STATE PROCUREMENT ETHICS IN THE NEW ERA OF REFORM

THE ILLINOIS Manufacturer

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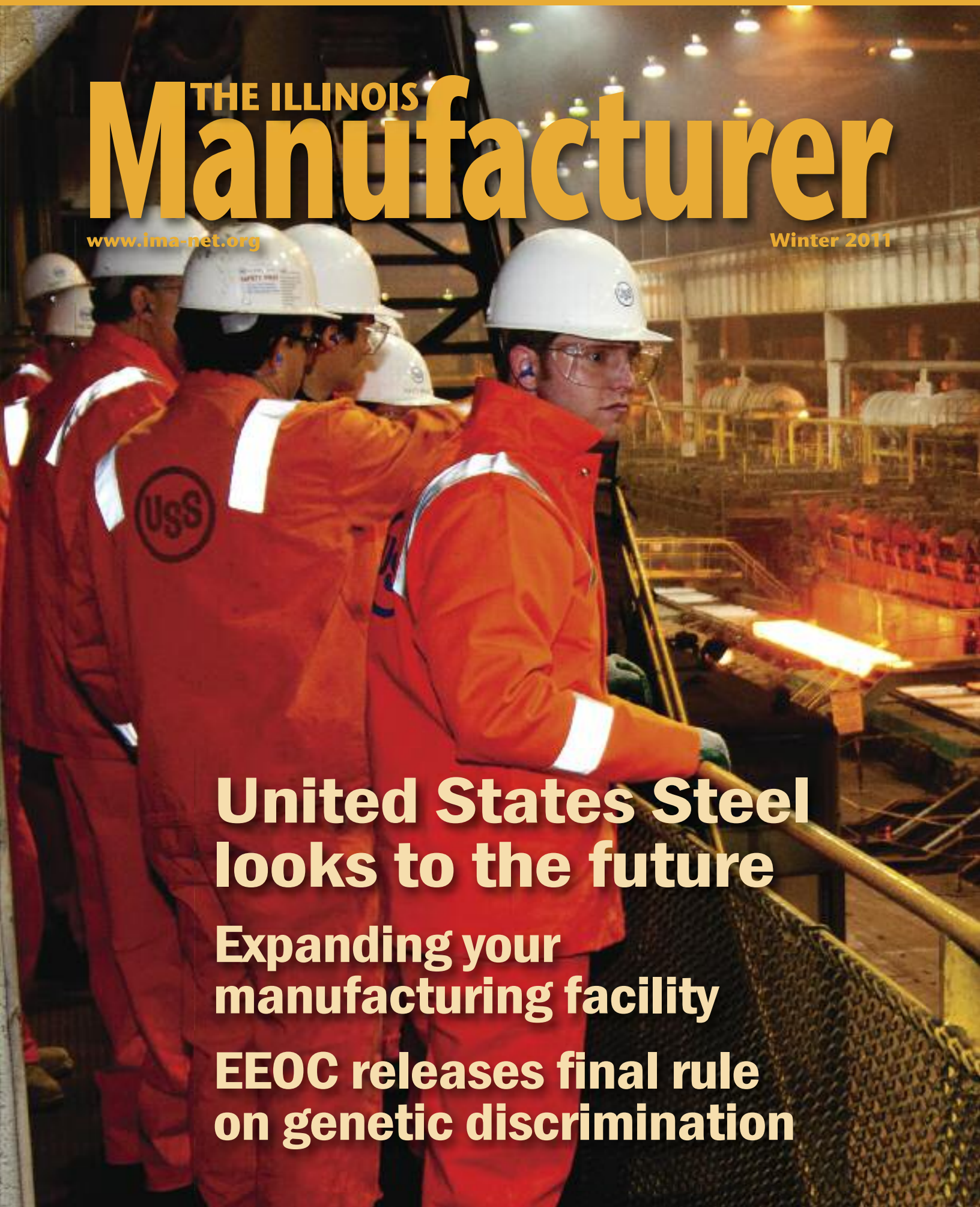
Winter 2011



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United States Steel looks to the future 16

U. S. Steel had its origins in the dealings of some of America's most legendary businessmen, including Andrew Carnegie, J. P. Morgan, and Charles Schwab. However, its principal architect was Elbert H. Gary, who also became U. S. Steel's first chairman.

Columns

ON THE COVER: Members of the IMA Young Leaders Council watch a red-hot steel slab move from a reheat furnace onto the 80" Hot Strip Mill at U. S. Steel's Gary Works where it will be rolled into thin sheet product. *Photos by Tim Klasinski*

The Illinois Manufacturer **is underwritten by Constellation NewEnergy, Inc.**

Mission Statement

The object for which the Illinois Manufacturers' Association was formed is to strengthen the economic, social, environmental and governmental conditions for manufacturing and allied enterprises in the state of Illinois, resulting in an enlarged business base and increased employment.

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President's Report

GREGORY W. BAISE

It was something to watch

Frankly, the way our finances were managed over the past ten years was a default on Illinois government's moral bond with the people of this state.

I have been around the Illinois legislative process for more than 30 years. In my time, I've witnessed two general tax hikes in the state (1983 and 1989), the legislative clock stopped to pass a bill to keep the White Sox from moving to Florida (1989), and watched a legislature impeach and convict a Governor (2008). But now, after watching a lame duck General Assembly pass the largest single income tax increase in our state's history ***in just one day***, I must say now I have seen it all.

For nearly a decade our state has spent more than it has brought in. The past administration failed to keep up with its moral and financial obligations to pay vendors and keep up pension payments. Now, Illinois faces a default of its bonds. Frankly, the way our finances were managed over the past ten years was a default on Illinois government's moral bond with the people of this state.

Illinois is in sad shape. We have the highest sales tax in the country, the third highest corporate tax rate in the country and the highest unfunded pension obligation as well. Now that takes some serious effort!

We continue to lose jobs as companies flee to other states and our response is higher taxes. Across this nation in the last election, voters made it clear to candidates that we want lower spending, lower taxes and no obligations that would drive us deeper into the abyss. But did Illinois' leaders get it? Obviously not.

Elections have consequences. Here in Illinois, we elected a governor who promised to raise taxes, spend more money on new programs and continue to obligate our future by not reining in spending. Guess what? This is one promise he's keeping — except this scheme is his campaign pledge on steroids.

Not only will business and individuals pay more, but also the governing class is not asked to sacrifice. State employees have health plans that ask them to pay little of the cost. They are receiving pay raises that well exceed cost of living increases being allotted in the private sector. Oh, and guess what? The governor negotiated the contract during the campaign and promptly got the public employees union endorsement just days later.

Illinois government, like most governments in this country, has used the entitlement system to curry favor with certain sectors of the electorate. We have expanded Medicaid eligibility to a point where a family of four making $86,000 annually can apply and receive benefits.

Illinois continues to allow itself the luxury of more units of local government than any other state in the union. While politicians complain about property tax increases, they never attempt to limit the tax levy, which is the amount each element of local government claims it needs to operate.

Illinois has more school districts than Florida has total units of local government. Water systems, fire protection districts, mosquito abatement systems, library districts, etc., which all have pension plans and health plans that are rich in benefits.

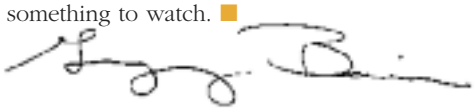
In order to curry favor with voters, politicians go along with lots of half-baked ideas that should never see the light of day — like free rides for seniors on mass transit systems. No matter what your income level is, in Illinois you can ride a bus or a train for free when you hit the ripe old age of 65.

In the 24 hours it took the General Assembly to pass the tax increase, there were some priceless moments. The best one though had to be when the chief sponsor of the tax hike in the House said that the tax increase would be a stimulus to our state's economy. Only in Illinois would a politician attempt to sell a 67 percent tax hike as helpful to the economy.

Sure, you'll hear about spending caps — hard caps that are in the tax-hike legislation. But again, only in Illinois will a politician tell you with a straight face that they are controlling expenditures when spending nearly $9 billion more during the next four years. A hard spending cap? Please don't insult our intelligence.

Illinois needed to get its financial house in order. Did we need additional revenue to meet our legitimate obligations? Yes. Reforming our spending practices, examining ways to expand the base of who is taxed, and looking to consolidate units of local government should have been the starting point of the process. But you can't do that ***in just one day,*** and it can't be done unless you're willing to take on entrenched interests that live off your tax dollars.

I would love to write a column someday that is complimentary to our leaders after they attempted to reform Illinois government. Now that would be something to watch. ■



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Legislative Report

MARK DENZLER

Impact of a lame duck session

. . . the Illinois General Assembly convened with more than 20 lame duck lawmakers in one of the busiest sessions in memory, with the IMA engaged at the forefront of the biggest issues.

Several hundred years ago, our forefathers in Britain coined the phrase "lame duck" to describe bankrupt businessmen whose power had eroded leaving them vulnerable. The term essentially referred to game birds injured by shot. Years later in the 1830's, use of this term was broadened to include elected officials in the closing days of their final term in office. Every two years in Illinois, following the General Election, members of the General Assembly meet in a "lame duck session" prior to the final adjournment but typically accomplish little. With Republicans making inroads and winning seats in the latest election, the Illinois General Assembly convened with more than 20 lame duck lawmakers in one of the busiest sessions in memory, with the IMA engaged at the forefront of the biggest issues.

Income Tax Increase: In the final twelve hours of session, Democrat lawmakers in the House and Senate passed legislation increasing the income tax on both individuals and corporations over the opposition of the IMA who testified in both the House and Senate Committees. Supported by Governor Pat Quinn, SB 2505 raises the individual tax rate from 3 to 5 percent beginning on January 1 for the next four years. At that time, the rate will decrease to 3.75 percent before returning to 3.25 percent in 2025. This 67 percent increase will impact not only individuals but also the 85 percent of companies (Subchapter S, partnerships, etc.) who file at the individual rate.

The corporate income tax rate will jump from 4.8 to 7 percent for the same four-year period of time. At that point, the tax rate will decrease to 5.25 percent in 2015 followed by a drop back to 4.8 percent in 2025. In Illinois, corporations must also pay a 2.5 percent replacement tax meaning that the effective tax rate will be 9.5 percent which is the third highest tax rate in the United States, trailing only Minnesota and Pennsylvania.

The tax package suspends the Net Operating Loss provision for corporations (exempts Subchapter S) for the next four tax years meaning that they will be unable to write off losses from previous years. Many of these companies who struggled during the recent recession will face the double whammy of a higher tax rate and inability to write off losses. Finally the tax package reinstates the Estate Tax with a $2 million exemption.

Spending: Democrats helped justify their support for the income tax increase by imposing a "hard spending cap" on future year appropriations. Beginning in FY2012, the new law provides that the Governor and General Assembly cannot spend more than $36.818 billion. For each of the next four years, state spending will increase by 2 percent to final level of $39.072 billion in FY2015. To ensure compliance, the law mandates that the Auditor General review spending and issue an opinion when spending rises above the cap. If that occurs, the Governor and General Assembly have 60 days to reduce spending or the tax increase is automatically repealed.

Republicans noted, and Democrats agreed, that the first year spending represents an increase of 10 percent alone because the plan includes funding for pensions, government employee health care, repayment of interfund borrowing, and replacement of lost federal revenue. The spending side did not include any budget reductions — it only sought to limit future increases.

Tenaska Electricity Tax: The Tenaska electricity rate hike failed on a second attempt in the State Senate after narrowly passing the House of Representatives. If SB 2485 had become law, Illinois residents and businesses would have been forced to buy electricity from the Taylorville Energy Center for the next thirty years at above-market prices. According to the Illinois Commerce Commission, this would have cost ratepayers $286 million annually or $8.6 billion over the next thirty years to subsidize this project that would have produced power costing 500 percent more than the competitive marketplace. The IMA helped lead the STOP Coalition that successfully lobbied against the imposition of this new electricity tax.

