CONCEALED CARRY COMES TO ILLINOIS

THE ILLINOIS Manufacturer

www.ima-net.org

Fall 2013

IMA MEMBER PROFILE: C. Cretors & Company

Common tax opportunities and challenges for Illinois manufacturers

Quarterly Economic Update

Commercial Bank

The recent softening in private payroll gains and the near-term hit from the fiscal policy impasse prompted us to shave our second half growth estimate to about 2% and push out Fed tapering of QE to next March. Although the historical tendency for weak first prints on employment in Q3 cautions against altering the economic outlook, there are legitimate uncertainties and the Fed has established a willingness to err on the side of ease. Housing and business surveys have held up through this stretch and apart from shutdown effects, leads on hiring conditions also have not faltered. The sustained lift from ongoing Fed accommodation along with cyclical forces still points to moderately stronger growth next year.

To discuss how this data can impact your business please call:

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The step down in private payroll increases from 200,000 in the first half to just 129,000 in Q3 is a blow to policymakers' confidence in sustained labour market progress. Moreover, the temporary nature of the fiscal agreement suggests policymakers will remain sensitive to downside risks beyond yearend. We expect fiscal drag to fade in coming months and that the expansion will be buoyed by the renewed loosening in financial conditions. The base case still anticipates an end to asset purchases by next September. Rate hikes are not expected until unemployment is approaching 6%, or well into 2015.

The outlook for inflation remains softer than policymakers' medium-term goal of 2%. Slower growth abroad has contained pressures on domestic goods prices and labour costs remain subdued. We expect a gradual move closer to the 2% target over the forecast horizon underpinned by domestic demand and moderately stronger growth abroad. Labour costs should firm somewhat with continued gains in hiring demand.

United States — Economic Forecasts, 2012-2014F

					2013			2014				2015
		2012	2013F	2014F	2Q	3QF	4QF	1QF	2QF	3QF	4QF	1QF
GDP	SAAR				2.5%	1.9%	2.0%	2.9%	3.0%	3.1%	3.1%	3.0%
	YoY	2.8%	1.6%	2.6%	1.6	1.4	1.9	2.3	2.5	2.8	3.0	3.1
Domestic Demand	SAAR				2.1	1.7	2.0	3.2	3.3	3.3	3.4	3.2
	YoY	2.4	1.5	2.7	1.5	1.5	1.5	2.2	2.5	2.9	3.3	3.3
Consumption	SAAR				1.8	1.8	2.7	3.0	3.3	3.1	3.4	3.2
	YoY	2.2	1.9	2.8	1.9	1.9	2.2	2.3	2.7	3.0	3.2	3.3
Business Investment	SAAR				4.7	3.9	3.4	4.7	4.7	5.1	5.4	5.5
	YoY	7.3	2.4	4.4	2.4	3.3	1.8	4.1	4.2	4.5	5.0	5.2
Housing Investment	SAAR				14.2	10.3	9.1	14.4	20.7	19.6	14.3	14.0
	YoY	12.9	13.2	14.6	15.2	14.2	11.5	12.0	13.6	15.9	17.2	17.1
Government	SAAR				-0.4	-1.7	-2.8	1.1	-0.7	0.0	0.1	0.0
	YoY	-1.0	-2.4	-0.7	-2.0	-3.2	-2.3	-1.0	-1.0	-0.6	0.1	-0.2
Exports	SAAR				8.0	4.8	5.7	5.6	5.6	4.8	5.2	5.1
	YoY	3.5	2.7	5.6	2.0	3.1	4.2	6.0	5.4	5.4	5.3	5.2
Imports	SAAR				6.9	3.5	4.7	6.4	6.7	6.1	6.0	6.3
	YoY	2.2	1.8	5.7	1.2	1.9	3.9	5.4	5.3	6.0	6.3	6.3
PCE Deflator	YoY	1.8	1.2	1.9	1.1	1.2	1.2	1.5	2.1	2.1	2.1	2.1
Core PCE Deflator	YoY	1.8	1.3	1.9	1.2	1.2	1.4	1.5	1.9	2.0	2.1	2.1
Unemployment Rate	%	8.1	7.4	6.7	7.6	7.3	7.2	7.1	6.9	6.8	6.6	6.5
S&P 500 Profits (US$ Per Share)	YoY	6.1	5.5	6.2	5.8	4.2	7.6	6.2	5.6	7.0	5.9	NA

Notes: F Citi forecast. E Citi Estimate. YoY Year-to-year percent change. SAAR Seasonally adjusted annual rate. Domestic demand excludes inventories and net exports.
Sources: Bureau of Economic Analysis, Bureau of Labor Statistics, I/B/E/S, Treasury Department, *Wall Street Journal* and Citi Research forecasts

Interest Rate and Bond Market Forecasts as of 23 October 2013

		Quarterly Average					
	Current	4Q 13	1Q 14	2Q 14	3Q 14	4Q 14	1Q 15
US							
Policy Rate (Fed Funds) End Quarter	0.25	0.25	0.25	0.25	0.25	0.25	0.25
3-Month Libor	0.24	0.24	0.24	0.32	0.45	0.55	0.65
2 Year Treasury Yield	0.30	0.33	0.43	0.58	0.73	0.90	1.08
5 Year Treasury Yield	1.29	1.32	1.48	1.75	1.98	2.15	2.38
10 Year Treasury Yield	2.52	2.56	2.70	2.95	3.15	3.25	3.40
30 Year Treasury Yield	3.62	3.69	3.88	4.13	4.28	4.35	4.50
2-10 Year Treasury Curve	222	224	228	238	243	235	233
2 Year Swap Spread (Swap Less Govt), bp	13	15	19	20	20	20	20
10 Year Swap Spread (Swap Less Govt), bp	14	12	8	5	5	5	5
30 Year Swap Spread (Swap Less Govt), bp	-3	-5	-10	-14	-18	-23	-25
30 Year Mortgage Yield	4.28	4.29	4.40	4.63	4.83	4.98	5.15
10 Year Breakeven Inflation	218	224	238	243	240	238	235

Fall 2013

Common tax opportunities 16 and challenges for Illinois manufacturers

From taxability of transactions to qualifying for economic incentives, tax opportunities and risks can be highly complex — information from IMA member McGladrey

Columns

ON THE COVER: Charles "Bud" Cretors, Charlie Cretors and Andrew Cretors (left to right), proprietors of C. Cretors & Company in Chicago, a leader in Illinois manufacturing for 128 years and an IMA member since 1940.

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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Share your company news with IMA . . .

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President's Report

GREGORY W. BAISE

Illinois is closing one day at a time

The following editorial appeared in almost every newspaper and news blog in the state recently. This is a true reflection of what I observed while traveling — and it's a sad commentary on the condition of our state.

. . . CAT executives get so many overtures from other states' governors and economic development departments that they now have a form letter they send in response thanking them for their interest but declining. For now.

I was traveling last week around Illinois.What I saw was sad. Very sad. My observations have been cemented in my mind while witnessing one gubernatorial hopeful resigning his candidacy and others continue to maneuver aggressively. To those who still aspire to serve in the governor's mansion, I have some pointed questions that voters need answered. I will get to those in a moment.

My trip began in my hometown, Jacksonville, for a memorial service for a mentor of mine which may have set the mood, but as I left town with fond memories of what used to be a thriving community, I was struck with how things had changed. Oh, Jacksonville still has its good points. While some manufacturers are still there, driving out of town it's hard to miss the empty skeleton of the old Anderson Clayton factory. It began manufacturing food products just after World War II, but closed a few years ago. Several other facilities are closed and the manufacturing base has shrunk dramatically. The town reflects a tired image of an era gone by.

