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Greater New York Contractors' NEWS



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January 2009

President's Message

The final days of 2008 have faded away, and 2009 is upon us. Are you sick of making the same resolutions year after year and never keeping them? Me too!



Ron Nathan

Here's a list of resolutions we can actually accomplish:

Put on at least 30 pounds.

Stop exercising.

Watch more TV.

Procrastinate.

Spend more time at work.

All kidding aside, I wish you all a happy, healthy and prosperous new

Turn to President's Message on page 3

You Are Invited To Our
JANUARY MEETING

Do Communication Problems Waste Your Time And Money?

A Program By

Dr. Richard J. Atkins

who works with individuals and businesses on Customer Service Training. Attendees develop skills to serve clients more effectively, increasing client retention and sales.

THURSDAY, January 8, 2009
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Followed Immediately by the program

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PRESIDENT'S MESSAGE *Continued from page 1*

year full of family, friends, laughter and unexpected blessings. Our ACCA chapter is planning exciting new activities for members in the upcoming calendar year, and I hope you will be a part of the fun. If you are not already a member, please visit our website at accany.org to join.

I hope you were able to join us at this year's Holiday Party at The Inn at New Hyde Park. It was a well-attended event, and everyone seemed to have a lovely evening. The hall was beautifully decorated for the holidays and included a wonderful display of lights and trees surrounding a large fireplace. This welcoming scene served as the backdrop for photographs of all attendees. We were served a delicious dinner and danced to live music provided by singer Rene Michaels and her band. The highlight of the evening was a visit from Marine Gunnery Sergeant Alexander Mesa and four Marines representing the US Marine Corps Reserve Toys for Tots Organization. ACCA members contributed a large number of toys to their annual toy drive, and it was a privilege to present them to the Marines and thank them for

their service. Many thanks to Anthony Carbone and the ACCA Board Members for making this Holiday Party such a great success. Thanks also to our generous Associate Sponsors B & F Johnstone, Enterprise Fleet Service, National Compressor Exchange, Amerisc Corp., Carrier NE, LIPA Trade Ally, Twinco Supply Co., and ABCO, for their support.

Green business trends are the way of the future. Not only can you protect our environment from unhealthy chemicals and hazardous materials, but you can save money by reducing, reusing and recycling! I recently discovered an easy-to-use website that allows you to search by material and zip code to locate a recycling facility in your area. The site is Earth911.com. It also gives details on office recycling and material reuse that can be applied to everyday business applications. Did you know that 99% of the materials in electronics are fully recyclable or reusable in other products? When old electronic items are properly recycled, hazardous materials such as lead and mercury are removed safely. Our businesses and home use paper, plastic, metal, glass, electronics, hazardous materials and organics each day, and we should all know how to dispose of them in a safe manner. — **Ron Nathan**

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technical advice. Accordingly, the Association cannot warrant the accuracy of the information contained in this newsletter and disclaims any and all liability which may result from publication of or reliance on the information provided herein. If legal advice or other expert assistance or advice is required, the services of a competent, professional person should be sought.

Editor's Notes

By Anthony N. Carbone

In the past, many were worried about the government becoming "big brother." Well, forget big brother. We now have "big daddy." The federal government has been asked to save many in private industry. First banks, and then Wall Street investment firms that were evidently set up as paper tigers with zero liquidity and leveraged to the hilt. Lehman Brothers was allowed to go crashing down. Bear Stearns gets picked up at scrap value by Jamie Dimon of JP Morgan Chase and Citi gets a cash infusion from the taxpayers via the federal government.

Since when did the federal government get empowered to save private industry? Where did all this money come from? Why do we have millions of Americans without health care and some living without food in poverty levels? Is big business a favorite child of the U.S. government or are these industries "too big to fail", which would cripple the U.S. economy?

Who next...the cell phone giants, managed healthcare, U.S. oil companies with dropping profits due to low per barrel oil prices? Will we really see rollback pricing and deflation and for how long? With the U.S. treasury printing money faster than the New York Times printing newspapers, what value will this dollar have? Will the

ruble and the dollar meet the same fate and inflation will come storming in like a twister tornado?

Hey, what about the air conditioning contractor and HVAC manufacturers? The marketplace is changing out there. This indoor comfort thing may become a luxury and a significant change in our industry may soon be here. Cast your line into the pool of available workers and you will find an abundance of technicians and installers willing to work for you even if they have to travel 50 miles a day. Many quality, experienced air conditioning and heating personnel are waiting on the side lines looking for work.

We are seeing a near dead stoppage of spending for big ticket items like cars, air conditioning, heating and major renovations. To be honest, in that environment, the only real safe investment for people today is in their homes. People are staying home more now. It is an eventuality that homeowners will realize well, if I am going to stay home, not travel, not go out to eat, not drive, not spend, I may as well be comfortable and as energy efficient as possible. This may be the place where people might see fit to spend, if they have a job to pay for it.

