



## Unconditional Waivers and Releases upon Payment:

How To Avoid Waiving Your Rights When an Owner or Prime Contractor Demands One before Payment is Made

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*A common issue that is encountered again and again is an owner and/or prime contractor demanding an unconditional waiver and release upon progress or final payment prior to issuing payment. This problem arises in various situations but seems to be especially common when the owner is a national company that is unfamiliar with California law. A contractor's and/or supplier's response to such a demand is crucial because an unscrupulous owner/prime contractor may not pay and claim that the execution of an unconditional waiver and release upon payment, prior to actually receiving payment, waives (i.e., forever gives away) the contractor's and/or supplier's stop notice, payment bond, and mechanic's lien rights for the amount of that payment. The question is, as a prime contractor, subcontractor and/or supplier, how do you respond to such a demand?*

### What is Permissible under California Law?

This situation usually requires you to educate the prime contractor and/or owner regarding what is permissible under California law, and may require that you get an attorney involved to send a strongly worded letter on your behalf. California Civil Code section 3262 provides the terms that must be included in a conditional or unconditional release upon payment and when each release form (conditional vs. unconditional) can be used. It provides that an unconditional release form can only be required if payment has already been made.

The repercussions for using an unconditional release form *prior* to payment extend beyond the waiver of claims by the contractor and/or supplier signing the release form. California Business & Professions Code section 7034 (b) states: "No contractor who is required to be licensed under this chapter shall require a waiver of lien rights from a subcontractor, employee, or supplier in violation of Section 3262 of the Civil Code." This means that a prime

contractor that attempts to extract from a subcontractor or supplier an unconditional release prior to making payment in violation of Civil Code section 3262, even if the demand is made at the insistence of the owner, may be subject to disciplinary action by the California Contractors State License Board.

### Using Release Forms

So, how are the release forms *properly* used? The way the process is designed to work, and the way that the releases are permitted to be used, is as follows: A contractor or supplier submits a *conditional* waiver and release form prior to payment being made. Then, *after* payment is actually made, the contractor or supplier submits an *unconditional* waiver and release form for the amount of the payment actually received. Any deviation from this process is a cause for serious concern.

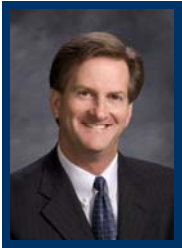


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In addition, contractors and suppliers should be very careful not to execute any releases which contain *additional* language which substantially deviates from that

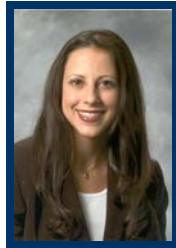
provided for in Civil Code section 3262. As mentioned above, section 3262 provides the terms that must be included in a conditional or unconditional release upon payment. It further provides that any release which departs from those terms is null, void and unenforceable. For example, some owners will attempt to include additional indemnity and/or warranty language in their release forms. These additions are improper and violate the provisions of Civil Code section 3262, making the release null, void and unenforceable. Nevertheless, a contractor or supplier should refuse to sign such a release and should only provide a release which complies with the provisions of section 3262.

If you have questions regarding the proper content of a conditional or unconditional waiver and release upon payment, consult the sample forms available from your local contactors/builders exchange, or consult an attorney. Do not be bullied into providing release forms which exceed that permitted by law. Something as simple as signing the wrong form could result in not getting paid.



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*Murphy Austin Adams Schoenfeld LLP's Construction Law Team was awarded a Tier One Ranking in the U.S. News & World Report - Best Lawyers "Best Law Firms" 2010 report.*



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