Later in the week I drove to Peoria. I traveled via Illinois Route 29, which enters the city from the north. Passing the small towns that dot the road along the Illinois River, you see empty buildings that once housed family-owned manufacturing facilities and were the center of economic activity in the town. They are now gone, as are the cafes, gas stations and small retail establishments that thrived when they were in business.

More towns that reflect a tired image of an era gone by.

When I arrived on the outskirts of Peoria, I passed the full parking lot of the Mossville Caterpillar facility. Finally an image of the way it used to be. But empty manufacturing and retail facilities on the north side of town quickly snapped my attention back to the "new reality." The housing stock is mostly run down or empty. One has to wonder, where did those families go to find their American dreams?

Arriving downtown, the energy level shot through the roof. A new CAT visitors center was teeming with guests. CAT's headquarters dominated the skyline, a CAT tech center was close by and the looming East Peoria manufacturing hub was just a couple of miles away. But could all of this go away, too?

I know for a fact that CAT executives get so many overtures from other states' governors and economic development departments that they now have a form letter they send in response thanking them for their interest but declining. For now. Will that always be the answer? Many scoff at the notion, but don't be so sure. I am only observing and have no knowledge or insight, but when you look at the disappearing manufacturing landscape of Illinois, one cannot know the answer to that question with certainty. Thank goodness CAT wants to stay here, in a state that has helped drive others away. And I'm sure the 4,000 Illinois companies who are vendors to CAT thank their lucky stars as well. But how long can good people tolerate bad treatment?

Earlier that day, the news of 400 jobs associated with one of our members, a lighting company in Gurnee, announced they were leaving for Kenosha, Wisconsin. Their employees won't even have to move. Another blow to our state's manufacturing base. One does not have to travel any distance to see a recent example of Illinois' loss of jobs and the havoc it is bringing to our economy and citizens.

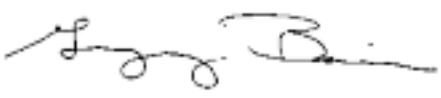
Our unemployment rate continues to lead the Midwest and be second worst in the nation. The violence and murder rate in neighborhoods that once housed manufacturing facilities in Chicago are national news. Our pension debt is worst in the nation. Our state continues to spend more than it brings in each year. Illinois is the poster child for the ruinous economic policies of high taxes, excessive workers compensation costs and regulatory policies that drive employers to look elsewhere.

Politically, we need solutions, not slogans. We cannot afford to wait. We desperately need leadership.

So I ask our candidates for governor on both sides of the aisle: ***What are your specific answers to these questions?*** No slogans. No quibbling. No spin.

1. How would you solve the pension debt problem? (No, not anyone else's plan, ***your*** plan.)
2. Do you support the extension of the temporary state income tax? If not, how do you plan to replace that revenue?
3. How do you plan to improve our state's education program to produce a skilled workforce for the future?
4. What is your plan to bring down worker compensation costs and reform our state's burdensome regulatory climate?
5. How do you plan stop Illinois from closing one day at a time?

Until we hear some specific answers to those and several other important issues, Illinois will continue to reflect a tired image of an era gone by. ■



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Power comes from being understood.[SM]

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For more information contact IMA board member **Karen Kurek** at **karen.kurek@mcgladrey.com** or **312.634.3920**.

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Legislative Report

MARK DENZLER

Solutions, not clichés, for Illinois' tax system

While advocates of a graduated income tax like to use the old cliché of making people pay their "fair share" because it's politically popular, such a system will have a negative impact in the real world, both for individual taxpayers and for businesses.

More than two hundred years ago, Ben Franklin coined the phrase, *in this world nothing can be said to be certain, except death and taxes.* While he was actually describing the newly minted United States Constitution in his letter to Jean-Baptiste LeRoy, Franklin's words are extremely prophetic in Illinois today, where we are just beginning to see the start of a major tax policy discussion set against the backdrop of looming 2014 elections.

Nearly three years ago, in the waning days of the 96th General Assembly, Governor Patrick Quinn and a Democrat General Assembly passed the largest income tax increase in Illinois history. Lame duck lawmakers provided just enough votes to increase individual income taxes by 66 percent while corporations saw their tax rates jump by 45 percent. Calling it a four-year temporary income tax hike, supporters like Senate President John Cullerton stated during the floor debate that "the first thing we have to do is pay our bills and cut spending."

Fast forward to 2013. Despite this massive increase in income taxes, in many ways Illinois is in a worse financial situation than before. While our mountain of unpaid bills has decreased slightly over this time, it still hovers around $6.5 billion. Illinois' pension debt — the absolute worst in the United States — has skyrocketed and now approaches $100 billion despite the fact that the state has made its actuarially-required pension payment in each of the last three years. While many other states have begun to recover from the recession, Illinois remains mired in economic malaise with a 9.2 percent unemployment rate, the second highest in the nation.

Now, with only one year left on the "temporary" income tax increase, the Governor and many Democratic lawmakers are already looking past the "temporary" income tax (set to expire at the end of 2014) and exploring a new, graduated income tax on Illinois taxpayers. One particular proposal authored by retiring Rep. Naomi Jakobsson from Urbana creates a seven-tiered system with a top rate of nine percent for taxpayers earning more than $500,000.

While advocates of a graduated income tax like to use the old cliché of making people pay their "fair share" because it's politically popular, such a system will have a negative impact in the real world, both for individual taxpayers and for businesses. A small business with approximately $500,000 in annual revenue would see a $20,000 tax hike compared to today's five percent tax rate under this graduated income tax plan. That's money that could be better invested in new equipment or pay raises for employees.

A middle class family, perhaps a teacher and a firefighter, earning a combined income of $100,000 would pay $2,000 in additional taxes under the graduated income tax plan. That family could use this extra money for groceries, car repairs, or perhaps a short vacation.

The fact of the matter is that a flat tax system is one of the true economic benefits that Illinois still enjoys.

But our tax system problems cannot be laid solely at the feet of the Democrat Party who initiated and passed the record income tax increase. Many Republican legislators, particularly those seeking higher political office, like to simply tell people that Illinois' problems can be resolved solely by "eliminating the income tax increase." But those legislators and candidates owe us more than simple platitudes. How do they plan to balance Illinois' budget by eliminating between $6 and $7 billion in annual revenue? Certainly cutting taxes will stimulate the economy, but additional budget cuts and program eliminations would be necessary.

As we head into 2014, Illinois will hear an awful lot of rhetoric from the political candidates on both sides of the aisle. Some will be screaming "fair share," while others will yell "cut taxes." Neither solution is that simple. We need real leaders with real solutions for reforming Illinois' tax system to make it work for everyone. ■

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MARK A. SPOGNARDI

Concealed carry comes to Illinois

Employers concerned about weapons in the workplace

On July 9, 2013, the Illinois General Assembly enacted the Illinois Firearm Concealed Carry Act (40 ICLS 66), becoming the last state in the Union to adopt a concealed carry firearms law. The law requires an Illinois Concealed Carry License for a citizen to carry a concealed weapon in Illinois, excluding current peace officers and retired police officers under a federally approved program. The law becomes effective immediately, but the legislation gives the Illinois State Police, charged with enforcing the law, 180 days after the Act's effective date to issue rules and regulations. The State Police will make applications available to the public on January 5, 2014.

The law has a litigious history, borne out of the lawsuit known as *Moore v. Madigan*, in which the Seventh Circuit found that the State's ban on carrying firearms was unconstitutional and in violation of the Second Amendment to the Constitution of the United States. As a result of the lawsuit, the Illinois legislature was ordered by the Court to, within 180 days, draft a law allowing the carrying of a concealed firearm. The law does not allow the open carry of firearms.