This plan is speculative at best and, hopefully, we will be able to wish each other a Happy New Year. Good luck and get ready by keeping your hands on the wheel and your eyes on the road of your business! — Anthony N. Carbone

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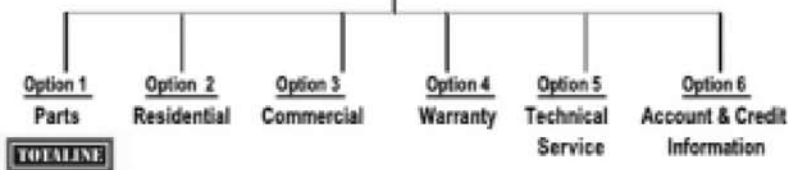
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People & The Workplace

By Alan B. Pearl,

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Democrats' Wish List

2009 could bring a lot of new legislation from Congress. Below is a description of two laws that would have significant impact on employers if they are passed.

Religious Accommodation in the News

The winter holiday season is dwindling, but employers should not forget about religious accommodation. A bill entitled "The Workplace Religious Freedom Act of 2008" was introduced in the Senate on September 26, 2008 by Sen. John Kerry.

The bill would amend Title VII of the Civil Rights Act of 1964 to establish provisions to require employers to make a "reasonable accommodation" for an employee's religious practice or observance, such as time off or dress. Title VII already prohibits employment discrimination based on race, color, religion, sex, or national origin. However, the Workplace Religious Freedom Act would require employers to be more accommodating of employees who wish to wear religious headgear, for example,

or take time off for holy day observances. The proposed bill would require employers to accommodate employees unless it means a "significant difficulty or expense."

Although this proposed bill has not yet become federal law, now is a good time for employers to review their handbook policies to avoid liability under current law. This is especially important for New York employers, because they already have state law that provides significant protection for employees' practice of religion. In 2002, the New York State Human Rights Law broadened the rights of individuals to practice their sincerely held religious beliefs without being penalized by their employers. The law has been amended to prohibit employers, as a condition of obtaining or retaining employment (including opportunities for promotion, advancement or transfers), any term or condition that would require a person to violate a sincerely held practice of his or her religion, absent a showing of undue hardship on the employer's business. New York's law extends beyond merely granting time off for religious observance, to "accommodate employees' other religious practices and beliefs." It is designed to prohibit employers acting directly, or indirectly through others, to impose circumstances that would force individuals to forego a religious observance as a condition of employment. It is expressly an unlawful employment practice in most cases to deny an employee permission for leave *solely because the employee seeks to use that leave*

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to accommodate a religious observance.

The 2002 amendment to the New York State Human Rights law incorporates a higher standard for showing that the accommodation would create an undue hardship. The employer must accommodate the individual's protected religious needs unless, "after engaging in a bona fide effort," the employer is "unable to accommodate the employee's or prospective employee's sincerely held religious observance or practice without undue hardship on the conduct of the employer's business." "Undue hardship" means an accommodation requiring significant expense or difficulty (including a significant interference with the safe and efficient operation of the workplace or of a bona fide seniority system). The law defines the specific factors for making an undue hardship analysis involving the size, scope and overall operating costs of the enterprise. In addition, an undue hardship will be found if an accommodation will result in the inability of the employee to perform an essential function of the position in which he or she is employed.

Employers should note that employees who exercise their rights under this law are not entitled to premium wages or premium benefits (as defined in the law) for work performed during hours such premiums ordinarily would be available, if the employee is working during those hours only as an accommodation to his or her sincerely held religious beliefs. This provision overrides any contrary provision of state law. However, nothing in the law authorizing religious accommodations is intended to alter or abridge the rights of employees regarding the payment of wages or seniority privileges accruing to those employees. In order to comply with the current law in New York and minimize liability, employers should:

- Review and revise personnel policies and procedures to assure they do not conflict with the New York State Human Rights Law's requirements;
- Inform and train supervisors and managers, including recruitment personnel, on the requirements of religious accommodation;
- Establish procedures for evaluating requests for religious accommodation and assigning any make-up time. Specifically, document: (a) bona fide efforts to accommodate religious practices, and; (b) the grounds

for asserting "undue hardship" where applicable.

- Assure that personnel decisions, particularly adverse ones, are not influenced by an individual's exercise of these protected rights.

Employers who know their own policy regarding religious accommodation now will find it easier to adapt this policy, should the Workplace Religious Freedom Act of 2008 be passed by congress in 2009.

PayCheck Fairness Act

This bill was introduced March 6, 2007. It already passed the House July 31, 2008, but has not been voted on in the Senate. This act would amend the portion of the Fair Labor

Continued on following page

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Workplace from page 9

Standards Act of 1938 (FLSA) known as the Equal Pay Act to revise remedies for and enforcement of prohibitions against sex discrimination in the payment of wages to: (1) add nonretaliation requirements; (2) increase penalties; and (3) authorize the Secretary of Labor (the Secretary) to seek additional compensatory or punitive damages.

