IN THIS ISSUE...

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

Air Conditioning Contractors of America
Greater New York Chapter

www.accany.org **PLEASE ROUTE THIS PUBLICATION WITHIN YOUR ORGANIZATION** **FEBRUARY 2013**

President's Message

Al Trudil

For those who attended last month's meeting it was very informative. Tim Devine did a very good job telling us about NYSERDA Business Partners Program and how we could get paid for doing our PM's.

This year we will be having at least two educational seminars – one for management and the other will be for technicians. The time, date and subject will be outlined in upcoming newsletters and also

Turn to President's Message on page 3

Thursday, February 7th Meeting

INSURANCE PANEL

Liability
Workman's Comp
Auto

Especially after Hurricane Sandy, a detailed discussion of these topics is vital to every ACCA business owner.

Presented by a team of experts from these three distingished insurance firms:

Newbridge Coverage
Amerisc
FOA & Son

Join your fellow ACCA members at this important meeting!

Westbury Manor

Cocktails at 5:30 pm; Dinner at 6:30 pm
Register Online at www.accany.org

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

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posted on the website.

We would like you to think about how ACCA could help you this year, are there any issues or topics you want to hear or know about. If there is please contact any board member and let them know. Please use ACCA as a networking experience and a place where we can bring the hottest and most relevant business topics back to you and your day to day operations.

I look forward to seeing you at the next meeting.

— Al Trudil

Interested in Shaping Your Business Future and that of our Organization? Volunteer to serve as an ACCA Board Member. Contact Executive Director John DeLillo (516-922-5832) or any ACCA Board Member.

ACCA Greater NY Chapter

Greater New York Contractors' News is printed monthly by the Greater New York Chapter of ACCA. Questions should be directed to the appropriate director or committee member for assistance. While this newsletter is designed to provide accurate and authoritative information on the subjects covered, the Association is not engaged in rendering legal, accounting, or other professional or 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

Just when manufacturers were proposing to accept their last orders for 80% natural gas furnaces due to the federal guideline changes for minimum efficiency, the government changed the rules and back pedaled on the efficiency requirements for the Northeast (see page 7).

So now, instead of gearing up to eliminate 80% furnaces and prepare for 90% furnace installations, many contractors and manufacturers are staying the course of 80% furnace installs. This is big news for many contractors who have placed huge furnace orders.

In January, the board of directors of the New York ACCA, under the direction of our new president, Al Trudil, has prepared an agenda to reach our goals for our all volunteer organization. We are concentrating on the relevancy of our organization and how it can assist contractors and suppliers.

The essence of our existence is to provide quality information, networking, and education to our members resulting in value to each participant. Many contractors and suppliers have forged important relationships that have resulted in excellent advice and additional profits. It's also provided a roadmap to avoid costly mistakes.

Make it your business to join ACCA for a wealth of knowledge that you can not put a price on.

Also, the board of directors would like to thank John Dellillo for his countless hours of oversight that he provides as our executive director. John and his staff have provided us with the support for our operation and once again we salute his work and guidance.

—Anthony N. Carbone

Sandy Revisited – Repair vs.Replacement of Flood Submerged HVAC Equipment

By John Ottaviano – Air Ideal

The NY State Department of State has issued the following: *"Floodwaters are not just water; the water may also be contaminated with chemicals, sewage, oil and other debris. When the floodwater is salt water, its corrosive effects are particularly damaging. Any or all of those can affect the integrity and performance of electrical systems and equipment, either immediately or eventually. In many cases, it is ultimately safer, less expensive and less time-consuming to replace the equipment*."

The Air Conditioning, Heating and Refrigeration Institute (AHRI) states*: "Replace, Don't Repair. Flood-damaged heating and cooling equipment and systems should be replaced and not repaired, according to AHRI. All inspection and replacement work on flooded equipment should be performed by qualified heating and cooling contractors, not by homeowners. You can turn misfortune into opportunity by considering new, energy-efficient models that will lower your future energy bills. Also ask your local utility about available rebates for new energy-efficient gas or propane furnac*es."

