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Greater New York Contractors' NEWS



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February 2007

President's Message



Ken Ellert

You couldn't tell by the weather that it is January. On the plus side, our home heating bills are down from last year and I'm still getting in a round of golf once in a while. On the other side there is virtually very little repair service or major breakdowns of equipment. For any of us that depend on the weather to generate

Please turn to PRESIDENT'S MESSAGE on page 3

FEBRUARY MEMBERSHIP MEETING

Alan Pearl
of
Portnoy, Messinger, Pearl & Associates
will head a timely presentation on
Wage and Hour Issues
Proper Employee Classification
Privacy Issues in the Workplace

Thursday, February 1, 2007
Westbury Manor

Cocktails 5:30 pm; Dinner 6:30 pm

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PRESIDENT'S MESSAGE *from page one*

service and sales, I hope you've come up with some inventive ways to keep busy.

A reminder that the ACCA National Convention is coming up in March in Orlando, Fl. There are many interesting workshops and seminars scheduled. This event is always well attended and can be an invaluable source of information to help you become a better manager and be more profitable. Specifics on the event and reservations can be found on their web site at: www.acca.org. I hope to see a few of you in Orlando.

Our board orientation meeting will be held shortly. We will be setting up our calendar of events for the upcoming year. If anyone has a topic that they think would be of interest to the members, please call or e-mail John DeLillo or me.

This year we implemented a new tier schedule for our associate members. We believe that this new system provides a substantial savings if you sign up for the higher levels of participation. If you have any questions regarding how the new system is structured and what it has to offer please contact John DeLillo at his office @ 516 922-5832. —**Ken Ellert**



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Editor's Notes

By Anthony N. Carbone

Alternative Energy.

Where do we go from here?

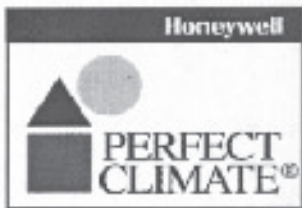
Alternative energy seems to be on everyone's mind, especially when oil prices were beginning to become incredibly expensive (so much for taking over the third largest producers of oil in the world); hybrid cars, hybrid air conditioning (Carrier), what's next?

Richard Kessel of LIPA says we must act. A barge in the sound called "Broad Water", carrying liquid natural gas. The commercials on the radio claim every resident customer will save at least \$300 per year. Is that with or without the "surcharge relief" or, if you're not comfortable with this, how about a set of windmills in the ocean?

This seems harmless. Atlantic City has this at the new Borgata Hotel and Casino. The Caribbean countries seem to be using this for some time now and I have not heard of any wayward or loose propellers flying off of them.

What happened to the "Hydrogen Farms?" This sounded interesting. I thought it might be more interesting if the hydrogen cells could be located at each individual home and we could produce our own energy and maybe back-feed the surplus to the utility.

Well, the most interesting change has been a weather surcharge by the utility, KeySpan, because this is the warmest December and January on record. I will say I love El Nino. This certainly tends to shake out marginal companies with the lack of work. Everything is changing even alternative energy! – *Anthony N. Carbone*



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- DECEMBER 7, 2006



Research Lays Groundwork for More Efficient Air Conditioning System Designs Using Flattened Tube Heat Exchangers

Arlington, VA — Replacing traditional round tube heat exchangers with flattened tube technology may enable the air conditioning industry to provide comfort cooling using a new refrigerant, while increasing efficiency, but not the system's size.

A newly released Air-Conditioning and Refrigeration Technology Institute (ARTI) report characterizes how flattened-tube heat exchangers function under various environmental conditions and pressures.

"Flattened tube heat exchangers have received much attention as a possible replacement to traditional round tubes, but until now little research has been done on the thermal-hydraulic performance of flattened tubes under wet, dry and frosted conditions," said Elizabeth Jones, a project manager with ARTI, which provided the funding for this project under its HVAC&R Research for the 21st Century program. "This research report addresses the fundamental science needed to allow the air conditioning

industry to engineer products using this technology."

The geometry of a flattened tube, compared with the traditional round tube heat exchanger, allows for improved heat transfer and thermal performance; increased coil and overall unit efficiencies; substantial refrigerant charge reduction; and more compact and reduced coil size.

In the ARTI report, University of Illinois researchers provide analysis, modeling and interpretation of air-side, thermal-hydraulic performance for flat tube heat exchangers under wet and frosted surface conditions. They make design recommendations to help improve the performance of plain, wavy, strip and louvered fins for flattened tube heat exchangers. They conduct a full assessment of the air-side thermal-hydraulic performance of flattened, round, and finned heat exchangers. In addition, researchers developed a new method to provide data on retention and drainage of water from the air-side surface of flat-tube heat exchangers under a number of operating conditions.

To read the final report, "High Performance Heat Exchangers for Air-Conditioning and Refrigeration Applications (Non-circular Tubes)," go to <http://www.arti-research.org/research/completed/final-reports/20021-final.pdf>. •



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People & The Workplace

By Alan B. Pearl,

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Equal Pay For Equal Work

In 1963 Congress passed The Equal Pay Act, a law requiring employers to pay men and women equal pay for equal work: it is a familiar old theme. Until recently however, the law instituting this very noble goal has not been given much attention. As a matter of fact, discrimination against women in the American workplace is very much alive and well in spite of various laws to designed to prevent it.

Women continue to encounter serious obstacles to equal job opportunity, and continue to be passed over for jobs and promotions for which they are qualified.

Women earn, on average, only 73 cents for every dollar earned by all men. The wage gap hovered around 60 cents to the dollar throughout the 1960s and 1970s, then decreased during the 1980s. During the 1990s, however, progress slowed in closing the gap. Minority women fare significantly worse. African American women earn 63 cents and Hispanic women 53 cents for every dollar earned by white men. In turn, this wage gap during a woman's working years leads to pension inequity later on.

