

# THE ILLINOIS MANUFACTURER

SECOND QUARTER 2020



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For address changes and adjustments, write to *The Illinois Manufacturer*. Presort standard postage paid at Bloomington, IL. Postmaster: Send address changes to *The Illinois Manufacturer*, 220 East Adams Street, Springfield, IL 62701. Telephone: (217) 522-1240.

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100 YEARS IN PUBLIC SAFETY:  
NYCO PRODUCTS COMPANY



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# MANUFACTURING ANSWERS OUR NATION'S CALL

MARK DENZLER, PRESIDENT & CEO



Our world literally changed in the blink of an eye. Rolling out of February, the United States had a record 50-year low unemployment rate of 3.5 percent and record highs in the stock market with the longest bull market run in history. The number of unemployed Americans tallied less than six million and manufacturers, along with schools, hospitals, and transportation companies, struggled to find qualified workers.

And then the novel coronavirus hit. We knew it was coming but the reports out of China were falsified and did not indicate the true magnitude of this pandemic. Many of our leaders ignored the warning signs or delayed a response. States are literally competing against each other for life-saving ventilators and equipment in a “Hunger Games” scenario. Our nation was wholly unprepared for the wave of illness that is overrunning hospitals and throwing our economy into a tailspin.

Over the past weeks, the stock market tumbled, losing nearly a quarter of its value and the unemployment numbers skyrocketed. More than 22 million Americans applied for government assistance through the second week of April and that number will continue to surge. We may even exceed the Great Depression when a quarter of our citizens could not find work.

The headlines are grim, the task is daunting.

But throughout the course of our history, every time that America has faced a challenge, manufacturers have answered the nation's call. Every single time. We are doing it again today in this battle against the global pandemic and the response has been heartening, a glimmer of hope in a sea of despair. American manufacturing innovation and ingenuity shines in the time of crisis.

Governor JB Pritzker asked me to co-chair a Task Force in Illinois designed to help increase production of important equipment and supplies, a task that I gladly accepted because I know that our manufacturers can meet this challenge. This war-like effort has been the most formidable undertaking of my career, and also one of the most frustrating, humbling, and rewarding.

The IMA's first and primary mission was making sure that manufacturers could continue operating during this pandemic. We drafted the language contained in the Governor's Executive Order declaring manufacturing as essential so that women and men on factory floors could continue producing life-saving equipment for doctors, nurses, and first responders while making sure that our grocery stores are stocked with food.

I've been overwhelmed and amazed at the manufacturing response from companies large and small across the entire state. Abbott Laboratories created a new testing kit that takes only takes minutes for results and is making them in mass quantity. When Illinois' testing fell short, scientists at AbbVie flipped a switch and began producing thousands of vials of testing reagents for public health officials. ComPac International in Carbondale created brand new, CDC-approved shipping containers for testing kits. Diageo went from making liquor to hand sanitizer while Richards-Wilcox moved from shelving to emergency beds used in triage hospitals. Ford, GM, and Brunswick are making masks and ventilators. Industry leader 3M used their surge capacity plan developed after the last pandemic to double production of N95 masks. The list goes on and on and on...

Our team sprang into action with laser-like focus to make sure that our members had real-time information that was accurate. We are delivering daily updates for IMA members and opened these up for all manufacturers across the state because we need everyone to succeed. More than 5,000 individuals participated in our first five webinars and the IMA team has answered more than 1,000 individual emails from our members.

We are working with officials from the White House to the State House to ease regulations and make sure that economic relief packages help manufacturers succeed and grow. This crisis demonstrates again the need for a strong manufacturing base in our nation.

Manufacturers, and the Illinois Manufacturers' Association, are answering our nation's call during this extraordinary time in our history. I'm grateful and proud of the women and men in manufacturing along with doctors, nurses, emergency responders, truck drivers, retail clerks, and others on the front lines.

American manufacturers are standing up and leading the way forward. We will get through this together and emerge stronger as a nation. ♦



# THANK YOU, MANUFACTURERS

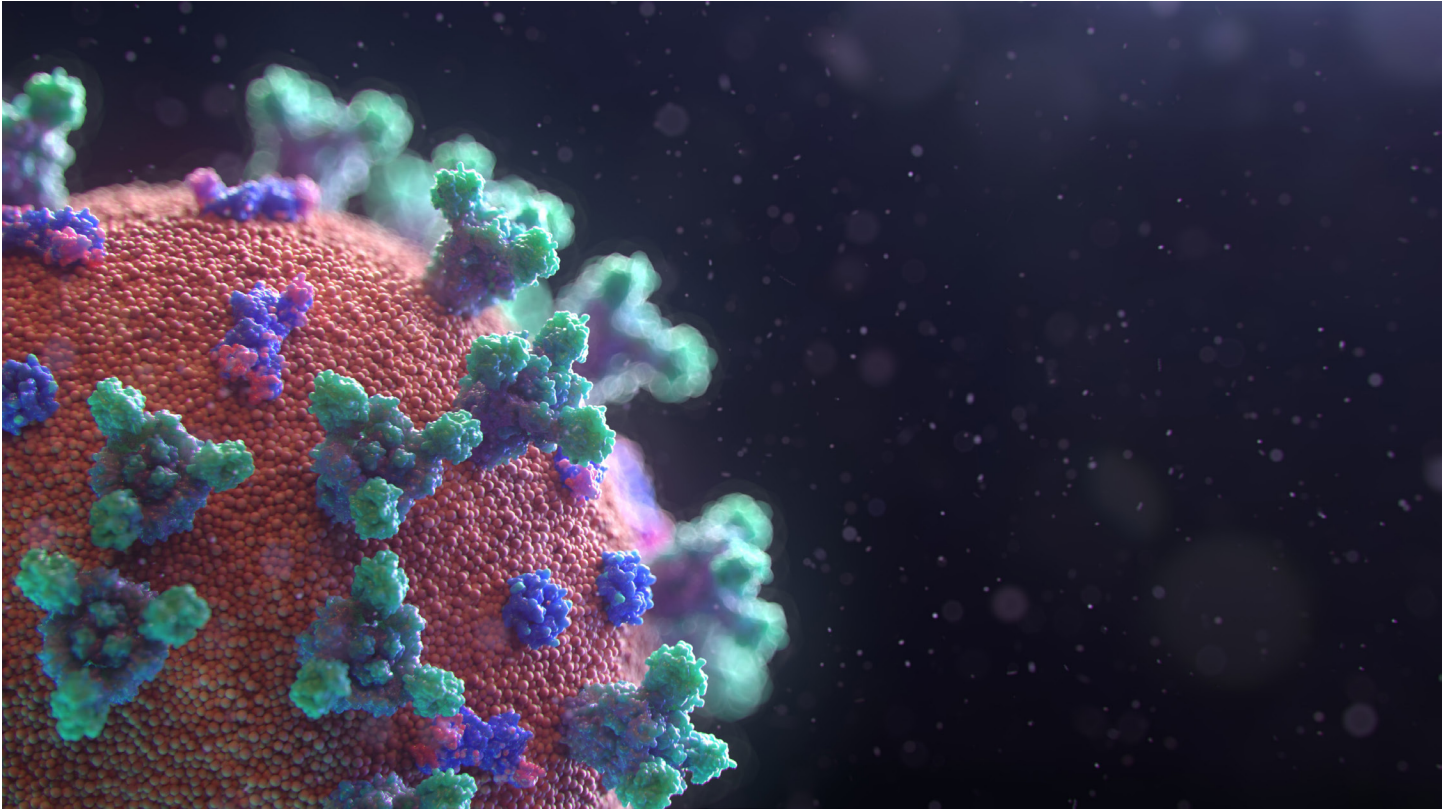


# YOU ARE ESSENTIAL



# COVID-19 AND THE EVOLVING INSURANCE LANDSCAPE

BLUE CROSS AND BLUE SHIELD OF ILLINOIS



In recent months, we have witnessed the significant toll that the COVID-19 pandemic has taken on the American public and global economy as a whole. Social distancing, shelter-in-place orders, and quarantines have become a part of everyday life. And while all of us have had to navigate the fear and anxiety associated with the health and well-being of our loved ones, business owners and their leadership teams also carry the burden of maintaining the well-being of their businesses and protecting the livelihood of their workforce as well.

It is apparent that most commercial businesses have experienced, or will experience, a substantial reduction in their business activities with many currently involved in a complete shutdown.

In an effort to stem the tide of the financial strain associated with COVID-19, the Federal Government passed the \$2.2 trillion Coronavirus Aid, Relief and Economic Security Act

[CARES] to support American families and small businesses. The Illinois Department of Commerce & Economic Opportunity also rolled out emergency assistance programs targeting Illinois Small Businesses; however, fear still persists that the funds available at this time are not enough.

The American Property Casualty Insurance Association [APCIA] estimates that U.S. small businesses will experience \$220 - \$383 billion in financial losses per month as a result of the Coronavirus outbreak. State and federal aid will certainly help business owners, but most will still be looking for additional avenues to maintain positive cash flow and minimize disruption to their business.

To that end, it is prudent that businesses understand the insurance implications of COVID-19. Does Business Interruption coverage apply to the Coronavirus outbreak? Can your existing commercial policy be a source

of cash flow improvement? What is the current outlook for future renewal rates and how can your business prepare?

## COVID-19 Coverage Issues

Over the last month, the most common question fielded by insurance agents across the country has been, "Is there coverage in the Business Interruption policy for business closure or slow down as a result of the Coronavirus?"

The short, simple answer is no, there is no coverage afforded under a traditional Business Interruption policy. The longer answer is more complicated as there are a few coverage forms in the market that could provide the potential for limited coverage under very specific circumstances but, for the majority of businesses, business interruption coverage does not apply.

In the interest of understanding, let's quickly explore the high-level fundamentals of Business Interruption cov-



erage (also referred to as Business Income):

- **What is Business Interruption insurance?** Business Interruption pays for the actual loss of business income you sustain due to the necessary suspension of your operations as a result of a direct physical loss. The loss or damage must be caused by, or result from, a covered cause of loss.

- **“Direct Physical Loss”** – Business interruption coverage is part of a property coverage form and requires a direct physical loss shutting down operations. *\*Physical loss, as understood and applied in the courts, requires physical damage to a covered property.*

- **Would Business Interruption coverage trigger as a result of a government shutdown?** Most policies include coverage tied to actions of a Civil Authority. This coverage is designed to provide loss of income sustained if a Civil Authority prohibits access to your premises as a result of a covered loss to an un-owned property. Coverage can be enacted if the property loss creates dangerous physical conditions as a result of the damage, or the action is taken to enable a civil authority to have unimpeded access to the damaged property.

However, prior case law states that a virus does not meet the definition of a direct physical loss or a covered cause of loss under a traditional property insurance policy.

Again, the common interpretation of Business Interruption forms is that a pandemic event does not trigger coverage. However, this issue is currently being challenged in the courts and there is legislative pressure to amend policy terms. Ultimately, case law or a change in legislation will determine the insurance companies’ obligations at some point in the future.

