

Lien Waivers: Aren't They All the Same?

Understanding the Primary Types of Lien Waivers

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Lien Waivers are common in construction credit. Project owners will often require lien waivers from contractors, subcontractors & suppliers to alleviate the possibility of subsequent mechanic's lien filings. Lien Waivers are also one of the most misunderstood and misused documents in construction credit. It is crucial for all credit professionals to understand the verbiage, potential remedies and potential consequences of lien waivers, prior to signing the document.

Simple Definitions

Lien Waivers have a tendency of creating considerable confusion, so let's take a quick look at the fundamental definition of our "key" words.

- **Conditional:** subject to requirements; made or granted on certain terms
- **Unconditional:** not subject to requirements; absolute
- **Partial:** existing only in part; incomplete
- **Final:** the last; end; termination or conclusion

If we pair up these definitions, we will begin to see the "purpose" or "core" of the type. For example, *Partial + Conditional = existing only in part and is subject to requirements.*

There are four primary types of lien waivers:

- 1. Partial Conditional:** A signed document agreeing to waive rights to a claim for a dollar amount or through a specified date, conditioned upon receipt and clearance of the partial payment.
- 2. Partial Unconditional:** A signed document agreeing to waive rights to a claim for a dollar amount or through a specified date. The waiver is not conditioned upon clearance of a payment. If the check is not received, or does not clear, the contractor/subcontractor/supplier will have waived their rights to that partial payment.
- 3. Final Conditional:** A signed document agreeing to waive rights to a claim, conditioned upon receipt and clearance of a final payment. If the contractor/subcontractor/supplier does not get the final payment, or the payment does not clear, the waiver does not waive their rights.
- 4. Final Unconditional:** A signed document agreeing to waive all rights to a claim. The waiver is not conditioned upon clearance of a final payment. The contractor's/subcontractor's/supplier's rights will be waived whether or not payment is actually received or cleared.

Key Features of a Lien Waiver

Every lien waiver should clearly identify the property name & project location, the debtor's name (your customer), the invoice or purchase order number, the payment amount and the disputed claim amount. If the lien waiver is for partial payment, you should also include the payment period or a through date.

The unconditional final lien waiver is the "end," meaning there is no turning back from an executed unconditional lien waiver – even if your debtor fails to pay or payment does not clear.



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Lien Waiver Language

Conditional Lien Waivers

For conditional lien waivers, the “conditional” language appears prominently at the beginning of the document.

Upon receipt by the undersigned of a check in the above referenced Payment Amount payable to the undersigned, and when the check has been properly endorsed and has been paid by the bank on which it is drawn, without any bankruptcy filing by <<Name of Debtor>> within ninety days thereafter, this document becomes effective to release and the undersigned shall be deemed to waive any notice of lien, any private bond right, any claim for payment and any rights under any similar ordinance, rule or statute related to payment rights that the undersigned has on the above described Property to the following extent:

This waiver has clear conditions: it is only effective once the creditor receives payment, payment has cleared and if the debtor files bankruptcy within 90 days after remitted payment, the waiver becomes null & void.

In this example, the waiver happens to be a partial conditional waiver, based on the following language:

This release covers a progress payment for all work, materials or equipment furnished by the undersigned to the Property or to the Undersigned’s Customer, for only the Payment Amount or such portion of the Payment Amount as the undersigned is actually paid, and does not cover any retention withheld, any items, modifications or changes pending approval, disputed items and claims, or items furnished or invoiced after the Payment Period. Before any recipient of this document relies on it, he should verify evidence of payment to the undersigned.

This waiver has clear conditions: it is only effective once the creditor receives payment, payment has cleared and if the debtor files bankruptcy within 90 days after remitted payment, the waiver becomes null & void.

If the waiver was a final conditional waiver, instead of calling out that the waiver covers “...a progress payment for all work...” it may state “...covers the final payment to the undersigned for all work...”

This release covers the final payment to the undersigned for all work, materials or equipment furnished by the undersigned to the Property or the Undersigned’s Customer and does not cover payment for Disputed Claims, if any. Before any recipient of this document relies on it, he should verify evidence of payment to the undersigned.

Conditional lien waivers are preferred over unconditional lien waivers, because the “conditions” provide the creditor with leverage, in the event payment is not received or does not clear.



