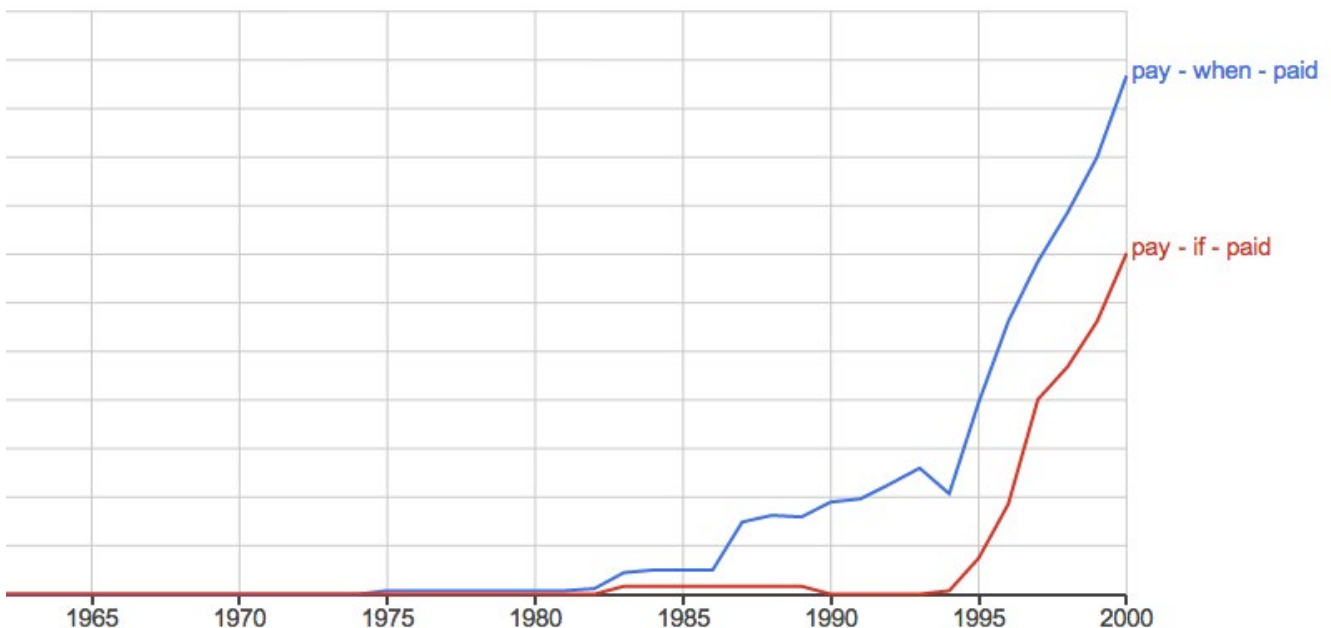


# The 50 State Guide to Contingent Payment Provisions

Contingent payment provisions, commonly referred to as pay-when-paid or pay-if-paid clauses, are found in almost every construction contract across the world.

In the United States, these provisions rose in popularity in the 1980s, first appearing in contracts as pay-when-paid clauses. As courts increasingly interpreted these provisions favorably towards those seeking payment, the clauses transformed into a more strict pay-if-paid variety.

Using Google Books Ngram Viewer, which analyzes terms for how frequently they appear in books and texts, you can see the rise of popularity in each type of provision through the following graph:



As you can see, pay-when-paid provisions popped into construction vocabulary in the 1980s. Both pay-when-paid and pay-if-paid provisions began to take off in popularity in the mid-1990s.

## The Difference Between Pay-If-Paid and Pay-When-Paid

The difference between the two general types of contingent payment provisions really depends on where you are located, as each state interprets these provisions differently. More on those nuances later.

For now, let's establish how these two clauses are interpreted generally.

### 1) PAY-WHEN-PAID

Originally, general contractors argued that these provisions shifted the financial risk of a construction project down the contracting chain onto subcontractors.

It didn't take long, however, for courts to parse the language in these provisions and hold that they were simply **timing mechanisms**. In other words, the provisions did not shift any financial risk, they merely created a timing structure for subcontractor payments. A subcontractor's payment was due **when** the contractor was paid.

And if the contractor was never paid?

Most courts held that since the provision did not shift any financial risk, if the contractor was never paid, payment would be due down the chain within a "reasonable time."