Insurance Journal ([www.insurancejournal.com](http://www.insurancejournal.com)) and Business Insurance ([www.businessinsurance.com](http://www.businessinsurance.com)) are reliable resources for new developments surrounding Business Interruption coverage and the COVID-19 pandemic.

### Opportunities for Improved Cash Flow

Insurance programs may not be designed to cover financial losses associated with COVID-19 but they may serve as a resource for businesses to improve short term cash flow.

**Mid-Term Exposure Changes** – An-

nual policy premiums for general liability and workers’ compensation are calculated using projected sales and payroll figures, respectively. These policies require a year-end audit to determine the actual rating exposure incurred and premium is adjusted accordingly. Businesses receive an additional premium invoice if sales or payroll exceed projections or a return premium if sales or payroll were less than projected.

- **Did you know that you do not have to wait until an audit to make exposure changes?** If your business has been impacted by COVID-19, you can contact your agent and advise them to reduce the sales and payroll exposure on your policies to a more appropriate projection. Endorsed changes will impact your annual premium and reduce the value of future invoices.

- **Auto Collision Coverage** – Another possible opportunity for short-term premium reduction could include the removal of collision coverage from unused vehicles. However, it is important to remember to add coverage back prior to using vehicles again.

**Carrier Premium Accommodations** – Many insurance companies are proactively offering premium deferments and accommodations to businesses impacted by government imposed shutdowns. Some have even gone as far as agreeing to suspend policy cancellations during the shelter-in-place order. Contact your agent or your carrier directly to find out if any premium accommodations can be made if cash flow is an issue for your business.

**Premium Financing Options** – The current interest rate environment makes premium finance companies an attractive option with many providers offering a variety of payment relief strategies to help businesses manage cash flow during these difficult times.

### Policy Renewal Considerations

Before the COVID-19 outbreak, the property and casualty insurance industry was already forecasting increased rate positions for the 2020 policy year. In the industry, we refer to cyclical rate increases as a hard or hardening market. There are a number of reasons for a hardening market but the simplest explanation is that premium dollars cannot support incurred losses. Insurance companies often use investment income to offset their underwriting losses but,

in the absence of a bullish market, loss funds are depleted. Therefore, rates are increased to help normalize the market and better fund claim activity.

Projections vary by line of coverage but, on average, rates were forecast to increase by 10-12 percent over the next 12 months to support under-funded losses. It is too soon to determine exactly how the Coronavirus will accelerate the hard market but, as discussed, underwriting exposure is down [sales and payroll], claim activity is increasing, and the stock markets are performing poorly.

So what should businesses expect and how can they prepare?

**Challenging Renewal Cycles** – Carriers will seek to take premium increases where possible and may elect to non-renew risks deemed high hazard or businesses with poor claim history.

**Be Strategic when Forecasting Sales and Payroll Exposure** – For purposes of cash flow, perhaps consider conservative sales and payroll forecasts for renewal quotes. Again, general liability and workers’ compensation policies are auditable. Be thoughtful and diligent in forecasting for underwriting purposes and plan for your year-end audit as well.

**Consider Competition** – In a hard market, insurers are looking for opportunities to improve the profitability of their portfolios. This is achieved by increasing premiums and non-renewing risks they deem undesirable. As such, businesses should consider exploring alternative quote options for their renewals.

Obtaining a competitive alternative does not mean that you have to leave your current provider but it does ensure that you are securing the best coverage and pricing terms available to you in the market.

2020 has been among the most challenging years – if not the most challenging year – in history. COVID-19 has changed our way of life and forever altered the way we do business around the globe. For now, the insurance industry doesn’t have an easy answer to the economic impact of the Coronavirus shutdown. However, well-educated businesses have an opportunity to use their existing insurance programs to improve cash flow and better prepare for the challenges ahead. ♦



# LET'S TALK ABOUT SOMETHING NORMAL

JIM NELSON



**I**t's been "All COVID All the Time" for the past several weeks, and I thought it might be an opportunity in this issue of The Illinois Manufacturer to write a riveting article about the latest performance report for Illinois schools. After all, following Stay-at-Home orders and washing our hands eight times a day, Illinois will one day return to normal.

So, how are Illinois schools doing? Frankly that's a loaded question and the best answer available is, it depends on where and how much you are willing to spend on local schools. A recent report published by Advance Illinois, The State We're In, reveals some things to consider.

Looking at overall rankings against the other 49 states, Illinois' K-12 system ranks 25th in learning conditions, 31st in equity outcomes and 22nd in overall outcomes. In postsecondary, we rank 28th in learning conditions, 15th in outcomes, but 42nd in equity outcomes.

While these rankings are not something worth getting overly excited about, they do indicate that the state's overall education system is relatively stable with the exception of postsecondary equity outcomes.

We know that state spending on education is one of the top three expenditures made by government; the other two drivers being long overdue payments to the state's five state pension systems and Medicaid. If we look at K-12 spending, in 2007 Illinois ranked a dismal 45th in per pupil spending at \$4,557. In 2017, we increased that amount to \$7,503, a 60 percent increase that improved our national ranking to 24th overall. Okay, that puts us in the ball game, but if a private sector company invested 60 percent to improve operations and products only to raise itself to middle-of-the-pack status, what has it really accomplished?

Moving on, state spending for higher education is downright embarrassing. In 2007, state per pupil spending stood at \$7,276 and a 19th national ranking. By 2017, that spending plummeted to just \$3,636 and as a state we stand appallingly at 45th in the nation.

Manufacturers have long known that a knowledge and skills gap is ever present in our education system, and challenges to find the right people with the knowledge and skills needed even for entry level jobs continue to grow unabated as technology advances. They also know that producing a mediocre product will not compete against better products.

The Illinois Manufacturers' Association has never been, nor are we now, an advocate of "just throw money at it" and all will be well. And while in this case there is truly a "you get what you pay for" element, if Illinois is to break out of mediocrity it must be willing to make the financial investments necessary to get the job done. But there must also be some real reformation in the total education system – from pre-school to post-doctorate – if we are to get a better product, which in this case is better comprehensive outcomes for every student. Illinois needs to look at its multilayered agencies that deal with education, and there are five, and ask, are we getting the best administration and oversight that gets the result we want?

I've always believed the salient questions to be asked if I'm not getting the results I want begins with "what are you going to do to get the result you do want" followed by three examination questions: 1) What is working well and needs to be kept, 2) What isn't working well but with the right changes could be beneficial, and 3) What should we stop doing? All too often, we don't get to the last question, and in this case all we need to do is look at the sheer number of statutory mandates to realize there are lots of things Illinois schools should stop doing.

Many of those conversations are going to be hard, and some toes may get bruised along the way. But parents, teachers, unions, administrators, and employers all have a stake in assuring that our total education system consists of a comprehensive strategy that prepares young people for a career, and provides employers with a talent pool of knowledgeable and skilled workers from which to choose. We have a choice to stay satisfied somewhere in the middle of the pack, or create an education system that is second to none.

We've talked here before about the state's overall goal that by 2025, 60 percent of all Illinois adults will have a post-secondary degree or industry recognized certificate and while the state has made modest progress, since 2013 we've moved the needle from 43 percent to just 45 percent in 2018. Based on this trend, we should be hitting the 60 by 25 goal right around 2050.

It's time we started asking questions. ♦

A handwritten signature in black ink that reads "Jim Nelson".





# IMA HEALTH PLAN

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by Manufacturers for Manufacturers.



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## 100 YEARS IN PUBLIC SAFETY: NYCO PRODUCTS COMPANY

**2020** has been a big year for Nyco Products Company of Countryside, Illinois. Not only is the company celebrating 100 years of manufacturing, but it also produces a one-step disinfectant – “Sani-Spritz Spray” – that has been in very high demand over the last several weeks. With the advent of the novel coronavirus (COVID-19), cleaning and disinfecting are now more important than ever before, and Nyco has been ramping up production of their cleaning agents while continuing to meet customer demands in the wake of this global crisis.

One hundred years ago, the state of Illinois had a different problem that young entrepreneur Vince Nyad decided to tackle – the need for clean, safe drinking water. Armed with a truck and a store of large glass bottles, Nyad’s “Chippewa Water” was distributed to restaurants and businesses across the state. Eventually as water purification improved in Chicago, Vince began selling a different product. “Beckleener”, a powdered cleaner for hard surfaces, quickly became Nyad’s more profitable venture, and Vince began a new company — Nyco. The janitorial product was the basis for what grew into a company that now makes hundreds of cleaning and disinfecting products for a wide range of markets.

Today, Nyco is manufacturing cleaners for everything from floor, laundry, and hand soaps to floor, carpet, car and boat care. The company also manufactures green chemical cleaning products that are certified by Green Seal™, NSF, and/or recognized for safer chemistry under the EPA’s Safer Choice program. But of all the products that Nyco makes, the one that is getting the most attention these days is the Sani-Spritz

Spray.

Sani-Spritz Spray is an EPA-approved one-step disinfectant cleaner that has demonstrated effectiveness against viruses similar to SARS-CoV-2, a novel coronavirus. It can be used on washable hard, nonporous surfaces of countertops, glazed tiles, stovetops, sinks, and toilet bowl surfaces, and also on soft surfaces such as fabric window treatments, bags, upholstered couches, sofa, chairs and seat cushions.

As hand sanitizers and home cleaning products have been flying off the shelves, Nyco’s Sani-Spritz Spray has also become a high-demand product.

Bob Stahurski, current CEO, who served as President from 1986-2018, said he has never seen anything quite like it before.

“Cleaning and disinfection awareness is at an all-time high. We used to sell much less of the Sani-Spritz Spray than we are right now,” Stahurski said, remarking that he had received an order for 20,000 cases of the disinfectant earlier that morning.

During this time, many manufacturers have switched their lines over and re-tooled to produce life-saving products for our nation. Similarly, Nyco has had to adjust to an influx of orders for their disinfectant. While the company is not drastically changing its product lines, Nyco’s team of heroes are dedicated and prepared to handle the needs of its customers.

Forecasting supply needs, finding a reliable chain of suppliers, and efficiently managing in-house production has been Nyco’s key to success.

“The most important aspect is being able to get all of the components we need for our products,” Stahurski said. “We need bottles, caps, sprayers, and corrugated cardboard for our boxes. We have had to talk with suppliers and build up a





Nyco is keeping up with the high demand for disinfectant.



Vince Nyad began his company to provide cleaner, safer drinking water for Illinois.



Helping Hand Center employees and coaches assemble test kits for a drain cleaner.

stock of orders that will keep us with a steady supply of materials so that there is no disruption.”

If necessary, Stahurski noted, components from another product such as a glass cleaner may be diverted for use in Sani-Spritz bottles. However, he does not predict a new line opening up for the production of Sani-Spritz Spray.

“There’s an uptick, a peak, and a decline — just like the virus. We have to maintain our focus on our existing customer base and make sure they know they are not abandoned. To be in business for 100 years, you have to adapt with the times but also stay true to your roots,” Stahurski said.

As a way of maintaining the needs of existing customers and accounting for an uptick of orders of Sani-Spritz Spray, Nyco has extended its operational hours and turned to the community, offering work for those who are temporarily unemployed.