Unconditional Lien Waivers

Unconditional lien waivers can be dangerous if blindly signed, as the signor is waiving all rights to further remedy regardless of whether or not payment has cleared. As you will see, the language in an unconditional waiver is absolute:

*The **undersigned has been paid and has received a progress payment** in the above referenced Payment Amount for all work, materials and equipment the undersigned furnished to his Customer for all above described Property **and does hereby waive** and release any notice of lien, any private bond right, any claim for payment and any rights under any similar ordinance, rule or statute related to payment rights that the undersigned has on the above described Property to the following extent:*

An unconditional partial waiver will also include wording similar to the conditional partial waiver, with respect to the monies received: "...covers a progress payment for all work, materials and equipment furnished by..."

The unconditional final lien waiver is the "end," meaning there is no turning back from an executed unconditional lien waiver – even if your debtor fails to pay or payment does not clear:

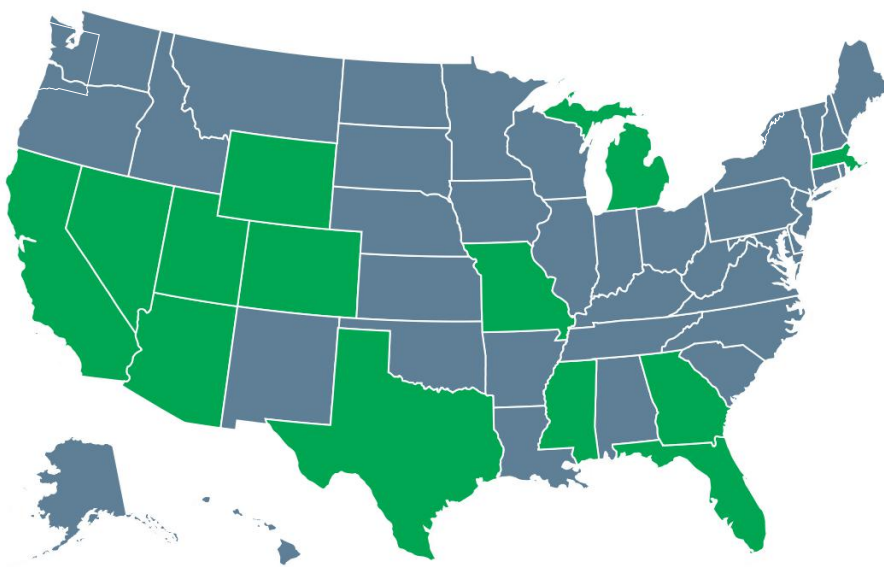
*The **undersigned has been paid in full for all work, materials and equipment the undersigned furnished to his Customer for the above described Property and does hereby waive and release any notice of lien, any private bond right, any claim for payment and any rights under any similar ordinance, rule or statute related to payment rights** that the undersigned has on the above described Property, except for the payment of the Disputed Claims, if any, noted above.*

Be extremely cautious when signing an unconditional final waiver!

Common Lien Waiver Questions

"Are lien waiver requirements the same in all states?"

The majority of states do not require a particular lien waiver format; however, there are some states with statutory requirements:



- Arizona
- California
- Colorado
- Florida
- Georgia**
- Massachusetts
- Michigan
- Mississippi**
- Missouri (residential projects)
- Nevada
- Texas
- Utah
- Wyoming



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“Is a Lien Waiver the same as a Release of Lien?”

No, and this is a common misconception. A lien waiver acknowledges receipt of payment whereas a release of lien releases a previously recorded document.

“Should I Sign This Waiver?”

The two main things to check when you are asked to sign a waiver:

1. Is it a partial or a final waiver?

- If it is a partial waiver, confirm that the dollar amount is correct. If the waiver includes a “paid through” date, be sure the dollar amount stated is correct for that time period.
- If it is a final waiver, confirm that payment of the amount stated includes everything billed or to be billed, that remains owed, on that project.

2. Is it a conditional or an unconditional waiver?

- The preferred waiver is a conditional waiver, which will specify that the waiver is conditioned upon receipt and clearance of the payment amount. If the payment is not received or does not clear, the waiver will not apply.
- An unconditional waiver does **not** state the payment has to clear the bank. If you do not receive the promised payment, or the check bounces, your rights remain waived.

When in doubt, seek a legal opinion – signing the “wrong” document could eliminate your mechanic’s lien and bond claim rights.

Did You Know?

NCS provides **FREE** lien waiver templates and online lien waiver management to all clients!

*** Unlike most states, GA & MS allow for an Affidavit of Non-Payment to be recorded if a waiver has been executed and payment has not been received. Watch the statutory time requirements!*

To Learn more:

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