The following web sites detail the need to replace flooded equipment as a reference for homeowners and adjusters:

http://www.ahrinet.org/floods+and+hvacr+equipment.aspx

http://www.weil-mclain.com/en/weil-mclain/resources/homeowner/library/articles/servicing-flooded-boilers/

http://emersonclimateconversations.com/2012/11/29/cleaning-up-after-hurricane-sandy/

http://safeharborinspections.com/hurricane-sandy-what-has-to-be-replaced-when-damaged-by-salt-water.html

It isn't just the question of corrosion and potential fire hazard that is a problem. Flood waters have also been contaminated with chemicals, oil, gas and other VOCs that are found on the street and in the ground, homes and other commercial spaces. Any ductwork or equipment that has been contaminated with flood water is subject to future corrosion and airflow through it can spread mold spores, chemicals and volatile organic compounds throughout the home, especially if insulation has been soaked. Also, most manufacturers will no longer cover warranty on equipment that has been in contact with flood water (see Weil McLain link). Replacing ductwork that has been in contact with flood water is the best course of action. Cleaning and sanitizing a few fittings in many instances is just as costly.

For those who must rebuild and replace equipment, there are several additional items to consider. Many times it is not just imperative to replace the equipment and electrical components, but other system components as well. All metal alloys have the potential for corrosion and pitting over time once exposed to salt and other corrosive compounds. Although copper refrigerant lines may not require immediate replacement, it has been the experience after previous floods that they may pit and form pin hole leaks a few years hence. The is especially the case with suction lines that are typically insulated with armaflex insulation that will soak up and trap moisture and saltwater and potentially eat at braised and solder joints. Another concern during the rebuilding process is that most homeowners and commercial spaces will be built to newer efficiency codes and standards and have an updated envelope that will affect equipment sizing. It is best to run new cooling load and heat loss calculations based upon the insulation factor of the newly rebuilt structure as opposed to just replacing what existed with the same capacity. In this way, you can avoid system short cycling and inefficient operation.

For these reasons, our recommendations to all flood victims, their insurers and mortgage holders is to replace any equipment that has been fully or partially submerged, whether or not it is or can be made operational. In this way, it will reduce liability for all and protect the subject property from further claim if and when the equipment fails or causes hazard in the future. •

Proposed Settlement Rescinds Regional Standards For Residential Gas Furnaces

By Charlie McCrudden

The Department of Energy (DOE) has agreed to withdraw the pending minimum energy conservation standards that include regional standards for residential non-weatherized and mobile home gas furnaces. The term "non-weatherized furnace" is used to define furnaces that are designed to be placed indoors.

According to the terms of the settlement, portions of the June 27, 2011 Direct Final Rule setting the minimum AFUE standards for residential non-weatherized and mobile home gas furnaces at 90% in the Northern region and 80% in the Southeastern and Southwestern regions is vacated, along with the pending May 1, 2013 compliance date.

Pending the Court's acceptance of this settlement, non-condensing furnaces remain legal to install in all states until further notice.

The DOE also agrees that it will initiate a new rulemaking for minimum energy conservation standards for residential furnaces and allow stakeholders the opportunity to comment.

The portions of the Direct Final Rule setting new minimum energy efficiency standards for central air conditioners and heat pumps, including any regional standards, remain in place, along with the January 1, 2015, compliance date.

On December 23, 2011, the American Public Gas Association (APGA) challenged the Direct Final Rule in a suit brought in the United States Court of Appeals for the District of Columbia. Last year ACCA joined the case as an Intervenor aligning with the APGA. Should the settlement agreement be accepted by the Court, this case would be resolved.