“We’ve moved production to Monday through Saturday,” said John Wunderlich, President of Nyco. “We’ve also approached some of the local restaurants that furloughed workers to come work with us.”

Nyco has also hired eight employees and expanded their second shift in order to accommodate incoming order demand.

While Nyco has been working with the community to get through the coronavirus pandemic, the company has been involved with another community partnership program for several years and was even selected in 2016 as the “Community Partner of the Year” by Helping Hand Center located in Countryside, Illinois.

Helping Hand Center is a nonprofit organization dedicated

to improving the lives of children and adults with disabilities in suburban Cook County and greater Chicagoland communities. The program provides Vocational Training, Job Placement Services, and Employment Consultation with the goal of helping individuals with disabilities prepare for, find, and maintain jobs in the community based on their career interests and skills.

Nyco employs 16 adults with disabilities. Some have stayed for years, but most are there to learn a new set of skills before they settle into more permanent jobs.

“We want to be a steppingstone for these individuals,” Stahurski said. “We are here to help them gain some confidence and skills that they can transfer into other jobs in the community. Having this partnership with Helping Hand Center has been the best win-win in the world.”

And a win-win it is! Helping Hand employees of Nyco earn the same wages as other Nyco employees while learning new skills, and Nyco receives help with small batch assemblies that cannot be automated. Whether it’s an oddly shaped label that can’t be put on a line or a sub-assembly for a bottle tip, employees from the Helping Hand Center have aided in keeping Nyco’s product lines efficient since 2012.

Though Nyco no longer sells bottled water, the company has stuck to its roots in public safety throughout the last 100 years. Working with the times and always making sure to provide the products businesses need most, Nyco has not only adapted but continues to flourish even in the most uncertain of times. The IMA is proud to honor Nyco and all makers that are boldly moving forward. ♦



# FINAL NLRB RULE LESS LIKELY TO FIND “JOINT EMPLOYER” STATUS

ICE MILLER, LLP



In a favorable development for many businesses and the franchise community, the National Labor Relations Board (“NLRB”) published a final rule (the “Rule”) to clarify the standard for determining joint employer status under the National Labor Relations Act (“NLRA”). The new NLRB Rule went into effect on April 27, 2020.

The NLRB’s final Rule was published shortly after the Department of Labor published its own rule, which also narrowed the definition of joint employment under the Fair Labor Standards Act (“FLSA”). The DOL rule sets the joint employer standard for wage and hour-related complaints under federal law.

The NLRB Rule clarifies that a business or franchisor will be considered a “joint employer” of another entity’s employees only if the business exercises “substantial direct and immediate control” over one or more essential terms of employment of another employer’s

workers. This new Rule is more flexible than the old NLRB rule, because basic franchise structures, such as setting quality and operational standards, should now not be enough to make a franchisor a joint employer.

## Essential Terms and Conditions

The NLRB Rule provides that control by an employer over the essential terms and conditions of employment must be related to one or more of the following: wages, benefits, hours of work, hiring, discharge, discipline, supervision and direction.

## Direct and Immediate Control

Under the new Rule, “substantial direct and immediate control” is defined for each of these essential terms and conditions of employment as follows:

- **Wages** – the employer must determine the wage rate, salary or other rate of pay that is paid. The definition excludes from consideration cost-plus

contracts that establish wage reimbursement rates.

- **Benefits** – the employer determines the benefit plan (health insurance or pension) or level of benefits of the supplied employees.

- **Hours of work** – the employer determines the work schedules or hours worked, including overtime of the supplied employees. Establishing operating hours does not indicate control.

- **Hiring** – the employer determines which employees are hired and which are not hired. Setting minimal hiring standards would not demonstrate control over hiring.

- **Discharge** – the employer must make the actual decision to terminate the employee. However, providing negative reviews to the other employer would not demonstrate control over the discharge decision.

- **Discipline** – the employer must make the actual decision to suspend or discipline the employee. A report of



misconduct does not demonstrate direct and immediate control over discipline as long as it is provided to the other employer and not to the employee.

• **Supervision** – the employer must actually provide instructions on how to perform the work or issue performance appraisals. Limited and routine instructions on what work to perform or when and where to perform the work, but not how to perform it, does not indicate control.

• **Direction** – the employer assigns work schedules, positions and tasks to specific employees. Actually setting schedules or describing the work to be accomplished does not indicate control.

The final Rule makes the list of essential terms exhaustive. As a result, if an employer exercises direct control with another entity over portions of the employment relationship not listed above, that will not be enough to establish joint employer status.

### Substantial Control

The NLRB Rule also states that control exercised on a sporadic, isolated or de minimis basis will not be considered to be “substantial”. Under the new Rule, indirect control and/or contractually reserved control over essential employment terms may be considered for joint employer status. However, indirect or contractual control is only relevant if it serves as additional evidence of “substantial direct and immediate control” of essential terms of employment.

### The “Old” Rule

The new Rule replaces the prior broad standard adopted by the NLRB in its 2015 Browning-Ferris decision. In that decision, the NLRB only required indirect control of another entity’s employees to determine joint employer status. This old rule pulled many businesses into joint employer status. For example, under Browning-Ferris, contractually reserving but never exercising authority to control essential terms and conditions of another business’ employees may have been sufficient to establish joint employer status. The final NLRB Rule clarifies that these contractual provisions are not evidence of direct and immediate control.

### Related DOL Rule

In January, the U.S. Department of Labor (“DOL”) announced a final rule updating its regulations interpreting

joint employer status under the Fair Labor Standards Act (“FLSA”). This is the first substantive update by the DOL to FLSA’s joint employer rule in more than 60 years. The DOL rule addresses the question of who is the employer when more than one unrelated entity shares control over an individual employee or group of employees.

In the final rule, effective March 2020, the DOL announced a four-factor balancing test for determining joint employer status under the Fair Labor Standards Act. This test considers whether the alleged joint employer:

- hires or fires the employee;
- supervises and controls the employee’s work schedule or conditions of employment to a substantial degree;
- determines the employee’s rate and method of payment; and
- maintains the employee’s employment records.

The DOL rule clarifies that no single factor solely can be used in determining joint employer status, and the weight to give each factor will vary depending on the circumstances. Before it was approved, there was an increased potential for franchisors to be pulled into FLSA claims. With the new rule, if the franchisor is meeting the four-step test and is generally removed from the direct oversight of workers they will not be considered a joint employer under the new DOL rule. Also, staffing companies that place an employee with another employer are not liable for FLSA claims if they have no direct or indirect oversight under the four-part test. On the other hand, those companies that directly engage staffing companies or other similar vendors, will want to be sure and examine those relationships, since they can no longer declare joint liability in FLSA claims, except in limited circumstances under the four-part test.

### What’s Next?

If two entities are joint employers under the NLRB Rule, both employers must bargain with the union that represents the jointly employed workers, both are potentially liable for unfair labor practices committed by the secondary employer, and both are subject to lawful boycott and union picketing if there is a labor dispute.

The final NLRB Rule provides significant clarification whether a business is a joint employer. After Browning-Ferris, employers many employers backed away from relationships with temporary

agencies, distributors, suppliers, and third party vendors out of concern of being viewed as joint employers. With the new NLRB Rule, employers may feel more comfortable in revisiting these relationships, while being careful to avoid direct control over other entities.

The Equal Employment Opportunity Commission has recently announced it also plans to issue a rule clarifying when an employer should be classified as a joint employer under federal anti-discrimination laws, such as Title VII, the Age Discrimination in Employment Act (ADEA), or the Americans with Disabilities Act (ADA). At this time, the EEOC has not published a proposed rule on joint employment. Employers must recognize that the potential impact of the joint employer doctrine may be different depending on which government agency or court’s interpretation is applicable.

The new federal standards from the NLRB, DOL and potentially the EEOC, are a part of the Trump administration’s larger efforts to reverse Obama-era employment standards, and replace them with more employer-friendly interpretations.

Since the new NLRB and DOL rules are federal regulations and not federal laws passed by an act of Congress, a new Administration can overturn or change them without Congressional consent. With the uncertainty of the 2020 election and possible changes to the Administration or Congress, businesses and franchisors may be hesitant to drastically change business operations.

Employers should also keep in mind that state laws governing wages, discrimination, retaliation, unemployment benefits, workers’ compensation and payroll taxes often have their own separate standards for who is deemed an employee.

Many of these standards (such as the stringent ABC test required to prove independent contractor status in California and New Jersey) are difficult for many companies to satisfy, even when workers are happy with how they are being classified.

As the workplace continues to transform, employers should monitor these ongoing changes, establish any new compliance requirements, and take appropriate actions to minimize the likelihood that they will be deemed a joint employer. More laws and regulations should be anticipated in the future. ♦



# HOW SHOULD MY BUSINESS REACT TO HISTORIC LOW GAS PRICES?

CONSTELLATION



**W**armer-than-normal weather and robust production ~94 Bcf/day have led to consistent low natural gas prices. Gas prices peaked at \$2.79/MMBtu on November 8th and have declined over the course of this winter. NYMEX prices have traded below \$2/MMBtu since January 17th and recently dropped to a new low of \$1.75/MMBtu.

Because low prices historically have been short-lived when coming out of a warmer-than-normal winter, energy managers should look for opportunities to lock in lower prices that may be available now and in the near future.

## What is Happening?

The U.S. is on track to have the fourth warmest winter since heating degree day figures began being tracked in 1950, and as a result, demand for natural gas has been low this winter. The year-over-year natural gas underground storage surplus has almost doubled from 17 percent on November 1st to a current surplus of 35 percent or 613 Bcf. Natural gas producers are struggling to show

adequate returns to shareholders in this low-priced market and have cut capital budgets for drilling activity. This could lead to lower gas production in the second half of 2020.

Although natural gas supplies are plentiful currently, this may change as additional liquefied natural gas (LNG) trains come online the second half of 2020, potentially boosting exports, while domestic demand increases as well (i.e., primarily due to electric power generation). If gas production declines at the same time, the market could rebalance in the second half of 2020.

## How Long are Prices Expected to Stay Low?

It's important that customers keep in mind that gas prices at historically low levels have been short-lived.

In the 21st century, prompt-month natural gas prices have been below \$2 per MMBtu less than 95 days, or less than 1.5 percent of the more than 5,000 business days since the turn of the century.

It's important that customers keep in mind

that gas prices at historic levels have been short-lived.

Currently, the prompt-month NYMEX Henry Hub natural gas price contract is near a four-year low, while the NYMEX 10-year strip is near all-time lows (i.e., ~\$2.50). The last time the NYMEX was this low was back in the winter of 2015-2016 when we experienced a similar warmer-than-normal winter. Yet by the fall of 2016, prices for prompt gas were more than \$3.50 due to gas displacing coal generation and strong summer-driven electricity demand.

Customers should know that the supply and demand balance can change quickly if natural gas production begins to decline and demand remains robust for power generation and exports.