### 2) PAY-IF-PAID

Frustrated, the general contractors went back to the drawing board and made their provisions more restrictive. These provisions have become known as "pay-if-paid" clauses, and as the label hints, they state that a subcontractor shall be paid only if the general contractor is paid.

Some clauses go so far as to spell out that "financial risk of the project is shifted onto the subcontractor" and that the "subcontractor assumes the risk that the owner will not pay." You may have also seen something like "payment from the owner to the general contractor is a **condition precedent** to the subcontractor being paid."

How are these interpreted?

These provisions are so new that many states have not yet weighed in on the matter. Among those states who have, the provisions have been either enforced, ruled invalid as against public policy, or enforced only after rigorous review.

## State-by-State Review of Contingent Payment Provision Jurisprudence

Really understanding how your construction contract's contingent payment provision will be interpreted requires you to look at the law specific to your jurisdiction. The interpretations of these clauses varies widely depending on the state law that applies.

Determining the state law applicable to your contract is another thorny topic. Generally, the state's law where the construction project is located will control the contract's provisions. However, there are some exceptions, such as contracts that specifically appoint a state's law as the controlling law.

The following chart examines how each state interprets pay-when-paid and pay-if-paid provisions. Remember that this chart is a very big picture overview of the state laws. There are a lot of additional nuances that could be very important to your particular circumstances, including disputes or ambiguities within the state itself.

STATE	PAY-IF-PAID	PAY-WHEN-PAID
Alabama	Enforceable when specific condition precedent to payment	Enforceable but merely establishes a timing mechanism (wording such as "payment shall be made after payment to contractor" does not create condition precedent to payment)
Alaska	Enforceable if explicit. A pay-when-pay clause can create a valid condition precedent to payment for a subcontract (Industrial Indem. Co. v. Wick Constr. Co)	Enforced as condition precedent to payment (pay-if-paid) if clear and specific
Arizona	Enforceable when specific condition precedent to payment (with exception when payment is not made due to gross mistake or fraud)	Enforceable. Any ambiguously worded clause is treated as a mere timing mechanism
Arkansas	Enforceable if clear and unambiguously set forth in the contract setting forth payment to contractor as condition precedent to payment to sub	No court cases found – likely to be seen as timing mechanism if ambiguous
California	Unenforceable by statute and case law	
Colorado	Enforceable if clear and unambiguous intent of the parties is for it to be a risk-shifting device	Ambiguous pay-if-pay clauses are treated as pay-when-paid clauses and merely require payment within reasonable time

STATE	PAY-IF-PAID	PAY-WHEN-PAID
Connecticut	Enforceable if clear and unambiguous, but disfavored and require much specificity. Require the subcontractor to explicitly assume risk of owners insolvency, and accept the risk-shifting.	Enforceable as a timing mechanism
Delaware	Unenforceable by statute (private projects). Public projects not addressed, but likely un-enforceable.	Enforceable previous to the passage of the statutory ban on pay-if-paid contracts – now unclear
Florida	Enforceable if clear and unambiguously shifting the risk of non-payment	Enforceable (ambiguous pay-if-paid) are treated as timing mechanism
Georgia	Enforceable, but contract must contain an express provision clearly showing the risk shifting to be the intent of the parties	Unclear, but likely treated as a timing mechanism
Hawaii	Likely enforceable. No Hawaii courts have specifically addressed the issue – but Hawaii statutes seem to allow for the enforcement of pay-if-paid clauses. HRS Sec. 444-25: “If payment is contingent upon receipt of funds, the contractor shall clearly state this fact in the contractor’s solicitation of bids.”	
Idaho	Pay-if-paid clauses are valid and enforceable if intent is clear	Enforced as condition precedent to payment (pay-if-paid) if clear and specific
Illinois	Unenforceable by statute as applied to mechanics liens. If case is not under the mechanics lien act, pay-if-paid clauses seem to be enforceable	Enforceable as timing mechanism
Indiana	Unenforceable by statute as applied to mechanics liens	Enforceable as timing mechanism
Iowa	Enforceable as condition precedent to payment	Enforceable as establishing a reasonable time for payment
Kansas	Unenforceable by statute as applied to mechanics liens or private bond claims	Enforceable as establishing a reasonable time for payment
Kentucky	Enforceable if intent is clear and unambiguous. If no specific intent that it operate as a condition precedent works as pay-when-paid	Establishes a reasonable time for payment

