IN THIS ISSUE...

Air Conditioning Contractors of America
Greater New York Chapter
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Greater New York Contractors' NEWS

ACCA Air Conditioning Contractors of America
Greater New York Chapter

www.accany.org

DECEMBER 2009

President's Message

Ron Nathan

IT DOES NOT SEEM THAT TWO YEARSHAVE PASSED since I was allowed to take the helm as president of the Greater New York Chapter of ACCA. Thank you all for your assistance and support. It has been my pleasure to serve. I would especially like to thank Anthony Carbone, Ken Ellert, John DeLillo, Mike Newman, Steve Bergman, Roy Bernheimer, Jim Carlson, John Ottaviano, Greg Singer, Marc Soffler, Richard Staiano, Harvey Stoller and Al Trudil for your hard work and dedication to our chapter. Our organization could not function without your support. Many

Turn to President's Message on page 3

The Directors and Officers of the Greater New York Chapter wish you a Happy and Safe Holiday Season!

Last Chance to Make Reservations for our December 3rd Holiday Gala, a Spectacularly Enjoyable Evening!

See page 13

ACCA, a federation of 60 state and local affiliated organizations, is the leading trade association representing the business, educational, and policy interests of the nation's heating, air conditioning, ventilation and refrigeration contractors. ACCA represents over 9,000 small businesses nationwide through its federation of affiliates.

PRESIDENT'S MESSAGE *Continued from page 1*

thanks to my partner Carl Holgerson for his support during my term, and most of all to my wife, Connie, and my family for their assistance over the last two years. I couldn't have done it without them.

I wish Anthony Carbone all the best as he assumes the duties of president. Anthony's enthusiasm and experience in our industry makes him a perfect choice to lead our organization. Good luck, Anthony! I'm sure all the board members join me in congratulating you and offering any assistance you may need during the next year.

Over the last two years that I served as president, we have enjoyed many successful events and welcomed new members into our organization. Our industry has seen many changes, and I believe our wide variety of guest speakers at meetings has provided both insights into business opportunities and educational information for our members. The HVAC industry has embraced green technology, computer applications, indoor air quality, and a host of other exciting developments. ACCA provides quality technical services, promotes good business ethics and sound business practices, and influences public policy to improve the business climate. Its mission is to assist and enable ACCA members to acquire, serve and satisfy their customers.

Human resource and labor relations professionals Rachel Cartwright and Rita DiStefano were the speakers at our November meeting. As representatives of Portnoy, Messinger and Pearl Associates, Inc., they presented some common HR situations that business contractors need to know. One problem they discussed was the use of personal e-mail, internet and cell phones in a business setting. Too often a "hostile or offensive work environment" can be created through the transmission of suggestive or insensitive messages. Inappropriate websites or chat rooms may be accessed by employees on work time and can cause many problems for an employer. There are a myriad of reasons why companies need to be proactive and implement explicit policies and procedures that outline what is acceptable and unacceptable usage of personal cell phones and company tools.

Ms.Cartwright and Ms.DiStefano also provided us with an explanation of Section 195 of the NY Labor Law which took effect October 26, 2009. This law states, in part, that all new employees must be notified in writing at the time of hiring of their rate of pay and be furnished with a statement of wages each time they are paid. In addition, each employee must be notified of the employer's leave policies. Copies of HR forms were provided along with handouts describing the law in detail.

In closing, I wish you all good health, happiness, and great success in 2010! Thank you again for your support, and I look forward to continuing to work with the ACCA board as we move into the future. ***— Ron Nathan***

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Editor's Notes

By Anthony N. Carbone

The year 2009 closes out this month and it couldn't be too soon for many contractors who were put to the ultimate economic test of their careers. With horrid economic conditions and financial turmoil across the board for consumers, contractors and suppliers, the HVAC industry had its worst year since the 1970s.

Evidently, it appears there is beginning to be a turnaround and dollars are beginning to flow again. The media and business news programs are reporting large corporations are starting to hire and resume salaries to where they were prior to the downturn. JP Morgan Chase has reported they will again begin matching 401K contributions and resume their bonus program. Some companies are back to five day work weeks. There is still cautious optimism out there.

I would like to conclude the year 2009 by thanking Ron Nathan of County Fair Air Conditioning for providing our Greater New York Chapter of Air Conditioning Contractors of America with great leadership and vision for the past two years. As president, he has worked closely with the board of directors and made thoughtful and tough decisions. We appreciate the sacrifices he has made for our all volunteer industry business association. Thank you, Ron Nathan, great job and well done!