There seems to be recent evidence that the Equal Employment Opportunity Commission is paying more attention to remedying the wage gap problem in the workplace. The EEOC has instituted an "Equal Pay Initiative" which it hopes will begin to close the wage gap. What this means to the employer is that the commission will strengthen enforcement in this area. In the past few years the EEOC has recovered more than \$15,000,000 dollars in back pay for more than 11,000 women.

We recommend that all employers conduct a self-audit of their pay practices, which may bring to light otherwise unrecognized pay inequities.

FSLA: Administrative Employees - Not A Catch-all Exemption

The Fair Labor Standards Act requires that many employees in the United States be paid at least the federal minimum wage for all hours worked and overtime pay at time and one-half the regular rate of pay for all hours worked over forty hours in a workweek.

There are employees who are not covered by the Act; "exempt" employees who work in an executive, administrative, professional and outside sales capacity form the largest group. Job titles do not determine the employee's status - an employee's specific job duties and salary must meet all the requirements of the Department of Labor's recently revised regulations.

Most employers continue to assume that if someone works in the office doing paperwork, then it is alright to classify them as exempt from the overtime requirements of the Fair Labor Standards Act - after all, isn't that what "administrative" means?

The requirements are actually pretty stringent for the meeting the Administrative exemption and more and more employers are fighting and losing this battle with the Department of Labor.

To qualify for this exemption, the employee must be compensated by salary, and must earn at least \$455 per week. The employee's primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers, AND the employee's primary duty includes the exercise of DISCRETION AND INDEPENDENT JUDGMENT with respect to matters of significance.

Your Controller would probably qualify as an exempt employee, but think again about your secretary, your file clerk, the mail room attendant, etc. Although these employees may earn enough, and may perform office work, how much independent judgment and discretion do they exercise? Does the employee have the authority to formulate, interpret or implement management policies or operating practices? Does the employee have the discretion to deviate from established

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policies and procedures without prior approval?

Some recent Department of Labor opinion letters on the subject have helped to drive home the message - the exemptions are not meant to apply to everyone —

- 1) Mortgage loan officers are exempt because they exercise discretion in choosing products for the client.
- 2) Loss prevention managers are exempt because their work was focused on the economic business of the employer.
- 3) Service Station managers are exempt even if they occasionally perform non- exempt work (pump gasoline, change oil, etc.).
- 4) Senior legal analyst not exempt as a professional because the employee did not exercise discretion and independent judgment to satisfy the administrative requirement and also did not have an “advanced degree” to satisfy the “learned professional” requirement.
- 5) Respiratory therapists - non exempt - the degree to become certified can be either two years or four years, and therefore, not enough advanced study is required in order for them to be classified as “learned professionals.”

Additionally, a recent class action law suit by all HomeDepot “Assistant Managers” is alleging that they were misclassified as exempt employees, when their duties really only consisted of the duties of a laborer. (As

an example of where title doesn’t mean anything)

Most often the Department of Labor looks to the production/office work dichotomy to decide one way or the other if the administrative exemption applies. Let me explain: the function that the person performs must be one that directly relates to general business operations as opposed to working on a manufacturing production line or selling a product in a retail or service establishment. Some examples of who would be exempt (provided by the Department of Labor): tax, finance, accounting, budgeting, auditing, insurance, quality control, purchasing, marketing, human resources. Employees who are probably not exempt (from recent cases): claims adjusters, dispatchers, customer service representatives, assistant manager who does not actually supervise anyone.

An ounce of prevention is worth a pound of cure in this area. A classification review of your company’s personnel for compliance with the FLSA may be worthy of your attention this year. Contact PMP if you would like us to send you a complimentary salary classification form that we customarily utilize when performing an FLSA review.

As always, should you have any questions or require more information regarding the FLSA regulations or any other topic covered in this article, please do not hesitate to contact Alan Pearl at 516-921-3400, or at abpearl@pmphr.com. •



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Statement From Stuart S. Zisholtz, Esq.

“Pay If Paid” Clause

For well over a century, parties to a construction contract in New York were permitted to incorporate a “pay if paid” provision. Thus, a general contractor was only obligated to remit payment to a subcontractor if it received payment from the owner.

In 1995, The Court of Appeals, New York’s highest court, found that such clauses violate New York’s public policy and were unenforceable.

Last month, the Court of Appeals rendered another decision with reference to a “pay if paid” clause.

In that case, the plaintiff, a subcontractor and Delaware Corporation was hired by a general contractor, a Florida Corporation. The parties agreed that Florida law would govern their contract. Unlike New York, Florida permits “pay if paid” clauses to exist. The question for the Court was whether New York would enforce the “pay if paid” clause even though New York has already found that such a clause is unenforceable.

By a unanimous decision, the New York Court of Appeals held that the parties choice of the law controls and, therefore, the “pay if paid” clause is enforceable.

The Court’s logic was that the parties should be free to chart their own contractual course and the courts should not interfere with the parties choice of the law. Thus, even though the clause violates public policy, the court refused to interfere with the parties’ intent in choosing Florida law.




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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 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. •

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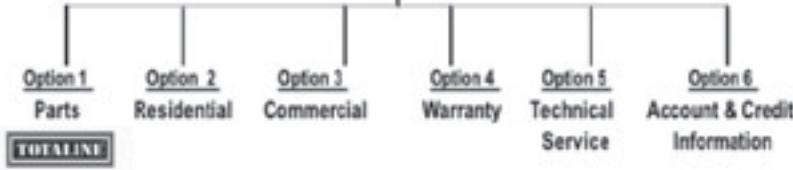
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