

Mechanic's Liens (OH)

A Lexis Practice Advisor® Practice Note by
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This practice note explains the timeline and procedures required by Ohio's mechanic's lien law, including filing and timing requirements, parties that are entitled to file a lien, and the types of work that give rise to lien rights. This practice note focuses on mechanic's liens placed on private, nonresidential, commercial projects.

For general guidance on mechanic's liens see [Mechanic's Lien Resource Kit](#), [Mechanic's Lien State Laws Survey](#), [Prompt Payment Acts and Lien Waivers \(Private Construction\) State Law Survey](#), and [Public Construction Projects Performance and Payment Bonds State Law Survey](#).

Basic Concepts and Legal Framework

What Is a Mechanic's Lien?

A mechanic's lien is a security interest, permitted and governed by statute, that can attach to the land, as well as to buildings and improvements to the land, for the purpose of securing payment for work performed.

What Is the Purpose of a Mechanic's Lien?

Mechanic's liens allow contractors, subcontractors, laborers, and suppliers to secure priority in payment for the value of the work performed or materials furnished in constructing, improving, or repairing a building or other structure.

Once a lien has been recorded, if the lien claimant is not paid voluntarily, the lien claimant can file a lawsuit to foreclose on the lien and force payment from the other party, just as a lender can file a lawsuit seeking payment and foreclosure if a borrower defaults on a note and mortgage.

When Are Mechanic's Liens Appropriate for a Project?

There is no dollar value threshold that triggers application of Ohio's statutory mechanic's lien law (found at Ohio Revised Code § 1311). Thus, a mechanic's lien can be filed even for a small value of labor or material. The application of the law is triggered when work constitutes an "improvement" to physical property. An improvement can be characterized as

base building, renovation, remodeling, adding structures, adding fixtures, etc. The analysis as to whether a party has lien rights lies in whether the work or material can be characterized as “improving” the value of the underlying real property. This is a broad definition and should capture most forms of construction activity. Most of what would be considered construction work, even at an existing building, will likely be considered an improvement and give rise to lien rights.

Design Professionals ‘ Rights

In Ohio, architects and engineers cannot file liens solely for off-site design work. They may, however, acquire lien rights if they conduct on-site direction of construction activities or related project management.

Public vs. Private Liens

There are different rules for public projects, private commercial projects, and private residential projects. It is important to know the identity of the actual owner of the project and the nature of the work. Unlike private projects where a mechanic’s lien attaches to the improved real property, a mechanic’s lien cannot attach to real property owned by the state, county, city, or political subdivision. Instead, unpaid contractors who have performed labor or furnished material for the improvement of a public project may file an attested account, which requires the public authority to segregate project funds equal to the amount of the claim pending resolution of the claim. For more information on public projects and attested accounts, see Ohio Rev. Code Ann. §§ 1311.25–1311.32. For information on mechanic’s liens on private residential projects, see Ohio Rev. Code Ann. § 1311.011.

Notice of Commencement (NOC)

The lien statute generally requires an owner to record a notice of commencement (NOC) for every improvement, but in certain limited circumstances, an owner may decide that the NOC is not necessary or worth the administrative effort.

Under Ohio Rev. Code Ann. § 1311.04(A)(1), the NOC must be recorded “[p]rior to the performance of any labor or work or the furnishing of any materials for an improvement on real property which may give rise to a mechanic’s lien” The

NOC identifies the project owner and original contractor(s) to parties not in privity of contract with the owner. These parties must then provide the owner with a notice of furnishing (NOF). For more details, including the impact on NOF requirements resulting from owner’s failure to file an NOC, see “Notice of Furnishing (NOF)” in Perfecting a Lien below.

Parties having a direct contract with the owner are not required to provide an NOF to the owner. See Ohio Rev. Code Ann. § 1311.05(A) (stating that “No original contractor has to serve the notice of furnishing to preserve lien rights arising from a contract with an owner, part owner, or lessee. No material supplier who is in direct privity of contract with an owner, part owner, or lessee has to serve the notice of furnishing upon the owner, part owner, or lessee or designee in order to preserve the material supplier’s lien rights.”).

Thus, if the owner is commencing a project that may be considered an improvement, and the owner can confidently assume that only direct original contractors will perform the work (without subcontracting the work further), the NOC may not be necessary. However, even for small projects, contractors may rely upon subcontractors or suppliers in the performance of work, unbeknownst to the owner.

