

[What Pa. Can Learn From Ohio's Mechanic's Lien Law](#)

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Body

The mandated creation of a State Construction Notices Directory to track work on construction projects costing in excess of \$1.5 million was one of the many changes made to the Pennsylvania Mechanic's Lien Law in 2014. To accompany the new directory, the Pennsylvania Legislature also passed several new notice requirements to apply to these construction projects.

Although the new notice procedure is not anticipated to go into effect earlier than December 2016, members of the Pennsylvania construction industry should begin now to familiarize themselves with the changes to the Lien Law to determine how to change their business practices to meet the requirements. Other states' laws and precedent can be a useful tool in helping owners, subcontractors and their lawyers jumpstart this process. Specifically, the 2014 amendments make Pennsylvania's mechanic's lien procedure similar to Ohio, as both the new notice-of-commencement and notice-of-furnishing filings have been required in Ohio for years.

The Anticipated Directory

In October 2014, Act No. 142 was enacted, amending the Pennsylvania Mechanic's Lien Law, [49 P.S. Section 1101 et seq.](#), and creating a more structured notice procedure for owners and subcontractors to follow. Specifically, the act permits the following four types of filings within the directory: (1) notice of commencement; (2) notice of furnishing; (3) notice of completion; and (4) notice of nonpayment.

A notice of commencement will be filed by an owner prior to the start of construction and must contain: (1) the full name, address and email address of the contractor; (2) the full name and location of the searchable project; (3) the county in which the searchable project is located; (4) a "legal description" of the property, including the tax identification number of each parcel included in the searchable project; (5) the full name, address and email address of the searchable project owner of record; (6) if applicable, the full name, address and email address of a surety for the performance and payment bonds and the bond numbers; and (7) the "unique identifying number" assigned the notice pursuant to Section 501.1(e)(1).

A notice of furnishing must be filed by a first- or second-tier subcontractor or supplier within 45 days after first performing work at the job site or first providing materials to the job site, containing: (1) a general description of the labor or materials furnished; (2) the full name and address of the person supplying the services; (3) the full name and address of the person who contracted for the services; and (4) a description sufficient to identify the searchable project.

Previewing Pa.'s Future by Examining Ohio's Past

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Ohio's system employs a notice method involving a notice of commencement filed by the owner and a notice of furnishing served by subcontractors and material suppliers. In Ohio, an owner's "substantial compliance" with the notice-of-commencement requirements is considered to "trigger" the subcontractor or material suppliers' obligation to file a notice of furnishing, as in [*Jim Morgan Electric v. Smith*, 684 N.E.2d 117 \(Ohio C.P. 1996\)](#). Likewise, under the Pennsylvania notice amendment, "a subcontractor that performs work or services or provides material in furtherance of a searchable project shall comply with the following if a notice of commencement has been filed and posted in accordance with Subsection (a)." Owners, subcontractors and material suppliers alike can gain insight from Ohio courts' interpretations of the statutory requirements for these notices.

For example, in [*Linworth Lumber v. Z.L.H.*, 802 N.E.2d 736, 742 \(Ohio C.P. 2003\)](#), aff'd, [*2003 Ohio 4190, P24 \(Ohio App. Ct. Aug. 4, 2003\)*](#), an Ohio trial court held that a subcontractor is excused from the notice-of-furnishing requirement if the owner fails to include information in the notice of commencement that is both statutorily mandated and necessary for the subcontractor to complete service of the notice of furnishing. The court discounted the significance of the owner's omission of the date the owner first executed a contract and various other details, and held that the inclusion of the name and address of the property owner and original contractor in the notice of commencement was sufficient. The Ohio Court of Appeals affirmed on the basis that the owner's notice of commencement substantially complied with the Ohio lien statutes.

In contrast, the court in [*Clinton Electrical & Plumbing Supply v. Airline Professionals Association, Local 1224*, 2006 Ohio 1274 \(Ohio App. Ct. Mar. 20, 2006\)](#), excused a subcontractor from filing a notice of furnishing when the owner abbreviated its name in its notice of commencement. The court held that by filing its notice of commencement under the name "APA Teamsters Local 1224," instead of "Airline Professionals Association, Teamsters Local 1224," the owner did not substantially comply with the requirements of the Ohio lien statutes.

The determinative fact in *Clinton* was that the owner's mistake prevented the correct indexing of the notice of commencement under the owner's proper name, and therefore a search of the owner's name failed to show the existence of the notice of commencement. The court also refused to interpret the Ohio lien statutes as placing a burden on the lien claimant to prove that it was prejudiced by the defect in the notice of commencement before excusing the lien claimant's failure to file the notice of furnishing.

Notably, Ohio's requirements for its notice of commencement are to ensure accuracy in a search of the property indexes so that a subcontractor may be informed of an owner's notice of commencement and may correspondingly file a notice of furnishing to protect its lien rights, as in [*RN Building Materials v. C.R. Huffer Roofing & Sheetmetal*, 683 N.E.2d 884 \(Ohio C.P. 1997\)](#). Pennsylvania's anticipated Internet-based directory, on the other hand, may eliminate some of the potential indexing risks in Ohio's system because the notice amendment provides that the notice of commencement must be searchable by the owner's name, contractor's name, the property address, and the notice's unique identifying number. Ohio has no central database for these notices. Instead, the notices are filed with the office of the county recorder where the property is located. Thus, a mistake in the owner's name alone would not necessarily prevent a subcontractor from locating the notice of commencement by other means under Pennsylvania's anticipated directory.

A reading of these cases should also not relieve an owner of a sense of duty to file a full and accurate notice of commencement. Unlike Ohio's lien statutes, the notice amendment does not use the word

"substantial" in connection to the required content of the notice of commencement. As such, Pennsylvania courts may decide to always require strict compliance with these requirements, similar to Ohio courts' treatment of the notice-of-furnishing requirements, as in *Carey Electric v. ABF Freight Systems*, C.A. Case No. 17335. T.C. Case No. 97-7764 (Ohio App. Ct. Aug. 13, 1999).

Similarly, subcontractors and material suppliers should never presume absolution of their obligation to comply with the act's notice-of-furnishing requirements merely because they know the owner was not perfectly compliant with the act. An example from Ohio case law of the irreversible consequences of a subcontractor's untimely filing of its notice of furnishing is *Jim Morgan Electric*, in which the court held that a subcontractor's failure to file its notice of furnishing until 48 days after the last day it performed work on the project precluded the filing of a lien altogether. The court further held that the owner's failure to post the notice of commencement at the project site and to include the date on which the owner first contracted with an original contractor in the notice of commencement, as required by the statute, did not excuse the subcontractor from timely serving its notice of furnishing. Unlike in *Clinton*, these omissions by the owner did not rise to the level of it failing to "substantially" comply with the notice-of-commencement requirements.

Given the similarity between the Pennsylvania lien law amendments and the current Ohio lien law, at this time Ohio case law provides the best guidance available for the construction industry as parties try to predict how the Pennsylvania lien law amendments will be interpreted. Specifically, the Ohio decisions serve as a useful warning of the potential pitfalls involved with Pennsylvania's new notice requirements, and illustrate the importance of conforming business practices early on to ensure compliance with these notice requirements.

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