For the year 2010, I have agreed to be a one year interim president of our organization and will work with president-elect for 2011 Mike Newman of Standard Refrigerator. He has been a steadfast supporter and board member of our organization for over five years. Our work together will foster a new vision and create a plan for the future for our Greater New York ACCA.

I want to thank the board of directors for their continued participation for the year 2009. Without the tireless volunteer effort and opinions of the board, we would lose our relevancy and the networking attributes the organization provides.

Our Executive Director, John Delillo, and his staff are the backbone of our Greater New York ACCA Chapter. The behind the scenes organizing and communication come from a well trained office staff whose experience lends itself to making ACCA work throughout the year. The e-mails, mailings, billing, notifications, training and all office functions that occur from week to week and day-to-day are handled by our Executive Director. I want to extend my heartfelt thanks to John Delillo and his entire staff.

The newsletter is our way to reach the many HVAC contractors on a monthly basis to let everyone know what is happening; what is changing next in our industry. Without the support of our advertisers, this publication would not exist. Thank you for supporting our newsletter. Stuart S. Zisholtz, Alan Pearl, Kelly Hiner and John Ottaviano are contributing writers to our newsletter as well as our monthly President's message and my Editor's notes. I hope you continue to read and support the vendors who make this newsletter possible.

I would like to wish all of you a healthy, happy and prosperous holiday season. Please be sure to join us for our Holiday Gala at Oevo Restaurant this year!

— Anthony N. Carbone

Spec' That Truck

By Kelly Hiner
Enterprise Fleet Management

In today's high performance driven economy, businesses want more from their fleet of vehicles: improved performance, lower maintenance, longer life and greater fuel economy – and reduced life-cycle costs. In addition, because modern vehicles are increasingly complex and technologically advanced, all the parts, though manufactured by many suppliers, must work together as a complementary system for optimum performance.

Spec'ing vehicles based on accurate information can make a big difference in selecting components that will provide maximum performance, lowest service and repair costs, and best resale value over the life of the vehicle.

One of the most critical considerations is the gross vehicle weight rating (GVWR). Simply put, the GVWR refers to the maximum a vehicle can weigh at any time. The GVWR includes the net weight of the vehicle, plus the weight of the driver and any passengers, as well as fuel, cargo and any aftermarket equipment or accessories added to the vehicle.

Exceeding the GVWR by regularly overloading a vehicle not only reduces its service life significantly, it also can be a safety hazard. It could also expose a company to legal litigation and judgments if there is an accident and the facts show that it was caused by an overweight vehicle.

Manufacturers determine the maximum acceptable weight limits for each vehicle by considering the combined weight of the strongest weight bearing components (the axles) and the weaker components (vehicle body, frame, suspension, and tires). When these are factored in, the manufacturer sets the vehicle's GVWR in accordance with established industry standards. However, modifying the chassis by adding helper springs or heavier tires/components does not increase the GVWR or payload capacity.

The easiest way to figure out how much weight a vehicle is designed to carry is to subtract its net weight (found in your owner's manual) from the GVWR (usually on a placard on the door jam). The remaining number is the maximum weight the vehicle can safely carry, including the driver, fuel and cargo. Aftermarket accessories and equipment also increases the weight of the vehicle and must be added to the net weight listed in the owner's manual. The best way to check the net weight is to take the vehicle to a certified scale and weigh it

While drivers may continue to load materials into their trucks if there appears to be space left in the vehicle, the frame, suspension, brakes and tires are not designed for weights above

the rating the manufacturer has established. Overloading a truck can cause premature mechanical failures on driveline components such as axles, drive shaft universal joints, transmission, and suspension parts and brakes. In addition, vehicles that operate above the GVWR are a potential safety hazard by affecting the way the truck handles and stops.

A good rule of thumb to follow is what most people in the trucking industry refer to as the "80 percent rule." While your truck will certainly be loaded to 100 percent capacity from time to time, the best practice is to generally spec your vehicle to operate at 80 percent of its GVWR. This will reduce the operating costs of your truck and help extend its service life.

Although years ago, overloading a vehicle was more commonplace, times have changed. While today's manufacturer's warranties usually cover everything except normal wear-and-tear items like tires, brake pads and filters, failure to comply with the truck's GVWR can often end up voiding the warranty.

