

PUBLICATION

Alabama's New Construction Retainage Law

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On September 1, 2011, a new retainage provision in Alabama's Prompt Pay Act at Alabama Code Section 8-29-3 becomes effective. The changes will not apply to current contracts. Only contracts that are executed on September 1, 2011, and thereafter, will be subject to the new law.

Highlights of the new retainage provision include:

- Defines the term retainage for the first time as “that money, or other security as agreed to by the parties to a construction contract, earned by the contractor, subcontractor or lower tier sub-subcontractor, or supplier for work properly performed or materials suitably stored . . . which has been retained by the owner conditioned on final completion and acceptance of all work in connection with a project.”
- Retainage is capped at 10% of the estimated amount of work properly done. However, because of another limitation discussed below, the effective cap on total retainage is 5% of the contract amount.
- No additional retainage may be held after the job is halfway complete. For the first half of the job, the paying party may withhold 10% of each pay application. For the second half of the job, the paying party may continue to hold the retainage kept from the work performed in the first half, but it cannot withhold any new retainage for the remaining work.
- Improperly held retainage by any party is subject to interest at a rate of 1% per month (12% per annum).
- The owner must release retainage to the contractor no later than 60 days after substantial completion (or 60 days after the contractor has completed its work as defined by the contract if that is earlier).
- Once the contractor receives its retainage, it must pay its subcontractors their retainage under the same time constraints as any other payment received from the owner (i.e., within 7 days unless other payment terms are agreed to).
- The paying party still has the right to withhold retainage for work not properly performed, payment not earned, any of the reasons listed in Alabama Code Section 8-29-4 if there is a bona fide dispute, or on other grounds set forth by the parties' contract.
- The definition of substantial completion includes a requirement for all necessary certificates of occupancy to have been issued so that the owner may occupy or utilize the project for its intended purpose.
- For contractors, subcontractors and sub-subcontractors, a provision has been added that states they shall have no lien rights in any construction loan, loan proceeds, or the disbursement or use thereof.

If you have questions about the new construction retainage law, please contact the authors of this alert, or any one of the more than 35 members of Baker Donelson's Construction Group.