Workers' Compensation: Efforts to reform Workers' Compensation stalled in the Illinois House. The IMA, as head of the Joint Employers Group comprised of six business groups, helped negotiate a final package (SB 1066) that would have implemented a 15 percent across the board cut in the Medical Fee Schedule, allowed the employer to choose the physician for an injured worker, strengthened utilization review, capped wage differential payments at the age of 67, reduced the cost of medical implants and devices, and helped prevent injured workers from receiving WC benefits if illegal drugs or alcohol caused the accident. While it was not a perfect bill and we had proposed stronger legislation, business

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SCOTT P. SEDER

State procurement ethics in the new era of reform

In the wake of political scandals and investigations by law enforcement officials, the State of Illinois enacted several laws in recent years that govern the conduct of State bidders and contractors. Recent State laws require the registration of certain bidding and contracting business entities with the Illinois State Board of Elections and prohibit political contributions by those entities to political committees established to promote the candidacy of declared candidates for the offices responsible for the award of contracts. These laws place affirmative duties and restrictions on bidders and contractors that must be understood in order for those business entities to avoid the loss of contracts, as well as fines, penalties, debarment and public relations fiascos. This overview highlights some of those requirements.

If you want to bid, you cannot give (and you must register)

The Illinois Election Code and the Illinois Procurement Code require business entities with contracts valued in excess of $50,000, bids on contracts valued in excess of $50,000 or a combination of bids and contracts valued in excess of $50,000 within a calendar year to register with the State Board of Elections and prohibit those entities from making political contributions to any declared candidate for the office responsible for the award of the contract. The offices covered under the law are as follows: Governor, Lieutenant Governor, Attorney General, Secretary of State, Treasurer and Comptroller. If a business entity has a contract with a State agency under the Executive branch, the Governor is responsible for the award of the contract. The State Board of Elections offers electronic registration for business entities and provides a certificate to registered entities. It is most important to know that State law forbids consideration by the State of Illinois of bids without the inclusion of a copy of the business entity's certificate of registration or verification from the entity that it is not required to register with the State Board of Elections under the new laws. In this new era of procurement reform, bidders and contractors must review their bid history and the applicable laws before responding to any State government contracting solicitation.

Contribution ban casts a wide net

The law's contribution restrictions and registration requirements extend beyond the business entity itself and include corporate parents and subsidiaries, non-profit organizations established by the business entity and certain political committees related to those non-profit organizations. It is important to note that certain employees are also covered under the ban. Those employees include any person with an ownership interest or distributive share in excess of 7.5 percent in the business entity, the President, Chairman or Chief Executive Officer of the business entity (or any individual who fulfills equivalent duties of those titles), any employee whose compensation is determined by the payment on the State contract (excluding regular salaried employees) and any spouses of those covered.

Penalties dictate that state vendors must have a compliance plan

Bidders and contractors must be aware that penalties for non-compliance can be severe. A business enti-

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DENZLER

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groups recognized political reality. According to the Director of Insurance, this legislation could have resulted in a 15 percent reduction in the cost of Workers' Compensation without requiring employers to pay for increased benefits for workers.

SB 1066 passed the House Executive Committee on a vote of 8-4 over the opposition of trial lawyers, labor unions, and health care providers. Ultimately, it was not called for final vote in the House of Representatives because Republicans would not vote for the measure believing that they could use their leverage to enact more sweeping changes than were contained in the bill.

The IMA and our team literally spent hundreds of hours and countless dollars on these issues over the Christmas and New Year's holidays. We sent numerous alerts to our members and we greatly appreciate the member companies who took time to call or write their elected officials to express their opinions on this legislation.

As I write, the 97th General Assembly has been inaugurated and we have again begun the process of reading the hundreds of new bills that have been filed by eager lawmakers. We'll continue to keep manufacturers advised of pending legislation. As always, thanks for your support. ■

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ty that violates the contribution prohibition may have its contract voided. If the entity violates the prohibition three times within a thirty-six month period, its contracts will be voided and it will be prohibited from bidding on State contracts for a period of three years beginning on the date of the last violation. Any intentional, willful or material failure to disclose required information to the State Board of Elections renders the business entity's contract, bid, proposal or contractual relationship voidable by the State should such a decision be deemed to be in the best interest of the State by the chief procurement officer.

In addition to the requirements described in this overview, there are many other obligations that registered business entities must honor to maintain compliance with the patchwork of Illinois laws governing the conduct of State contractors. This increase in responsibility for registered business entities comes at a time when there is greater transparency in the State procurement process now that certain communications made to State employees related to government contracting must be reported by State employees to the Procurement Policy Board and be made public on its website.

Any registered business entity should seek out experienced counsel to establish policies and procedures that will ensure that it does not inadvertently run afoul of its obligations under the new laws at the cost of losing its contract. ■

CHAD W. MOELLER & CASANDRA RDZAK

Got privacy? The impact of European data protection laws in U.S. litigation

Litigation involving multinational parties is an increasingly common occurrence in U.S. courts. The collection, review and production of hundreds of thousands of corporate documents and employee emails have become part of a costly routine to fulfill U.S. discovery obligations. Due to the strict data privacy laws in most European jurisdictions, the situation is complicated when a company has operations both in the United States and Europe. The mere intra-company transfer of corporate documents containing personal data could expose a multinational company to fines, civil, and even criminal penalties in the foreign country. As a result, multinational companies are well-advised to educate themselves on the impact of the European data protection rules on the type and amount of foreign discovery an entity may be required to disclose, and understand the potential pitfalls that compliance with cross-border discovery obligations may create.

Differing notions of privacy between the United States and most European countries are substantial. While U.S. laws generally presume that a corporation owns an employee's personal data in the workplace, the laws in most European countries presume that an individual's right to privacy is a fundamental human right, and that employees have the right to protect such data from being transferred or disclosed to third parties.

The European Union Data Protection Directive (the "EU Directive"), adopted by the European Commission in October 1995, is the starting point for most European data protection laws. The EU Directive regulates the levels of data privacy protection among the member states and provides a general framework for protecting an individual's right to privacy with regard to the "processing" and the "transfer" of "personal data" outside of the European Union. Because the EU Directive is not self-executing, it requires EU member states to enact legislation implementing its terms. Thus, the level of data protection in certain European countries may surpass that imposed by the EU Directive.

What is "personal data?"

The EU Directive defines "personal data" as "any information relating to an identified or identifiable natural person." See Art. 2(a). This broad definition is meant to cover all the information that relates to, or allows a third party to identify, an individual. As a result, multinational companies must be mindful of the nature of the information they intend to produce during the litigation discovery process. Indeed, a document, email, or personnel file that identifies any one of the company's foreign employees, or relates to those employees, is likely protected under the data protection laws and possibly out of reach for discovery purposes.

"Processing" of personal data

Processing of personal data is defined as "any operation or set of operations which is performed upon personal data, whether or not by automatic means" and includes the "collection, recording, organization, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction" of personal data. See Art. 2(b). This definition encompasses a multinational entity's collection of the data, even if the data

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GOT PRIVACY?

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does not leave Europe. Any attempt to collect or review an employee's individual emails or electronic documents containing the employee's name or other personal data is hampered by these rules.

European regulators do allow processing of an employee's personal data when the processing is done in accordance with established data protection principles. Specifically, data processing is considered legitimate if: (1) the data subject gives his or her unambiguous consent; (2) data processing is "necessary for compliance with a legal obligation to which the data controller is subject;" or (3) data processing is "necessary for the purposes of legitimate interests" pursued by the data controller or by a third party. See Art. 7(a), (c) and (f). The exceptions are not nearly as broad as they appear.

While at first blush the consent exception may seem like an easy way around the processing hurdle, pursuant to interpretation guidelines issued by the Article 29 Working Party — an independent European advisory body on data protection and data privacy — consent must be "freely given" and the data subject must have a "real opportunity" to withhold his or her consent, or to withdraw it subsequently. "Freely given" consent is particularly problematic in the employment context because an employee may feel that he or she is compelled to consent to the processing and production of the personal information as a condition of continued employment. In addition, obtaining consent could become burdensome when, for example, a relevant email contains personal data of a number of parties to the communication.

Processing of personal data under the second and third exceptions fares no better. As for the second exception, U.S. discovery is not generally considered a legal obligation, and the processing of personal data is likely not legitimate absent a European court order addressing the request. In terms of the third exception, the Working Party has expressly recognized the "tension between the disclosure obligations under U.S. litigation or regulatory rules and the application of the data protection requirements of the EU," reasoning "that the parties involved in litigation have a legitimate interest in accessing information that is necessary to make or defend a claim." This legitimate interest must be balanced, however, with the "rights of the individual whose personal data is being sought." This balancing test takes into account issues of "proportionality, the relevance of the personal data to the litigation and the consequences for the data subject."

"Transfer" of personal data

Assuming that the processing of personal data is proper, parties cannot use the personal data in litigation unless it is also properly transferred to the United States. Pursuant to the EU Directive, the "transfer" of personal data to countries outside of Europe is generally prohibited unless the country of destination "ensures an adequate level of protection." See Art. 25(1). The United States, however, is not accepted as providing a "level of protection" comparable to the European Union.

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DAVID JOHNSON

The hunt for willing lenders

With lenders still conservative, management teams should look to financial advisors to manage the process of securing the financing necessary for growth

Manufacturers have had a hard time of it for the past few years, but finally growth seems to have returned. Weaker competitors have fallen by the wayside as a result of the titanic recession of 2008-2009 and now order volumes are increasing. However, management teams must be cautious as they look to growth opportunities, given the continued scarcity of liquidity (particularly for smaller companies). Skilled financial advisors can help management teams secure the sources of liquidity necessary to take advantage of the opportunities presented by the market and return to growth after the painful retrenching of the past few years.

Those companies that have survived the recession now look forward to a brighter future. The October Federal Reserve "Beige Book" noted that Illinois-area manufacturers in general have "a very positive outlook for the remainder of 2010 and early 2011." In the manufacturing sector growth is once again (finally) a plausible goal for many.

However, most companies need additional financing to fund their pursuit of growth opportunities. To the consternation of many management teams, lenders are in many cases proving to be reluctant to provide the needed financing. It is in these situations that managers need both the guidance and understanding of skilled financial advisors well-versed in the frustrating tendencies of (commercial) bankers.

Frustration in dealing with lenders is certainly not new. The 19th century satirist Mark Twain defined a banker as "a fellow who lends you his umbrella when the sun is shining, but wants it back the minute it begins to rain." Twain might also have gone on to note that, having had an umbrella removed at the worst time, a lender might then insist on proof of twelve months of consistent dryness before again extending use of an umbrella.

Though not a new phenomenon, the anger and frustration management teams feel toward many lenders is palpable. These managers rightly protest that the growth opportunities they are presented with, comprised largely of growing order volumes and new customer opportunities, are not the bubble-era fever dreams of the easy credit days, when small companies branched out into side ventures that later imperiled the entire company. Sadly, those protestations are as true as they are irrelevant, and management teams must adjust themselves to the reigning ethos of the lending community.

That ethos is, essentially, a shunning of small-company risk.

In frequent conversations with commercial lenders active throughout Illinois, my colleagues and I

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Expanding your manufacturing facility

By Harry B. Kuchma, SE, SECB, M. ASCE, KRW Consulting

This article addresses common scenarios for expanding a manufacturing facility.

Building code issues

Expanding any facility, is both exciting and perilous. A code analysis is a must. Starting without one, is like traversing a minefield without a map. You must establish what you have to do to be code compliant, and what you must avoid.