Constellation's managed natural gas solution allows customers to layer in a combination of fixed prices and floating prices designed to offer more price protection. Learn more about our customized natural gas plans today contact Richard Cialabrini at Richard.Cialabrini@constellation.com. ♦

Constellation – 24/7 access to billing and energy usage data



# HARNESS THE POWER OF PREDICTION IN LOGISTICS

AM TRANSPORT SERVICES

Many manufacturers see the logistics department as a cost center for their entire company – a necessary but aggravating evil. After all, you have to deliver your product or you can't invoice your customer. But this viewpoint is dated, and in fact, may be damaging to your bottom line. We're finding that savvy manufacturers can hedge operating costs by investing in logistics services to stabilize budgets and predict future costs - even in a disruptive market.

In a typical manufacturing business, the sales team relies on the logistics department in order to create and provide accurate quotes for end customers. However, the process for doing so is often cumbersome and not replicable. Many manufacturers are using an old "formula" they've been using for years, and the truth is, it's not actually a formula. In addition, it doesn't take a variety of variables (real-time market fluctuations, capacity considerations, etc.) into account. For example, let's say the "formula" relies on a flat rate of \$2.00 a mile that is then multiplied by the number of miles required to reach the end customer.

Sure, these sorts of formulas have worked in the past, but they are worthless during times of disruption, and the logistics industry is now operating under a new normal that is predicated upon the daily possibility of disruption by way of increased government regulations, weather-related events, or even geo political and/or mass health crises. (We have yet to see the full effects of the Coronavirus on today's and the future market.)

Too often, a sales team will invest time and money in training, sharpening sales messaging, prospecting customers, and a variety of marketing materials. What they forget, or perhaps do not realize, is they continue to use the same arbitrary formula that doesn't really take the scope of the logistics process into consideration - let's call it quick math - to price their products.

During our research of this phenomenon, we've found that a typical Illinois manufacturer spends at least 10 percent of their total revenue on supply-chain related costs. When you're using quick math numbers, this 10 percent adds up quickly. What man-

ufacturers don't know about the real cost (and cost savings available) in logistics hinders their ability to leverage logistics for the good.

Here's the good news. There are excellent tools out there. A combination of technology, data analysis, and long-term supply chain experience can be used by 3PLs to help sales teams predict pricing for future sales.

Here's how it works: A 3PL takes a look at the lanes involved to assess whether it's a good fit for their operations based on volume, weight, and transit times. Then with lane analysis, they can reach out to carriers who have run similar lanes before. This is where a 3PL's long-term relationships with a variety of preferred carriers in the market really benefits the manufacturer. Finally, a forward-thinking 3PL will use an always-evolving rating tool that utilizes internal and true market data to generate predictive rates

which means lower costs and higher efficiency for the manufacturer - especially when pricing future products.

Although 3PLs don't have a crystal ball, one of the reasons smart manufacturers turn to 3PLs is because they are looking for a trusted advisor to help them make sense of a volatile freight market. This relationship extends beyond securing a truck to pick up a load from your shipping dock. A good 3PL makes the time to understand your business, gets to know your customers, and offers cloud-based tools for accurate rate prediction.

Historically, logistics operations and outsourcing freight to 3PLs has been largely transactional. This is changing. With advanced technologies, long-term relationships, and data analysis, 3PLs can help manufacturers predict which will make a difference in your budget. ♦



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# MEMBERS IN THE NEWS: STEPPING UP IN THE FIGHT AGAINST COVID-19

**W**hile much of our state has been staying at home, businesses in Illinois have risen to the challenge and ramped up production, switched production lines to manufacture much-needed medical supplies, developed new life-saving products, and donated money and supplies to the cause. IMA members are making the headlines for their efforts, and our team is honored to assist in boldly moving these makers forward. Thank you for your service to our state, to the nation, and the world.

## 3M Doubled Production of N95 Face Masks to Fight Coronavirus

*from Bloomberg*

When the world started clamoring for respirator masks to help confront coronavirus, 3M was ready.

The company has in two months doubled global production of N95 masks to about 100 million a month, and it's planning to invest in new equipment to push annual mask production to 2 billion within 12 months. On March 22, Chief Executive Officer Mike Roman said in a news release that 3M had sent 500,000 respirators to hard-hit Seattle and New York City, and that it was ramping up production of hand sanitizers and disinfectants as well. Two days later, Roman said 3M would work with Ford Motor Co. to produce powered air purifying respirators, waist-mounted devices that blow air into helmets that shield wearers.

3M makes about two dozen versions of the N95, for different industrial and medical purposes.

The N95 respirator is so named because, worn properly, it blocks at least 95% of airborne particles from entering a wearer's mouth and nose, while still allowing respiration through the microscopically porous shell.

The filters can block invaders as small as 0.3 microns, or about 1/100th the thickness of a human hair.

## Abbott Laboratories New Coronavirus Test Provides Results in as Few as Five Minutes

*from TIME*



On March 27, the U.S. Food and Drug Administration granted emergency use to Abbott Laboratories for its rapid COVID-19 test designed for doctor's offices, urgent care centers and smaller hospitals without complex testing labs. According to the Illinois-based company, the test can give positive results in as little as five minutes, and negative results in about 13 minutes.



A 3M employee prepares surgical face masks for packaging.



The test runs on Abbott's ID NOW device, which is about the size of the toaster, and is currently used by many sites to quickly test for flu, strep and respiratory syncytial virus (RSV) while patients wait. For COVID-19, health providers would have to order an additional \$40 cartridge, about the size of a replacement ink cartridge for printers, specifically developed to pick up genetic signatures of the SARS-CoV-2 virus. Most insurers have pledged to cover the cost of the test, which is about the same price as the ID NOW test for flu, without additional costs to patients who qualify.



The Abbott test—like the gold standard COVID-19 test developed by the U.S. government—uses chemicals to shatter the virus' outer shell so it spills out its genetic material, in the form of RNA. Chemical reactions then amplify that genetic material so special molecular probes in the test solution can pick up even small amounts of virus. That's where the rapid test differs from the others in use right now; with the traditional technology, that amplification process requires repeatedly cycling the temperature of the chemical reactions from low to medium to high and back down again. The ID NOW device can perform the genetic expansion at a constant temperature, which means it can spit out results more quickly.

### Caterpillar Foundation Commits \$8.5 Million to Global COVID-19 Response Efforts

As the events surrounding the COVID-19 pandemic continue to evolve rapidly, the Caterpillar Foundation, the philanthropic arm of Caterpillar Inc. announced it is committing \$8.5 million to support global communities, including underserved populations, who are affected by the virus.

The Foundation's investment will support nonprofit organizations who are working to help prevent, detect and respond to the pandemic; providing resources to hospitals, medical staff and patients; addressing food insecurity; and enabling online STEM and coding education for youth impacted by school closures.

"These investments are an important expression of our company's values," said Jim Umpleby, Caterpillar Chairman and Chief Executive Officer. "As we all work together to fight the pandemic, the Foundation's resources will provide essential support in communities around the world."

The Caterpillar Foundation is also expanding its existing U.S. Matching Gifts Program to provide a 2:1 match on employee and retiree donations made to eligible nonprofits beginning March 16 through May 1, 2020, per the program conditions that can be found at [caterpillar.com/matching-gifts](http://caterpillar.com/matching-gifts).

### Com-Pac: Shipping containers for tests

*from Chicago Tribune*



Medical packaging manufacturer Com-Pac International has made shipping containers for disease tests such as the Ebola virus and anthrax. In March, it started making shipping containers for COVID-19 tests, too.

"We took some of our miscellaneous components, put them together to fit what the CDC (Centers for Disease Control and Prevention) requires," said Greg Sprehe, president of the Carbondale-based company. "We have just been getting orders like crazy."

The coolers Com-Pac are assembling for the COVID-19 tests are about the size of two shoe boxes, Sprehe said. Labs need the tests to remain frozen, so the coolers must be outfitted to do so.

Com-Pac uses a production line to make specimen bags, like the biohazard bags that hold vials of blood after it is drawn from a patient, Sprehe said. Shipping containers are typically assembled by the employees as orders are placed.

But Com-Pac had to triple capacity to fill the orders coming in for COVID-19 test containers, Sprehe said. It set up a "pop-up production line" to more efficiently assemble the coolers, which each need the proper labels, specimen bags and other components.

The company added about 10 new employees to its 250-person workforce, and many people are working overtime.

### Diageo Pledges 8 Million Bottles Of Sanitizer For Health Workers

*from Forbes*

Drinks giant Diageo pledged to enable the creation of over eight million bottles of free hand sanitizer intended for frontline care workers during the fight against the coronavirus.

The company behind Johnnie Walker whisky and Smirnoff vodka is the largest spirits producer in the world, and it is donating two million liters of alcohol to manufacturing partners for production. In this case, it consists of grain neutral spirit (GNS), ethyl alcohol distilled at 96% abv, that will be distributed globally.

Working with national governments where it has distillation operations, as well as partner hand sanitizer manufacturers, the company is aiming to deliver sanitizer to frontline care workers as soon as possible.

In the Diageo's official press release for the story, chief executive Ivan Menezes highlighted Diageo's commitment to



this effort.

"Healthcare workers are at the forefront of fighting this pandemic and we are determined to do what we can to help protect them. This is the quickest and most effective way for us to meet the surging demand for hand sanitizer around the world."

## Exelon Contributing More Than \$1.15 Million To Support Communities During COVID-19



Exelon Corporation and its family of companies announced today that they will donate more than \$1.15 million to national and local relief organizations to support communities impacted by the spread of the coronavirus.

To further assist families and businesses experiencing financial stress during this public health crisis, all Exelon utilities -- Atlantic City Electric, BGE, ComEd, Delmarva Power, PECO, and Pepco -- and Constellation have suspended service disconnections and are waiving new late payment charges until at least May 1.

In addition, the Exelon Generation power plants are supporting local food banks, senior centers and other aid organizations in surrounding communities.

The donations will support all efforts these organizations are collectively undertaking to assist communities during this crisis, including the delivery of food assistance, financial resources and health care services, among other urgent needs.

## Ford using F-150 parts to design respirators for coronavirus fight

*from Fox News*



Ford is helping 3M redesign the powered air-purifying respirator (PAPR) that it makes for first responders and health care workers to protect them from contracting the virus while treating patients. The new device incorporates a fan normally

used to for ventilated F-150 seats, 3M HEPA filters and power tool batteries for portability.

Ford is looking into the feasibility of manufacturing them at an initial rate of 1,000 units per month at the Advanced Manufacturing Center, where it currently 3D-prints brake parts for the Mustang Shelby GT500, with plans to quickly expand production beyond that number. Ford is also working with GE Healthcare to engineer a simplified version of its much-needed ventilator that it said could potentially be built at a Ford facility.

In the meantime, Ford has started producing transparent face shields to protect health care workers from bodily fluids and expects to be manufacturing them at a rate of 100,000 per week by next week.

## GM offers manufacturing blueprints for face masks to 600 auto parts suppliers amid virus pandemic

*from CNBC*

General Motors is encouraging and empowering its suppliers to assist in production of medical face masks for frontline workers amid the coronavirus pandemic.