Under the law as passed, the person carrying must possess a valid license to carry a concealed weapon. A "concealed firearm" means a loaded or unloaded handgun carried on or about a person concealed or partially concealed by the person licensed. It also means the carrying of a weapon in a vehicle.

To receive a concealed carry license, an individual must be at least 21 years old and possess a valid Firearm Owner's Identification Card ("FOID"). The individual is disqualified if found guilty in Illinois or any other state of a misdemeanor involving the use or threat of use of physical force or violence within the five year period preceding the date of the application for a concealed carry license, or two or more violations of driving under the influence of alcohol, drugs, intoxicating compounds, or a combination thereof, or as the subject of a pending arrest warrant or prosecution. The license applicant must also not have been under a court ordered alcohol or drug treatment program within the preceding five years of the date of the license application. Finally, the applicant must undergo 16 hours of approved firearms training.

The law places restrictions on where firearms can be lawfully carried concealed. Conceptually, the law generally places restrictions on and makes distinctions between carrying a concealed weapon in public and private buildings and their parking areas. Specifically, the law prohibits concealed carry in private and public pre-school and daycare centers, and elementary and secondary educational establishments, and in their parking lots. The law also prohibits concealed carry in hospitals, mental institutions, and non-acute health centers, and their parking lots, and in establishments where more than 50 percent of the revenue is derived from the sale of alcoholic beverages, and their parking lots.

The law prohibits the concealed carry of firearms in any building or parking area of any area under the control of the executive or legislative branches of state government, except for areas under the control of the Department of Natural Resources where firearm possession is permitted. The law also prohibits concealed carry in any court building, or building under the control of local government, or any area where firearms are prohibited under federal law. The prohibition also extends to any building or parking area of any

see **CONCEALED CARRY** *page 8*

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CONCEALED CARRY

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adult or juvenile detention or correctional institution, prison or jail.

Additionally, the law prohibits concealed carry in public parks, playgrounds, and athletic facilities, licensed gaming establishments, sports stadiums/arenas, airports, and amusement parks, museums, and zoos, and their respective parking areas. Public and Private colleges and universities are free to develop policies regulating the carrying of concealed firearms, including parking areas. Cryptically, the law states that the owner of real property of any type may prohibit the carrying of concealed weapons on the property under his or her control, but the owner must post a sign noting that firearms are prohibited on the property.

The law contains important employer rights, and provides that an employer may prohibit firearms or weapons on its property. Specifically, the law states that signs prohibiting the concealed carry of guns shall be posted at the entrance of any building, premises, or real property specified as a prohibited area, unless the building or premises is a private residence. The law also provides that the owner of private real property of any type may prohibit the carrying of concealed firearms on the property under his or her control. To invoke this prohibition, a sign measuring 4" x 6" inches must be conspicuously posted. The state police are mandated with adopting rules for the standardization of signs. As noted, employers who are in control of statutorily prohibited zones must also post this approved sign. The law provides an express presumption that concealed firearms are allowed to be carried on the property if no approved sign is posted. The state approved sign will be available on the web site of the Illinois State Police at www.isp.state.il.us/firearms. The law also acts as a denial and limitation on home rule powers under the Illinois Constitution.

> The law has a litigious history, borne out of the lawsuit known as *Moore v. Madigan*, in which the Seventh Circuit found that the State's ban on carrying firearms was unconstitutional and in violation of the Second Amendment to the Constitution of the United States.

The law provides an important exception which applies to all employers and all statutorily prohibited areas. This exception provides that a person may lawfully carry a concealed weapon in a vehicle in a parking lot, and may carry and store the firearm in a locked case, in a locked, parked vehicle in the parking lot. When stored in the vehicle, it must be in a secured container out of plain view. The law also provides that a person may carry the concealed weapon in the immediate area around the vehicle in the prohibited parking area, for the limited purpose of storing and retrieving the weapon from the vehicle's trunk, provided the person ensures the firearm is unloaded before exiting the vehicle.

Because of the language concerning prohibited areas, and a failure to adequately address a private employer's property rights, it can be expected that there will be litigation over the extent to which an employer may prohibit firearms in areas adjacent to the physical establishment where it conducts business, such as parking lots. Given the tension between the presumption of lawful carry when no sign prohibiting carry is posted, and given the statutory language allowing concealed carry in parking lots, future litigation will focus on the extent to which employers may prohibit employees from concealed carry in the employer's parking area, and whether there has been adequate posting.

A prudent employer will have a written policy, either stand alone or in an employee handbook, which applies to visitors and employees, stating its policy with regard to weapons on its property, including its parking lot, and other areas that it controls. For those employers who wish to prohibit concealed weapons on its property, it should clearly specify where concealed carry is prohibited, and post conspicuously in those areas where the prohibition applies, including parking areas. Other employers may be more gun friendly, allowing concealed carry in their respective physical buildings, and/or in the parking lots. ■

KEN MALL

Knowledge retention — What it takes to acquire and train champion employees in today's economy!

One of the leading indicators on the health of the manufacturing industry that everybody can agree on is auto sales. In October, automakers reported another month of double-digit increases, selling 17 percent more cars compared to the same month last year. If the trend holds, U.S. auto industry sales would be at a post-recession high of 16.09 million vehicles, increasing sales by more than 1.6 million vehicles from last year's total.

With the unemployment rate nationally still above seven percent (and in Illinois more than nine percent), a big question is, what does the improvement in the manufacturing sector mean for people looking for jobs. It seems that the answer today revolves around: wages, technology, knowledge retention, and skills gaps.

Wages — Our firm recently surveyed 62 manufacturing companies across the Midwest to identify their future hiring trends. The good news is these 62 companies plan to hire 568 new employees over the next three years with production workers leading the hiring with 280 new hires, followed by machinist, (88 new hires), fabricators (66 new hires), and welder-fitters (54 new hires). The bad news is wages for the less skilled production worker range from $7.25 per hour up to $20 per hour, with the average at $11 per hour. The higher-skilled positions fared a little better, ranging from $8.50 per hour to more than $40 per hour.

Technology — The annual investment by U.S. manufacturers in new technology has increased almost 30 percent since the recession ended. Instead of hiring low wage workers to perform simple and repetitive manufacturing tasks, companies are investing in technology. A company called iRobot sells a $22,000, easy-to-train robot designed to go in a factory where they do not currently have robots. The robot has a useable life of about three years, which means it costs less than $4 per hour to operate. Some traditional jobs associated with manufacturing, and even manufacturing jobs returning to the U.S. from overseas, will likely go to robots.

Knowledge Retention — It's hard enough to attract skilled new workers, but the healthy economy (and increased 401k balances) is convincing an increasingly significant portion of the skilled and experienced workforce to retire. Years of experience are walking out the door and little is being done proactively to capture that institutional knowledge.

Skills Gaps — It is clear that higher skilled workers are doing better during this recovery than the lower skilled workers. It is also clear that when the amortized cost of purchasing a robot is less than half the cost of a low-skilled/low-paid worker — the robot will get the job. Fortunately, robots still require maintenance, which is likely to be performed by humans and not other robots.

Will the manufacturing sector in the U.S. grow? Yes! Will employment in the industry also grow? Yes, just not as fast as most people hope or expect. Future jobs will require higher skills, and not just technical skills. Future manufacturing workers and trades people will be expected to solve complex business problems as well as technical problems as part of their daily work — skills that

see **KNOWLEDGE RETENTION** *page 10*

Ken Mall is Managing Director of Workforce Consulting at EDSI. He has more than 20 years of leadership experience working with top-tier companies, labor organizations and government agencies identifying the skill needs of their workforces, and developing and implementing solutions to meet those needs. He can be reached at 313-271-2660 or by email at kmall@edsisolutions.com.