Spec'ing new vehicles should always begin with a detailed assessment of a company's needs, including annual mileage, payload requirement and service application. The initial cost of a properly spec'd vehicle may be slightly higher then expected, but you will save money in the long run with less expensive maintenance and repairs, reduced down time, and higher resale value.

Kelly Hiner is Group Sales Manager for Enterprise Fleet Management in New York and can be contacted at 973-709-2499. Visit the company's web site at www.enterprisefleet.com or call toll free 1-877-23-FLEET. •

Chapter's SCCC Endowment

Last month's Greater New York Contractors' News contained a comprehensive article on the Chapter's SCCC Endowment headed "Working for the Future of Our Industry." The article was researched and written by John Ottaviano who heads our Scholarship Committee. •

WELCOME NEW MEMBER

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WHEN IT COMES TO MANAGING ONE'S RISK OF LOSS to a "down-stream" provider in the Construction Industry, the insurance topic that frequently arises is "Additional Insured" (AI) status. However, too often, focus rests on the language of contracts, rather then on the Standard Operating Procedures employed in regard to them.

"Down-stream" providers (for Owners, Contractors, for Contractors, Subcontractors, etc.) are often required by contract to name certain parties as "Additional Insureds" on their liability policies. Through variously worded Insurance Specifications, the down-stream entities advise their broker and/or carrier to provide AI coverage to those parties.

To be sure, the language used in Insurance Specifications is important. But, even when drafted well, too often contracting parties fail to manage the process after the contracts are executed. Too often, Executives and Risk Managers, assume that their staffs are collecting the proper coverages. Unfortunately, many times they are not.

Over the years, state legislatures and courts have produced statutory and common law that limit the ability of a party to obtain indemnification from a down-stream entity for most personal injury and property damage claims; at least until close of lengthy litigation. The laws preventing those claims are deemed good public policy - ensuring financially strong entities remain available to prevent and/or satisfy claims. However, those same authorities have allowed contracting parties to allocate between themselves who should "insure" against those claims.

Now, much has been written by experts on the proper language to use for the broadest AI coverage, and the hazards of not doing so. Suffice it to say that full coverage of "Your Work," without exclusions for issues of *fault, sole negligence, completed-operations, job-site presence,* or one of the many other endorsement variations, is the AI status that can provide one with a "Get out-of-jail free card" when it comes to a claim.

As mentioned though, even where contracts are executed with appropriately broad language, executives merely assume that their employees (Building Managers, Project Managers, Purchasing Department staff, etc.) are collecting the proper coverage documents.

In practice, even where broad AI cover is required, down-stream entities either do not, or can not, comply with the Spec. However, without a standard procedure for managing the exchange of those documents, the potential AI party will not know the difference. And, that's where the greatest opportunity lies.

INSURANCE AND FINANCIAL SERVICES

Where AI-demanding parties both use proper contract language and implement standard ops within their organizations for collecting and rejecting non-conforming AI documents, they capture the coverage they've contractually sought. When they review AI documents against the contracts (either internally, or often through their insurance broker), they are able to measure compliance. For example, reviews may be managed and documented as follows:

- ☐ J 0 *Additional Insured Form is per* CG *2033 & 2037 (2001 ed.)* or CG *2010* 11/85.
- ☐ K 5 *Additional Insured Form is per* CG 2033 *& 2037 (2004 ed.)*
- ☐ L 10 *Additional Insured Form used is neither "J" or "K"* (i.e., Other coverage form).
- ☐ M 10 AI Endorsement does not provide Completed Operations coverage.
- ☐ N 10 *AI Endorsement does not provide "Primary & Non-contributory" coverage*.

By reviewing the actual AI endorsements, the AI parties can call for resubmission of Spec-compliant coverage forms. Absent that, even with a properly phrased Insurance Spec, a carrier responding to a claim whose insured has issued a missing or narrowly written AI endorsement, will be under no obligation to assume the defense and indemnity of the AI party.

Moreover, very often, down-stream providers are able to obtain the full "Your Work" AI endorsement from their carriers, but only do so when forced to. Very often they will provide a deficient AI form, and unless challenged, will not provide the broader AI coverage. Unfortunately, the AI party does not realize the deficiency until after a claim occurs.

Vigilance in this process will allow one to avoid claims that would otherwise be tendered down-stream. The avoided losses, naturally translate into increased profits.

