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## Kentucky Fairness in Construction Act – Effective July 1, 2007

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Recently, the Kentucky legislature enacted the “Kentucky Fairness in Construction Act”, which becomes **effective on July 1, 2007**. This Act sets forth various restrictions which will redefine some of the terms and conditions in your company’s construction agreements.

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- **SCOPE**

- “Construction” means building, altering, repairing, improving, or demolishing any structures or buildings, or other improvements of any kind to any real property
  - Residential construction is exempt
  - Maintenance exempt
  - Processing equipment work exempt
  - USDA Rural Utilities Services projects exempt
- “Business days” – not defined in statute, but Kentucky law defines as weekdays excluding holidays

- **PROMPT PAYMENTS**

- Owners must pay GC/prime within **30 business days** after “timely, properly completed, undisputed request for payment.”
- Interest on unpaid amounts accrues at 12% per annum commencing on the **31<sup>st</sup> business day**
- For statute to apply (and interest to accrue), Contractor must provide Owner with notice on **25<sup>th</sup> business day** indicating non-payment and pending statutory consequences
  - Unusual Notice Requirement
    - For statute to apply on the **25<sup>th</sup> business day** Contractor must provide Owner

with written notice via certified mail indicating non-payment and pending statutory consequences

- Postsecondary Educational Institutions and Boards of Education are allowed **45 business days**
- Contractor must pay Subcontractors undisputed amounts within **15 business days** of receiving payment from Owner
  - Provision applies to retainage
  - Interest accrues at 12% per annum commencing on **16<sup>th</sup> business day**
  - No notice requirement similar to Prime Contractor-to-Owner obligation
- Provisions apply to all payments to all lower tier subs
  - Successive 15 business day periods
- What is a “timely, properly completed, undisputed request for payment”?
  - “properly completed” – no prohibition against subjective terms to create “dispute”
  - “request for payment” – AIA A201: Article 9 “pay applications” must be certified for payment by Architect
  - “undisputed” – pay applications will be scrutinized more carefully
  - **Likely Ramifications –people will dispute payment to avoid paying 12% interest**
- **RETAINAGE**
  - Until 50% completion “in accordance with the contract” retainage limited to 10% of any undisputed payment due
  - Beginning at 51% completion, retainage is limited to 5%
  - Retainage, less 200% of reasonable estimated cost of completion, shall be released to Prime within **30 days** of substantial completion
    - Reasonable cost of completion determined by Contracting entity
    - Substantial completion determined by Contracting entity’s agent
  - Prime shall release proportionate share of retainage to Subcontractors within **15 business days** of receipt
- **SUBSTANTIAL COMPLETION**
  - “the point at which, as certified in writing by the Contracting entity, a project is at the level of completion, in strict compliance with the contract, where:
    - (a) necessary approval by public regulatory authorities has been given;
    - (b) the Owner has received all required warranties and documentation, and

- (c) the Owner may enjoy beneficial use or occupancy and may use, operate, and maintain the project in all respects, for its intended purpose.”
  - No mention of existing retainage legislation
  - Retainage on public project must be held in escrow accumulating limited interest
- **UNENFORCEABLE PROVISIONS**
  - Severability
    - If provision is found to be void – the Court will only strike that provision
    - The remainder of the contract (the “un-struck” part) will remain in full force and effect
- **NO DAMAGE FOR DELAY**
  - A provision that purports to waive, release or extinguish the right of a Contractor or Subcontractor to recover costs, additional time, or damages, or obtain an equitable adjustment of the contract, for delays in performing the contract are, in whole or part, **within the control of the Contracting entity** is **unenforceable**.
  - Unusually bad weather that cannot be reasonably anticipated, fire, or other acts of God shall not automatically entitle the Contractor to additional compensation under this paragraph.
  - Law does not render null, void and not enforceable a contract provision that:
    - (a) permits a Contractor or Subcontractor to recover that portion of delay costs caused by acts or omissions of the Contracting entity;
    - (b) requires notice of any delay by the party affected by the delay;
    - (c) provides for reasonable liquidated damages;
    - (d) provides for arbitration or any other procedure designed to resolve contract disputes; or
    - (e) specifies which costs are recoverable by a Contractor or Subcontractor for delay
- **DISPUTE RESOLUTION**
  - Any provision that waives, releases or extinguishes the right to resolve the dispute through litigation
    - Can still require binding arbitration as a substitute for litigation
    - Can still require nonbinding alternative dispute resolution as a prerequisite to litigation
  - Public construction: can bypass agency administrative hearing
- **MECHANICS LIENS**
  - Any provision that waives, releases or extinguishes the right to take a mechanic’s lien on

- the property is unenforceable
- The Act provides that a Contractor receiving a judgment against the Owner has 60 days to file a mechanic's lien as provided by statute
  - "No lien" contract is unenforceable, but it does not affect routine conditional lien waivers to secure progress payments
  - Public lien ("claims against funds") new longer time limit:
    - Lien shall be filed within **60 days** of last labor or material to site, or substantial completion, whichever is later
    - Existing language was simply 60 days of last lien or material to site and could require lien well prior to sub. completion
    - Only provision that affects suppliers
- **ATTORNEY'S FEES AND COSTS**
    - Recoverable
      - Prevailing party can recover reasonable attorneys fees in actions to enforce if losing party acted in bad faith
      - Public contracts: only to the extent of the "public contract rate" for attorney's fees
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### *About Tom Keuler*

Tom Keuler credits his legal intensity to an inherent drive to win. What better place to have garnered this competitive spirit than his hometown of Green Bay, Wisconsin. From that renowned gridiron arena to the board rooms and courtrooms of western Kentucky, Tom has "packed" on more than two decades of knowledge and experience in practically all aspects of the general practice of law. He has litigated in federal and state courts and in bankruptcy court and has argued cases in federal and state appellate courts.

### *About David Kelly*

David Kelly is a Denton & Keuler partner with a singular purpose—to effectively examine every detail of every case for the pure objective of achieving successful outcomes for his clients. David has extensive litigation experience in matters of personnel, construction, commercial concerns, civil rights, and personal injury. David also possesses an expansive knowledge of employment law.

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