KNOWLEDGE RETENTION

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were not needed by assembly line workers a generation ago.

What does it takes to acquire and train champion employees in today's economy?

It takes everybody working together — industry, education, and government — to create a system that will meet manufacturer's current and future needs, while taking people from unemployment (or underemployment) to jobs and ultimately, family-sustaining careers.

Closing the skill gap is key — but what can manufacturers do directly to close the skill gap?

The answer is easier than you might think: manufacturers need to clearly define what their skill needs are. Throw away those job descriptions and learn how to perform a job task analysis. Job descriptions usually define what employees are responsible for and the education or experience level expected, but they don't tell you the skills necessary to perform the jobs.

Analyzing your jobs by defining the job tasks, and associating skills with each job task will help you to ensure the skills of current and future workers will match the job tasks you need them to perform. Skill gaps will also be easy to identify and close using job task analysis — when gaps are identified, creating an On-the-Job (OJT) program or identifying an external training course is quick and easy using job tasks as the reference.

Job analysis is also very useful when trying to identify the knowledge leaving the organization. Imagine creating a detailed list of job tasks that are key to your organization's continued operation, and then identifying who in your organization can perform those tasks. Chances are you'll identify several people at or near retirement that you depend on to perform those tasks. With the job task analysis in hand, you'll have a map to start creating your knowledge retention strategy.

The manufacturing industry is embracing credentials like National Institute of Metal Working (NIMS) and American Welding Society (AWS), which are based on job tasks analysis, making it possible for you to map the skill needs of your job to the most appropriate credential for your situation. Training providers including Career and Technical Education programs base their curriculum on job task analysis. Sharing your job task analysis with training providers and CTE programs will help them to improve their programs and meet your needs more directly.

Training providers know that in order to meet employers' specific skill needs, their training curricula may need to be reorganized to target exactly what employers are seeking in terms of training content and delivery, and to incorporate industry-recognized credentials.

Developing a clearer understanding of the specific requirements of your jobs, and sharing that information with current and future workers, training providers and others, will help you acquire and train champion employees in today's economy. ■

MICHAEL P. FURMANEK & BENJAMIN T. HORTON

First-to-file: The race to the patent office is on

More than two years ago, on September 16, 2011, President Obama signed the America Invents Act ("AIA") into law. The AIA makes dozens of changes to the United States patent system. The changes range from small things like increasing patent office filing fees, to larger things like restricting the right to sue those who falsely mark a product with a patent number. On March 16, 2013, the AIA's most significant change went into effect — that change moved the United States from a ***First to Invent*** country to a ***First to File*** country.

First to what?

First to Invent means that if two individuals, A and B, file patent applications on the same invention, the patent may be awarded to the individual that can prove that he invented first. He is the First to Invent. On the other hand, in a First to File country, the patent may be awarded to the individual that simply filed the first patent application, with no regard for who actually invented first. He who is First to File, wins the patent. Until now, the United States had been a First to Invent country for over 200 years. As other countries around the world implemented and modified their patent laws, they abandoned First to Invent because it was complex and inefficient.

First to File is the way of the world

When the Philippines switched from First to Invent to First to File in 1998, the United States officially became the last First to Invent country in the world. As one might imagine, with the increasingly global nature of conducting business, clinging to such a system had made the United States an awkward and complicated piece of the international patent puzzle. Thus, the AIA strives for global harmony:

> *It is the sense of the Congress that converting the United States patent system from 'first to invent' to a system of 'first inventor to file' will . . . promote harmonization of the United States patent system with the patent systems commonly used in nearly all other countries throughout the world . . .*
>
> ***Leahy-Smith America Invents Act, § 3(p).***

Despite the benefits of international harmony, maybe, just maybe there is a hint of unfairness about a system that awards a patent to the individual that invented second, third, or fourth, as opposed to the individual who truly invented first. It almost seems un-American. Despite these undertones of First to File, though, there are plenty of reasons why it is a good idea.

Although it may appear to be easy to determine who truly invented first, as required in a First to Invent country, in practice it has proved difficult, expensive and time consuming. Determining First to Invent often required litigation or litigation-like proceedings, where documentary evidence and witness testimony were closely scrutinized. Ultimately, some trier of fact such as a judge or a jury had to evaluate the evidence and reach a determination as to which individual invented first and, therefore, deserved the patent. Determining who is First to File, however, is as easy as looking at the date stamps on the competing patent applications. Also, because a First to Invent determination often

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FIRST TO FILE

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requires judges and juries across the country to weigh evidence, it is an inherently unpredictable process.

What's the catch with First to File?

First to File makes it easier to predict who will be entitled to a patent. But First to File also makes it more difficult to determine when and whether or not to file for a patent.

When the United States was a First to Invent country, it was often the case that manufacturers would develop new methods or machines and proceed in secrecy through the normal course of business to perfect those new methods or machines. By the time the kinks were worked out, the manufacturer would generally have an idea of the commercial viability of the new method or machine and the decision whether to pursue patent protection was easy. If the invention worked and it had commercial viability — protect! In the meantime, if a competitor developed the same idea and sought patent protection first, the manufacturer could always "swear behind" the competing patent by pointing to any dated documents, lab notebooks, test results, correspondence, and the like, that prove earlier invention. Thus, although the manufacturer may have filed for patent protection at a later date, it at least had the opportunity to prove that it was the First to Invent, and therefore, deserved the patent over its competitor.

In a First to File country, the competitor that files first is awarded the controlling patent.

Now that the United States is a First to File country should I file patent applications for all my ideas?

There are undoubtedly many strategies that manufacturers are implementing to protect their corporate assets in the post-AIA world. Here, however, are some basic things that can be easily done to maximize your potential in the United States, the world's most recent First to File country.

- First, establish corporate policies taking First to File into account. At a minimum, this could include establishing a formal evaluation program for new ideas. Such evaluations may be conducted by one or more members of the management team, marketing team, and/or legal team and should occur on a frequent and regular basis. The faster the evaluation team learns of new developments, the sooner they can assess the financial and competitive viability of those developments, which means, for commercially viable ideas, less time is wasted from conception of the idea to when a patent application is filed. Another key aspect to this evaluation process is education. The engineers, marketing professionals, and any other members of your organization that may be developing new ideas must be educated on the fact that in order to protect those developments, they should be evaluated early.
- Second, file provisional applications on everything that your organization develops. Provisional applications never become patents themselves, but they can be cheaper to prepare and file than regular patent applications. The advantage is that a provisional application gives the inventor up to a year to test, refine, further develop, and, yes, determine the commercial viability of his invention. Within that year, further provisional applications can be filed to incorporate key refinements over the original concept. By the one year anniversary of the first-filed provisional, the organization should have a better perspective on whether making the investment in a regular patent application is worthwhile. If a regular patent application is filed by that one year anniversary, the subject matter in the regular application will be entitled to the filing date(s) of the provisional application(s) disclosing the corresponding subject matter.
- Third, if your organization is already a prolific patent filer, one might consider broadening your patent disclosures by including as many related concepts as possible in the application, even though some may appear to fail your organization's particular litmus test for patenting. With this approach, if you subsequently develop a new use or commercial application for those ideas, the disclosure is there and it has the early filing date on which you can rely.