More details and analysis of this settlement will be forthcoming once it is accepted by the Court. •

WELCOME NEW MEMBERS

New Contractor Member

C & B Plumbing
Robert Courtien
629 5th Avenue
Pelham, NY 10803
phone: 914-738-7878
fax: 914-738-8274
email: *bobby.courtien@cbplumbinginc.com*

New Bronze Associate Member

FOA & Son
Greg Reddock
68 South Service Road
Melville, NY 11747
phone: 516-228-1244
fax: 516-228-1235
email: *greg.reddock@faoson.com*
website: *foason.com*

AIA Responds To Market Trend For "Green Projects" With New AIA Contract Forms

By Michael D. Ganz, Esq

Today, more and more buildings are being designed and constructed as "green projects". In the United States (and in other countries around the world) LEED certification is the recognized standard for measuring building sustainability. The LEED green building rating system is designed to promote design and construction practices that increase profitability while reducing the negative environmental impacts of buildings and improving occupant health and well-being. LEED certification includes a rigorous third-party commissioning process and a rating system offers four certification levels for new construction -- Certified, Silver, Gold and Platinum which correspond to the number of credits accrued in five green design categories: (a) sustainable sites, (b) water efficiency, (c) energy and atmosphere, (d) materials and resources and (e) indoor environmental quality. There are other third-party certifications for green projects such as The Green Globes System. In addition, Energy Star for energy efficiency programs requires third-party certification. These certifications provide market recognition of a building's environmental attributes and are being required of more projects, not only the high profile projects of the past.

In response to this market trend, in 2011, the American Institute of Architects ("AIA") released its AIA D503-2011 Guide for Sustainable Projects to assist owners, contractors, and architects with drafting contracts for projects seeking some form of sustainable project goal. The D503-2011 contains an overview of legal and practical issues arising on green building projects and model contract language that can be added to the standard AIA contract forms to address sustainable project goals.

However, as a follow-up to the D503-2011 Guide for Sustainable Projects, the AIA released new contract forms in May 2012 to address these same issues. These new contract forms include the A101-2007 SP (Owner-Architect Agreement); A201-2007 SP (General Conditions); A401-2007 SP (Contractor-Subcontractor Agreement); B101-2007 SP (Owner-Architect Agreement); C401-2007 SP (Architect-Consultant Agreement); and B214-2012 (Scope of LEED Certification Services for Architect). All of these forms with the exception of the B214-2012 are generally modified versions of the conventional 2007 AIA contract forms with additions relating specifically to sustainable project goals. (See below for key additions)

The new AIA contract forms contain several new defined terms that project participants will need to learn and become familiar (See Section 1.1.9 below). The "Sustainability Objective" is the defined sustainable goal for the project, which could include third-party certification or other sustainable goals not involving project certification or registration. Once the "Sustainability Objective" is defined, the "Sustainable Measures" are identified, including specific design elements or construction means or methods that are necessary to achieve the "Sustainability Objective". The "Sustainability Plan" is the document that specifically identifies and describes the "Sustainability Objective" and that allocates roles and responsibilities for individual achievement of the "Sustainable Measures".

These new AIA contract forms contain other notable provisions with which contractors must familiarize themselves. For instance, there are rigorous additional provisions for "cleaning up" the site. The Contractor may be required to recycle, reuse, remove or otherwise dispose of materials in accordance with the projects "green requirements". The Contractor must also prepare and submit to the Architect and Owner a construction waste management and disposal plan setting forth the procedures and processes for salvaging, recycling or disposing of construction waste generated from the project.

Another crucial provision for a Contractor has been added to the standard A201 form mutual waiver of consequential damages in which the Owner and Contractor waive indirect damages against each other should there be a breach of contract. For example, in the A201, the Owner waives the indirect damages of loss of use, rent and the Contractor waives indirect damages for loss of bonding and indirect delay damages such as additional home office overhead. The new AIA A201-SP form adds the provision that the Owner waives "*damage resulting from failure of the Project to achieve the Sustainable Objective or one or more of the Sustainable Measures including unachieved energy savings, unintended operational expenses, lost financial or tax incentives, or unachieved gains in worker productivity*." This provision is extremely important to the Contractor since those damages to the Owner could be substantial and in excess of the Contractor's contract price for the project.