On a construction project where subcontractors will be involved, it is important for the owner to timely file an NOC in advance of work for two reasons: (1) an owner who fails to record and post the NOC pursuant to Ohio Rev. Code Ann. § 1311.04 becomes liable to the lien claimant for all actual expenses incurred by the claimant in obtaining information that would otherwise have been provided in the NOC, and (2) the recording of the NOC triggers the claimant’s obligation to serve the NOF within the statutory time frame in order to preserve the claimant’s lien rights. The NOC provides the owner some protection by triggering NOF service requirements for subcontractors. Subcontractors who fail to serve an NOF as required by statute waive their mechanic’s lien rights.

Recording by Mortgagee or Original Contractor

If an owner fails to timely record the NOC, any mortgagee of the property may do so on the owner’s behalf. An original contractor may also record the NOC on the owner’s behalf within 10 days after the project begins or three days after demanding that the owner do so.

Duration of NOC

The NOC is valid for six years after recordation, at which time the NOC expires. Ohio Rev. Code Ann. § 1311.04(S). The owner can specify an expiration date shorter than six years in the NOC. There is no affirmative requirement to remove the NOC after the project is complete.

Contents of NOC

The NOC must include:

- A legal description of the real property where project is located
- A description of the improvement
- The name, address, and capacity of the owner, part owner, or lessee contracting for the improvement
- The name and address of the fee owner of the real property
- The name and address of the owner's designee, if any
- The name and address of all original contractors under agreements with the owner
- The date the owner first executed contract with an original contractor
- The name and address of all lending institutions providing financing
- The names and address of all payment bond sureties
- The statutorily required statement
- The name and address of the person who prepared the NOC –and–
- An affidavit of owner verifying the notice was served on original contractor

Ohio Rev. Code Ann. § 1311.04(B).

When preparing the NOC, the owner should strictly adhere to these requirements and ensure the information included in the NOC is accurate. If the NOC contains incorrect information, the owner will be liable to subsequent lien claimants for any resulting loss of lien rights and any actual expenses of preserving those rights, including attorney's fees if the loss and expenses incurred are a direct result of the lien claimant's reliance on the incorrect information. Ohio Rev. Code Ann. § 1311.04(C). However, some Ohio courts have concluded that an owner's substantial compliance is enough. For example, in *Jim Morgan Elec. Co. v. Smith*, the NOC failed to identify the execution date of the contract between the owner and original contractor. Because there was no

evidence that the missing date prejudiced the subcontractor, the subcontractor was not excused from serving its NOF to preserve its lien rights. *Jim Morgan Elec. Co. v. Smith*, 684 N.E.2d 117 (C.P. Franklin County 1997). However, misidentifying an owner "is a more substantial deficiency than an omitted date" and will result in noncompliance with the statute. *Clinton Elec. & Plumbing Supply v. Airline Professionals Assn., Local 1224*, 2006-Ohio-1274 (Ct. App.); see also *RN Bldg. Materials, Inc. v. C.R. Huffer Roofing & Sheetmetal, Inc.*, 683 N.E.2d 884 (C.P. 1997).

For a form of NOC, see Notice of Commencement (Mechanic's Lien) (Private Commercial Project) (OH).

Recording and Notice Requirements for the NOC

The NOC must be recorded by the owner in the county where the project is located before construction begins. It must also be served and posted as follows:

- The owner must serve a copy of the NOC to the original contractor. Ohio Rev. Code Ann. § 1311.04(H). The original contractor then has 10 days to serve the NOC upon any requesting subcontractor with whom it is in direct privity. Ohio Rev. Code Ann. § 1311.04(E). Similarly, any subcontractor that has been served the NOC has 10 days to serve the NOC to any requesting second-tier or sub-subcontractors that are in direct privity with the subcontractor. Ohio Rev. Code Ann. § 1311.04(F).
 - The "original contractor" includes a construction manager and any person who undertakes to construct, alter, erect, improve, repair, demolish, remove, dig, or drill any part of any improvement under a contract with an owner, part owner, or lessee. Ohio Rev. Code Ann. § 1311.01(E).
 - Failure to serve the original contractor will result in the owner becoming liable to the original contractor for all actual expenses incurred by the original contractor in obtaining the information otherwise provided in the NOC. Ohio Rev. Code Ann. § 1311.04(H).
- The NOC must be posted on the project site.
 - The lien statute requires "conspicuous" posting of the NOC. Ohio Rev. Code Ann. § 1311.04(G)(1). The owner should consider posting multiple copies of the NOC on the project site, including in common break or meeting rooms, at the site entrance/exit, in the superintendent's trailer, etc. If the NOC is amended,

be sure to update the posted NOC and remove any out-of-date NOCs that were previously posted on the project site.