Code authorities limit travel distances and call for fire separation walls. Although, fire walls protect, you they also limit your options. Any penetration through a fire wall requires fire actuated closures. Increasing 'maxed out' floor areas may require changing such things as travel distances, fire wall locations, sprinkler use, refuge (safe) areas inside the building. Where fire walls are required, specialized construction and material must be used. Only lab tested assemblies (such as UL) are permitted. These fire tested assemblies are material and product specific — no substitutions, not even a different manufacturer. Your insurability may be affected.

Although OSHA is not strictly a building code, it has authority regulating workplace safety. OSHA has numerous requirements relating to safety that may impact building design. Stairs, railings, landings, ladders must meet not just minimum strength, but also dimensional requirements. Presence of some chemicals may require larger or specialized HVAC equipment. Electrical panels and equipment have their own clearance and separation requirements. Although this may not strictly be a cost issue, it requires additional space.

The EPA may impact your building design depending on products you use or produce. Volatile or hazardous chemicals require control or spill containment. In some cases, an additional drainage system beyond the usual two is required, or a separate hazardous waste drainage system.

Knowledge of how volatile or hazardous chemicals interact or degrade common building materials is important. The chemical sensitivity of construction materials have been tested over the years and their resistance is known. Sodium hydrochloride attacks concrete, sulphuric acid corrodes unprotected steel, varnishes dissolve PVC.

Process considerations. Why a GA?

If your manufacturing process is not well understood, your building design will reflect it. This is what separates the experienced design team from the others. Without a GA (General Arrangement), navigating your building design is like traveling through unknown lands without a map. In any complex manufacturing process there are numerous steps involved in turning raw material into a finished product. Whether the product is sold directly to consumers, or to other re-processors, you have your requirements for receiving the raw product and the buyer has his. If these are not properly addressed at either end, your product may not be saleable or it may miss its price point. Everything from beginning to end flows from the manufacturing process. This is true whether we are speaking about fabrication or a specific chemical process: the appropriate bulk materials, add-ins, chemical reactions and equipment that make it happen. And all of this must be carried out in a specific sequence and time frame without exceeding cost. If any part of this chain is broken, the product may not meet specifications or become unmarketable.

The best way to ensure that everything is considered, is for the owner to provide several non-construction drawings, documenting all steps of the process. This is accomplished through P&ID (Process & Information Drawings), GA and single line drawings. Single line drawings outline all requirements relating to power and electrical operation of the equipment. P&ID's are simple drawings utilizing icons representing process flow from loading dock through all equipment, valves, heaters, mixers and other process work down to the packaging. The General Arrangement (GA) is a simple drawing or set of drawings showing all physical structures, equipment as it relates to the building and to other equipment. Tanks or pumps are shown in their correct locations. If equipment is to be elevated on a mezzanine to allow grav-

ity flow of liquids during discharge, they are thusly shown. Under the mezzanine, all supporting motors, filters or other equipment are shown to approximate scale. Clearances are clearly noted including aisle width to allow traffic to and from manufacturing areas. If equipment requires platforms or access-ways, they are shown. Stairs and ladders are carefully located to allow for efficient access and safe exiting.

If design for either the process system or the building is started without these vital preliminary documents, one is almost assured, of an inefficient building or process system design. These documents may be created by the owner or by the consultant. Only the most sophisticated owners create their own GA's and P&ID's because it takes an intimate knowledge of both the process and equipment as well as a considerable expenditure of time. When the consultant produces these drawings, he spends much time with key personnel knowledgeable in the manufacturing process. Once these drawings are complete, the design of the systems and the building can proceed with confidence.

Structure considerations

When erecting a brand new building, many decisions have to be made. Fortunately when expanding an existing building, many decisions are already made for you. For aesthetic reason and in the interest of uniformity, it is usually best to stick with the same type of construction and materials as the original. That is, if the building has masonry walls and a steel roof set on steel beams and columns, it is advisable not to change the structural system, unless there is a compelling reason. More than likely, many decisions in the original building were determined by code and zoning issues.

Interior column spacing is best kept identical unless there is a change in the process that requires it. If a higher roof is desired, it may be best to consider a new freestanding building. Where a lower roof is adjacent to a higher roof, increased snow drift loading will impact the design of the adjacent lower bay. The lower roof may have to be reinforced, increasing the cost of the roof.

A geo-technical report is a must. This is not just to protect your investment in the building: a poor subgrade may affect proper operation of your plant. Settlement, especially differential settlement, may cause serious impediments to movement of product or materials, or operation of equipment. If you have heavy loading or heavy equipment, a geo-tech report will also alert you to the need for a special floor or foundation design.

When adding space to an existing building, it is important to consider which walls to penetrate. It is not advisable to remove large sections of bearing wall unless you have no other options. Usually an end wall, where the roof steel is parallel to the wall is a logical choice to avoid major wall strengthening. If one must break through a bearing wall, a series of small openings is less expensive than undertaking a major wall reinforcing task.

If lighting is a significant cost, there are new types of fixtures and lighting products on the market. This technology is moving so quickly that new products are much more efficient than they were even three years ago. Choice of proper lighting products can lead to significant savings.

Build in flexibility into the roof framing

If your facility needs to support a high concentration of overhead piping or roof mounted equipment, this can become an important future issue. In such areas, it is not advisable to use open web steel joists for the roof construction. Although using open web steel joists is an efficient way to frame roofs, if there is need to support large numbers of closely spaced piping, hose reels, manifolds or even small equipment, this may not be your best choice. If future market demands require that your facility revise the process to meet changes in the composition of your product, or even a complete change in the product you are manufacturing, your building roof framing may not have the flexibility required to allow for changes without incurring large costs. In such areas, it is best to pay a little more up front and use rolled structural sections (I-beams). Open web steel joists are notoriously difficult to reinforce. In contrast, rolled sections are stronger and they are relatively easy to reinforce.

Lowering maintenance costs

One way to save money on energy costs is by making sure you have sufficient insulation. Buildings erected prior to the 70's were usually under-insulated. What is the optimum amount? Numerous case studies have shown that three inches in the roof (20 R value) and two inches in walls (13 R value) is usually best. The above values will yield about five to seven year pay back. If you have to heat and air condition your plant, even better. Your payback will be at the lower (five year) figure. Over-insulating, except in rare cases does not save you money. Increasing insulation above the optimum by even one inch, increases payback to about 15 years.

Doors, and especially windows, are huge sources of energy loss in a building. Thus, use of energy saving fenestration is one strategy. Unless you have double pane windows in your facility, the pay back can be reasonable, well under 10 years. Even if you do not feel this to be a good use of monies, we feel that Federal and state regulations will be promoting this in the near future. Of course, should the cost of energy increase dramatically in the near future, the payback would drop significantly.

If lighting is a significant cost, there are new types of fixtures and lighting products on the market. This technology is moving so quickly that new products are much more efficient than they were even three years ago. Choice of proper lighting products can lead to significant savings. Occupancy sensors, where appropriate, will shut off lighting or reduce it's use when an area is vacated. Green energy sources, if properly selected and integrated, can benefit

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the bottom line. This has to be carefully considered as there is much confusion and misinformation about the appropriateness and efficacy of various green energy sources.

For facilities that require high maintenance, it is imperative that the building materials, especially finishes, be appropriate for the type of work conducted at the facility. Where sanitation is important, say food processing, or certain sensitive manufacturing processes, the surfaces need to be impervious, smooth and for the most part seamless. Where cleanliness is important, the surfaces have to be chosen to withstand harsh cleaning chemicals and abrasion.

Storage facilities and warehousing must be able to resist the inevitable hits and bumps from forklift equipment. This often includes such strategies as encasing the bottom four feet of building columns in concrete and providing steel guides (bumpers) at the level of the motorized equipment. Floors must be able to support heavy wheel loads from palate lifts or forklifts. Abrading of the floor may be an issue with certain motorized lifts and storage materials. Floor joints are placed in concrete slabs to prevent shrinkage cracks. These joints have to be properly designed. If not properly spec'd and designed, heavy traffic over floor joints often can cause concrete to crack and disintegrate.

How unions affect building cost

This issue varies greatly depending on type and strength of union organization in your area. Where union presence is strong, one has to take into account union rules and culture. Early in the planning stages it is advisable to speak with key workers and get their input on issues relating to their duties and details of carrying them out: that is, such work issues as handling of heavy or bulk materials, storage (stacking), unloading of bulk materials, loading of finished product, type of regular or irregularly scheduled maintenance, cleaning of work areas. Worker comfort is also an important cost factor: locker rooms, lunch room, toilets.

With a strong union all of the above will likely be more costly as the unions will want to make things more comfortable for their members. Under some circumstances they may limit amount or volume of work performed per unit of time. For lifting, the use of mechanical aids (fork lift, palate trucks, drum lifters, cranes etc.) is often required. Although this is not strictly a union issue, the union may want to 'trade up', say a fork lift instead of a palate truck, an ergonomic suction lift instead of a hand truck. In unloading or loading of materials, the union rules may require more workers than you feel are necessary to do the job. In some industries, unions, or even your safety officer may push for stricter or more frequent safety features. Thus if you are working 'high' (as defined by the work manual) you may need to provide many safety tie-offs. Shallow pits or change of floor elevation, in some cases as low as eight inches, may require a guard rail or even a removable guard rail. These rules often are beyond OSHA work safety rules.

Indirect cost items may result from union work preferences. Certain out of the way areas requiring infrequent attention, say on the roof, are usually accessed by way of ladders. If a worker is required to carry hand tools or parts for purposes of monitoring or periodic equipment maintenance, say changing of filters, the union may want a stair rather than a ladder. This is of course initially more costly and more importantly, requires more floor space. If you have equipment requiring infrequent attention in a secluded but tight area, a ladder may be the only option. This requires skill in dealing with your maintenance department.

What about ADA?

ADA is not a union issue, it is a workers issue. This U.S. Act has a cost implication for building design. Unless you have many office workers at your manufacturing facility, the impact for manufacturing may be nominal. Clearly you will need to address this for your clerical staff in the office layout. You will have wider foot traffic aisle widths, larger toilets, grab bars, ramps and elevators, etc. These issues are well known. As a minimum, all this requires more space and hardware. For the factory floor, it is a bit more cloudy.

How physical is the requirement for workers in your plant? If a large part of it is simply sitting and assembling small parts, soldering, inspecting, etc., where workers in wheelchairs can easily work along side unimpaired workers, you will have to make some accommodations. If you must run up and down ladders attached to equipment, use lifting devices like drum lifts and other strenuous activity that a wheelchair worker cannot do, then you may not be required to make that area ADA compliant. Each class of workers must have a tightly defined job description. If your job description is vague and unclear, you may find yourself out of compliance.

Consider the following descriptions of a particular job: ". . . monitor pressure valves, adjust product mix when required to conform to standard. . . . ." Concise but a bit incomplete if you should be audited. Compare this to the following phrase: ". . . record pressure valve readings in a log book from a ladder afixed to the boiler; with the help of a drum lifter, load

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Cost of expansion

For the purposes of establishing a rough budget we provide average cost guidelines for a light industrial facility.

Area (SF)	5000	10,000	20,000	40,000	80,000
Cost ($/SF)	$173	$162	$155	$150	$147

Notes:

1. Based on a steel structure 20 feet high with concrete block perimeter walls.
2. For most heavy industrial facilities, increase the above figures by 25 to 50 percent.
3. Note: Use of above figures must be appropriate for your structure type and conditions.
4. Of the above amounts 25 to 30 percent is for non-structural elements: electrical, mechanical, plumbing, fire protection.