In a note to the suppliers, Shilpan Amin, GM's vice president of global purchasing and supply chain, said it is making the automaker's step-by-step manufacturing plans for the personal protective equipment available to any company willing to join in the cause.

"Our ultimate goal is to get more masks to the people who desperately need them," he said in part of the message obtained by CNBC. "We also recognized it would be counterproductive if GM -- or any other manufacturer -- competed for supplies with existing medical-mask companies. By making available GM's production processes to our global supply base, we hope to facilitate other companies' efforts to bring more materials, more equipment and ultimately more face-masks to the community."

GM, according to a spokesman, provided suppliers detailed specs on materials, equipment, and processes -- essentially, what suppliers would need to know to ramp up their own production lines. He said the message was sent to 600 suppliers.

## GSK Supports Global Efforts to Tackle COVID-19

GSK is donating \$10 million to WHO and the UN Foundation's COVID-19 Solidarity Response Fund to support WHO and partners prevent, detect and manage the pandemic, particularly where the needs are the greatest. The company is also working with five partner companies and research groups across the world to make its vaccine adjuvant technology available to support COVID-19 vaccine research programs.

The use of an adjuvant is of particular importance in a pandemic situation since it may reduce the amount of vaccine protein required per dose, allowing more vaccine doses to be produced, before contributing to the protection of more people.

GSK is also donating surplus reagents to countries to support diagnostic testing, preparing to do the same for surplus personal protective equipment (PPE) and have initiated new volunteering processes for employees, to enable those with medical or specialist expertise to provide support to frontline health workers and national governments.



## Horizon Therapeutics plc Donates \$1.5 Million to COVID-19 Response Efforts in Illinois and Other Impacted U.S. and Global Communities

Horizon Therapeutics plc (Nasdaq: HZNP) announced on March 26 that it, in partnership with Illinois Governor JB Pritzker, has provided \$500,000 to the Illinois COVID-19 Response Fund and \$500,000 to the Illinois Biotechnology Innovation Organization (iBIO) Institute's COVID-19 Response Fund.

The Illinois COVID-19 Response Fund will support residents who need access to critical services such as emergency food and basic supplies, interim housing and shelter and primary health care services. The fund will work in tandem with other funds in Illinois to ensure that resources are allocated to those in the most need. The iBIO Institute's COVID-19 Response Fund will coordinate with the Illinois Manufacturers Association, along with State, corporate, private and philanthropic donations, to make direct purchases of protective medical products to support Illinois based healthcare workers and first responders.

"We owe it to the communities where we live and work to provide assistance during times of crisis," said Timothy Walbert, chairman, president and chief executive officer, Horizon. "We are committed to supporting Illinois residents, healthcare workers and first responders during this unprecedented time and hope that other companies in Illinois will join us in providing support to these efforts."

## LCR Hallcrest: A million forehead thermometers

*from Chicago Tribune*

LCR Hallcrest makes thermometers that can be used in health care. Some of its thermometers also hang on the walls of deli counters at grocers, while others measure the surface temperature of dishware in dishwashers. President and owner Rocco Sapienza said the manufacturer shifted its production to increase the number of disposable forehead thermometers for use in hospitals.

"Our goal is to make a million a week," Sapienza said. "We have had to increase production four times."

The company has filled orders for the Cook County Department of Corrections, where the thermometers will be used to take the temperatures of prisoners. LCR Hallcrest has also sold directly to a handful of consumers. During the SARS outbreak in 2003, it manufactured hundreds of thousands of thermometers, Sapienza said.

To meet demand during the COVID-19 outbreak, the Glenview-based company hired 15 temporary workers, adding to its production line workforce of 55, Sapienza said.

## Peerless Cleaning providing disinfecting services for first responders

*from Herald-Review*

Peerless Cleaning & Restoration Services has announced it will be providing free disinfecting services for first responder vehicles during the COVID-19 pandemic.

"We thought this would be a great way to help them and keep them safe while they're out there on the front lines," said Brad Wike, company president.

A company news release directs first responders, which includes police, fire and ambulance personnel, to contact the Peerless office at (217) 423-7703 to set up a time to have the vehicle serviced.

## True Value's Cary plant ramping up production of hand sanitizer

*from Daily Herald*

True Value Co. is converting part of its paint manufacturing plant in Cary to begin production of hand sanitizer and cleaning products in response to the coronavirus pandemic.

The Cary factory typically churns out several million gallons of paint annually.

Now, the 600,000-square-foot facility will ramp up production of hand sanitizer.

The first several thousand gallons will be donated to True Value hardware stores across the country to protect employees against COVID-19 while they serve customers.

True Value plans to increase production to help address shortages as the company sources more raw materials.

The company also is manufacturing cleaning and sanitizing products such as hand soap, all-purpose cleansers with and without bleach and degreasing cleanser.

## United Scrap Metal Ramps Up Production

As one of the nation's leading metal recyclers, United Scrap Metal produces granulated aluminum and copper to the Medical, Pharmaceutical and Chemical industries. The Cicero facility is operating 24/7 to fulfill the increased demand from the pandemic while five of their other operations across the country are also providing raw materials.

## University of Illinois designs prototype for low-cost, easy-to-build ventilator — and offers it free to manufacturers

*from Chicago Sun-Times*

Engineers at the University of Illinois at Urbana-Champaign have created an easily-manufactured, disposable and portable emergency ventilator they hope can be quickly put into production to help hospitals deal with a surge of COVID-19 patients.

Engineers at the university's Grainger College of Engineering in collaboration with Carle Health in Urbana worked to create a prototype that has run for more than 75 hours — about 125,000 breathing cycles — and works as well as a commercial model, the school announced.

Following successful testing, the components and design of the prototype — called the Illinois RapidVent — have been posted for anyone to download for free at the college's website. The university will not receive royalties from the design nor benefit financially from production of the ventilators, according to Rashid Bashir, the college's dean and a professor of bioengineering. ♦





# AN EMPLOYER'S SOPHIE'S CHOICE: WHETHER TO ACCOMMODATE MARIJUANA USE UNDER THE FMLA AND ADA

GREENSFELDER, HEMKER &amp; GALE, P.C.



**W**ith Illinois permanently legalizing medicinal marijuana under the Compassionate Use of Medical Cannabis Program Act (the “Act”), many Illinois employers are facing yet another dilemma when addressing marijuana related issues in the workplace: how does an employee’s use of medical marijuana affect an employee’s rights (and an employer’s responses) under the Family Medical Leave Act (“FMLA”) and the Americans with Disabilities Act (“ADA”)?

## The FMLA Dilemma

The FMLA allows eligible employees up to 12 weeks of unpaid leave for treatment of a serious health condition and provides various definitions of what

constitutes a serious health condition. Among those, a serious health condition is any condition which incapacitates a person from work for more than three consecutive days and includes an in-person visit with a medical provider who administers a regimen of continuing treatment, such as prescription medication. So, if an employee meets those qualifications, the employee likely qualifies for a leave of absence under the FMLA.

Let’s say an employee claims to be suffering from “depression,” and qualifies for intermittent FMLA leave since he previously could not work (i.e. incapacitated) for one full work week because of the depression, and during this time period was treated by a psychiatrist who prescribed him medical

marijuana as part of his treatment regimen. Let’s also say the psychiatrist directs the employee to use medicinal marijuana, as needed, to treat the symptoms of depression when they manifest, and the employee requests a half day of FMLA intermittent leave to treat the depression and by using medicinal marijuana. Because the employee qualifies and has been certified for intermittent FMLA leave, his employer would have to grant that request, or risk an FMLA interference and/or retaliation claim. Importantly, the fact that the employee is treating with medical marijuana at home and during his FMLA leave of absence, even if the employer has knowledge of this, generally should not subject the employee to discipline. Indeed, the Act prohibits an employer

from discriminating against a medicinal marijuana cardholder based on his status as a registered qualifying patient of medical marijuana. However, and notwithstanding the employee's cardholder status, the Act permits employers to enforce their zero tolerance and/or drug free workplace policies should a cardholder be impaired or under the influence of medicinal marijuana at the workplace and while performing his job duties. The Act also permits employers to consider an employee's medical marijuana cardholder status if failing to do so requires the employer to be in violation of Department of Transportation regulations.

What if the employee only wanted to take two hours of intermittent leave (e.g. 12:00 p.m. to 2:00 p.m.) to use the medicinal marijuana, then return to work? Would his employer be required to permit the employee to return to work at 2:00 p.m.? Probably not (nor should it), as the employee would likely be impaired and/or under the influence of marijuana and, thus, in violation of the employer's zero tolerance and/or drug-free workplace policy.

But what if the employee insisted, claiming he would not be impaired, and the employer acquiesced and permitted the employee to return to work the rest of his shift (until 5:00 p.m.)? That decision would be fraught with peril, and potential liability. Even putting aside the potential for injury to the employee (or others), particularly if the employee held a safety sensitive position, what if the employer has a good faith belief (and it likely would) that the employee is in fact impaired or under the influence after returning to the workplace, required the employee to submit to a drug test, pursuant to the employer's zero tolerance/drug testing policy, then terminated the employee following a positive test and after giving the employee an opportunity to rebut the presumption of impairment, which the Act requires? One would think the employer would be on solid ground and immune from legal liability, right? The employer's actions may not be risk free. The employee could argue, despite the

compelling evidence of a positive drug test and other objective indicators supporting impairment, that his employer terminated him in retaliation for his taking FMLA intermittent leave; or is attempting to interfere with his use of FMLA intermittent leave. If a judge or jury believed either was the employer's true motivation, those actions (interference and retaliation) are illegal under the FMLA, and the employee could be awarded damages, attorney fees, and reinstatement.

In practice, employers must be aware that under the FMLA, even for an employee using medicinal marijuana during his FMLA leave, the employer must accommodate and grant FMLA leave for the underlying serious health condition.

### **The ADA Dilemma**

The ADA requires employers to make reasonable accommodations for qualified workers with disabilities. What about the ADA and medicinal marijuana use, as a reasonable accommodation for an underlying condition that qualifies as a disability under the ADA? Well, the ADA provides that a person currently using illegal drugs is not a qualified individual with a disability and, thus, is not protected by the ADA. The ADA defines "illegal drug use" by reference to federal law rather than state law, and federal law does not authorize medicinal marijuana use. Indeed, marijuana remains a Schedule 1 illegal substance. And, the ADA provides no exception for medicinal use of marijuana.