If you are interested in learning more about Additional Insured coverages and/or related Standard Operations, feel free to call Mike Banahan at Amerisc Corp. at (516) 7457560 or email him at mbanahan@amerisc.com . •

Permissibility of GPS Tracking on Company Cars

By Rachel Cartwright, Esq. and Rita DiStefano

Thank you all for allowing us to speak last Thursday night regarding Privacy in the Workplace. During the presentation, an interesting question was raised; several ACCA members wanted to know whether they could use GPS tracking on company work vehicles that are taken home by employees during "off duty hours." The following memorandum should provide some guidance on the issue.

Generally, because employer use of GPS devices to track employees is relatively new, there are no federal or New York statutes expressly prohibiting employer use of GPS. However, employers should still be wary of liability under "common law" for invasion of privacy. While there are no cases dealing with GPS surveillance by employers in New York, there have been relevant cases in other states. A vast majority of other jurisdictions have held that where an employer placed a GPS tracking device on a company car, there was no intrusion upon the employee's privacy, even when the tracking was done after business hours. The key factors in these cases were that the employer had a written policy and that the employees had signed forms acknowledging that they were aware of the monitoring policy.

Employers should keep in mind that the ultimate goal is to avoid litigation entirely, not just win it. Obtaining consent significantly undercuts an employee's ability to later argue that GPS tracking is an invasion of privacy. In general, employers should:

- Implement a written policy regarding GPS tracking;
- Enforce the policy uniformly towards all applicable employees;
- Obtain written authorization from employees to install and use GPS devices;
- Limit access to GPS tracking information to those who have a clear business need to know that information; and
- Develop security provisions to ensure that GPS information is not used for inappropriate purposes.

If there are any additional questions, please feel free to contact Rachel Cartwright at rcartwright@pearl-law.com. •

On The Move/People In the News

If you are "on the move" or your company is doing something that will be of interest to other members, let us know. We'd like to publish it. Email the information (photo too if available) to Don Gumbrecht at dgumbrecht@aol.com.

People & The Workplace

By Alan B. Pearl,
Portnoy, Messinger, Pearl & Associates, Inc., Syosset, NY
516-921-3400, Fax 516-921-6774 e-mail: ABPearl@pmpHR.com, Website: www.pmpHR.com

Overtime and Company Owned Blackberrys/PDA's

Employers know that when their hourly employees work extra hours, they should pay them overtime. However, many do not think that they need to pay employees overtime when they respond to e-mails on PDAs/BlackBerrys or use their cell phones and pagers outside of work hours. The failure to compensate employees for these activities could result in liability for unpaid base and overtime pay.

A recent increase in complaints filed on behalf of non-exempt workers illustrates potential risks for employers who provide PDAs to workers. The complaints seek wages and overtime pay for workers' time spent reviewing and responding to text messages, e-mails and other communications received through company-issued PDAs. The complaints allege the employers distributed PDAs to non-exempt workers and required them to review and respond to electronic communications after work hours.

Calculating the time employees spend outside of work hours on business related calls and e-mails is difficult. So, employers should make it a clear policy that employees do not use these devices for work related purposes outside of normal working hours. That is, unless the employer wants to compensate the employee for this time.

Employers should review their policies and procedures concerning the use and distribution of PDAs and other devices and providing remote access to non-exempt employees. Determine the benefits and risks of providing these employees with the ability to work outside normal work hours. Consider whether exempt management-level employees or supervisors can respond to emergencies or other work-related matters outside of normal work hours. Company policies should clearly specify expectations with respect to the use of PDAs and the recording of time spent reviewing and responding to messages.

This office is available to answer questions regarding these legal actions and the steps a company can take to reduce the chances of facing suit.

Workers Compensation and Wellness Plans

With the holidays right around the corner, many employers may be considering wellness plans for their employees. A healthy workforce is often a top priority for employers, as it keeps insurance costs down and boosts attendance and

positive morale. However, a recent New York appellate court decision highlights one of the risks of a wellness -having to pay workers' compensation benefits to employees injured while taking advantage of a company-sponsored wellness program.

There are many types of wellness plans. One example is employers which subsidize all or a portion of the cost of gym membership. However, this practice could result in a Workers Compensation Claim, as was the issue in *Torre v. Logic Technology, Inc*. In this case, an employee suffered a spinal cord injury while participating in an exercise class at a fitness center which his employer made available for employees during work hours.

In general, employees are entitled to workers compensation benefits when an injury or illness arises out of and is in the course and scope of employment. Claimants generally cannot recover workers' compensation benefits for injuries arising out of their voluntary participation in an off-duty athletic activity not constituting part of the employee's work related duties. However, an exception exists when an employer requires employees to participate in such activity, compensates employees for participating in such activity, or otherwise sponsors the activity.