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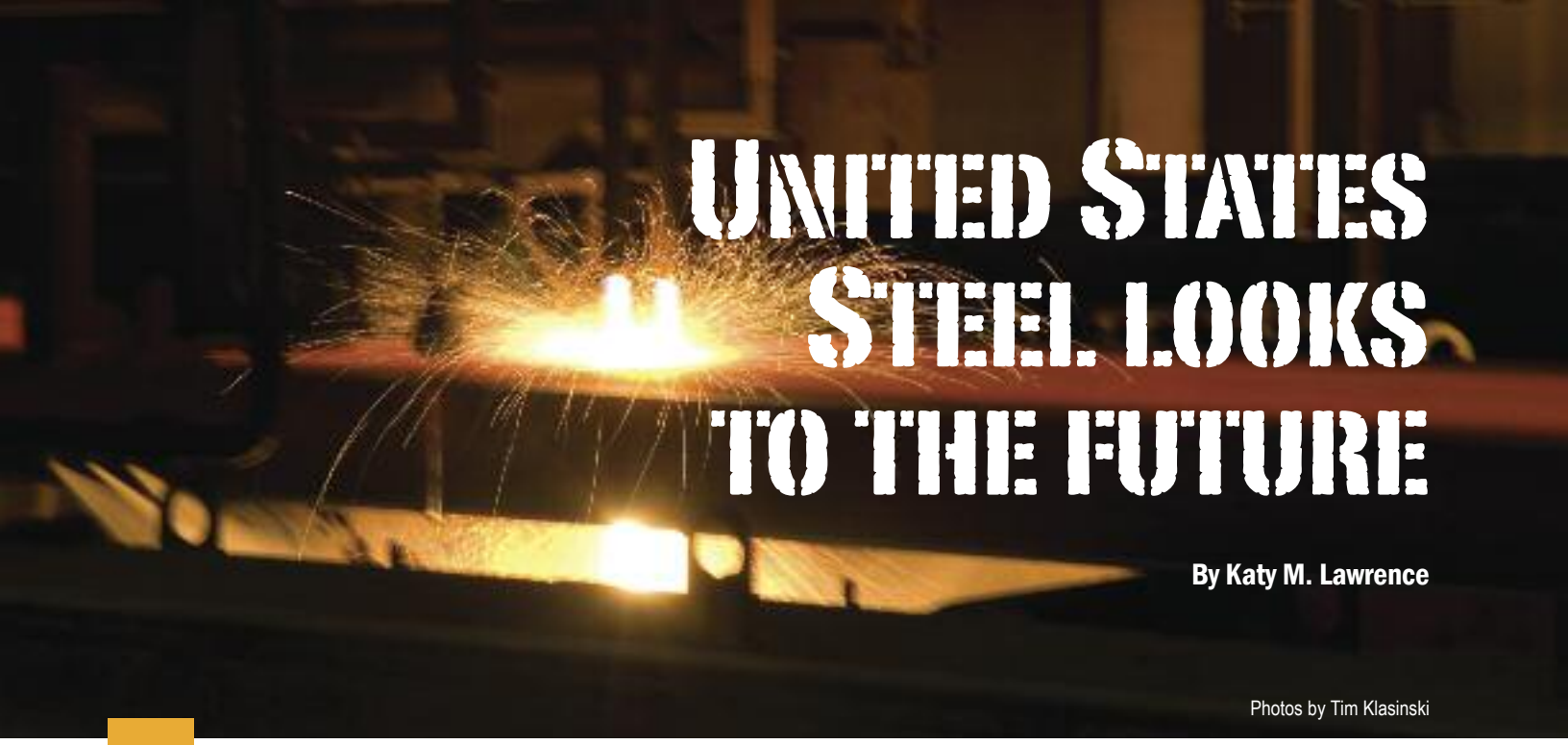

United States Steel Looks to the Future

By Katy M. Lawrence

Photos by Tim Klasinski

Headquartered in Pittsburgh, Pennsylvania, IMA member United States Steel Corporation has major production operations in the United States, Canada and Central Europe and a total annual raw steelmaking capability of 31.7 million net tons. The company, which employs more than 42,000 people worldwide, manufactures a wide range of value-added steel sheet and tubular products for the automotive, appliance, container, industrial machinery, construction, and oil and gas industries. U. S. Steel is also engaged in several other business activities including the production of iron ore pellets and coke, railroad and barge transportation services, and real estate operations.

When founded in 1901, U. S. Steel was the largest business enterprise ever launched, with an authorized capitalization of $1.4 billion. Throughout the years, U. S. Steel responded to changing economic conditions and new market opportunities through diversification and periodic restructuring. Today, over a century after its founding, U. S. Steel remains the largest integrated steel producer headquartered in the United States.

U. S. Steel had its origins in the dealings of some of America's most legendary businessmen, including Andrew Carnegie, J.P. Morgan, and Charles Schwab. However, its principal architect was Elbert H. Gary, who also became U. S. Steel's first chairman. At the turn of the century, a group headed by Gary and Morgan bought Carnegie's steel company and combined it with their holdings in the Federal Steel Company. These two companies became the nucleus of U. S. Steel, which also included American Steel & Wire Company, National Tube Company, American Tin Plate Company, American Steel Hoop Company, and American Sheet Steel Company. In its first full year of operation, U. S. Steel made 67 percent of all the steel produced in the United States.

Gary Works, appropriately named after founding father Elbert H. Gary, is U. S. Steel's largest manufacturing plant and is situated on the south shore of Lake Michigan in Gary, Indiana. Comprised of raw material, steelmaking and finishing facilities, Gary Works has an annual raw steelmaking capability of 7.5 million net tons. There are also two other U. S. Steel facilities in Northwest Indiana that are operated as part of Gary Works: East Chicago Tin, a tin mill products finishing facility in East Chicago, Ind., and Midwest Plant, a finishing facility in Portage, Ind., that produces hot dip galvanized, cold-rolled and electrical lamination sheets as well as tin mill products.

Sheet products, hot strip mill plate products and tin products are manufactured at Gary Works. Hot-rolled, cold-rolled and galvanized sheet products are produced for customers in the automotive, metal building components, home construction and appliance markets.

Tin mill products are used by customers in the container industry in the manufacture of food and beverage containers, aerosol cans, paint cans and pails, and more.

These high value-added steel products have demanding chemistries and specifications that can be made only from the hot metal that is produced in blast furnaces, which provide the lowest cost, most efficient, high volume means of making high-quality liquid iron.

In 2005, the largest blast furnace in U. S. Steel's fleet and in North America was rebuilt. What used to be No. 13 Blast Furnace is now known as No. 14 Blast Furnace and has the latest advances in control technology and can produce up to 9,200 tons of hot metal per day, with an expected availability of better than 96 percent and a campaign life of 20 years.

The use of iron can be traced back to about 4000 BC. Around 100 BC, the Chinese developed a bellows technology that allowed for a continuous flow of air into the blast furnace instead of intermittent puffs, and by 100 AD they were using waterwheels to mechanize the process. Europeans wouldn't have similar technology until the middle of the 16th century. Modern day blast furnaces resemble the "stuckhofen," a shaft-type furnace found in Germany, Austria, Belgium, and the Netherlands

around 1350 AD. Like today's blast furnace, the interior of the stuckhofen was shaped like two truncated cones stacked base to base. The furnaces were roughly 10 to 16 feet tall; were charged from the top; used charcoal exclusively as a fuel; were fed air through one or two nozzles; or tuyeres (pronounced tweers) and each had a drain hole that was plugged while the iron was being reduced and dug out when the furnace was tapped.

While the chemical reactions required to produce iron from iron ore have not changed in a thousand years, comparing the Chinese or stuckhofen blast furnaces to those used today would be like comparing an ox cart to an 18-wheeler. Over the years, blast furnaces have become more efficient in several ways. In addition to improvements in raw materials and iron ore, performance has been improved and coke consumption reduced by injecting alternate fuels through the furnace tuyeres, along with hot air. Natural gas, coke-oven gas, oil and pulverized coal are the primary alternate fuels, with some furnaces like Gary No. 14, being capable of substituting one for another depending upon cost and availability. To improve combustion, oxygen is also injected into all U. S. Steel's blast furnaces.

Control room at the U. S. Steel Gary Works facility.

The most significant contribution to blast furnace efficiency has been made by modern control technology. State-of-the-art process control computers used in conjunction with sensors located throughout the blast furnace allow precise control of every aspect of the operation. Raw materials can be measured exactly and optimally placed within the furnace. The wind rate can be precisely controlled to adjust furnace temperature and iron throughput, and the proper amount of alternate fuel and oxygen can be injected. Finally, there is no guessing when to tap the furnace. The accumulated data from the sensors and con-

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IMA Young Leaders Council tours U. S. Steel Gary Works

The IMA Young Leaders Council (IMA YLC), a group of approximately 74 young professionals in manufacturing and related industries, toured U. S. Steel's Gary Works facility on December 2, 2010, the day before the IMA Annual Luncheon in Chicago. Twenty-eight IMA YLC members participated in the tour.

Founded in 2007, the mission of the IMA Young Leaders Council is to provide educational and social environments to help develop industrial leaders for the manufacturing sector in Illinois. The YLC creates opportunities for young professionals to expand their professional growth and prepare them to become future leaders. The YLC promotes information sharing and networking opportunities and provides for leadership and educational programs throughout the year.

Gary Works General Manager and former IMA Board member Sharon Owen gave the group an overview of Gary Works' facilities and the steelmaking process in general prior to a facility tour that included stops at the No. 2 Continuous Caster, the control room at No. 14 Blast Furnace, the Hot Strip Mill and the Temper Mill.

Illinois companies like Caterpillar, Deere & Co., Ford, United Scrap Metal, Philippi-Hagenbuch and others participate in the IMA YLC.

U. S. Steel's Manager of State Governmental Affairs Katy Lawrence has participated in the YLC since its inception in 2007 and serves on the Steering Committee.

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trol parameters tell the operator just when to swing the drill into place and bore out the plug.

Generations of iron-masters, chemists, metallurgists and engineers have dedicated their careers to making blast furnaces better, and employees across U. S. Steel's facilities, including the more than 5,800 people employed at its three Northwest Indiana operations, are doing their part today to make the company's blast furnaces even better for years to come.

U. S. Steel's Illinois facility, Granite City Works, is located in the Metro East area of Illinois. This facility has raw material, steelmaking and finishing operations and has an annual raw steelmaking capability of 2.8 million net tons. It primarily produces hot-rolled and coated sheet products for a variety of end use markets. Granite City Works is also home to a state-of-the-art coke making facility that began operating in 2008. Known as the Gateway Energy & Coke Company LLC, the effort between SunCoke Energy and U. S. Steel includes a cogeneration plant owned and operated by U. S. Steel and a heat recovery coke plant that is owned and operated by Gateway Energy & Coke Company, a wholly owned subsidiary and affiliate of SunCoke Energy. The heat recovery coke plant consists of three batter-

Photos at left . . .

Top: Steel slabs are lifted from the continuous caster's runout area and prepared for transport to the plant's hot strip mill.

Center: At the hot strip mill, steel slabs are rolled into sheets that are fractions of an inch thick and then coiled to await further processing in other areas of the plant.

Bottom: Members of the IMA Young Leaders Council visited the temper mill, where sheet products are cold rolled to change the surface to match customer specifications.

ies of 40 coke ovens each, a total of 120 coke ovens. The plant can yield approximately 650,000 tons of coke per year, and a conveyor system transports the coke produced directly to the blast furnaces at Granite City Works.

The heat recovery coke plant utilizes SunCoke's proven, low-emissions technology, which produces high-quality blast furnace coke. This technology is identified in the 1990 Clean Air Act, which directs EPA to use SunCoke's technology as a "basis for setting emission standards for new coke oven batteries" and establishes the basis for Maximum Achievable Control Technology (MACT).

The heat recovery ovens are operated at a negative pressure, adding air from the outside to oxidize all volatile matter and release the heat of combustion within the oven system. Hazardous Air Pollutants (HAPs) are destroyed by thermal oxidation within the oven. The operation of the ovens under negative pressure eliminates door and other equipment leaks during the coking process. Consequently, there are no emissions of odorous compounds. The heat recovery coke plant technology also has many other attributes that allow the plant to operate in an environmentally protective way.