- o If the owner, part owner, lessee, or designee fails to maintain a posted copy of the NOC, the owner, part owner, lessee, or designee is liable to a subcontractor, material supplier, or laborer who becomes a lien claimant for all actual expenses incurred by the lien claimant in obtaining the information otherwise provided by the posting. Ohio Rev. Code Ann. § 1311.04.
- There can only be one NOC per project, however, the NOC must be amended if the owner adds new original contractors, lenders, or sureties. (If amended, the owner, part owner, lessee, or designee owner must refile the NOC with county recorder, repost the NOC on the project site, and re-serve copies of the amended NOC to the original contractor.)
- The owner has no duty to provide the NOC to subcontractors, unless requested. The owner must provide the NOC to subcontractors within 10 days of a request thereof. Ohio Rev. Code Ann. § 1311.04(D).
- If the NOC is recorded, subcontractors must serve an NOF on the owner within 21 days after the date the subcontractor first performed labor or work or furnished material at the site of the improvement. If the NOC is not recorded, subcontractors have no obligation to serve an NOF in order to preserve their lien rights. (See “Notice of Furnishing (NOF)” section below, for more information on timing and procedures.)

Perfecting a Lien

To perfect a lien, contractors must complete a three-step process:

- 1 Serve an NOF upon owner and original contractor (assuming the NOC was filed by owner). (As noted below, parties in privity of contract with the owner and individual laborers do not need to serve an NOF to retain their lien rights, and therefore are only required to complete Steps 2 and 3 of this process in order to perfect a lien.)
- 2 Record an affidavit of lien –and–
- 3 Serve the affidavit on the owner

It is important to note that these statutory requirements must be strictly adhered to, otherwise, the lien may be invalidated.

Notice of Furnishing (NOF)

The NOF puts owners and contractors on notice of a subcontractor’s involvement in a project and preserves lien rights for the subcontractor. Parties in privity of contract with the owner and individual laborers do not need to serve an NOF to retain their lien rights.

The NOF must be substantially in the form set forth in Ohio Rev. Code Ann. § 1311.05(B) and include the following information:

- The name and address of the owner or designee (If the owner included a designee in the NOC, the subcontractor must serve the NOF to that designee.)
- The name and address of the original contractor
- The description and location of the project
- The date of first work performed or material provided
- The following statutorily required statement:
 - **WARNING TO OWNER: THIS NOTICE IS REQUIRED BY THE OHIO MECHANICS’ LIEN LAW. IF YOU HAVE ANY QUESTIONS ABOUT YOUR RIGHTS AND DUTIES UNDER THESE STATUTES YOU SHOULD SEEK LEGAL ASSISTANCE TO PROTECT YOU FROM THE POSSIBILITY OF PAYING TWICE FOR THE IMPROVEMENTS TO YOUR PROPERTY**
- The name and address of the subcontractor
- The name, capacity, and address of person signing NOF – and–
- The date of NOF

Whether the NOC is recorded has an effect on the timing and procedure of the NOF:

Timing if the NOC is recorded is as follows:

- The NOF must be served on the owner within 21 days of the first performed labor or work or furnished material at the site of the improvement. Ohio Rev. Code Ann. § 1311.05(A).
 - o The subcontractor must serve the NOF upon the owner, or the owner’s designee, at the address provided in the NOC.
 - o If the subcontractor is not in direct privity with the original contractor, it must also serve the original contractor within the same time frame.
- If the NOF is served more than 21 days after a subcontractor or material supplier who is required by the statute to serve an NOF first performed labor or work or furnished material at the site of the improvement,

the service preserves the subcontractor's or material supplier's lien rights for amounts owing for labor and work performed and materials furnished within the 21-day period immediately preceding service and thereafter. However, it does not revive any prior lien rights for labor or work performed or materials furnished prior to the 21 days immediately preceding service of the NOF. Ohio Rev. Code Ann. § 1311.05(D)(1).

- If the NOF is never served on the owner and the original contractor (when required), no lien rights are available.

If an NOC is not recorded, the subcontractor is not required to serve an NOF to preserve lien rights. Ohio Rev. Code Ann. § 1311.05.

For a form of NOF, see Notice of Furnishing (Mechanic's Lien) (Private Commercial Project) (OH).

Affidavit of Lien

After the lien claimant complies with any applicable NOF requirements, it must prepare an affidavit of lien and record the lien with the county recorder in the county where the project is located. Ohio Rev. Code Ann. § 1311.06.