In *Torre*, it was found that the employer sponsored the activity which led to the injury. The court reasoned that the employer encouraged the claimant to have a gym membership, and offered reimbursement to its employees for half of their center's membership fees. The employer's sponsoring the fitness center activity in this manner caused the claimant's injuries to be considered compensable, as having arisen out of the scope of employment.

Employers, therefore, need to consider the effects of a potential increase in workers' compensation claims on the effectiveness of their wellness programs, and how the design of their programs can mitigate those risks.

New Swine Flu Legislation: Emergency Influenza Containment Act

In our last article, we addressed concerns about Swine Flu in the work place. Concern over H1N1 and other contagious illnesses continues to be a high concern among employers as well as their employees and customers. In response, Congress is considering legislation that would require employers to provide up to five days of paid sick leave per year to workers afflicted with influenza or other, similar contagious illnesses.

The Emergency Influenza Containment Act would apply to employers with 15 or more employees. If passed, the bill would apply to both full- and part-time employees who are

Continued on following page

People & The Workplace

Continued from previous page

directed to leave work or not come in because the employer believes the employee has symptoms of a contagious illness, or has been in close contact with an individual who has symptoms of a contagious illness.

Covered employees would be entitled to an amount of paid sick leave calculated based on the employee's regular rate of pay and scheduled hours of work. Employers and companies that already provide five or more paid sick days per year would be exempt from the bill's requirements.

The measure also would prohibit employers from firing, disciplining, or retaliating against workers who comply with the employer's directive to stay home or not come to work.

Under the proposed law, the employer could cut short an employee's paid sick leave allotment by notifying the employee of its belief that he or she can return to work.

So far, the legislation has not been passed. This office will follow the status of the bill and advise you with updates.

New York Labor Law 195:

For those of you who were not able to attend the presentation on Privacy in the Workplace presented on November 5, 2009, we discussed Section 195 of the New York Labor Law. This law requires that employers provide the new hire of notification in writing of their regular hourly rate and the overtime rate. You can obtain a copy of a sample notice by e-mailing me.

Of course, if you have any questions regarding this article, you can reach me at ABPearl@pmphr.com. •

Check the ACCA national website, www.acca.org, regularly for up-to-date information on our industry.

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Statement From Stuart S. Zisholtz, Esq.

You Must Have A Signed Order To Do Work

In the past, I wrote various articles about how you must get your agreements signed before you do any work. This included the contract, any change orders, purchase orders, etc.

I also instructed everyone to review the terms of the contract so that they are clear and unambiguous. It is imperative that you understand the terms and conditions of the agreement as clearly as you understand your bid.

Recently, a decision was rendered by the Appellate Division, Second Department, which could have lasting effects on the construction industry in New York.

In the public sector, a change order will not be paid unless there is a written and authorized change order executed by the parties. In the private sector, however, a change order is valid, even if it is oral and the contract directs written C.O.'s, as long as it was authorized and the work performed was outside of the scope of the contract. The rationale for this rule is that the parties may waive any portion of the contract and as long as the work performed is outside of the scope of the contract, the owner should be obligated to pay for it.

Recently, however, the Court found in a private sector project that where a contract executed between the parties expressly precludes oral extras, or change orders not documented in writing and the owner disputes the extras or change orders, the claim may be dismissed.

This is the first time that I have come across a decision which dismissed oral change orders where the contract directed that they be in writing.

Ramifications of this decision could be severe. Most contractors are told in the field to do certain work which is outside of the scope of the contract and the paperwork will follow later on. Many times the paperwork does not follow and you are forced to invoice the change order without having a signed change order.

According to this decision, you perform the work at your own peril.

While it may cause your job to be performed at a slower pace, it appears that the Courts are now directing that you receive a signed written change order pursuant to the terms of the agreement before you commence with your work.

Never let your lien time run out!

For a free copy of a pamphlet pertaining to mechanic's liens and payment bond claims. Kindly contact me or the

Stuart S. Zisholtz is a partner in the law firm of Zisholtz & Zisholtz, Mineola, New York, a general practice firm specializing in Construction Law and Mechanic's Liens. He is also a member of the Greater New York Chapter, ACCA. He can be reached at 516-741-2200. •

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Join us and get the competitive advantage to move your company into the 2009 HVAC season!