The above considerations are only a few that can help manufacturers alleviate at least some of the anxieties that are inevitably present in the First to File, post-AIA world. Every organization is unique in its structure, objectives and policies, and therefore, each is encouraged to review those structures, objectives and policies to ensure alignment with the new United States patent law realities. ■

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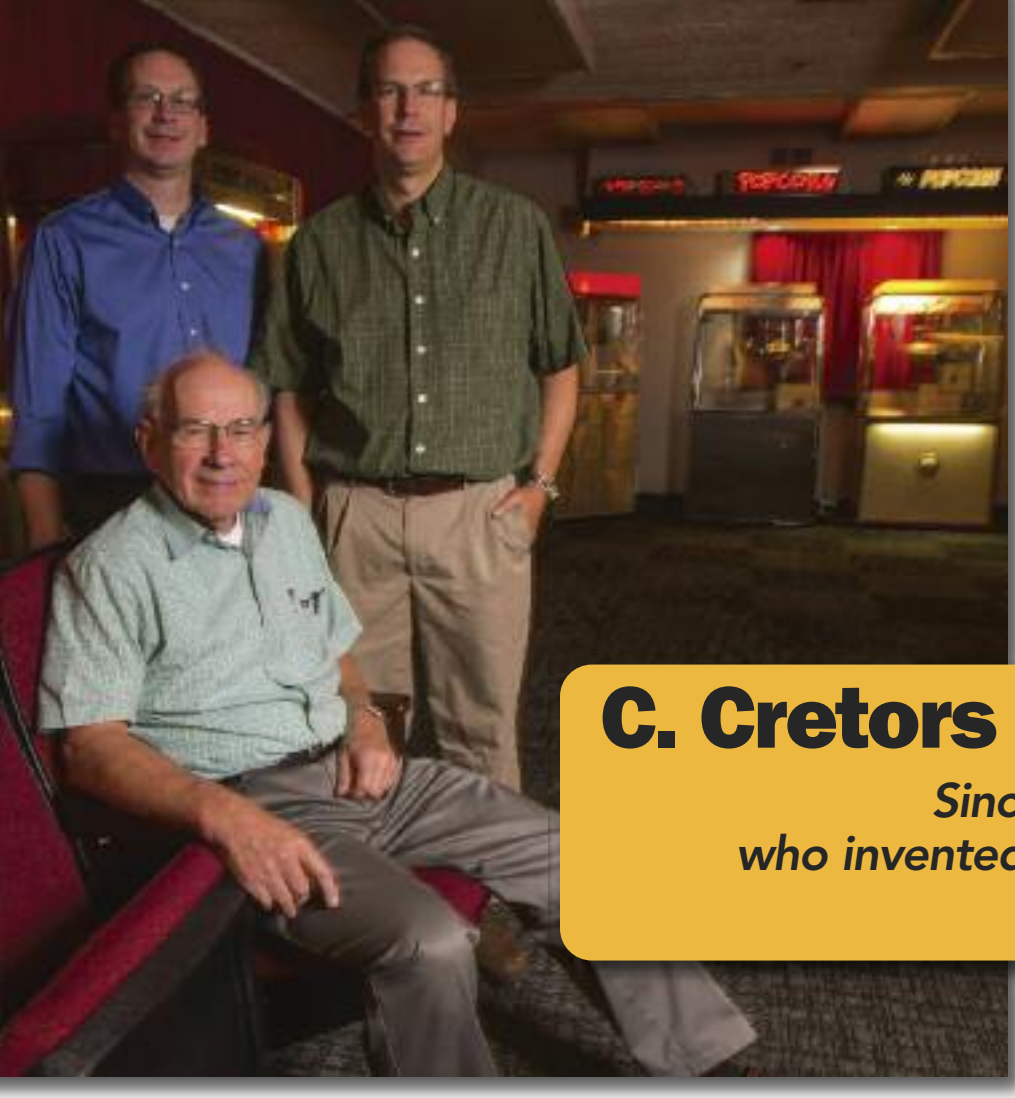

IMA MEMBER PROFILE:

C. Cretors & Company is a family business . . . pictured (from left) are Andrew Cretors, Charles "Bud" Cretors and Charlie Cretors (seated)

C. Cretors & Company

Since 1885 . . . the people who invented the popcorn machine

By Dan Naumovich

The marriage of popcorn and movies has been such a harmonious and enduring relationship that most people have never even considered how the two got together in the first place. As is usually the case in these situations, there is a fascinating story of how they met. It's a tale of innovation, circumstances and an Illinois-based manufacturer.

When movie theaters first began popping up in the early 1900s, their proprietors had to decide how they wanted to present themselves to the public. At the time, theaters were the home of either fine arts performances or bawdy burlesque shows. Deciding that they would rather be associated with the former, they went for a more dignified atmosphere, one that didn't include the selling of concessions.

Over time, the movie houses proved quite popular and ticket holders waited in long lines on the sidewalk. Industrious street vendors, selling what was still a novel snack at the time, rolled up with their popcorn carts to feed the theater goers while they waited for the doors to open. Years later, the movie proprietors decided to take over this attractive revenue stream and purchased their own poppers. And all throughout the world, they are still doing so to this day.

Andrew Cretors knows the story well. His great, great grandfather, Charles Cretors, founded C. Cretors & Company in 1885. He also invented those poppers that brought popcorn to the masses. Today, Andrew serves as president, having taken over for his father, Charlie Cretors, in 2006. His brother, Charles "Bud" Cretors and sister, Beth Youdell, are also involved in the business. Charlie said that keeping things in the family has been a key to their success.

"This is especially true in the export business. Most of the older cultures of the world see family as very important. The fact that our family has continued to run the business, rather than cash in on it, is respected. People also like to have a face. If you have a complaint with General Motors, there is no Mr. General Motors to speak to. You can, however, speak to Mr. Cretors," he said.

Similar to the Chicago Bears, the Cretors franchise originally hailed from downstate Decatur before moving up north and hitting it big. Not only did Charles Cretors invent the first commercial popcorn popper, a steam-powered machine, but he also came up with the process of popping the corn in oil. This resulted in more even cooking temperatures and more flavorful popcorn.

In 1893, Charles introduced his product to the public at the Columbian Exposition in Chicago, where the smell of buttered popcorn drew much attention his way. At the turn of the century his company invented a horse-drawn popcorn wagon and in the following decade designed poppers that were powered by electricity. When the Depression hit in the 1930s, the cheap entertainment offered by movies created a boom not just for theater owners, but for the Cretors Company as well.

"That was the market we grew up in and that's where a lot of our sales throughout the years have come from. Every major movie theater chain in the U.S. and pretty

When C. Cretors & Company was just getting started, they used the above apparatus to entice customers to try their new popcorn snack.

much throughout the whole world has had a machine from us," Andrew said.

Anyone today who has ever volunteered to work the concession stand at one of their child's sporting events has most likely operated a Cretors machine. In addition to the popcorn poppers, the company manufactures other staples of the trade such as cotton candy makers, hot dog cookers, nacho cheese dispensers, and snow cone shavers. Cretors also provides equipment to commercial food producers. Intersnack, Frito-Lay and MOM Brands (formerly, Malt-O-Meal Company) are among its industrial clients.

While the company manufactures and sells concession equipment, what the customer is really buying is an opportunity. Whether it's a school, a candy shop, a movie theater or a giant food manufacturer, the customer views the Cretors' products as a means of generating revenue.

"It's been recognized since the days of my great, great grandfather that people buy our equipment to make money. And when you think about it, they're really buying a promise for their investment. So it's extremely important to us that the machines perform well over time," Andrew Cretors said.

As domestic manufacturing has continued to move overseas, Cretors has taken advantage of their position as an "American Made" company.

"We put a Made in America sticker on every box that goes out, unless it's going out to parts of the world where they may not want that," Andrew said.