The new sustainable project versions of the A101, A201, A401, B101, and C401 conventional contract documents relate only to projects utilizing a design-bid-build project delivery method. Projects utilizing other delivery methods, such as design/build, do not yet have AIA contract forms addressing these issues. However, the model contract language outlined in the D503-2011 Guide for Sustainable Projects may be utilized for these types of projects in order to address the same type of sustainability process.

The B214-2012 an update from AIA's prior LEED Certification exhibit, which was originally released as the B214-2007. The B214-2012 document can be used as an addendum to the B101 Owner-Architect Agreement, where the Architect is also going to perform the services relating to LEED Certification. However, the B214-2012 could also be used as the basis for a separate agreement between Owner and an independent LEED consultant for the project. Unlike the other new sustainable contract forms, which can apply to a broad range of sustainable project goals, the B214-2012 is specifically designed for a project that is seeking certification as a LEED project.

Project participants involved in any aspect of green building or sustainability should familiarize themselves with these new contract forms and evaluate whether these contracts are right for their particular projects. Even if you choose not to use the new contract documents, these new forms should nonetheless serve as a good excuse to review (and perhaps to modify) old contract forms to ascertain whether those forms effectively address the unique aspects of projects incorporating sustainability goals.

Key Additions to Standard AIA-201 2007 for Sustainability Projects

§1.1.1 The Contract Documents

The Sustainability Plan is made part of the Contract documents.

§1.1.9 Special Definitions

§1.1.9.1 Sustainable Objective

The Sustainable Objective is the Owner's goal of incorporating Sustainable Measures into the design, construction, maintenance and operations of the Project to achieve a Sustainability Certification or other benefit to the environment, to enhance the health and well-being of building occupants, or to improve energy efficiency. The Sustainable Objective is identified in the Sustainability Plan.

§1.1.9.2 Sustainable Measures

A Sustainable Measure is a specific design or constructive element, or post occupancy use, maintenance or monitoring requirement that must be completed in order to achieve the Sustainable Objective. The Owner, Architect and Contractor shall each have responsibility for the Sustainable Measure(s) allocated to them in the Sustainability Plan.

§1.1.9.3 Sustainability Plan

The Sustainability Plan is a Contract Document that identifies and describes the Sustainable Objective, the targeted Sustainable Measures: implementation strategies selected to achieve the Sustainable Measures, the Owner's, Architect's and Contractor's roles and responsibilities associated with achieving the Sustainable Measures, the specific details about design review, testing or metrics to verify achievement of each Sustainable Measure and the Sustainability Documentation required for the Project.

§1.1.9.4 Sustainability Certification

The Sustainability Certification is the initial third-party certification of sustainable design, construction or environmental or energy performance, such as LEED, Green Globes™, Energy Star or another rating or certification system, that may be designated as the Sustainable Objective or part of the Sustainable Objective for the Project. The term Sustainable Certification shall not apply to any recertification or certification occurring subsequent to the initial certification.

§1.1.9.5 Sustainability Documentation

The Sustainability Documentation includes all documentation related to the Sustainable Objective or to a specific Sustainable Measure that the Owner, Architect or Contractor is required to prepare in accordance with the Contract Documents, Responsibility for preparation of specific portions of the Sustainability Documentation will be allocated among the Owner, Architect and Contractor in the Sustainability Plan and may include documentation required by the Certifying Authority.

§1.1.9.6 Certifying Authority

The Certifying Authority is the entity that establishes criteria for achievement of a Sustainability Certification and is authorized to grant or deny a Sustainability Certification.