Healthy Families Act

This bill was introduced March 17, 2007 and has been referred to Committee.

This act would provide for paid sick leave to ensure that Americans can address their own health needs and the health needs of their families. In general it would apply to employees who worked at least 20 hours a week, and would mandate 7

days of paid sick leave.

Portnoy Messinger and Pearl would like to wish everyone a healthy and prosperous new year. •

On The Move/ People In the News

Mark Bedson, is now with **Kaback Enterprises**, 45 West 25th Street, New York, NY 10010. He can be reached at 212-645-5560 ext 126

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HVAC for Non-Technical People Available

The Air Conditioning Contractors of America has released "Understanding HVAC," a new 3-CD computer video training package designed to help non-technical office and sales staff better understand the HVAC business and their place in it.

This new program, taught by noted industry presenter Jack Rise, was created in response to several requests from ACCA contractor members seeking an easy way to bring their non-technical employees up to speed on HVAC and the contracting business.

"Understanding HVAC" is not about system design; instead it explains the basics of HVAC equipment, how important the HVAC contracting industry is, and how vital the role of each employee is in running a successful contracting business.

The three CDs, each of which include appropriate handouts, are:

Part 1, The Things That Make Us Different Are the Same

This session offers a brief history of HVAC and the industry's relevance in the modern world. Human comfort is discussed, and the importance of customer interaction at all levels of a contracting business. Also includes a

discussion of business cycles relative to weather and the economy, and the importance of communication and paperwork flow within a company.

Part 2, How Comfort Works

Simple definitions of important HVAC terms are discussed, and an air conditioning system is built "from the ground up" in order to help employees understand how the system works. Includes brief discussion of refrigerants, heat pump operations, duct system types, and standards and codes.

Part 3, How Much Does It Cost?

The cost of doing business is explained in detail, along with the need for training and the need to distinguish your company from the competition. Accessories such as humidifiers, electronic air cleaners, media air cleaners, UV lights, programmable thermostats and HRV/ERVs are all explained and their application discussed.

This 3-CD set offers contractors an excellent opportunity for contractors to offer their employees in all departments a solid grounding in what your business does, and a greater appreciation for the role that they each play. A review set of ten questions is included on each CD.

"Understanding HVAC" is available exclusively from ACCA for only \$299 (\$199 for ACCA members). It is available at www.acca.org/hvacessentials, along with the other products in this popular line of computer-based training from ACCA. It may also be ordered by phone at 888-290-2220. •



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Statement From Stuart S. Zisholtz, Esq.

Releasing Subcontractor Retainage

Almost every contract in the commercial arena contains a clause permitting the general contractor to withhold 10% retainage on behalf of the subcontractor.

The question becomes when is the general contractor required to release the retainage to the subcontractor.

From the general contractor's point of view, it holds the retainage as an offset in case the owner assesses back charges or liquidated damages upon closeout of the project that are due to the subcontractor's performance. From the subcontractor's point of view, retainage should be released upon successful completion of its work as opposed to completion of the entire project. Essentially, the contractor performing foundation work or demolition may have to wait for years on a major project until the final retainage is released.

There are two determinative factors which will decide when retainage can be released.

First, the party's contract must be reviewed to determine whether or not the general contractor may hold all of the retainage until the project is completed and its own retainage is released from the owner.

Second, if the project is complete, has the owner alleged any defects in the work of the particular subcontractor

who is seeking the release of the retainage from the general contractor?

Recently, two decisions from the Appellate Division have addressed these very issues.

In the first case, the subcontractor sued for the balance due on its subcontract. The general contractor paid the full subcontract price less 10% retainage. As a defense the general contractor claimed that since the owner had not accepted the project as complete, the contractor had no obligation to release the retainage. The contract between the general contractor and the subcontractor provided that the general contractor could withhold 10% retainage until such time as the entire construction project was completed and accepted by the owner of the project.

In response, the subcontractor argued that this clause was unenforceable and violated the prior decisions of the Court of Appeals which struck the pay if paid clauses. The Appellate Court disagreed and found that since the owner had not yet accepted the work, the general contractor rightfully could continue to hold the retainage.

In a second decision, a mechanical contractor sued to recover a balance due including retainage. The subcontractor was successful against the general contractor because it established that it had completed its work and that no back charges existed which pertained to its contract with the general contractor.

The key issue with respect to retainage is to review your



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contract to determine when it is appropriate for the retainage to be released. If the contract permits the release of the retainage only after the owner has accepted all of the work, then you are stuck. If however, you negotiate the contract to permit the release of the retainage once the owner has paid for and accepted the subcontractor's work, then you should be able to receive your retainage upon completion of your work.

Never Let Your Lien Time Run Out!

For a free copy of a pamphlet pertaining to payment bond claims and Mechanic's Liens, please contact me or the association.

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. •

Letters to the Editor

Please fax your comments or experiences that you would like included in our monthly newsletter. Send it in, hand write if you like. We will print it and see what others think. Fax...516-829-5472.



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