As an international company and the leader in their market, Andrew said that one of the biggest challenges that they currently face is simply keeping up with demand. Still, they are keeping an eye on foreign competition.

"We've seen in other markets where the foreign competition initially offers poor quality, but then they stick with it and start to improve. So we're cautiously watching our competitors to see if they improve enough to where it would make it difficult for us," he said.

At home, one of the challenges the company faces is finding workers with the necessary experience and expertise to operate in a manufacturing environment.

"There's a lack of skilled labor. We need to find people who can put our stuff together. They need to be able to read wiring diagrams. They need to be able to operate a lathe and know how to cut metal," Andre said.

In terms of the current business environment for manufacturers, Andrew feels that the state is making efforts to create favorable conditions. He said that his company has faced challenges in maneuvering through the red tape when attempting to attain certain incentives being offered and he thinks the manufacturing industry as a whole would be better served if the availability of such incentives were better communicated. That said, Andrew admits to not being very politically involved. That is why he values the company's membership in the IMA.

"The voice that IMA provides up the chain and into the political arena is huge. In the grand scheme of things, we're not that big of a company. We don't have lobbyists and lawyers and PR companies out there advocating for us, so an organization like IMA lets us leverage our company into a much larger voice," he said.

C. Cretors & Company has been a member of the IMA since 1940. Having an association that specifically addresses the needs of manufacturers has also proved beneficial over the years.

"The IMA has been beneficial from a benchmarking standpoint and a networking standpoint. It gives us the ability to speak to other people who are manufacturers. There are a lot of other peer groups out there, but sometimes if you're the only manufacturer sitting around a table of service providers, it can be difficult to relate," he said.

C. Cretors & Company has been a leader in Illinois manufacturing for 128 years. Their long-term success can be attributed to many things — chief among them a commitment to quality and the consistency that results from remaining a family-run business. Asked for his take on why they have remained so strong for so many years, Charlie credits a simple approach:

"Probably just by being direct and honest with customers and employees." ■

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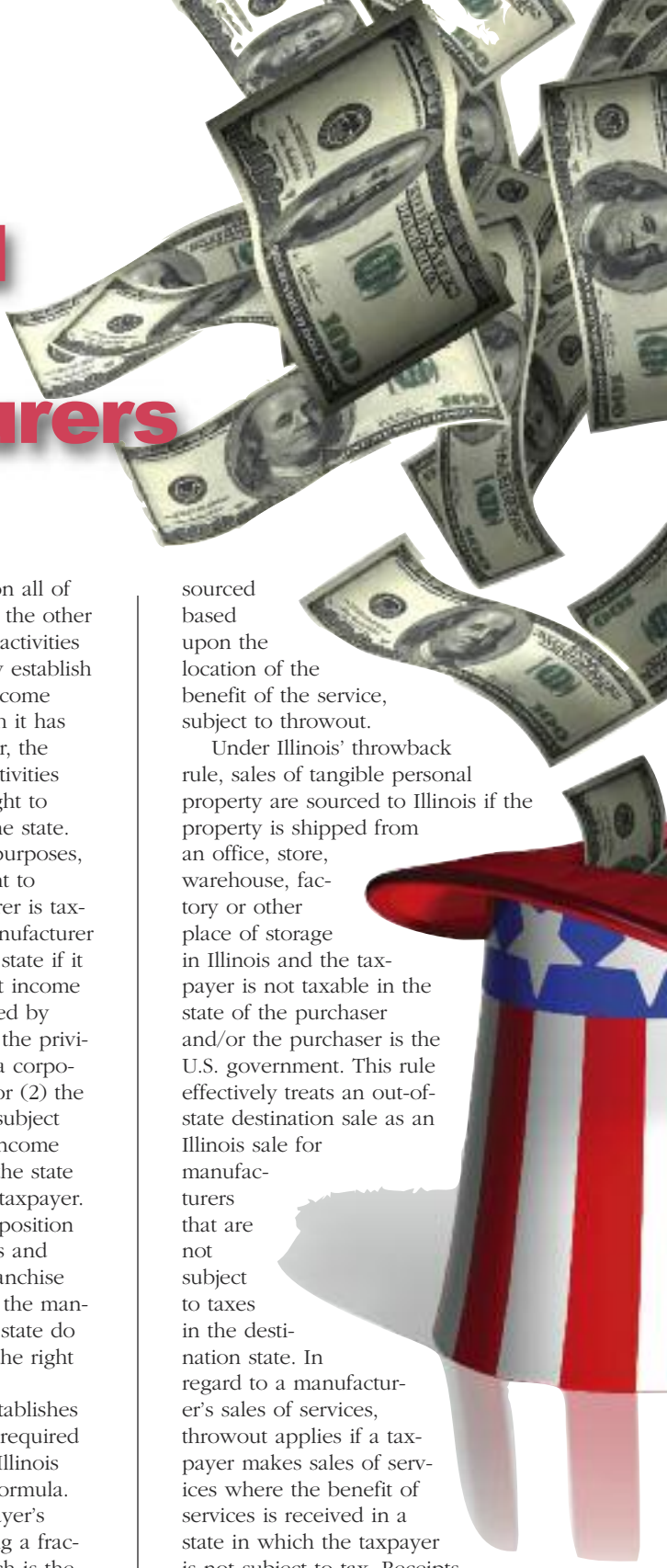
C. Cretors & Company employee Danny Sotelo assembles a popcorn machine at the company's manufacturing facility.

Common tax opportunities and challenges for Illinois manufacturers



By Thomas J. Blaze and Robert Kolosky, McGladrey

State and local taxes present many challenges and opportunities for Illinois manufacturers. From tax base calculation to the nuances of apportionment, from taxability of transactions to qualifying for economic incentives, tax opportunities and risks can be highly complex, and are often missed in the day-to-day focus on operations and the drive for growth. To maximize benefits and mitigate risk, these items should be analyzed in relation to a company's facts and circumstances.

Income tax nexus issues

One of the core issues in relation to state income taxes is determining which states have the legal right, or jurisdiction, to impose an income tax on a business. This concept of jurisdiction, or "nexus" as it is known in the state tax arena, is defined by limitations imposed by the Commerce Clause and the Due Process Clause of the U.S. Constitution, Federal Law (e.g., Public Law 86-272), and state specific "doing business" definitions. These limitations can require highly complex analysis, and conclusions depend upon the states in which a manufacturer has business activities and the nature and extent of those activities.

The right to apportion, throwback and throwout. While the most obvious impact of making a nexus determination is whether a business has to file and pay income tax in a particular state, these determinations also play out in deciding whether that business has the right to apportion, is subject to Illinois' throwback rule for sales of tangible property, or is subject to Illinois' throwout rule for sales of services.

As a general rule, a manufacturer that only has business activities in one state is subject to tax on all of its income in that state. On the other hand, a manufacturer with activities in more than one state may establish the right to apportion its income between the states in which it has business activities. However, the nature and extent of the activities required to establish the right to apportion depends upon the state.

For Illinois income tax purposes, a manufacturer has the right to apportion if the manufacturer is taxable in another state. A manufacturer is subject to tax in another state if it is either (1) subject to a net income tax, a franchise tax measured by income, a franchise tax for the privilege of doing business, or a corporate stock tax in that state or (2) the state has the legal right to subject the manufacturer to a net income tax, regardless of whether the state imposes such a tax on the taxpayer. Note that Illinois takes the position that voluntary tax payments and payments of a minimum franchise tax that bear no relation to the manufacturer's activities in that state do not give the manufacturer the right to apportion.