The Owner's Additional Responsibilities

§2.2.6 The Owner shall perform those Sustainable Measures identified as the responsibility of the Owner in the Sustainability Plan, including any approved changes, or as otherwise required by the Contract Documents. The Owner shall require that each of the contractors and consultants perform the services or work assigned to them in accordance with the Sustainability Plan.

§2.2.7 The Owner shall comply with the requirements of the Certifying Authority as they relate to the ownership, operation and maintenance of the Project both during construction and after completion of the Project.

The Contractor's Additional Responsibilities

§3.1.2 The Contractor shall perform the Work in

Continued on page 10

January 10th Meeting

ACCA members gathered at the LaGuardia Marriott on January 10th to hear a representative from the New York State Energy Research and Development Authority (nyserda) discuss energy and the environment plus 2013 initiatives.

New AIA Contract Forms

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accordance with the Contract Documents, including any Sustainability Measures identified as the responsibility of the Contractor in the Sustainability Plan.

§3.2.2.1 The Contractor shall meet with the Owner and Architect to discuss alternatives in the event the Owner or Architect recognizes a condition that will affect achievement of a Sustainable Measure or achievement of the Sustainable Objective. If any condition is discovered by, or made known to, the Contractor that will adversely affect the Contractor's achievement of a Sustainable Measure for which the Contractor is responsible pursuant to the Sustainability Plan, the Contractor will promptly provide notice to the Architect and meet with the Owner and Architect to discuss alternatives to remedy the condition.

§3.11.2 The Contractor shall be responsible for preparing and completing the Sustainability Documentation required from the Contractor by the Contract Documents, including any Sustainable Documentation required to be submitted after Substantial Completion. The Contractor shall submit the Sustainability Documentation to the Architect in accordance with any schedules or deadlines set forth in, or as otherwise required by the Contract Documents. In the absence of schedules or deadlines for submission of Sustainability Documentation in the Contract Documents, the Contractor will submit the Sustainability Documentation with reasonable promptness so that the Architect may submit the Sustainability Documentation to the Certifying Authority.

§3.15 Cleaning Up

§3.15.1 The Contractor shall also recycle, reuse, remove or dispose of materials as required by the Contract Documents.

§3.15.2 The Contractor, in accordance with the Contract Documents, shall prepare and submit to the Architect and Owner a construction waste management and disposal plan setting forth the procedures and processes for salvaging, recycling or disposing of construction waste generated from the Project.

§9.8 Substantial Completion

§9.8.1 Except for that portion of the Sustainability Documentation which by its nature must be provided after Substantial Completion, the Contractor shall submit all other Sustainability Documentation required from the Contractor by the Contract Documents no later than the date of Substantial Completion. Verification that the Project has achieved the Sustainable Objective, or the actual achievement of the Sustainable Objective, shall not be a condition precedent to issuance of a Certificate of Substantial Completion in accordance with Section 9.8.4

§9.15.1.6 Claims for Consequential Damages (Excluded Under AIA 201)

3. damage resulting from failure of the Project to achieve the Sustainable Objective or one or more of the Sustainable Measures including unachieved energy savings, unintended operational expenses, lost financial or tax incentives, or unachieved gains in worker productivity.

Michael D. Ganz is a partner at Tunstead & Schechter, a law firm concentrating in construction law. Mr. Ganz is a graduate mechanical engineer and has worked as a project engineer for both private companies and government agencies before practicing law. More information about Tunstead & Schechter is available by contacting Mr. Ganz at mdg@tslawyers.com. Tunstead & Schechter is located at 500 North Broadway, Suite 101, Jericho, New York 11753 (516) 822-4400. •

Best Time to Think About Remarketing

By Kelly Hiner

Experienced fleet managers know that achieving strong resale value requires thoughtful planning that begins at the time of vehicle purchase. Those who plan properly may be rewarded, not only with reductions in total fleet spend but also with as much as 20 percent retained equity at the time of sale. Increased residual value requires ordering the right vehicles for the job, disciplined maintenance, quality repairs, appropriate vehicle replacement intervals and drivers who are focused on safety. Cutting corners on any of these disciplines means shortchanging yourself down the road.