The cogeneration plant supplies electricity and process steam to Granite City Works. By producing high-pressure steam to power an associated steam turbine generator, electricity is generated at a capacity of 78 megawatts — which takes the place of electricity that was previously obtained from the community. The cogeneration plant also has a blast furnace gas boiler to utilize gasses from the blast furnace. Environmentally protective attributes of the cogeneration plant include: generation of steam produced from process fuels that may have otherwise been burned off; significantly reduced greenhouse gas emissions compared to the boilers that were replaced; and increased efficiency because the new system only requires 75 percent of the fuel that a separate heat and power system would require.

Throughout its nearly 110-year history, United States Steel Corporation has consistently sought out and developed new technologies to help improve all aspects of the steelmaking and finishing process — from environmental performance to product quality. The No. 14 Blast Furnace rebuild at Gary Works and the heat recovery coke plant project at Granite City Works are just two examples of the company's recent efforts in this key aspect of its business. ■

Chicago Lakeside Development

Chicago Lakeside Development, LLC, a venture of Chicago-based McCaffery Interests, Inc. and U. S. Steel, announced in late 2010 the opening of a 2,000 square-foot marketing center that signifies the beginning of formal marketing for the development of the property that was formerly home to U. S. Steel's South Works.

The Chicago Lakeside Marketing Center is housed in the only remaining structure on the nearly 600-acre former U. S. Steel South Works steel production plant located between 79th and 91st Streets on Lake Michigan's shore. The structure was originally built in 1917 and has been transformed to reflect the development's vision and opportunity, while maintaining the historical impact.

When completed over a span of 30 years, the development will include 13,575 new homes, 17,500,000 square feet of retail and other commercial space, a new high school, and a 1,500 slip marina. Construction is expected in a minimum of six distinct phases.

Phase I of the development will include new public infrastructure and the mixed-used development identified as The Market Common, an 800,000 square foot project featuring retail, restaurants, entertainment venues and residential units. Phase I centers around a 76-acre land parcel bound by 79th Street, 83rd Street, Brandon Avenue and the re-routed Lakeshore Drive. Construction of Phase I is scheduled to begin as early as 2012.

Designed by Skidmore, Owings and Merrill in conjunction with Sasaki Associates and Antunovich Associates, this development is perhaps the largest public-private development project ever undertaken in Chicago. The Master Plan long-term vision includes an estimated $450 million in new public infrastructure, 125 acres of public land, miles of lakefront access, new bike paths, and expansive commuter rail and bus service to connect the development to surrounding neighborhoods, the central business district, and beyond. It will take an estimated 30 years to complete and cost more than $4 billion in both public and private funds. The Master Plan has earned national and international recognition and is the recipient of four prestigious awards:

- 2009 AIA National Honor Award Regional & Urban Design
- 2009 Chicago Athenaeum International Architecture Award
- 2009 AIA Boston Chapter Sustainable Design Award Urban Design & Master Plan
- 2007 AIA Chicago Chapter Sustainable Design Award

These are forward-looking statements concerning the future development of the Chicago Lakeside property. The functions and size of the ultimate development as well as the timing, cost and financial performance of the development are subject to many factors over a long period of time including, among others, general economic conditions, developments in residential and commercial real estate markets in the Chicago area, the availability and terms of necessary financing, final plans and specifications, and the terms of to-be-negotiated-for construction and other contracts. Consequently, actual development may be significantly different than that contemplated in these statements.

Author **Katy M. Lawrence** *is Manager of State Governmental Affairs for United States Steel Corporation. Lawrence worked for the Illinois Manufacturers' Association from 1994-2002, serving as Director of Government Affairs; and is now an active member of the IMA Young Leaders Council Steering Committee.*

GOT PRIVACY?

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Thus, personal data can only be transferred to the United States if an exception to the prohibition against transfer applies or if alternative means to provide an "adequate level of protection" are used. Similar to the processing of personal data, the transfer of such data may be allowed if: (1) the data subject has unambiguously consented to the transfer, or (2) the transfer is necessary or legally required on important public interest grounds for the purpose of "the establishment, exercise of defence of legal claims." See Art. 26(1)(a) and (d). Not surprisingly, the exceptions are construed narrowly.

The analysis under the consent exception mirrors the requirements and drawbacks of the consent exception in the context of the processing of personal data. The second exception suggests that the transfer of personal data might be allowed for purposes of U.S. legal proceedings. But the Working Party has generally limited the application of this exception to situations where the provisions of the bulky Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters have been complied with. The Hague Convention is an international, multi-lateral treaty which allows one member nation to receive discovery information from another. It provides that a U.S. court may request discovery to the competent authority of another contracting state by means of a letter of request. A contracting state, however, may ignore or deny the request if it considers that the request would threaten its sovereignty. To complicate matters further, the U.S. Supreme Court has ruled that compliance with the Hague Convention is an optional way of collecting evidence abroad for litigants before U.S. courts. See *Societe Nationale Industrielle Aerospatiale v. U.S. District Court,* 482 U.S. 522 (1987).

Conclusion

Ensuring simultaneous compliance with European data privacy laws and U.S. litigation discovery obligations is daunting. Multinational companies with operations both in the United States and Europe must understand the applicable data protection rules and employ strategies that minimize the risk of penalties and liability. As an initial matter, the company should consider all the grounds for legitimate processing and transfer of personal data. The company should raise the data privacy issues early in the litigation, and if necessary, educate the court on the implications of the data protection laws on the proposed discovery. If necessary, the company should also seek protective orders and take measures to limit the scope of discovery and disclosure of personal data from those documents relevant to the litigation. Only a methodical consideration of the interplay between European data protection laws and U.S. discovery obligations will avoid the trappings of the two disparate bodies of law. ■

References

1. See generally, Seth Berman, Cross-Border Challenges for e-Discovery, *Business Law Int'l,* Vol. 11, May 2010.
2. Working Party, Opinion 8/2001 on the Processing of Personal Data in the Employment Context, Sept. 13, 2001 (5062/01/EN/Final WP 48).
3. The Working Party's guidelines provide only guidance regarding data privacy matters, rather than well-recognized protection, against the consequences of a potential disclosure of personal data in violation of the data protection laws.
4. Working Party, Working Document 1/2009 on Pre-Trial Discovery for Cross Border Civil Litigation, Feb. 11, 2009 (0339/09/EN WP-158).
5. See generally, Carla L. Reyes, The U.S. Discovery – EU Privacy Directive Conflict: Constructing a Three-Tiered Compliance Strategy, 19 *Duke J. Comp. & Int'l L.* 357 (2009).
6. Working Document on a Common Interpretation of Article 26(1) of Directive 95/46/EC of 24 October 1995, at 15, Nov. 2005 (2093/05/EN-WP114).

BRIAN HARTSTEIN

EEOC releases final rule on genetic discrimination

On November 9, 2010, the Equal Employment Opportunity Commission ("EEOC") published the final rule to implement Title II of the Genetic Information Nondiscrimination Act of 2008 ("GINA"), clarifying its interpretation of many portions of the Act. GINA prohibits employers and health insurers from discriminating on the basis of "genetic information" and strictly limits the collection of such information. There are three routes to employer liability under GINA: (1) discrimination based on an employee's genetic information or the genetic information of a family member; (2) unlawful collection of genetic information; and (3) failure to properly maintain and preserve the confidentiality of genetic information. The final regulations provide greater clarity on several key aspects of the law, including the inadvertent acquisition of genetic information, the acquisition of genetic information through wellness programs, the storage of genetic information, GINA's interplay with other federal, state or local laws, and the definition of various terms within the Act.

Acquisition of genetic information

The text of GINA made clear that employers were strictly limited in their acquisition of genetic information about employees. The new regulations add clarity to the types of activity that will be considered prohibited collection, including obtaining that information through internet searches aimed or likely to result in acquisition of genetic information, actively listening to third-party conversations, searching an individual's personal effects in order to obtain genetic information, and making requests about health status that are likely to result in the disclosure of genetic information.

Inadvertent acquisition

The general prohibition against requesting, requiring or purchasing genetic information does not apply to "inadvertent" acquisition of such information (e.g., when requesting health information in order to determine a reasonable accommodation in compliance with the ADA or for confirming qualifications for FMLA leave.)

However, employers should be aware that a lawful request for medical information that leads to the acquisition of genetic information will not be considered inadvertent if the request fails to explicitly direct the health care provider not to provide genetic information. The regulations provide sample safe harbor language that employers are directed to use and will constitute sufficient warning to medical providers:

The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers and other entities covered by GINA Title II from requesting or requiring genetic information of an individual or family member of the individual, except as specifically allowed by this law. To comply with this law, we are asking that you not provide any genetic information when responding to this request for medical information. 'Genetic information,' as defined by GINA, includes an individual's family medical history, the results of an individual's or family member's genetic tests, the fact that an individual or an individual's family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual's family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services.

The safe harbor language is not necessary if the request is not likely to result in obtaining genetic information. This is most likely to occur if a request is narrowly tailored — for instance, if an employer is only

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pigment into product door located on the top of the tank . . . ." Clearly the second description implies climbing agility and the ability to maneuver heavy packaged bulk products. If your job descriptions are not accurate and clear, wherever the job requires strength and various bodily skills, you may run afoul of ADA. This will require expenditure of monies. More importantly, if you do not have the necessary space that this may require, you may be forced into a very expensive and time consuming retrofit.

Special requirements

Many structures have special requirements. Although beyond the scope of this article, for the sake of illustration, we enumerate a few of these: clean rooms, labs, cranes, heavy machinery, automatic rack storage and retrieval systems, underground storage tanks, special metal finishing processes, truck unloading facilities, hazardous material storage, blast areas (explosive products or aerosol filling), radioactive products and many others too numerous to list. ■

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EEOC

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requesting the result of an MRI.

Other examples of inadvertent acquisition of genetic information include: inadvertently overhearing a conversation; information gained through casual or water cooler type conversation; unsolicited information (for example, an unsolicited email from an employee); or through social media the employer has permission to access.

Wellness programs

Employers with wellness programs should be aware of very specific restrictions laid out in the final rule. The first requirement is that providing genetic information cannot be required to participate in the program. In addition, employees may not be penalized for failing to provide genetic information, and there cannot be a financial inducement for providing the information. Employers may offer financial inducements for completing health risk assessments that include questions involving genetic information, but it must be clear that the inducement is available whether or not genetic information is provided. The regulations provide specific examples to illustrate how this provision operates.

Employers using a wellness program must use written authorization forms to demonstrate that participation in the program is voluntary. These forms must be written in a manner reasonably likely to be understood; describe the genetic information that is being obtained and its purpose; and describe the restrictions on disclosure of the information.

Confidentiality of personnel files

Employers are not required to remove existing genetic information from personnel files that was in place prior to the implementation of GINA on November 21, 2009. Nevertheless, it is generally recommended that genetic information be placed in separate confidential medical files. This can be the same files maintained for and subject to Section 102(d)(3)(B) of the Americans with Disabilities Act ("ADA").

Interplay with other laws

The EEOC's regulations go into detail regarding the interaction between GINA and various federal, state and local laws. The regulations specifically note that state or local laws providing "equal or greater protections than GINA" from genetic discrimination or from "improper access to information" are not preempted by GINA.

The regulations also note that "the acquisition, use, and disclosure of medical information that is not genetic information about a manifested disease, disorder, or pathological condition is subject to applicable limitations under sections 103(d)(1)-(4) of the ADA."

Definitions

The final regulations have also provided more detailed information on the definition of various terms used in GINA.

Employee — Will include both current and former employees.

Family Member — Refers to a dependent, as that term is used in the Employment Retirement Income Security Act ("ERISA") but is limited to "persons who are or become related to an individual through marriage, birth, adoption, or placement for adoption." Family members also include persons related "from the first to the fourth degree."