Once a manufacturer establishes the right to apportion, it is required to apportion its income in Illinois using a single-sales factor formula. Under this formula, a taxpayer's income is apportioned using a fraction, the numerator of which is the taxpayer's Illinois-sourced business gross receipts and the denominator of which is the taxpayer's total business gross receipts. Sales of tangible personal property are sourced to Illinois if the property is delivered or shipped to a purchaser within Illinois, subject to a throwback rule. For manufacturers that also perform services, receipts from such sales are sourced based upon the location of the benefit of the service, subject to throwout.

Under Illinois' throwback rule, sales of tangible personal property are sourced to Illinois if the property is shipped from an office, store, warehouse, factory or other place of storage in Illinois and the taxpayer is not taxable in the state of the purchaser and/or the purchaser is the U.S. government. This rule effectively treats an out-of-state destination sale as an Illinois sale for manufacturers that are not subject to taxes in the destination state. In regard to a manufacturer's sales of services, throwout applies if a taxpayer makes sales of services where the benefit of services is received in a state in which the taxpayer is not subject to tax. Receipts from thrown out services are excluded from both the numerator and denominator of the service provider's sales factor. The analysis for determining whether a business is subject to tax in a state for throwback and throwout purposes is the same as is used for determining whether the taxpayer has the right to apportion. However, it is impor-

tant to note that a taxpayer that has the right to apportion may still be subject to throwback or throwout for sales made into particular states if the taxpayer's apportionment right is not established by its activities in those states.

Income tax credits and incentives

Illinois provides numerous tax credits and business incentives designed to encourage business investment. These programs are subject to varying qualifying requirements and application processes, and generally require ongoing documentation and reporting. For manufacturers, Illinois' small business job creation, research, and economic development credits can be particularly lucrative.

Small business job creation tax credit. Any Illinois business that has no more than 50 full-time employees (counting all locations) that hires new full time employees between July 1, 2012 and June 30, 2016 is eligible for a tax credit of $2,500 per new employee hired, provided the new hire results in an overall increase in employees by the business. The credit is applied towards payment of Illinois withholding taxes and may be carried forward for five years.

Research credits. In addition to the research income tax credits available at the federal level, Illinois businesses are allowed to take a credit for qualifying expenditures that are used to increase research and development activities in Illinois. The Illinois income tax credit equals 6.5 percent of qualifying expenditures.

Economic Development for a Growing Economy ("EDGE"). The State of Illinois offers a non-refundable statutory state income tax credit known as EDGE. EDGE is designed to offer a special tax incentive to encourage businesses to locate or expand operations in Illinois when there is active consideration of a competing location in another state. For eligible businesses, EDGE awards are based on the amount of state income taxes withheld from the wages or salaries of employees in newly created jobs or retained jobs attributable to a particular project. The amount of EDGE is awarded and calculated on a case-by-case basis, and can be as high as the amount of tax receipts collected from Illinois income taxes paid by the newly hired or retained employees of the company in connection with the project. EDGE can be used against income taxes and is generally earned and paid over a period not exceeding 10 years. In addition to the requirement that the business must have a competing location in another state, eligible businesses must also make an investment and retain or create employees.

Sales tax on retail sales

The sales tax is a tax on the sale at retail of tangible personal property, enumerated services, and certain other specifically taxable items. Manufacturers registered for sales and use taxes are required to collect sales tax from their customers unless an exemption is available and properly documented. It sounds simple on the surface, however there are significant consequences in not fully understanding this concept. Following are two situations that require special attention by retailers and manufacturers.

Resale certificates from customers. Under the Illinois sales tax law, sellers who are required to collect tax must either charge tax or document an exemption when they make deliveries in Illinois. When selling to customers that claim the resale exemption, manufacturers should document the exempt sale by obtaining a properly completed CRT-61, Illinois Resale Certificate. The obligations of a seller with respect to accepting a Certificate of Resale were addressed in *Rock Island Tobacco and Specialty Company v. Illinois Department of Revenue,* 87 Ill.App.3d 476, 409 N.E.2d 136, 42 Ill. Dec. 641 (3rd Dist. 1980). The Rock Island court held that when a retailer obtains a proper Certificate of Resale that contains a registration or resale number that is valid on the date it is given, the retailer's liability is at an end. However, if the registration or resale number is determined not to be valid, the Illinois Department of Revenue will assess sales tax on the retailer. The purchaser's registration or reseller number should be verified at the Department's website by clicking on the "Tax registration inquiry" box.

Drop shipments. The administration of a drop-shipment or "third party sale" can be a troublesome and confusing area for many different businesses, including manufacturers. To understand the taxation of a drop-shipment, we must first look at the components of drop-shipment transactions. Generally, the following occurs:

- The retailer accepts an order for tangible personal property from its customer, the final end user of the tangible personal property;
- The retailer (who does not have the desired property) places a similar order with a third party, usually a manufacturer or distributor;
- The third party then ships the tangible personal property directly to the retailer's customer (ultimate user), but sends the invoice for the property to the retailer;
- The customer then receives an invoice from the retailer.

Sales and use tax on this transaction will primarily depend on the state where the property is shipped to. If the third party shipper is not

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registered to collect tax in the state where they are shipping the property into on behalf of the retailer, then the shipper charges no tax on their bill. If the retailer is not registered in the destination state, the liability then falls into the hands of the ultimate end user to self-assess the applicable use tax on the transaction. However, if the shipper is registered to collect tax in the destination state, then by law they are required to collect a tax on the transaction from the retailer. The retailer can give the shipper a valid resale certificate that will allow the shipper to exempt the transaction with the retailer. Most destination states will accept as proof of resale, a certificate issued from a state other than theirs. Some states do not and herein lay the issue. These states require the shipper to have a valid resale certificate from the destination state issued by the retailer. If the retailer can't issue a certificate from the destination state, the shipper must charge tax on their invoice. If a manufacturer finds itself in a drop-shipment situation, it is important to understand each state's laws regarding third party drop-shipments into their states.

Illinois is one of the states that will accept an out of state resale certificate or other proof that the sale is for resale. California, on the other hand, does not recognize the resale exemption when the retailer/purchaser is not registered in California to collect sales or use tax. Instead, a registered California wholesaler is required to collect tax from consumers based on the retail price or wholesale price plus a 10 percent markup or less if the wholesaler can document a lower markup.

Sales and use tax exemptions and credits

Illinois makes many sales and use tax exemptions and credits available to manufacturers. However, it is very complicated to maximize the utilization of these opportunities, and on-going documentation requirements can put many of these items at risk on audit even if a manufacturer qualifies and complies with the initial application and documentation requirements. As a result, manufacturers often end up overpaying sales and use taxes. To help manufacturers better understand some of the core opportunities in this area, we have addressed some of the sales and use tax credits and incentives below.

Manufacturing machinery and equipment. In Illinois, sales tax does not apply to sales of machinery and equipment used primarily in the manufacturing or assembling of tangible personal property for wholesale or retail sale or lease. The exemption extends to repair and replacement parts as long as the parts are incorporated into exempt machinery and equipment.

The difficulty in applying the exemption includes determining where the manufacturing process begins and where it ends. The statute specifies that the manufacturing process commences with the first operation or stage of production in the series and does not end until the completion of the final product in the last operation or stage of production in the series. To illustrate, forklifts that move raw materials from in-bound transportation trucks into raw material inventory and forklifts used in the finished goods warehouse generally fall outside the manufacturing process and would not qualify for the exemption. However, forklifts used to move partially finished goods from one manufacturing station to another will fall within the manufacturing process and would qualify for the exemption as long as they are primarily used in that capacity.