The process begins when selecting new vehicles. Choosing the right vehicle for the job must be the first priority. While this may seem obvious, it is all too often neglected. Engine size, tow capacity and payload are all critical when choosing the most efficient vehicle to do the job safely. For example, trying to save on fuel or acquisition expense by substituting a lighter duty vehicle when a heavier duty vehicle is more appropriate can be a mistake. Not only will overloading the vehicle diminish fuel economy, it can also cause premature mechanical failure and potential safety risks.

Once the correct class of vehicle is determined by matching it to the specific usage need, it's time to consider how equipment choices can impact resale value, as well as help to improve employee satisfaction and retention. A professional fleet management company can assist by leveraging its remarketing professionals' experience. Some equipment options can recoup their upfront cost by increasing resale value at the end of the vehicle's cycle. Although it depends on the specific vehicle, features such as third-row seats, alloy wheels, leather, and moon roofs can help differentiate individual vehicles in the wholesale market and drive competition.

Similarly, vinyl wraps and decals may be a better choice than custom paint to advertise the company name and promote brand recognition. When wraps and decals are properly removed, there is no loss of value at resale because the vehicle is ready for the next purchaser. This also insures a company's brand will not be tarnished if the new owner does not repaint over the existing graphics.

Determining the best time to replace vehicles is another key component that can impact the total cost of ownership. While it may seem tempting to run vehicles longer to delay acquisition expense for new vehicles, the cost savings may be negated by loss of fuel efficiency, increased maintenance repairs and employee downtime.

How and when a company decides to sell its vehicles depends on many variables, including factors such as time of year, mileage, vehicle type, age and maintenance history. Knowing when to dispose of older vehicles, a process known in the fleet management industry as "cycling," can ensure vehicles are replaced at appropriate intervals to achieve optimum performance and the best resale value. Trained remarketing professionals can help business owners take the guesswork out of this process by providing guidance on industry trends and disposal channels as well as general market knowledge.

Last, but certainly not least, it is important to resist the temptation to cannibalize vehicle parts before selling. Exchanging used tires from a unit coming out of service to use on a vehicle that is still in the fleet may seem like a good idea initially, but in reality you'll end up paying for new tires anyway when the new buyer deducts the cost for replacing the worn tires.

Today's vehicles, technology, and used car market are rapidly changing. Working with a professional fleet management company can help ensure an efficient plan that will best utilize vehicles from acquisition to disposal and everything in between.

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. •

People & The Workplace

By Alan B. Pearl,
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Review Your Leave Policies

New York regulations require employers to grant employees the opportunity to take leave in certain circumstances. This article will cover some of those circumstances.

Jury Duty Leave

Under New York Judiciary Law Section 519, an employer cannot discharge or penalize an employee for taking jury duty leave if the employee notified the employer prior to doing so. An employer is permitted to withhold wages of an employee who is serving jury duty during the period of such service. However, if the employer employs more than ten (10) employees, it may not withhold the first forty ($40) dollars of the employee's daily wages during the first three (3) days of jury service. Notably, the employer is not obligated to pay the employee the jury fee ($40 per day) if the employee is not missing work to serve as a juror. Moreover, if the wage for time missed from work is lower than the jury fee, the State pays the difference between the wage and the jury fee. Violations of Section 519 are punishable as criminal contempt of court.

Military Spouse Leave

Section 202-i of the New York Labor Law allows employees who work for an employer for an average of twenty (20) or more hours per week and have a spouse in the United States military to take up to ten (10) days unpaid leave when the spouse is on leave from the military while deployed during a period of military conflict to a combat theater or combat zone of operations. The law applies only to employers who employ "twenty or more employees at at least one site." In addition to this state law, employers should also be mindful of the federal requirements governing military family leave contained in the Family and Medical Leave Act (FMLA).