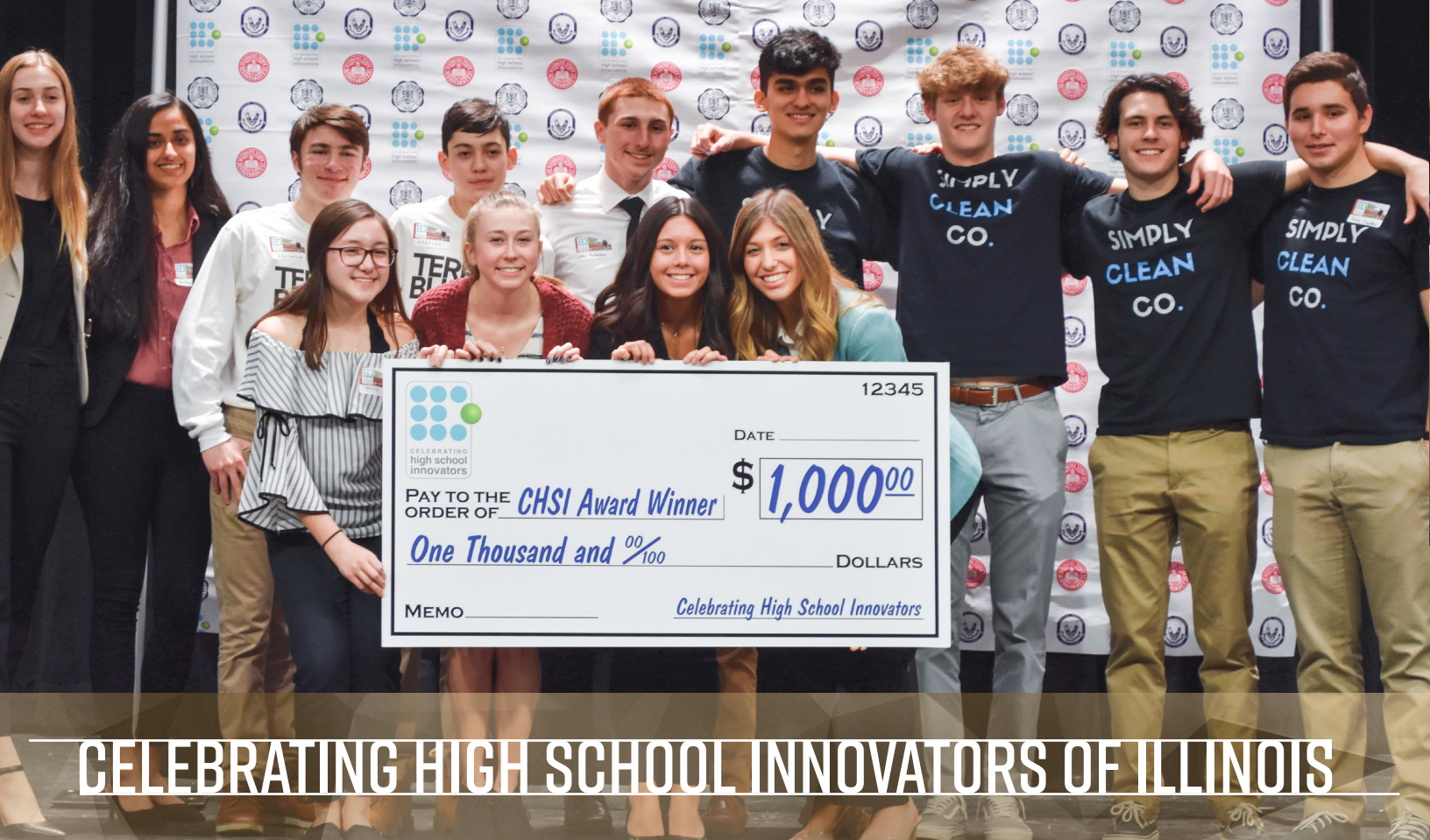
However, the Act legalizes medicinal marijuana and, the Illinois Privacy in the Workplace Act makes it a "lawful product" for which an employer cannot discriminate. Notwithstanding, the Act states that nothing "shall prohibit an employer from enforcing a policy concerning drug testing, zero tolerance, or a drug free workplace;" and, "nothing shall prohibit an employer from disciplining a registered qualifying patient for violating a workplace drug policy." So long as the employer has a written zero tolerance and/or drug free workplace policy in place, employers are

not required to permit an employee to be under the influence of medicinal marijuana in the workplace and during working hours, or while performing the employee's job duties. And, therefore, an employer is not required to permit a medicinal marijuana cardholder to use and/or possess medicinal marijuana in the workplace and during working hours (this includes meal periods) as a reasonable accommodation, even if prescribed by the employee's doctor for an underlying condition that qualifies as a disability.

However, employers should be aware of the requirement to engage in the interactive process for the underlying medical condition necessitating medicinal marijuana use. Thus, although illegal drug use is not protected under the ADA, an employer's obligation to accommodate a qualified worker with a disability remains in place, just not by permitting the employee to smoke medicinal marijuana at work. So, while an employer may act adversely against an employee for violating the company's zero tolerance and/or drug free workplace policies while at work (no protection under the ADA or the Act), the employer may not subject the employee to an adverse action because of the underlying disability (protected under the ADA). Employers who fail to distinguish these two scenarios may find themselves in litigation with one side arguing it has the right to enforce a drug-free workplace, and the other arguing the employer's enforcement of its drug-free policy was merely a pretext to discriminate against his or her disability.

Ultimately, although marijuana is both legal (under state law) and illegal (under federal law), it does not change employment law, but it should change employment practices. Employers are well advised to review their policies and consult employment counsel on a case-by-case basis. ♦





## CELEBRATING HIGH SCHOOL INNOVATORS OF ILLINOIS

**A**t a time when manufacturers are needed more than ever, one organization is inspiring young entrepreneurs and inventors to solve the world's problems. Celebrating High School Innovators (CHSI) is a collaboration between Illinois State University (ISU), Millikin University and Pontiac Township High School which identifies, fosters, and celebrates talented high school students across the state of Illinois. On March 2, 28 high school teams met for the annual celebration, bringing with them a wide variety of innovations to the table.

Paul Ritter, a Biology and Environmental Sciences Teacher at Pontiac Township High School, Founder of CHSI, and self-proclaimed 'Chief Cheerleader' for the high school innovators, has been hosting the celebration since 2012.

"The goal of this initiative was to find the best and brightest kids that our state has to offer — that our world has to offer — and bring them together, celebrate them for their accomplishments, and take them to the next level.' And that's what's happening right now," Mr. Ritter said.

Mr. Ritter works with several educators, entrepreneurs, and industry leaders at Illinois State University's Center for Mathematics, Science, and Technology (CeMaST) and Illinois Career and Technical Education (ILCTE) as well as the Illinois Manufacturers' Association to put together the yearly competition. Judges from across the state and from all walks of life come together to learn about the products and solutions created by the high schoolers.

In the first round, judges visited with teams for 15 minutes and asked questions. The students' innovations were judged on originality, utility, practicality, sustainability, and potential impact, and their professionalism during presentations was also a key deciding factor.

In the second round, the top 10 teams presented their projects and answered challenging questions from a panel of six judges, including IMA's very own Gordy Hulthen and Jim Nelson.

"The top 5 teams receive a \$1,000 prize so they can continue with

their work on these important projects. They also get a 1,000 scholarship each year for four years to go to ISU if they decide," Mr. Ritter said. "ISU is an incredible university and if we didn't have all of these people who believed in the CHSI mission, we wouldn't be able to make these great things happen for kids."

And great things have indeed happened for these innovators. Blake Whittle, who was one of the top 5 winners in 2016, is now in his senior year as an Organizational Leadership major at ISU and has come full circle to serve as the Program Coordinator for CHSI.

"Blake has transcended the barrier and is now leading the charge," Mr. Ritter said. "This program was meant to take kids to the next level, and Blake has certainly done just that."

Dr. Mark Hoelscher, Professor of Entrepreneurship at Illinois State University, was especially impressed by the preparedness and well-thought-out business plans of this year's competitors.

"The most exciting thing about this event, for me, is to see these kids being moved to action. There are teams that have already started LLCs, teams that have already sold their products, and teams that already have websites," Dr. Hoelscher said.

He further explained that because these students were given the opportunity to explore and test their ideas with the 'safety net' of their high schools and educators, they will be much more prepared to maintain successful businesses once they reach college.

"These kids are thinking about business insurance. They understand quarterly tax reports and make their annual filings," Dr. Hoelscher said. "There's just no substitute for that kind of experience. And if they are already at this level when they get to college, educators like myself will be able to move them much farther up the ladder than we could have if they did not have these kinds of opportunities."

What these high schoolers achieved with the tools and guidance they were given is nothing short of amazing. From farm equipment to fashion statements and high-tech sanitizers to community solu-





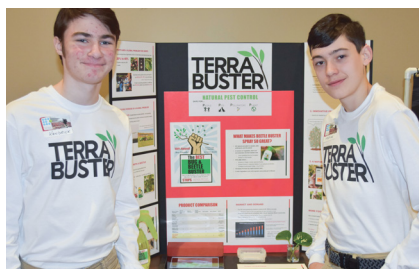
**CHSI 2020 Judges (left to right):** (1) Dr. George Rutherford - Associate Professor of Physics, Illinois State University; (2) Patrick Walsh - Associate Director of Admissions, Illinois State University; (3) Jim Nelson - Illinois Manufacturers' Association; (4) Gordy Hulten - Illinois Manufacturers' Association; (5) Tom Tully - Secretary/Treasurer, Illinois Education Association; (6) Jason Helfer - Deputy Officer of Instructional Education, Illinois State Board of Education

tions, this year's competitors came to the CHSI celebration with a passion for innovation and the ingenuity to back it up. It is a real-life example of what can happen when students are truly engaged in their education.

"Whether it's focused on conservation efforts, addressing worldwide challenges, or creating and bringing new products and services to the market, CHSI's STEM-focused approach enhances the educational experience of every student. By having an outlet for creativity and a forum to bring ideas to fruition, these students are getting a head start on their careers," said Jim Nelson, IMA's Vice President of Education & Workforce Policy and Executive Director, IMA Education Foundation.

The top 5 teams had a wide variety of innovations and equally intriguing presentations.

Of the more theatrical presentations came from Kendrick Bakel (left) and Matias Habib (right) of Sandwich, Illinois. Their product, "Terra Buster" is an all-natural pest killer and repellent made from natural, safe ingredients one of the students found in his mother's cupboards.



"You want to know how safe it is?" Bakel asked the judges. "That safe," he replied, answering the question by spraying the bug repellent into his mouth. "It doesn't taste very good, but it's safe enough that your pets and your kids could eat it."

Another team from Pontiac Township High School discussed their work on the alligator snapping turtle, an endangered species. Their "30 by 30" act calls for 30 percent of all state lands set aside for conservation by 2030.



islaters in Illinois and other parts of the country, and the team was nominated for a \$250,000 Indianapolis Prize for their conservation

efforts.

Krishna Patel (left) and Eva Tuecke (right) traveled from the Illinois Math and Science Academy (IMSA) to discuss their "Fision Lens" concept — a peel-and-stick prescription corrector that allows consumers to change the prescription of their glasses without having to buy expensive new frames.



Barrington High School students Sophia Hitchison, Jaylyn Chavarria, and John Palumbo (left to right) showed off their "Safe Pack," a theft-proof fanny pack. Armed with a waterproof phone pouch attached to a steel-enforced retractable wire, festival-goers and travelers have an extra level of protection when it comes to one of their most valued personal items — their phones.



