursuant to contracts under more than one  
252 original contract for construction work, the notice requirements shall be met with respect to the  
253 construction work provided under each original contract.

254 (4) A person filing a preliminary notice by alternate means is responsible for verifying  
255 and changing any incorrect information in the preliminary notice before the expiration of the  
256 time period during which the notice is required to be filed.

257 (5) A person who files a preliminary notice that contains inaccurate or incomplete  
258 information may not be held liable for damages suffered by any other person who relies on the  
259 inaccurate or incomplete information in filing a preliminary notice.

260 Section 4. Section 38-11-204 is amended to read:

261 **38-11-204. Claims against the fund -- Requirements to make a claim --**

262 **Qualifications to receive compensation -- Qualifications to receive a certificate of**  
263 **compliance.**

264 (1) To claim recovery from the fund a person shall:

265 (a) meet the requirements of Subsection (4) or (6);

266 (b) pay an application fee determined by the division under Section 63J-1-504; and

267 (c) file with the division a completed application on a form provided by the division  
268 accompanied by supporting documents establishing:

269 (i) that the person meets the requirements of Subsection (4) or (6);

270 (ii) that the person was a qualified beneficiary or laborer during the construction on the  
271 owner-occupied residence; and

272 (iii) the basis for the claim.

273 (2) To recover from the fund, the application required by Subsection (1) shall be filed  
274 no later than one year:

275 (a) from the date the judgment required by Subsection (4)(d) is entered;

276 (b) from the date the nonpaying party filed bankruptcy, if the claimant is precluded  
277 from obtaining a judgment or from satisfying the requirements of Subsection (4)(d) because the  
278 nonpaying party filed bankruptcy within one year after the entry of judgment; or

279 (c) from the date the laborer, trying to recover from the fund, completed the laborer's  
280 qualified services.

281 (3) The issuance of a certificate of compliance is governed by Section 38-11-110.

282 (4) To recover from the fund, regardless of whether the residence is occupied by the  
283 owner, a subsequent owner, or the owner or subsequent owner's tenant or lessee, a qualified  
284 beneficiary shall establish that:

285 (a) (i) the owner of the owner-occupied residence or the owner's agent entered into a  
286 written contract with an original contractor licensed or exempt from licensure under Title 58,  
287 Chapter 55, Utah Construction Trades Licensing Act:

288 (A) for the performance of qualified services;

289 (B) to obtain the performance of qualified services by others; or

290 (C) for the supervision of the performance by others of qualified services in  
291 construction on that residence;

292 (ii) the owner of the owner-occupied residence or the owner's agent entered into a  
293 written contract with a real estate developer for the purchase of an owner-occupied residence;  
294 or

295 (iii) the owner of the owner-occupied residence or the owner's agent entered into a  
296 written contract with a factory built housing retailer for the purchase of an owner-occupied  
297 residence;

298 (b) the owner has paid in full the original contractor, licensed or exempt from licensure  
299 under Title 58, Chapter 55, Utah Construction Trades Licensing Act, real estate developer, or  
300 factory built housing retailer under Subsection (4)(a) with whom the owner has a written  
301 contract in accordance with the written contract and any amendments to the contract;

302 (c) (i) the original contractor, licensed or exempt from licensure under Title 58,  
303 Chapter 55, Utah Construction Trades Licensing Act, the real estate developer, or the factory  
304 built housing retailer subsequently failed to pay a qualified beneficiary who is entitled to  
305 payment under an agreement with that original contractor or real estate developer licensed or  
306 exempt from licensure under Title 58, Chapter 55, Utah Construction Trades Licensing Act, for

307 services performed or materials supplied by the qualified beneficiary;

308 (ii) a subcontractor who contracts with the original contractor, licensed or exempt from  
309 licensure under Title 58, Chapter 55, Utah Construction Trades Licensing Act, the real estate  
310 developer, or the factory built housing retailer failed to pay a qualified beneficiary who is  
311 entitled to payment under an agreement with that subcontractor or supplier; or

312 (iii) a subcontractor who contracts with a subcontractor or supplier failed to pay a  
313 qualified beneficiary who is entitled to payment under an agreement with that subcontractor or  
314 supplier;

315 (d) (i) unless precluded from doing so by the nonpaying party's bankruptcy filing  
316 within the applicable time, the qualified beneficiary filed an action against the nonpaying party  
317 to recover money owed to the qualified beneficiary within the earlier of:

318 (A) 180 days from the date the qualified beneficiary filed a notice of claim under  
319 Section 38-1a-502; or

320 (B) 270 days from the completion of the original contract pursuant to Subsection  
321 38-1a-502(1);

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

325 (iii) the qualified beneficiary has:

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

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

331 (C) made reasonable efforts to obtain asset information from the supplemental  
332 proceedings; and

333 (D) if assets subject to execution are discovered as a result of the order required under  
334 this Subsection (4)(d)(iii) or for any other reason, obtained the issuance of a writ of execution  
335 from a court of competent jurisdiction; and

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

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

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

342 (5) The requirements of Subsections (4)(d)(ii) and (iii) need not be met if the qualified  
343 beneficiary is prevented from compliance because the nonpaying party files bankruptcy.

344 (6) To recover from the fund a laborer shall:

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

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

348 (7) A fee determined by the division under Section 63J-1-504 shall be deducted from  
349 any recovery from the fund received by a laborer.

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

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

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

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

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**Legislative Review Note**  
**Office of Legislative Research and General Counsel**