On private, nonresidential, commercial projects, the time period to record an affidavit of lien to preserve lien rights is 75 days after the last day work was performed or materials were provided. Ohio Rev. Code Ann. § 1311.06(B)(3). The last day of work occurs when the claimant completes the work required under the contract. Completion of punch list work may qualify as last day of work, but warranty work does not. A supplier's last day of work is the day when the materials were delivered to the project.

The affidavit of lien must include:

- The amount due over and above all legal setoffs
- A legal description of the property (The property description is sufficient if it is based upon the description contained in the NOC.)
- The name and address of the person to and for whom labor or work was performed or material was furnished
- The name of the owners, part owners, or lessees of the property
- The name and address of lien claimant –and–
- The first and last dates that the lien claimant performed any labor, work, or furnished any materials to the improvement giving rise to the lien

Ohio Rev. Code Ann. § 1311.06.

For a form of an affidavit of lien, see Affidavit for Mechanic's Lien (Private Commercial Project) (OH).

Serving the Affidavit on the Owner

A copy of the affidavit of lien must also be served on the owner within 30 days of filing.

The affidavit of lien must be served by either certified mail or some other delivery method that includes written evidence of receipt. Ohio Rev. Code Ann. § 1311.07. If the owner cannot be found, a copy of the lien must be posted conspicuously on the project site within 10 days after expiration of the 30-day service period.

Notice to Commence Suit (NCS)

The Notice to Commence Suit (NCS) compels claimants to enforce their lien claims within a specified time period. The owner or other statutorily authorized party may (but is not required to) notify the lienholder to commence suit on the lien by written notice. Ohio Rev. Code Ann. § 1311.11(A)(1). The NCS provides a mechanism to accelerate the lien claim process and clear liens from the title record.

The statute does not include a required form or specify required contents of the NCS. The NCS should contain a copy of the lien, reference the lien, and clearly state that the owner is notifying the lien claimant to commence suit.

For a form of NCS, see Notice to Lienholder to Commence Suit (Mechanic's Lien) (Private Project) (OH).

The NCS must be served as follows:

- The NCS may be served on the lienholder, at the address of the lienholder as shown in the affidavit of lien, through his or her agent indicated on the affidavit of lien, or at any later address of the lienholder that has been delivered in writing to the owner, part owner, lessee, mortgagee, other person with an interest in the real property, original contractor, or subcontractor.
- The NCS must be served by the sheriff.
- Within 30 days after service of the NCS, the owner must execute an affidavit describing how service was accomplished, attach the NCS and service return/proof to the affidavit, and record the affidavit with the county recorder.

Timing

The owner is not required to serve the NCS but can do so anytime within the six years during which the lien is valid. If the owner does not serve an NCS, the lien claimant has six years to enforce the lien by bringing an action. If an action is brought to enforce the lien within that time, the lien continues in force until final adjudication thereof. Ohio Rev. Code Ann. § 1311.13(C).

The lien claimant has 60 days after service of the NCS to commence suit or the lien is void. Ohio Rev. Code Ann. § 1311.11(B)(3).

Bonding-Off a Lien

Prior to or after a suit has commenced on a lien, the owner or original contractor may remove the lien from the record by posting a substitute security interest (approved by local court) for the lien in the form of a bond, cash deposit, or other reasonable security in double the amount of the claim secured by the lien (or one-and-a-half times the amount of the claim if the claimed amount exceeds \$5,000). Ohio Rev. Code Ann. § 1311.11(C)(1).

The requirements for bonding-off a lien are as follows:

- Procure the bond or security interest from a surety or applicable financial institution.
- Apply to the local court of common pleas, which will hold a hearing to determine if the bond is sufficient.

Consult local legal counsel for assistance with procuring a bond and filing the appropriate application with the court of common pleas.

If the application is approved, then from the date of approval, the bond or posted security interest shall be substituted for the security of the lien, rendering the lien void and the property wholly discharged from the lien. Ohio Rev. Code Ann. § 1311.11(C)(2). If an action has already commenced on the lien, the action is automatically terminated, and the action may proceed on the substituted bond or posted security interest. Ohio Rev. Code Ann. § 1311.11(C)(3).

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Erin Luke is a partner in Thompson Hine's top-ranked Construction practice group. She counsels clients on all aspects of project planning, development, and execution. Her experience includes representing owners, developers, contractors, and design firms on large-scale domestic and international projects in a broad range of industry sectors including hotel and resort developments, convention centers and facilities, sports stadia and entertainment complexes, casino and gaming developments, energy and infrastructure projects, P3 and public construction, hospital and school developments, and other high profile community impact projects.

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