Sulayman Pandit, Gray Pauli, Carson Grebe, and Jack Cooper (left to right) from Wheaton Warrenville South High School demonstrated their "Simply Clean" device that kills germs and bacteria by emitting a UV light, and can sense when a person has their hand on the door or has just used the door. An idea that could one day provide hospitals, businesses, and public spaces with sanitized door handles could be very useful in the wake of an event such as the coronavirus.



"CHSI promotes multiple opportunities for direct interaction between manufacturers and their local schools. It really impacts efforts to build a talent pool for industry," Nelson said. "Meeting local challenges with local solutions bodes well for manufacturing and assures development of new products and processes stay vibrant."

The next great idea is sitting in every classroom all across America. It's up to us to create and promote platforms for every student to express themselves, and have the opportunity to pursue their passions. Fostering their creativity and ingenuity could inspire solutions that may one day change the world. ♦



# LEARNING TO RETAIN BEFORE YOU RECRUIT

MARTIN RECRUITING AND CONSULTING



**T**he manufacturing industry, like most other industries in America, cannot find enough people to grow – and even sustain – their businesses. Finding reliable and skilled workers is no doubt a challenge. Yet many business owners are often working so hard to recruit that they forget to shut the back door and just as quickly employees are leaving.

If you are not keeping the majority of your people, it's going to be infinitely harder to attract additional employees. Consider the reasons why your last all-star employees left and categorize them into two groups: things outside of our control (ex: moved, death, spouse's transfer) vs. things within our control (culture, leadership, not enough hours, overworked, lack of growth, pay, coworkers, underappreciated).

If the majority of your people are leaving for reasons that are within your control, you're in luck! There's an opportunity to make adjustments to help keep these good employees onboard.

There are often small changes that can

be made internally to help companies take good care of who they have and bring on additional manpower as a result. They can be grouped into three categories:

1. Onboarding Process
2. Communication Standards
3. Celebrations and Appreciation

## Onboarding Process

Last year, a recruit shared that he didn't know where the bathroom was until after his first whole week at work. He thought he had to go to the gas station across the street! Embarrassing story for sure, but these things sometimes happen — particularly in fast-paced settings like a warehouse.

One way to mitigate this issue would be to create a video that covers all of the "first day details." You can show new hires what to expect before they arrive including where to park, what door to use, where to put their lunch, what to wear, and of course where the bathroom is.

When they arrive on their first day, you want to treat new employees as individu-

als and make them feel special. One great way to do this is to assemble welcome gift bags for each employee. There's no need to spend a great deal of money here—you can buy inexpensive gift bags and tissue paper, and make sure each bag is ready with safety glasses, hearing protection, a cap, all of their issued shirts in their size, etc. Label each bag with the employee's name, and have your receptionist present it to them with a smile when they show up for their very first shift. Make it clear that you are expecting them and welcoming them to your team.

## Communication Standards

Companies can avoid turnover by setting a standard of communication and following through on their commitments.

Make talking with your people a scheduled, non-negotiable part of running your business. Sitting down for 1-1s gives your team members an opportunity to collect their thoughts and bring their concerns to you on a regular basis. We recommend doing this bi-weekly.

Here's a sample script to get you started:  
"How was your week last week?"  
"What are you most proud of, and what did you do really well?"  
"What were the biggest challenges you had, and how can I help?"

The questions and the conversations might seem simple, but over time, as you actively communicate with people outside of your inner circle, you will build a bridge between labor and management. By listening attentively and taking action in response to your employees' concerns, you demonstrate that you are there for them and that you care.

Don't wait until issues crop up to have conversations. Create a system to follow, proactively: regular, scheduled opportunities to give your employees your full attention, deliver praise, and offer support.

### Celebrations and Appreciation

As your company grows and people get busy with urgent projects, holding large celebrations can become a logistical challenge. All the same, it's worth it to make regular celebrations and appreciation a part of your company's DNA.

Don't forget to mark major company

milestones and employee birthdays with celebration and take the time to acknowledge any employees with especially long tenure at your company. If planning isn't your thing, delegate it to someone who is more organized. The important thing is to find a way to get it going and to establish a tradition in your organization.

Be creative, and give your organization's leaders license to surprise, delight, and reward achievements in personal ways. This can be as simple as a small budget for occasional ice cream at the supervisor's discretion, or as elaborate as an in-house currency of "praise dollars" that get handed out whenever a peer sees a job well done, and which can then be exchanged for small prizes back at the warehouse.

Don't be afraid to have fun with this. You could even create a ridiculous novelty trophy that gets awarded to a different employee each week — a rubber chicken, a golden toilet seat mounted on a plaque, a framed photo of the owner in a top hat and a monocle — the idea is to inject some joy into the workday, and to celebrate your employees in a memorable way that creates a sense of goodwill, tradition, and community on a regular basis.

Choosing to invest in your people and in making your company a great place to work, will reward you with a great team that you can depend on for years to come. It also allows you to narrow your focus on recruiting to find people who will fit best within your culture.

When you are seeking new employees, consider all of the means available to help you. A digital marketing expert can help you with keeping up with your social media to include all of the fun you have as a team. They can help you revamp your website to list job descriptions and make the application process simple.

Don't forget about other creative options besides posting on common job posting boards. I've seen companies have success in hosting open houses with hot dogs and beer. Ask your team members to invite their friends and give them a referral bonus if someone signs on. Don't forget to invite your vendors — you'd be surprised at how many people they know in the industry.

Overall, there is no right or wrong answer when it comes to recruiting in this highly competitive market. Hire young, hire old, hire people of all races and religions. But most importantly hire frequently and keep the back door shut. ♦

## The Illinois Manufacturers' Association is honored to congratulate



**Linda McGill-Boasmond**  
IMA Board Chair



**Cindy Tomei, CAE**  
IMA Vice President

**for being recognized as a Crain's Notable Woman in Manufacturing!**





## 2020 MAKERS MADNESS: “THE COOLEST THING MADE IN ILLINOIS” CATERPILLAR’S 797F LARGE MINING TRUCK

Caterpillar’s 797F Large Mining Truck – commonly known as the 797 – is an enormous, yellow, and iconic representation of manufacturing worldwide and in Illinois. Built exclusively in Decatur, Illinois since 1998, and standing 23 feet tall on six 13-foot tires, the 797 is instantly recognizable – and is a fitting winner for the Illinois Manufacturers’ Association’s first annual Makers Madness contest to name “The Coolest Thing Made in Illinois.”



The Makers Madness contest was launched by the IMA in February and for three weeks, the public was invited to nominate any product made in Illinois. Over 260 unique nominations were received, and voting opened online at [MakersMadnessIL.com](https://MakersMadnessIL.com). For more than two weeks, voters

could vote – five times per day – for their favorite items. At the end of the nominations round, almost 100,000 votes had been cast, and the top 16 products advanced to seeded, bracketed, head-to-head contests. Voters narrowed those top 16 products to eight, and then from eight products again to a Final Four. Finally, the last week of March, these Final Four products competed against each other, with the winner earning the title of “The Coolest Thing Made in Illinois.”

In the end, rising above the rest, the 797 was triumphant.

“The Caterpillar 797F Mining Truck is a great example of American manufacturing, innovation and ingenuity and is well deserving of the title of Coolest Thing Made in Illinois. Designed for mining and heavy-duty construction, this iconic truck is rugged and dependable,” said Mark Denzler, president and CEO of the Illinois Manufacturers’ Association. “While this contest began before we started to feel the effects of the COVID-19 pandemic, Makers Madness has been a great way to showcase the wonderful products made in Illinois and the great career opportunities manufacturing offers. Every day, our manufacturers are making life-saving products, equipping first responders and ensuring our food supply remains safe and strong.”

Since 1998, Caterpillar has produced more than 1,000 797s, the largest mechanical-drive mining truck in the world. Able to haul 400 tons of payload, the 797 is a workhorse. The



first-ever commissioned truck is still working in Canadian oil sands after more than 130,000 hours of use. If the 797 was working a standard 40 hours a week, that'd be a 62 year-long career! The largest populations of 797s are in the Americas and Australia, and the applications have grown to include copper, coal, and iron mines.



Powered by a 20-cylinder, quad-turbocharged Cat C175 engine producing up to 4,000 horsepower, the 797 offers a variety of fuel maps to balance productivity and fuel consumption and can be configured to meet North American emissions standards. As with all Cat large mining trucks, the 797F features a complete power train designed and manufactured end-to-end by Caterpillar.

"I could not be more excited about the 797F Large Mining Truck being voted 'The Coolest Thing Made in Illinois!'" said Denise Johnson, Caterpillar Resource Industries Group President. "I'm so proud of the Decatur team who design, manufacture and deliver this 400-ton truck to our global customers."



The Cat 797F model is one of the most popular 400-ton trucks on the market, and weighs 572,235 pounds fully configured and empty, or 1,375,000 pounds at gross full payload. Its 400-ton payload capacity is the equivalent of 13,000 bushels of soybeans or 686,000 ears of corn. For the Makers Madness contest, Caterpillar employees in Decatur proudly promoted the 797's nomination with viral graphics touting less conventional payload equivalencies, such as 61 elephants, or 396,714,034 M&Ms, or 2,133,333 hockey pucks.

"It is an honor having the Caterpillar 797F mining truck chosen as the Coolest Thing Made in Illinois. This acknowledgment is a direct reflection of the men and women who show up every day to make the best products in the world for the customers we serve," said Tina Czerwinski, Caterpillar's Decatur facility manager. "I am very proud of our team."

The 797 is so iconic that it greets guests as they start tours at the Caterpillar Visitor Center in Peoria, where a life-size 797 truck bed holds a 60-seat movie theater. And visitors are always sure to snap a photo in front of the massive 13-foot tires.

The IMA had planned to announce Makers Madness contest winner at the Illinois Governor's Mansion in Springfield on April 1 as part of a special luncheon, but the coronavirus crisis and resulting cancellations forced the online contest to be concluded online – with Illinois Governor JB Pritzker crowning the champion via video.

"As a businessman, I know how important our manufacturing sector is to Illinois' economy. We produce over \$300 billion of goods a year — right here in Illinois. You are the makers and the doers that drive our state forward," said Governor Pritzker. "After nearly 300,000 votes were cast in the IMA's Makers Madness contest, I want to congratulate the entire team at Caterpillar on their win and for building the Coolest Thing Made in Illinois."

The Illinois Manufacturers' Association will recognize Makers Madness finalists and The Coolest Thing Made in Illinois – the 797F – at an appropriate event later in 2020.