Genetic Information — The regulations define Genetic Information as (i) an individual genetic test; (ii) the genetic tests of the individual's family members; (iii) the manifestation of the disease or disorder in family members of the individual (family medical history); (iv) an individual's request for, or receipt of, genetic services, or the participation in clinical research that includes genetic services by the individual or a family member of the individual; or (v) the genetic information of a fetus carried by an individual or by a pregnant woman who is a family member of the individual; or (vi) the genetic information of a fetus carried by an individual or by a pregnant woman who is a family member of the individual and the genetic information of any embryo legally held by the individual or family member using an assisted reproductive technology.

Genetic information does not include information about sex or age of the individual, the sex or age of family, or the information about the race or ethnicity of the individual or family members that is not derived from a genetic test. Nor does it include cholesterol tests, blood count, liver function or drug and alcohol tests.

All employers should review their procedures to ensure compliance with GINA and the new regulations, especially with regard to the collection of employee medical information for FMLA, ADA or other purposes. Employers should also review their wellness programs and conduct a review of personnel files to ensure they are in compliance with the regulations. If you have any questions about these issues, or if you would like assistance in reviewing your requests for medical information, wellness policies or recordkeeping practices, please contact the author listed at the bottom of page 21. ■

DANIEL A. KAUFMAN & CHARMAINE M. BUTLER

Transitioning former employees into contingent workers

Faced with the ever-growing need for workforce flexibility and just-in-time delivery of worker skill sets, employers increasingly have been moving parts of their employee workforce into a contingent workforce. Many retirees, down-sized employees, and individuals who just want freedom and flexibility are increasingly opting to work as contingents, even for the companies that most recently employed them. If done correctly, these "alumni" worker arrangements can benefit both the employer and the individual. To realize the potential benefits of this transition, employers must ensure that they continue to comply with applicable labor and employment laws. This article outlines the issues that employers should consider when transitioning to a contingent workforce.

Change in liabilities. In many cases, labor and employment laws apply differently to employees, contingent employees and independent contractors. To ensure legal compliance, we discuss select laws that apply to contingent workers, as well as the steps employers should take as they transition employees to contingent status.

Fair Labor Standards Act (FLSA). The FLSA establishes minimum wage, overtime and child labor standards for employees. The FLSA covers all employees engaged in commerce or the production of goods for commerce, as well as certain types of other employees. Under its broad reach, the FLSA covers contingent workers, except independent contractors and self-employed workers. The FLSA does not distinguish between full-time and part-time employment or between temporary and permanent workers. According to Department of Labor (DOL) regulations, in joint-employment relationships (where more than one employer has legal responsibility for the worker, and the employment among the employers is related), all employers are responsible for complying with the FLSA. Therefore, joint employers should specifically address in writing which entity is responsible for complying with the FLSA. While aggrieved employees still will be able to sue either of the joint employers for noncompliance under the FLSA, clear contractual language might help to minimize the litigation expense of sorting out liability.

A trap with regard to engaging higher-level alumni and other contingent workers related to exempt status. Many workers consider it prestigious to be "exempt" from overtime, or consider it to be demeaning to be paid hourly and receive overtime. Employers must resist the temptation to give in to these sentiments. Employees should be classified correctly, even if they do not like the classification.

Avoiding misclassification. Misclassification of workers as employees of some other entity (and not as co-employees of two or more entities) can create significant risk. Even greater risk is created by misclassification of workers as independent contractors. Because there exists no single standard by which federal and state courts and agencies determine independent contractor status, many employers struggle to determine how best to ensure their alumni meet the level of independence and entrepreneurship that federal and state laws require of independent contractors.

see **TRANSITIONING** *page 24*

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WILLING LENDERS

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have noted a pronounced lack of urgency regarding new loan activity. While the business press is abuzz with stories of loose credit markets, that applies primarily to larger (>$500MM in sales) companies. The vast majority of companies, however, still are faced with lenders perfectly willing to wait another quarter or two, just to be sure.

For managers eager to grow again, the idea of deferring or refusing growth opportunities for as much as half a year is maddening. It does not have to be this way, but managers need guidance to avoid being forced to sit by and watch growth opportunities go unrealized.

In the current environment financial advisors can help manufacturers starved of funding in the following ways:

- **Tell the truth, but sell the story:** Many manufacturing companies have had a rough last few years, but historical financial results will only tell part of the story. Skilled finance professionals understand that lenders take comfort in long-term fixes in the cost structure, book of business improvements (perhaps lower customer concentration, higher average gross margins, etc.) and projections including assumptions that are both detailed and defensible.
- **Address lender concerns:** Some lenders are most concerned about maintaining/growing a relationship, some are looking to avoid any more troubled loans (as bank workout departments remain overburdened), some want stringent covenants, and some just want to know that borrowers understand their view of the world. Drawing on industry contacts and deep experience, financial advisors can work to craft the best qualitative and quantitative pitch for each individual lender, while allowing management to focus on the business.
- **Make sure the company is "bankable:"** Some companies are not yet ready to work with lenders, or are not yet ready to graduate to a larger credit facility. At times this is due to economic factors, but very often it comes down to a question of systems and expertise. Financial advisors know that lenders take great comfort in knowing that a 13-week cash forecast is in place, and the weekly cash reporting is something management is committed to. They appreciate management teams that can defend higher advance rates on working capital (in an asset-based lending facility) with recovery data from a nationally recognized appraisal firm. In short, lenders like to know that they are working with a management team that speaks their language or hires advisors who do.

In an ideal world, lenders would embrace companies that, having survived tough times, are now faced with enticing growth prospects. The reality is that many lenders are cautious when they see historical financial results with red ink, and convincing them of the worthiness and safety of a loan can easily become a full-time job. Luckily for frustrated managers, there are financial advisors who possess the skills and connections to address lenders' concerns in a timely manner while allowing managers to focus on managing their business. These are exciting times for manufacturing companies, and executives at these companies must avail themselves of every resource available to ensure that the opportunities offered by the market are not left to wither due to lack of financing. ■

TRANSITIONING

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The law, not the employment contract, determines whether an individual is working as an employee or an independent contractor. Employers should take care to classify all putative independent contractors properly. The IRS and other agencies are likely to scrutinize any "employee" immediately returning as an independent contractor, if that person is doing the same job they did before; especially if the person has no business expenses; and even more especially if they do not have any other clients, and are not looking for any. Whatever procedures are in place for ensuring proper independent contractor classification, businesses should exercise greater caution in classification of alumni, and in most cases should avoid immediately rehiring alumni as independent contractors.

Penalties for misclassification. Tax penalties for worker misclassification are significant. But the IRS and state tax agencies are not the only government institutions concerned with worker misclassification. Indeed, IRS investigations into workers' proper status often result from non-tax employment matters involving the Department of Labor, the Equal Employment Opportunity Commission, state unemployment or workers' compensation agencies and even the Department of Homeland Security. Where such employment matters result in legal disputes over a worker's proper status, employer penalties could be significant.

To illustrate, in 2001, Microsoft reportedly settled a contingent worker case for $97 million after the Ninth Circuit Court of Appeals agreed with the plaintiffs that the company had mislabeled them as independent contractors. The court found that the plaintiffs were in fact employees and should have been allowed to participate in Microsoft's benefits plans, including its stock option plan.

Penalties for employers that are found to have misclassified employees as independent contractors could extend even beyond civil court. Several states recently have passed legislation addressing the problem of worker misclassification. In Delaware, for example, new legislation provides for criminal fines and imprisonment penalties for employers, whether the employer misclassified the worker knowingly or unwittingly. Further, if an employer is found to have knowingly misclassified a worker, Delaware may bar the employer from working on public projects. Other states have similar laws, and more are coming.

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TRANSITIONING

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Family and Medical Leave Act (FMLA). The FMLA provides various protections for employees who need time off from work because of family medical issues or the birth or adoption of a child. To qualify for coverage under the FLMA, the employee must have worked for the employer for 1,250 or more hours during the past 12 months. The FMLA applies to employers that employ 50 or more employees who work 20 or more calendar weeks in a year. Independent contractors and self-employed workers are not counted as employees for determining whether the employer has 50 or more employees.

According to DOL regulations, under a joint-employment relationship, only the primary employer is responsible for complying with the FMLA notice requirements. However, both employers are barred from interfering with FMLA rights, and in many cases both employers have duties with respect to returning an employee to work. Accordingly, joint employers must determine which entity is the primary employer of their contingent workforce and must cooperate in return to work situations.

Federal non-discrimination laws. Title VII of the Civil Rights Act ("Title VII"), the American with Disabilities Act, (ADA) and the Age Discrimination in Employment Act (ADEA) are some of the federal laws that protect job applicants and employees from various forms of discrimination, such as that based on race, national origin, gender, disability and age. Title VII and the ADA apply to employers that have 15 or more employees for 20 or more calendar weeks in a year. The ADEA applies to employers that have 20 or more employees for each working day in 20 or more calendar weeks in a year. States (and in some cases, municipalities) have parallel laws, which in many cases provide more protection to employees and are more restrictive on employers.

Title VII, the ADA and the ADEA cover contingent workers other than independent contractors. In fact, each of these Acts explicitly includes temporary employment agencies and their employees in its coverage. To reduce risk of liability, joint employers should ensure that each others' non-discrimination policies and procedures comply with Title VII, the ADA and the ADEA.

While independent contractors generally are not covered by these Acts, another provision of the Civil Rights Act provides protection of independent contractors from racial discrimination in both the terms of a contract and in the creation of a hostile work environment. Businesses must be careful not to relax their vigilance against discrimination in cases in which alumni are determined to be independent contractors because businesses face liability for most types of discrimination whether a person is correctly classified as an employee or as an independent contractor. In short, businesses should avoid discrimination, regardless of whether the individuals being discriminated against are their employees, joint employees, somebody else's employees or independent contractors.

> To realize the potential benefits of transitioning parts of their employee workforce into a contingent workforce, employers must ensure that they continue to comply with applicable labor and employment laws.

National Labor Relations Act (NLRA). The NLRA guarantees the right of employees to organize and bargain collectively. The NLRA applies to all employees and employers in their relationships with labor organizations whose activities affect interstate commerce, regardless of the size of the employer or labor organization. Under current National Labor Relations Board precedent, contingent employees normally cannot be included in the same bargaining units as other employees without employer consent. This precedent might change, and mixed bargaining units containing contingent and other workers might become fair game, or much easier to form. In any case, employers should follow developments in this area over the coming months.

Employers should monitor workplace sentiment among contingent employees, particularly among the employer's alumni, to prevent unions from taking advantage of workplace discontent. After all, employers are likely to lose much of the incentive of transitioning to a contingent workforce if they are faced with the logistical and monetary burdens of responding to bargaining unit campaigns related to contingent employee complaints.

The NLRA does not cover independent contractors. In the last few years, national litigation over proper classification of independent contractors has included NLRB litigation, and this trend is expected to continue. Unions typically are suspicious of and hostile to any independent contractor classification. Businesses should expect continued scrutiny of independent contractor classification decisions under the NLRA.

Conclusion. The "legal tail" need not "wag the dog." If a contingent relationship between a former employee and a business makes sense and is mutually advantageous, it should happen. The benefits associated with transitioning an employee into a contingent worker are real. The risks also are real -- especially in alumni situations; but through understanding and managing those risks, businesses and their staff can realize their goals.

If you have any questions about contingent workers, or any other issues, please contact the authors. (See bottom of page 23.) ■

Advertiser Index

Abbott again recognized for environmental initiatives in Illinois

IMA member company Abbott announced in late October that it has received the annual Illinois Continuous Improvement Award for environmental excellence. It is the ninth time Abbott has been honored for its efforts to safeguard the environment and integrate sustainability initiatives at its corporate headquarters and throughout its operations in Illinois.