Blood Donation Leave

New York requires employers that employ twenty or more employees at at least one site to grant employees who work for the employer for an average of twenty (20) or more hours per week the opportunity to take leave to donate blood. The employer must grant an employee who wants to donate blood at least three (3) hours of leave of absence in any twelve (12) month period or "allow its employees without use of accumulated leave time to donate blood during work hours at least two times per year at a convenient time and place set by the employer, including allowing an employee to participate in a blood drive at the employee's place of employment." The employer must provide written notice to its employees of their right to take blood donation leave in the manner specified by New York State Department of Labor guidelines.

Be sure to amend your company handbook to comply with these leave policies. If you haven't had your handbook reviewed in two (2) years, I suggest you do so. Our beginning of the year program is in full progress and members are invited to send in their handbook for review.

American Taxpayer Relief Act of 2012

On New Years Day, Congress passed the American Taxpayer Relief Act of 2012. The Act not only averted the "fiscal cliff," it also extends a number of employment-related tax provisions. For example, the Act permanently extends the employer-provided education assistance exclusion, which permits employees to exclude from income up to $5,250 per year in employer-provided education assistance. The Act also extends federal emergency unemployment benefits, the Work Opportunity Tax Credit, and the exclusion for employer-provided transit and vanpool benefits. Notably however, the Act does not extend the two (2) percent FICA payroll tax cut.

FLSA and Training Programs

Many employers have asked me whether they must compensate their employees for attending training programs. Under federal law, there are circumstances where employers do not need to pay their employees to attend such programs. Regulations to the Fair Labor Standards Act(FLSA) provide that "[a]ttendance at lectures, meetings, training programs and similar activities need not be counted as working time if: (a) attendance is outside of the employee's regular working hours; (b) attendance is in fact voluntary; (c) the course, lecture, or meeting is not directly related to the employee's job; and (d) the employee does not perform any productive work during such attendance." Under the regulations, "training is directly related to the employee's job if it is designed to make the employee handle his job more effectively as distinguished from training him for another job, or to a new or additional skill." Notably, "[w]here a training course is instituted for the bona fide purpose of preparing for advancement through upgrading the employee to a higher skill, and is not intended to make the employee more efficient in his present job, the training is not considered directly related to the employee's job even though the course incidentally improves his skill in doing his regular work."

Should these topics require elaboration please contact me at ABPearl@pmphr.com. •

Make a habit of checking the ACCA national website www.acca.org regularly for up-to-date information on our industry.

Statement From Stuart S. Zisholtz, Esq.

Payment and Performance Bonds

Almost all public projects require payment and performance bonds. Many large, private projects also require payment and performance bonds. I have written numerous articles about the time restraints associated with claims under each of the bonds. This article, however, will address the rights of the surety company in any claim brought against it.

A payment bond inures to the benefit of the subcontractors and suppliers. In the event a subcontractor and/or a supplier are not paid, they have the right to institute a claim against the surety for the balance due. The surety, in turn, will defend the claim utilizing various legal arguments but most of all will adopt all of the defenses of its principal.

A performance bond inures to the benefit of the owner. The principal on the bond guarantees performance of the contract with the owner. Failure to perform under the terms of the contract may result in the owner seeking to have the surety complete the project. Again, the surety's defenses are based solely on various legal arguments as well as adopting the position of the principal.

Once litigation commences, the surety usually has two options available to it. The surety may defend the claim using its own counsel or it may tender the defenses to the principal requesting that the principal pay all legal costs and retain its own counsel. However, if the surety tenders the defense but later determines that it may be at risk in paying any of the claims under the bond, a conflict of interest may arise between the surety and the principal. The surety will ultimately seek reimbursement through an indemnification agreement that was executed with the principal at the time the bonds were issued.

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. •