



Fact Sheet, H. 1401 & S. 956
AN ACT RELATIVE TO FAIR RETAINAGE PAYMENTS
IN PRIVATE CONSTRUCTION

BACKGROUND: In the construction industry, the single greatest problem for business owners has long been the extreme delay in getting paid for work performed – often stretching from 3 to 6 months or more. The problem has been particularly acute for subcontractors, who shoulder most of the costs for labor and materials on construction projects, and are forced to keep financing the work while waiting months to get paid.

In 2010, the Massachusetts Legislature recognized that chronic slow payment puts businesses and jobs at risk, and took a major step to correct the situation by passing “An Act to Promote Fairness in Private Construction,” otherwise known as the “Prompt Pay Law,” c.293 of the Acts of 2010. The new law, which took effect in November 2010, promises to speed up the flow of regular periodic, “progress” payments on construction projects – to the great benefit of all parties. It is one of the most significant laws for private construction in decades.

Good as it is, however, the Prompt Pay law does nothing to speed up one of the most important payments on any construction project, the payment of “retainage.” “Retainage” represents funds withheld from each progress payment to ensure full and satisfactory completion of the work. Retainage is a concept unique to construction; no other industry employs such payment “holdbacks” as an incentive to complete work.

THE PROBLEM: Retainage represents a huge sum – often 10% or more of the value of the contract – and it is typically not released for months, sometimes years, after a contractor’s work is complete. The delay in getting retainage payments can cause as much problem as delay in getting periodic payments, because retainage not only represents a contractor’s costs, but also all of his profit. Delay in getting retainage payments can cause cash flow problems that make it difficult to stay in business, particularly in a recession.

THE CASE FOR REFORM: There are compelling arguments for doing away with “retainage” altogether; indeed, the federal government and some states have done so, with no ill effects. However, there are equally good arguments for preserving retainage as leverage for project owners. Recognizing the merits of both arguments, we take a middle ground. Our bill does not propose elimination of retainage. Instead, **our bill simply proposes setting reasonable limits on the amount of retainage withheld, and the time for payment.** In doing so, we follow in the footsteps of 20 other states that have brought retainage reform through legislation.

SPECIFICS OF THE BILL:

- 1) It sets an outside limit of 5% on the contract payments that can be withheld for “retainage.”
- 2) It sets an outside limit on the time for payment of retainage, which is 30 days after “substantial completion” of the project. The bill defines “substantial completion” in accordance with the American Institute of Architect’s (AIA) standard contract form, which has the effect of making the payment due at a much earlier point in time than is usual under most industry contracts.
- 3) It includes several additional features that are unique, and reflect our commitment to fairness. Specifically, it allows retainage funds to be held back for any incomplete or defective punchlist items, and for any “claims” made in good faith. No other states provide for such allowances.

SUMMARY: This bill a natural complement to the Prompt Pay Law and is consistent with it – including many of the same procedural processes, and applying only to private projects over \$3 million in value that are subject to the Mechanics Lien Law. The bill is fair and reasonable to all parties, avoiding many controversial options that have been proposed elsewhere. Like Prompt Pay, it will bring much needed relief to an industry hit hard by recession, and is long overdue. We urge the Legislature’s favorable consideration and support.

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Be it enacted by the Senate and House of Representatives in General Court assembled,

And by the authority of the same, as follows:

Chapter 149 of the General Laws is hereby amended by inserting after section 29E the following section:

Section 29F: (a) As used in this section the following word(s) shall have the following meanings, unless the context clearly requires otherwise:

"Contract for construction", a contract for which a lien may be established under sections 2 or 4 of chapter 254 on a project for which the person whose contract with the project owner has an original contract price of \$3,000,000 or more; provided, however, this shall not include projects containing or designed to contain at least 1 but not more than 4 dwelling units.

"Claim", an allegation that the party seeking payment of retainage breached its contract for construction for the project.

"Incomplete or defective work", items required for full performance of the contract for construction which remain to be performed or which have been performed but require repair or replacement. Incomplete or defective work shall not include items to be repaired or replaced pursuant to a warranty or guarantee.

"Retainage", a portion of a payment due pursuant to a contract for construction that is withheld to ensure full performance of such contract for construction.

"Substantial completion", the stage in the progress of the project when the work required by the contract for construction with the project owner is sufficiently complete in accordance with the contract for construction so that the project owner can occupy or utilize such work for its intended use. Substantial completion may apply to the entire project, or a phase of the entire project if the contract for construction with the project owner provides for phased completion.

(b) Every contract for construction which provides for retainage shall also provide that retainage shall not exceed 5% of each progress payment.

(c) Every contract for construction which provides for retainage shall provide a reasonable time period within which all retainage shall be paid. Except as provided in paragraph (d) and (e) of this section, and subject to subsection (e) of section 29E of chapter 149, the time period for payment of all retainage shall not exceed 30 days after substantial completion; provided, however, that the time period for payment of retainage by the person at each tier of contract below the owner of the project may be extended by 7 days more than the time period applicable to the person at the tier of contract above such person.

(d) Any amount withheld from the payment of retainage for incomplete or defective work items shall not exceed the estimated cost to complete or correct the items under the contract for construction, and shall be pursuant to a writing which describes the incomplete or defective work items and the value attributable to each item, and which is certified as made in good faith. Subject to subsection (e) of section 29E of chapter 149, the time period for payment of the amount attributable to each incomplete or defective work item shall not exceed 30 days following a written application for payment submitted after the item has been completed or corrected.

(e) Any amount withheld from the payment of retainage for a claim shall not exceed the estimated value of the claim for which the person seeking payment has received prior written notice, and shall be pursuant to writing

which describes the factual and contractual basis for the claim, and which is certified as made in good faith. Any amount withheld from the payment of retainage for a claim under this paragraph (e) shall be paid forthwith upon resolution of the claim, which shall be subject to the applicable dispute resolution procedure.

(f) A communication required in this section to be in writing may be submitted in electronic form and by electronic means.

(g) A provision in a contract for construction which purports to waive or limit any provisions of this section shall be void and unenforceable.