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How Massachusetts' newly enacted retainage law affects you

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Massachusetts enacted a new law designed to remedy retainage abuses on construction projects. This law restricts to 5% retainage withheld from payments and establishes a process for releasing retainage. The greatest risk to owners is the potential that insufficient retainage will exist to address contractor failures or punchlist issues. This article discusses some new requirements created by the law as well as risk mitigation techniques. It is not an exhaustive analysis of the law and professional consultation should be sought before contracting on projects encompassed by it.

The law applies to all private projects where the base contract value at the owner to contractor level is not less than \$3 million excepting only residential projects (regardless of contract value) of 4 or fewer units.

The law limits the amount of retainage that can be withheld (5%) and establishes a process for paying down the retainage. For example, the contractor must submit a notice of substantial completion within 14 days of achieving the same. The owner then has 14 days to accept or reject the notice. An owner's failure to reject will be deemed to be an acceptance of the notice. If the owner rejects the notice, the owner must provide a factual and contractual basis for such rejection.

The owner must provide a punchlist within 14 days of substantial completion. The contractor must provide a punchlist to all subcontractors and suppliers from which it is withholding retainage within 21 days after substantial completion. The contractor, subcontractors, and suppliers written applications for release of retainage must include an update concerning the punchlist items. The owner must pay retainage no later than 30 days following submission of the application (unless withholdings are allowed by statute) and the time period for payment is extended by seven days for each tier below the contractor.

The law sets forth very specific limitations on the amounts that can be withheld from retainage payments. These limitations are set forth in the Partridge Snow & Hahn LLP Retainage Law eblast.

The owner's risk mitigation occurs at three phases: (1) contractor selection phase, (2) contract drafting phase, and (3) construction phase. With regard to contractor selection process, Owners must select contractors more carefully than ever. For example, this process should include an inquiry regarding working capital. Insufficient working capital accounts for the vast majority of contractor failures in a recovering construction market (exactly the type of market we currently occupy). Partridge Snow & Hahn LLP has prepared a detailed questionnaire to assist in the contractor selection phase.

With regard to the contract drafting phase, this law applies regardless of whether its provisions are expressly stated in the contract documents. Accordingly, it is highly advisable that the construction contract mirror the language of the law to ensure full compliance. The law is unique to Massachusetts so standard industry contracts, like the AIA, will not contain the required language.

With regard to the construction phase, the law puts owners at risk of waiving significant rights unless

owners affirmatively act. For example, owners waive the right to reject contractors' declaration of substantial completion unless Owners timely object to the same. Likewise, the law prohibits owners from withholding retainage payments unless owners had timely provided a detailed list of all outstanding items and a value for each. In short, owners must be aware of their affirmative obligations to avoid waiving significant legal rights.

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