With nearly 300,000 votes cast in total, the Makers Madness contest featured and incredibly strong top 16, with representation from every sector and corner of Illinois:

- **BEER NUTS Bar Mix** (BEER NUTS, Bloomington)
- **Caterpillar 797F Large Mining Truck** (Caterpillar Inc., Decatur)
- **CERV2 Smart Ventilation System** (Build Equinox, Urbana)
- **Fisher Oven Roasted Never Fried Mixed Nuts** (John B. Sanfilippo & Son Inc., Elgin)
- **Fla-Vor-Ice** (Jel Sert Company, West Chicago)
- **Ford Mustang Headlight** (North American Lighting, Paris)
- **Functional Hand** (Thera-Solutions, LLC., Elmhurst)
- **Komatsu 980E-5 Electric Drive Truck** (Komatsu America Corp., Peoria)
- **MasterPrint** (Ingersoll Machine Tools, Rockford)
- **Orion Spacecraft Command Module Control Switches** (Otto Engineering Inc., Carpentersville)
- **Plochman's Craft Beer Blended Mustard** (Plochman Inc., Manteno)
- **Sloan Flushometer** (Sloan Valve Company, Franklin Park)
- **STEAM Primer** (Lux Blox, Galesburg)
- **Suncast Storage Shed** (Suncast Corporation, Batavia)
- **The Clipper** (Wahl Clipper Corporation, Sterling)
- **Tripsaver II Cutout-Mounted Recloser** (S&C Electric Company, Chicago)

The Final Four were the Caterpillar 797F Large Mining Truck, BEER NUTS Bar Mix, Thera-Solutions Functional Hand, and The Clipper from Wahl Clipper Corporation.

Makers Madness will be an annual competition hosted early each year by the Illinois Manufacturers' Association. The 2021 contest will open for nominations in February 2021 at [www.MakersMadnessIL.com](http://www.MakersMadnessIL.com). ♦



# BIOMETRIC INFORMATION PRIVACY LIABILITY: A HIGH AND RISING TIDE

VEDDER PRICE



The Spring 2018 issue of *The Illinois Manufacturer* featured an article (“What You Need to Know About Using Your Employee’s Biometric Information”) counseling that readers make it a high priority to comply with a 2008 Illinois law, the Biometric Information Privacy Act (“BIPA”), though BIPA had been largely ignored for much of the first decade of its life. Subsequent developments, including a flood of BIPA class actions, and Facebook’s \$550 million BIPA settlement, have underscored the soundness of that advice, and demonstrated the massive liability employers risk if they violate BIPA’s mandates on how they collect, use, share and secure biometric information, such as the fingerprint scans widely used in modern time keeping systems. This article reviews BIPA’s requirements, surveys the BIPA explosion, discusses court decisions that have detonated and sustained that explosion, and concludes with some practical action items.

## **BIPA’s Rationale and Requirements**

Unlike other unique identifiers, such as social security or credit card numbers

that can be changed, biometrics (for example, unique physical characteristics useful in identifying an individual, such as DNA, fingerprints, facial, hand or retinal features) are immutable. Because they do not change, biometrics are particularly useful in a variety of business settings. They can facilitate reliable, cost-effective time tracking for nonexempt workers, and virtually eliminate the time clock fraud of old (where Jones punches in for his tardy coworker Smith in Smith’s absence). Biometrics can also promote security by reliably keeping unauthorized staff out of facilities, secure parts of physical plants, and information storage devices where confidential information or trade secrets are stored. (Look no further than your iPhone® home key’s finger scanning feature.)

But the same unchangeable nature that makes biometrics useful arguably requires unique security measures to prevent their misuse. BIPA was intended to safeguard against the risk of identity theft created by the widespread use of biometric technology to facilitate financial transactions and security screenings. It imposes both detailed requirements

on the management of information derived from biometric identifiers, and stiff penalties (“liquidated damages” in statutory parlance), for violations. BIPA requires private entities that use or possess biometric information and identifiers to maintain publicly available written policies that disclose their collection of biometric information, their purpose in collecting it, the use to which they will put it, and their retention schedule and guidelines for destroying biometric information and identifiers. BIPA also mandates that before any data is collected, written releases be provided by each individual from whom biometric data is to be obtained (such as manufacturing employees who will use finger-scan time-keeping technology). BIPA requires that biometric information users adhere to the “reasonable standard of care” for handling biometric information and identifiers in their relevant industry, and bars private entities from selling or disclosing biometric information and identifiers.

## **BIPA’s Sanctions**

BIPA has sharp teeth. Unlike other biometric privacy legislation to date, BIPA includes severe penalties and gives indi-

viduals “aggrieved” by BIPA violations potentially crippling private causes of action. Negligent violations of BIPA carry a \$1,000 per violation penalty, or liability for actual damages, whichever is greater, and intentional or reckless violations carry a per-violation toll of \$5,000 or actual damages, whichever is greater. All violations entitle prevailing plaintiffs to recover their reasonable attorneys’ fees, expert witness fees, and other litigation expenses. Consequently, BIPA defendants face not just the substantial financial burdens of paying their own defense counsel; if they lose, they also face liability for their opponents’ attorneys’ fees and other litigation expenses.

Consider hypothetically the potential multiplier effect of BIPA “liquidated damages.” In January 2009, a small manufacturer implemented biometric timekeeping, but failed to have a publicly available, BIPA-compliant written policy. Throughout the subsequent year, each of its 300 employees used its time-clocks four times per shift (at shift start and end, and at break start and end) for each of five shifts per week for each of 50 workweeks. Assuming this manufacturer’s violations are found merely negligent, plaintiffs’ class counsel may argue that its BIPA liability for that year totals \$300,000,000 plus class counsel’s fees and costs. If the same manufacturer’s violations are found “intentional” or “reckless,” workers’ class counsel may argue that its liability is \$5,000 per violation for each of 300,000 violations, or \$1,500,000,000 in fines, plus plaintiffs’ class counsel’s fees. Given these astronomical numbers, many plaintiffs adopt damages theories less aggressive than this four-violations-per-shift calculation, and our hypothetical manufacturer might well settle for a substantial discount. Still, the BIPA multiplier effect would give the plaintiffs’ class counsel formidable leverage in negotiating that settlement.

### ***Rosenbach* Opens the Floodgates**

On January 25, 2019, the Illinois Supreme Court decided *Rosenbach v. Six Flags Entertainment Corp.*, in which the plaintiff alleged that the theme park took her minor son’s thumbprint when issuing his season pass, and committed technical BIPA violations, though she did

not claim any actual harm (such as misuse of the boy’s biometric data). Rejecting Six Flags’ contention that Ms. Rosenbach’s son could not be “aggrieved by a violation” of BIPA sufficient to warrant the suit without pleading and proving actual harm, the Illinois Supreme Court held that no allegation of actual harm was necessary for the plaintiff to seek relief. It remains controversial whether BIPA liquidated damages are available to plaintiffs who have suffered no actual damages. Notwithstanding, plaintiffs’ class counsel (and some judges) maintain that *Rosenbach* indeed decided that no actual damages are necessary for plaintiffs to recover BIPA liquidated damages.

The Flood that Followed and the Facebook Settlement

Predictably, after *Rosenbach*, plaintiffs’ class counsel fell in love with BIPA. Relieved of any obligation to plead that a defendant’s technical noncompliance with BIPA actually hurt anyone, they have prosecuted class actions with a zeal that shows no signs of relenting. The ease with which employers and others can unintentionally violate BIPA has fueled the ascendancy of BIPA class actions.

Suit filing reports for the Circuit Court of Cook County, Illinois, reflect the filing of 72 BIPA class actions in calendar 2018, and 20 BIPA class actions in the final calendar quarter of 2018 (October through December 2018). During the first calendar quarter of 2019 alone (just 2/3 of which post-dated the *Rosenbach* decision), 80 BIPA class actions (four times the total number for the preceding calendar quarter, indeed more than the total number for all of 2018) were filed in the Circuit Court of Cook County. For calendar year 2019, 279 BIPA class actions were filed in the Circuit Court of Cook County, nearly four times as many as were filed in 2018 (the last full year before *Rosenbach*).

Following *Rosenbach*, the federal Ninth Circuit Court of Appeals in *Patel v. Facebook, Inc.* rejected Facebook’s contention that a massive putative class of users who claimed BIPA violations arising from Facebook’s facial recognition software lacked standing to sue because they did not allege actual “real world” harm. (Facebook’s facial recognition software enabled it to analyze newly uploaded photos and suggest that users “tag”

friends in the photos.) In December 2019, Facebook petitioned the U.S. Supreme Court to decide whether constitutionally required standing (harm sufficient to entitle one to bring suit) could exist based solely on the risk that a plaintiff’s personal information might be misused in the future. The Supreme Court refused to consider Facebook’s appeal on January 21, 2020, however, subjecting the tech mammoth to the risk of a trial that it averted days later with a \$550 million settlement.

While sophisticated tech giants including Facebook, Google, and Vimeo have been caught in the BIPA web, many far smaller employers have also been forced to defend BIPA class actions brought by plaintiffs who can sue without claiming they have sustained any actual harm from the technical violations they allege.

#### **Action Items**

If your business uses biometrics as simple as finger scan timekeeping systems, it is at risk, and should, either independently or with qualified counsel:

(1) audit, for the duration of its use of biometrics, whether it has complied fully with BIPA’s policy-making and publication, notice, consent, security and other requirements;

(2) identify, quantify and mitigate its risks of BIPA liability by correcting any areas of noncompliance;

(3) consult vendors used to facilitate biometric data collection, storage, use, and deletion, to assess their BIPA compliance;

(4) evaluate vendor agreements that allocate liability risks, including BIPA liability, through indemnification and insurance procurement provisions;

(5) review insurance programs to assess whether BIPA liability is or is not covered (whether BIPA liabilities fall within standard insurance coverage is itself a complex and disputed question);

(6) consider BIPA liability in the insurance renewal process; and

(7) monitor, and consider supporting legislative and judicial initiatives aimed at moderating the BIPA burden that employers in Illinois and elsewhere now face. ♦



# NEW IMA MEMBERS

**ANFINSEN PLASTIC MOLDING INC.**  
Oswego, IL

**CBM PLASTICS, INC.**  
Arthur, IL

**CERRO FLOW PRODUCTS LLC**  
Sauget, IL

**DANENBERGER FAMILY VINEYARDS**  
New Berlin, IL

**DONSON MACHINE CO.**  
Alsip, IL

**GREENSFELDER, HEMKER & GALE, P.C.**  
Chicago, IL

**HISTORIC TIMBER & PLANK**  
Brighton, IL

**ILLINOIS COMPONENTS, INC.**  
Lombard, IL

**ILLINOIS PETROLEUM COUNCIL**  
Springfield, IL

**MARTIN HOOD LLC**  
Champaign, IL

**MEL-O-CREAM DONUTS INTERNATIONAL, INC.**  
Springfield, IL

**MEYER TOOL & MANUFACTURING**  
Oak Lawn, IL

**MINCON ROCKDRILLS USA, INC.**  
Benton, IL

**MOLDING SERVICES OF ILLINOIS**  
Olney, IL

**NORTHGATE TECHNOLOGIES, INC.**  
Elgin, IL

**NSA RUBIN BROTHERS**  
Chicago, IL

**PLUM CREEK PRINTING COMPANY**  
Edwardsville, IL

**STC, INCORPORATED**  
McLeansboro, IL

**T.H. SNYDER COMPANY**  
Danville, IL

**THOMAS ENGINEERING INC.**  
Hoffman Estates, IL

**US GLOBAL PETROLEUM**  
Franklin Park, IL

**VERTEC BIOSOLVENTS**  
Downers Grove, IL

**XENTRIS WIRELESS, LLC**  
Addison, IL

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### **Full PPE Equipped Personnel**

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