STATE	PAY-IF-PAID	PAY-WHEN-PAID
Louisiana	Enforceable if contract is specific and explicit – “condition precedent” language is explicit	Enforceable as timing mechanism
Maine	Unclear	Unclear
Maryland	Enforceable but must contain clear and unambiguous language shifting the risk of nonpayment to the sub	Enforceable as timing mechanism – unclear pay-if-paid clause treated as pay-when-paid
Massachusetts	Enforceable but must contain clear and precise language	Enforceable as requiring payment within reasonable time
Michigan	Enforceable if clause contains “condition precedent” language	Enforceable as requiring payment within reasonable time
Minnesota	Enforceable but must be unequivocal and unambiguous, and disfavored by courts	Enforceable, but payment may not be delayed after payment to the general
Mississippi	Enforceable, but must clearly and unambiguously intend to shift the risk of payment by the owner to the subcontractor	Enforceable as requiring payment within reasonable time
Missouri	Enforceable if clear and unambiguous	Enforceable as requiring payment within reasonable time
Montana	No Montana courts have addressed the issue – but Montana statutory language is similar to language in states, such as CA, that have found pay-if-paid clauses to be unenforceable (Mont. Code. Ann. Sec. 28-2-2103, 28-2-723)	
Nebraska	Unclear	Enforceable as requiring payment within reasonable time
Nevada	Unenforceable by statute and as against public policy	Unclear
New Hampshire	Unclear	Unclear
New Jersey	Enforceable if clear and unambiguous	Enforceable to permit reasonable postponement of payment
New Mexico	Presumably enforceable based on dicta	Enforceable as timing mechanism
New York	Unenforceable by statute	Enforceable as fixing reasonable time for payment

STATE	PAY-IF-PAID	PAY-WHEN-PAID
North Carolina	Unenforceable by statute	Unclear – but likely enforceable as mere timing mechanism
North Dakota	Unclear	Unclear
Ohio	Unenforceable by statute (at least in cases of mechanics liens)	Enforceable but set an absolute promise to pay within a reasonable time
Oklahoma	Enforceable if clear and unambiguous	Enforceable to postpone payment for reasonable time after work completed
Oregon	Pay-if-paid clauses are valid and enforceable where “ clear and unambiguous language... expressing the intention that the happening of a contingency over which the [sub] has no control shall be a condition precedent to payment...[is] found in the contract.” (Mignot v. Parkhill, 391 P.2d 755 (Or. 1964))	Pay-when-paid clauses are enforceable in Oregon, and merely require that payment be made “within a reasonable time”
Pennsylvania	Enforceable	Enforceable as to the order and timing of payment
New Hampshire	Unclear	Unclear
South Carolina	Unenforceable by statute	Enforceable as fixing reasonable time for payment
South Dakota	Unclear	Unclear
Tennessee	Enforceable, but requires clear language	Enforceable as fixing reasonable time for payment
Texas	Enforceable with unequivocal and express agreement	Enforceable as to time and manner of payment, but not payment itself
Utah	Unenforceable by statute	Enforceable as to postponing payment for reasonable time
Vermont		
Virginia	Enforceable if stated in contract with clear and unambiguous language, or if it can be established through parol evidence	Enforceable as to a reasonable delay in making payment

STATE	PAY-IF-PAID	PAY-WHEN-PAID
Washington	In 2006, a Washington Court of Appeals declined to address the validity of a pay-if-paid clause. <i>W. States Paving Co. v. Pease &amp; Sons, Inc.</i> It appears, however, that pay-if-paid clauses are enforceable if explicit – but are looked upon with disfavor by the courts. A clause specifying a sub would be paid “to the extent that the contractor has [already] received payment” was not explicit enough to create a condition precedent, and only established a reasonable time for payment to sub ( <i>Amelco Elec. V. Donald M. Drake Co.</i> )	Pay-when-paid clauses are enforceable in Washington, and to suggest a reasonable time for payment. A contractor may be allowed to postpone payment “for a reasonable period of time” following the completion of work
West Virginia	Enforceable – and also prevents sub from pursuing surety under payment bond	Enforceable
Wisconsin	Unenforceable by statute	Enforceable by statute
Wyoming	Unclear	Unclear