"Abbott's efforts in Illinois are part of our broader commitment to safeguard the environment across all areas of our business and in all global communities in which we operate," said Corlis Murray, vice president, Global Engineering Services, Abbott. "We have set aggressive targets to achieve environmental results in the areas of greenhouse gas emissions, water usage and waste reduction. We're taking a holistic approach to our environmental impact, from sourcing of raw materials to the use of our products by consumers and health care professionals."

Abbott was recognized for six projects aimed at implementing "green processes" and reducing carbon dioxide (CO_2) emissions at its facilities in Lake County, Illinois.

The Continuous Improvement Awards are part of the Illinois Governor's Sustainability Awards program. The awards recognize businesses and organizations in the State of Illinois for significant achievements in protecting the environment through sustainable business practices. The award is administered by the Illinois Sustainable Technology Center (ISTC), a division of the Institute of Natural Resource Sustainability at the University of Illinois. ■

Brescia named Vice Chair of key NAM committee

IMA Board member Chris Brescia, Vice President of Government Affairs at Smurfit-Stone Container Corporation has been named Vice Chair of the National Public Affairs Steering Committee and Committee Chair of the Key Vote Advisory Committee for the National Association of Manufacturers. Brescia has more than 30 years experience in government and public affairs engaging in advocacy for sound public policy affecting the nation's business community. Brescia also served on the staff of the US Senate Select Committee on Small Business. A graduate of The Johns Hopkins University, where he concentrated studies in International Affairs, Brescia joined Smurfit-Stone Container Corporation in 2005. Smurfit-Stone is a leading manufacturer of paperboard and paper-based packaging. ■

Douglas Oberhelman of Caterpillar elected Vice Chair of NAM

Douglas R. Oberhelman, chief executive officer of Caterpillar Inc., was elected in October to a two-year term as vice chair of the National Association of Manufacturers (NAM) Board of Directors.

"Doug knows what it takes to keep U. S. manufacturers globally competitive," said NAM President and CEO John Engler. "Doug is a highly engaged board member of the NAM's Executive Committee and our Manufacturing Institute on a broad range of issues from exports to infrastructure to skills training," he said.

"With the right policies and legislation in place, America can continue to be a leader in the global marketplace. I look forward to working with manufacturers nationwide as well as policymakers in Washington to advance initiatives to make the United States the best country in the world to manufacture, both to meet the needs of the American market and serve as an export platform to the world," Oberhelman said.

Oberhelman joined Caterpillar in 1975 in the corporate treasury department and has held a variety of positions for the company in the United States, South America and Japan.

He is currently a director on the boards of Caterpillar Inc., Eli Lilly and Company, The World Resources Institute (WRI), The Wetlands America Trust and The Nature Conservancy — Illinois Chapter. ■

Companies are racking up "Miles" in IMA competition

More than 3,500 workers who are competing in the IMA's Manufacturing Miles competition ended 2010 with more than 53,000 miles under their collective belts as the first calendar quarter of the year-long competition drew to a close.

Companies with more than 2,000 workers and those with fewer than 20 are engaged in establishing wellness in the workplace programs. Manufacturing Miles is a competition to encourage those efforts by offering prizes for companies who can accumulate the most miles before the end of the competition, October 31, 2011. All IMA member companies are eligible to participate and prizes and recognition will be made for the top small, medium and large competing manufacturers.

It's not too late to enter the Manufacturing Miles competition. The competition measures how many miles employees can accumulate by engaging in their favorite pastime activities with a focus on wellness. A conversion chart lists dozens of activities, including a number of winter activities like bowling, hunting, skiing and skating, that can be converted into and counted as miles.

Simply complete the free registration form on the IMA Website at www.ima-net.org and get started. Companies large or small have an excellent chance to win, and many company coordinators have been surprised at how quickly workers can accumulate miles. The IMA will provide pedometers for each worker participating.

Funding for Manufacturing Miles was provided by a grant from the Illinois Department of Public Health. For more information, contact Jim Nelson at the IMA, 800-875-4462, ext. 3023, or jnelson@ima-net.org. ■

2011 IMA Holiday Report

www.ima-net.org

Illinois Manufacturers' Association

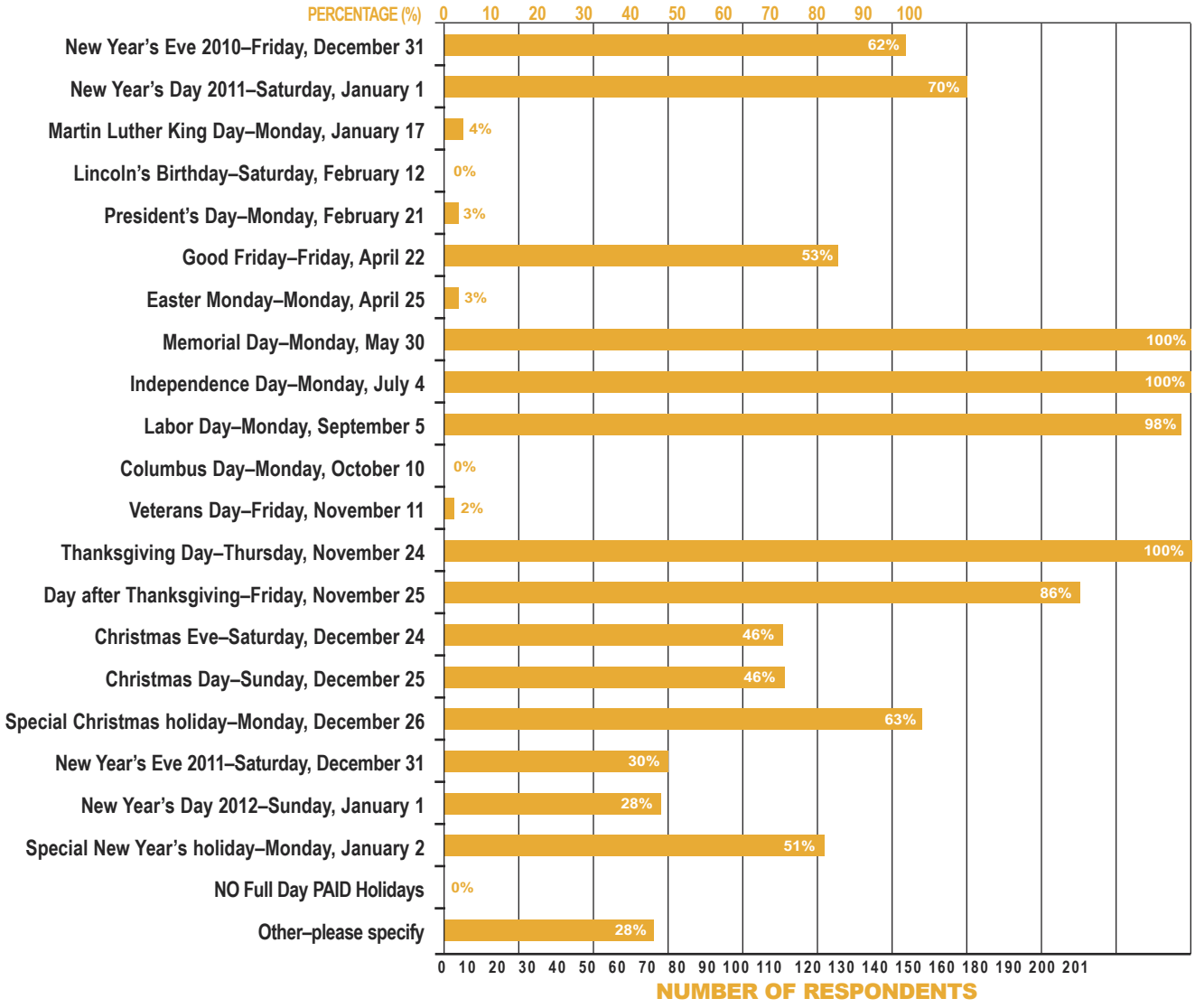
The IMA's Annual Holiday Report highlights employers' plans on select holidays throughout the year. This year's survey was conducted in September, 2010 and applied to the 2011 calendar year. Four questions were asked ranging from total number of paid days off to a breakdown of full or half day paid holidays, and on which days the member company is actually closed throughout the year. More than 200 IMA members responded. These are the results.

The majority of respondents provide at least 10 full day paid holidays per year, including New Year's Eve, New Year's Day, Good Friday, Memorial Day, Independence Day, Labor Day, Thanksgiving Day and the day after Thanksgiving, Christmas Eve, and Christmas Day.

How many paid holidays do you provide your employees (not including personal days)?

6 or fewer days	15	7%
7 days	24	12%
8 days	37	18%
9 days	37	18%
10 days	53	26%
11 days	22	11%
12 or more days	13	6%
Total	**201**	**100%**

FULL DAY PAID HOLIDAYS



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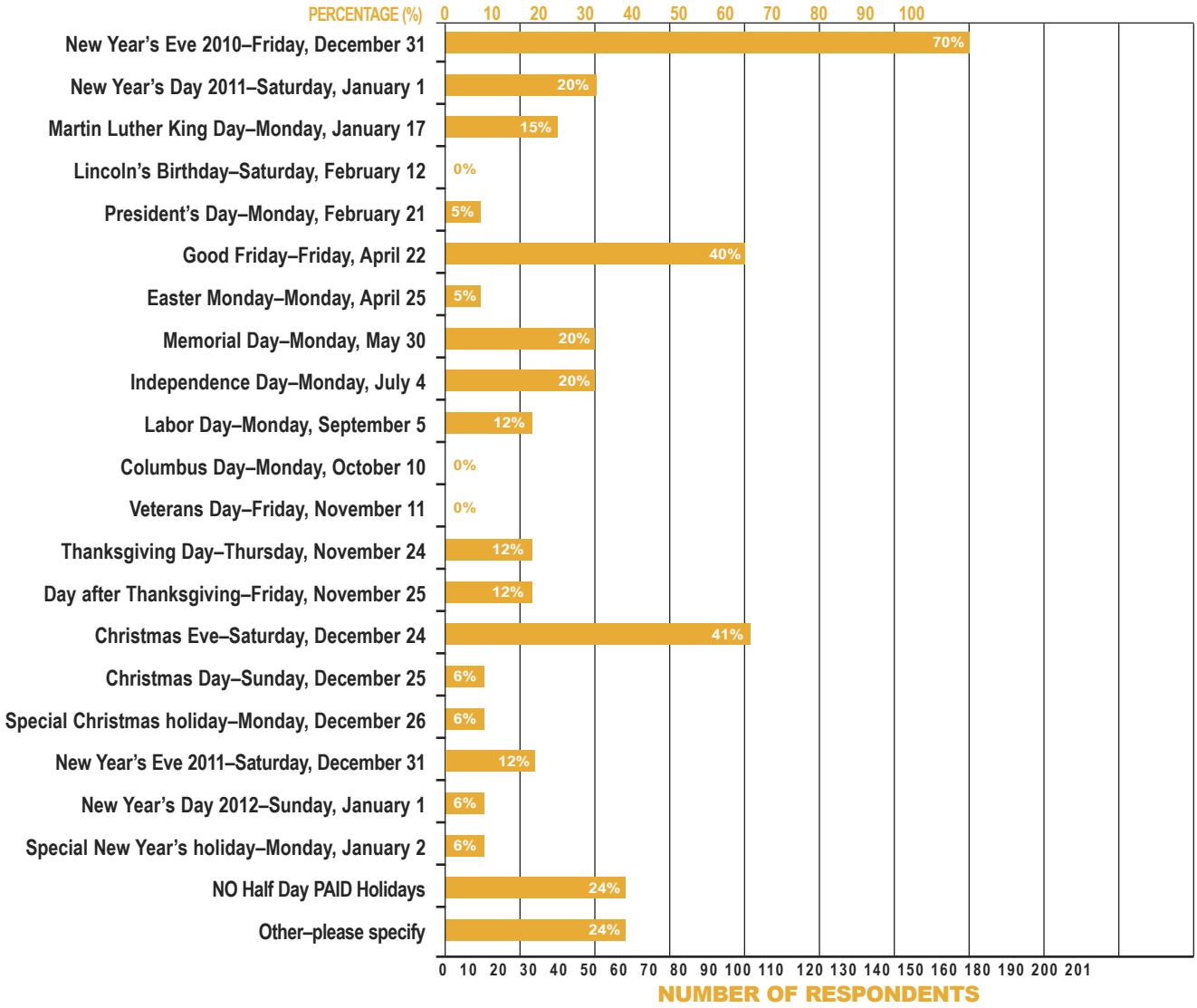
HALF DAY PAID HOLIDAYS



Historically many manufacturing plants continue to operate with skeleton crews or reduced shifts on paid holidays. However, this does not always represent the majority. In 2011, a few major holidays fall on a weekend day so many companies are closing down on a special or additional day. The percentage of respondents who actually close down operations completely on certain holidays is shown at right.

