



All lien releases are not created equal: Take time to understand their differences

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

A lien release usually comes up when it is time for payments to be released. Whether you are an owner paying a general contractor or a general contractor paying a subcontractor or supplier, a proper release is key to the payment process. The lien release essentially says that the contractor or supplier has been paid for its services and waives the right to file a mechanic's lien against the project. Because of the consequences of signing a lien release, you should make sure that you understand the difference between the types of lien releases and what you are signing.

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

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

Final waivers: A final lien waiver means that you have been paid in full and are forever waiving any right to file a lien against the project. The final waiver should be signed at the end of the project in connection with your final payment.

Partial waivers: A partial lien waiver means that you have received a partial payment, or are receiving a partial payment, and that you waive the right to file a mechanic's lien for that particular portion of the labor or materials that you provided as identified in the waiver. Determining whether the lien release you are signing is a final or partial waiver can sometimes be difficult. Often the document will have a title as either "partial lien waiver" or "final lien waiver" but, even then, read it. Regardless of the title, make sure that the document actually says that you are doing what you think you are doing. If it is final, that is what the release should say. If it is partial, it should say that.

Helpful Lien Waiver Tips

An important tip is to make sure that you actually are paid before you sign the release. The lien release or the lien waiver usually says that you are acknowledging receipt of payment. If you have not been paid and the release is not conditional then don't sign it! Now, of course there are situations where payment will not be released until you sign and provide the lien waiver. A simultaneous exchange is acceptable. You hand the lien waiver to the person that is paying you and

they in turn hand you a check. Simple enough.

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

One final note - remember that in New York, a pre-lien waiver is void against public policy. That means that when you start the project no one can require you to waive your right to file a mechanic's lien before you actually provide the labor and materials. If they do, the waiver is void and is not enforceable. That does not mean you should sign the pre-lien waiver anyway. Explain that the lien waiver is void and that you will not waive your right to file a mechanic's lien until you are paid for your services. Knowing your legal rights is a critical component to the contract negotiation phase. Vincent Pallaci, Esq. is a managing partner at Kushnick Pallaci, PLLC, Melville, N.Y.