Less than two percent of respondents close down on non-traditional holidays such as Martin Luther King Day, Lincoln's Birthday, Columbus Day and Veterans Day.

New Year's Day	75%
Good Friday	51%
Memorial Day	98%
Labor Day	94%
Thanksgiving Day	99%
Day after Thanksgiving	87%
Christmas Eve	60%
Christmas Day	69%
New Year's Eve	57%

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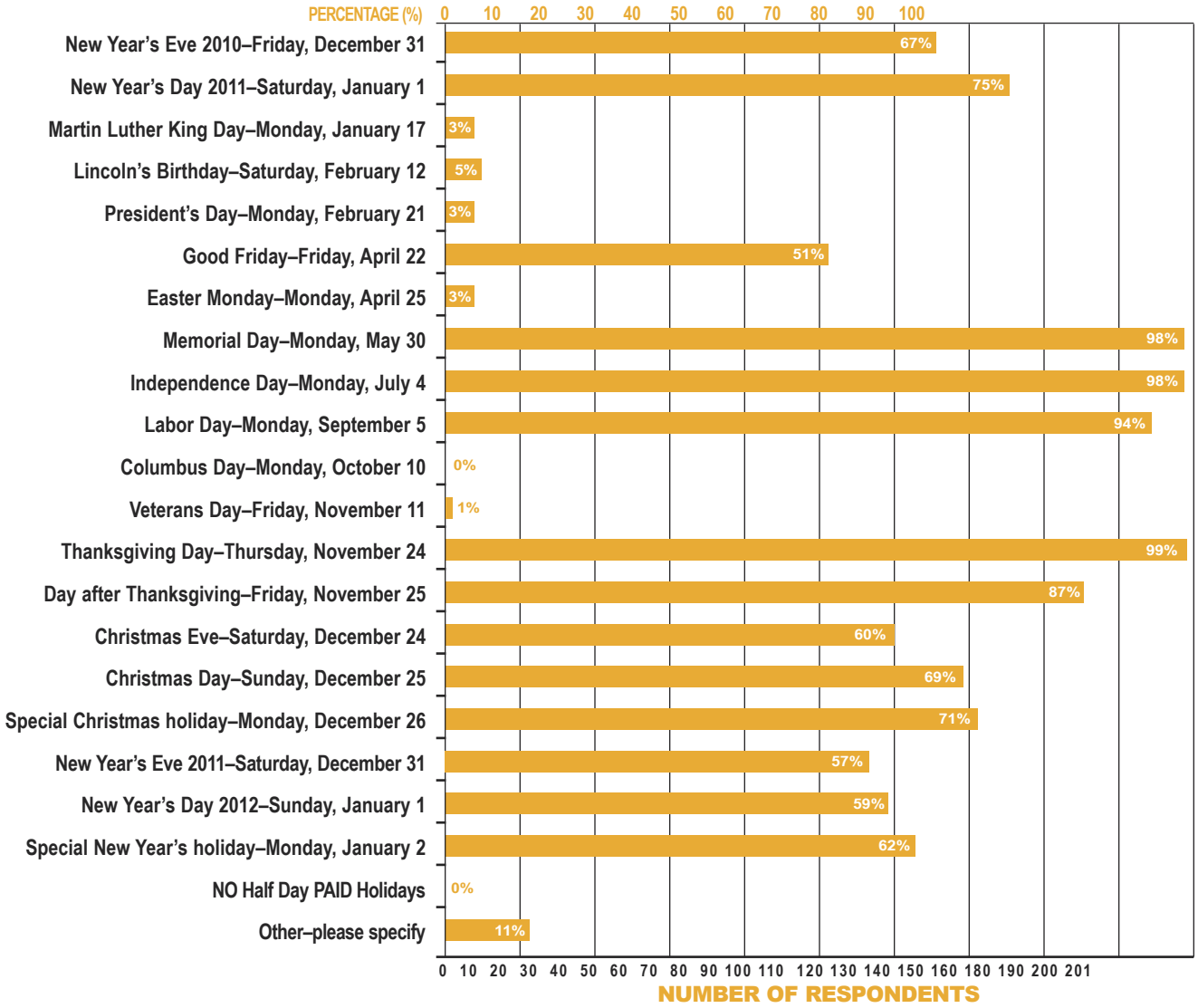
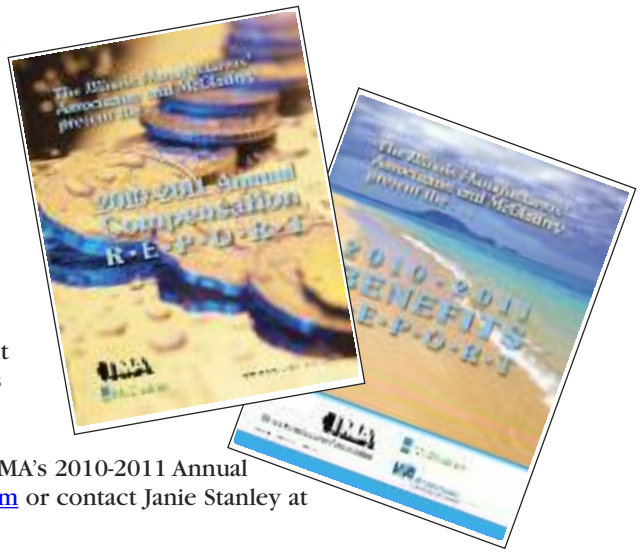


Thanks to all those who responded for making this report possible. If you have any feedback regarding additional information you might like to see in next year's report, or have questions, please contact Janie Stanley, Revenue & Grant Administrator, at 800-875-4462 x3020 or email jstanley@ima-net.org.



Order your copies today!

IMA's 2010-2011 Annual Compensation Report and 2010-2011 Benefits Report are available now . . .

Conducted with the assistance of RSM McGladrey, the IMA's 2010-2011 Benefits Report contains data on employers' plans for a variety of different benefit plans. The IMA's 2010-2011 Annual Compensation Report contains actual wage rates for 186 job descriptions related to manufacturing.

To order your copies of the IMA's 2010-2011 Benefits Report and/or the IMA's 2010-2011 Annual Compensation Report, visit https://www.ima-net.org/ben_report_order.cfm or contact Janie Stanley at 800-875-4462, x3020 or email jstanley@ima-net.org.

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New IMA members

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Chicago, IL

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Deerfield, IL

HICKSGAS, INC.
Roberts, IL

HUFF & HUFF, INC.
Oak Brook, IL

ILLINOIS RENEWABLE FUELS ASSN.
Bloomington, IL

STAFFING SERVICES ASSN. OF ILLINOIS (SSAI)
Springfield, IL

SYSTEMS RESEARCH, INC. (SRI)
Schaumburg, IL

VALUABLE RESOURCES COMPANY
Gilberts, IL

VERTEX RESOURCE GROUP, INC.
St. Charles, IL

WEBLINX, INC.
Oswago, IL

2011 Calendar of events

February 3, 2011
IMA-MIT Event: Strategic Planning and Goal Setting, DePaul University O'Hare Campus, 8770 W. Bryn Mawr Ave., Chicago
The Strategic Planning and Goal Setting Workshop aims to assist managers and team leaders to plan strategically, set goals and objectives for their functional team, and align them with actions, as well as to demonstrate strategic thinking during everyday operations. For more information, visit https://www.ima-net.org/MIT/css0216.cfm.

February 4, 2011
IMA Small Manufacturers Council Quarterly Meeting, NEW LOCATION: Gibson's Restaurant, 2105 Spring Road, Oak Brook, 8:00 am–!2:00 noon
There is no charge to attend for IMA members. For additional information, contact Jim Nelson, 217-522-1240, Ext. 3023, email: jnelson@ima-net.org.

February 17, 2011
IMA Event: Wellness–A Manufacturer's Strategy to Control Rising Health Care Costs Hilton Lisle, 3003 Corporate West Dr., Lisle, 7:30-11:30 am, Cost: $40
Experts from DSP Insurance, BlueCross BlueShield of Illinois, Interactive Health Solutions and Michael Best & Frederich will cover health care and wellness initiatives and how your business can benefit from these types of programs. To register, visit https://www.ima-net.org/seminar_wellness.cfm. Contact: Kimberly McNamara, 630-368-5300, email: kmcnamara@ima-net.org.

February 18, 2011
IMA-MIT Event: Consultative Selling Skills for Sales Professionals, DePaul University O'Hare Campus, 8770 W. Bryn Mawr Ave., Chicago
Be ready to turn your "lean and mean" sales team into 'customer friendly' advisors your clients will trust to help them make complex buying decisions. Get a better grasp of the needs and vision of your customers. For more information, visit https://www.ima-net.org/MIT/css0204.cfm.

February 25, 2011
IMA-MIT Event: Essential Leadership Skills for Newly Promoted & Front Line Supervisors DePaul University O'Hare Campus, 8770 W. Bryn Mawr Ave, Chicago
One day program that will prepare your supervisors for a complete change of responsibilities and offer a plan for the challenges ahead. They will come away with a better understanding of what the boss, peers, staff and company expects of them. The invaluable set of tools in this program will prepare supervisors for their important new role, providing greater confidence and success. For more Information visit https://www.ima-net.org/MIT/els.cfm.

March 4, 2011
IMA-MIT Event: Effective Presentation Skills DePaul Univ., 8770 W. Bryn Mawr Ave., Chicago
This interactive, energetic workshop will provide the business presenter with all of the necessary skills required to deliver a winning presentation. For more information, visit https://www.ima-net.org/MIT/eps.cfm.

March 10, 2011
IMA-MIT Event: Assertive Communication Skills: Communicating With Authority and Impact, DePaul Univ. O'Hare Campus, 8770 W. Bryn Mawr Ave., Chicago
Workers today need to be able to communicate effectively in order to increase their credibility and effectiveness in dealing with coworkers, clients, customers and management. Assertive communication provides the speaking and listening skills necessary in today's complex work environment. For more information, visit https://www.ima-net.org/MIT/acs0310.cfm.

March 18, 2011
IMA-MIT Event: Time Management and Personal Effectiveness Skills, DePaul Univ. O'Hare Campus, 8770 W. Bryn Mawr Ave., Chicago
This full day workshop will identify the essential personal effectiveness skills needed in today's fast paced environment, and focus on applying these key skills utilizing the process you choose: paper based, e-tools or both. For more information, visit https://www.ima-net.org/MIT/tmpes0318.cfm.

March 21-24, 2011
ProMat 2011, McCormick Place, Chicago
When the material handling and logistics industry's premier event, ProMat 2011, opens on March 21 it will include over 700 exhibits and an Educational Conference that features Keynotes on supply chain security and the next generation of robotic innovation. For more information, visit http://www.promatshow.com, or call 800-345-1815.

Visit http://www.ima-net.org/calendar.cfm or http://www.ima-net.org/MIT/open.cfm for information, pricing, etc., and a complete listing of IMA and IMA-MIT offerings.

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