Manufacturer's Purchase Credit (MPC). The MPC is a significant sales tax credit available to Illinois manufacturing companies and printers that purchase qualifying exempt manufacturing and printing machinery and equipment, including qualifying repair and replacement parts. Purchasers of qualifying exempt machinery and equipment will receive a credit equal to 50 percent of the state tax portion of the sales tax (i.e., 6.25 percent) that would have been paid if the qualifying machinery was taxable. For example, a manufacturer that purchases one million dollars annually of qualifying exempt manufacturing machinery, equipment and repair parts will earn MPC equal to $31,250 ($1,000,000 * 6.25% * 50%).

Once the MPC is earned, the manufacturer can use the credit to offset the state sales or use tax on purchases of production-related tangible personal property. Examples of items where a manufacturer can use the MPC include:

- All property used or consumed in a manufacturing facility, including pre-production or post-production material handling, receiving, quality control, inventory control, storage, staging and packing for shipping or transport;
- Property used or consumed in R&D activities;
- Property purchased for incorporation into real estate within a manufacturing or graphic arts facility;
- Fuels, coolants, solvents, oils, lubricants, cleaners, adhesives, and other supplies and consumables; and
- Hand tools, protective apparel, and fire and safety equipment.

Production-related tangible personal property does not include property used, within or without a manufacturing facility, in sales, purchasing, accounting, fiscal management, marketing, personnel recruitment or selection, or landscaping.

The MPC must be used within two calendar years following the year in which the credit was earned. Specific MPC forms must be completed and filed by the manufacturer on an annual basis or the MPC is not valid. These forms are due by June 30th of each year. The Department of Revenue estimates that the MPC is one of the most underutilized credits administered by the Department.

Resale exemption for purchases. The most obvious exemption for Illinois manufacturers is the resale exemption. Illinois provides that a purchase of tangible personal property is deemed to be purchased for resale, and applies to the extent to which the property is resold as an ingredient of an intentionally produced product or byproduct of manufacturing. This is fairly clear when a manufacturer of furniture purchases wood for an ingredient into the furniture tax-free under a resale exemption. But what about paint that is applied to the furniture, acids used to clean the wood or better yet, paint thinner that is used as an additive to the paint? Paint will generally be classified as an ingredient while acids and paint thinner may

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Innovative funding options for energy efficiency initiatives

According to the 2012 Deloitte reSources study, 90 percent of US companies have specific electricity and energy management goals in place. Of those companies, nine-in-ten are specifically targeting electricity consumption and cost reduction as means to achieve these goals. As sustainability becomes more essential to corporate brand and environmental stewardship efforts, many companies are creating sustainability plans that reduce greenhouse gas emissions and also deliver energy cost savings. Improving energy efficiency is a common component of a larger sustainability plan that also may include load response, on-site solar installations, renewable energy supply or carbon offsets.

However, in today's competitive economy many companies are challenged to find capital or financing to implement desired energy efficiency initiatives, even when cost effective solutions could be implemented. According to the Deloitte reSources study, capital funding is the number one barrier to progress, followed by length of payback period.

At the same time, many companies lack in-house resources and technical expertise to efficiently design and implement an energy efficiency program. So, given the constraints on financial and technical resources, how can an organization gain control of their energy usage and lower their energy cost? The first step is to identify which energy efficiency option is best suited for your situation.

Three ways to reduce energy costs

Businesses seeking to improve energy efficiency have three primary options:

1. Energy Performance Contracting
2. Design/Build Programs
3. In-Electric-Rate Funding

Option 1: Energy Performance Contracting (EPCs)

Energy Performance Contracts, also known as EPCs, require no upfront capital for energy efficiency projects. Instead, energy efficient building improvements are funded through guaranteed cost savings over a relatively long-term contract (typically greater than 10 years and up to 20) with an energy service company (ESCO). The ESCO handles project design and development, procurement, construction, commissioning, and reporting, and also may assist with arranging the financing. EPCs are typically utilized to leverage short-term savings projects with long-term ones while enabling major energy related infrastructure improvements. Large capital improvement projects, such as chiller and boiler replacement, are usually mixed in with quick payback energy conservation measures (ECMs) like lighting and variable frequency drives. The primary markets for this option are in the public sector.

Option 2: Design/Build Programs

In the design/build approach, the organization that seeks to improve energy efficiency has access to upfront capital for the energy efficiency projects. Capital requirements are often in excess of $1 million. The organization funds the project, and the ESCO provides an extension to the organization's staff for technical expertise to accelerate the effort, maximize efficiency, help the customer understand the energy markets' impact on the project and navigate the available rebates, incentives and tax credits. Primary markets for this option are healthcare and higher education; secondary markets include commercial and industrial enterprises.

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Constellation is the preferred energy provider for IMA members. For more information, visit www.constellation.com/IMA. Or, you may contact Constellation's Roger Tarras at roger.tarras@constellation.com, 888-312-1563.

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Harassment prevention — An investment you can't afford to ignore

When you find yourself with a "To Do" list that gets longer each day, and more tasks at hand than the time to complete them, it can be easy to let anti-harassment training fall to the bottom of the list. Yet a comprehensive, thorough, and well-documented training program for all employees and especially supervisors will provide both tangible and intangible benefits that should not be overlooked. Failure to focus on harassment prevention can lead to dire consequences. For example:

- News headlines in early May touted a $240 million verdict from a jury in Iowa — in a case brought by the EEOC on behalf of a class of developmentally disabled individuals who alleged they were subjected to harassment and discriminatory treatment in a food processing operation. Although the dollar verdict was reduced once the damages caps were enforced, this stunning verdict sent a clear message to employers. *EEOC v. Hill Country Farms,* No. 3:11-cv-00041-CRW-TJS (U.S. Dist. Ct. S. D. Iowa 2013).
- In another recent case that generated news coverage, a seven-day trial resulted in a $1.5 million jury verdict on claims of sexual harassment and retaliation by a group of temporary employees at a logistics facility. *EEOC v. New Breed Logistics,* No. 2:10-xv-02696-STA-tmp (U.S. Dist. Ct. W. D. Tenn. 2013). Again, the EEOC was the plaintiff on behalf of the victims. The EEOC issued a press release about the case and noted it had brought eight cases to trial in the current fiscal year and prevailed in all but one.
- The EEOC also brought harassment claims against the operators of an International House of Pancakes franchise in Racine, Wisconsin. The jury found in favor of employees who claimed they were subjected to sexual harassment and awarded punitive damages. The jury verdict was upheld on appeal to the Seventh Circuit Court of Appeals, which in its lengthy opinion provided a road map for employers who want to avoid such dire consequences. *EEOC v. Management Hospitality of Racine d/b/a/ International House of Pancakes,* 666 F.3d 422 (7th Cir. 2012)

Although an employer may think that the odds are slim that a harassment charge against your company will develop into a lawsuit that the EEOC ultimately takes to trial with a million-dollar or more outcome, the mere possibility of such litigation should keep managers and business owners awake at night.

So perhaps now is the time to ask yourself these two questions — if the adequacy of our company's harassment prevention and correction program were on trial, how would it look to a jury? Or, from a more practical standpoint, ask yourself — if we invest time and money in non-discrimination and harassment training will we see a return on our investment? With those thoughts in mind, let's take a quick look at the law, and then consider the benefits of a prevention program and some of the best practices for effective policies and procedures.

There is constant litigation involving federal and state laws prohibiting workplace discrimination, including harassment. Title VII of the Civil Rights Act (one of the statutes enforced by the EEOC) prohibits discrimination on the basis of sex, including harassment because of sex. The non-harassment obligations also include other protected classes such as race, religion, and national origin. Title VII applies to employers with 15 or more employ-

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Risk management for manufacturers: Achieving results through smart insurance and employee relations practices

By Tonya G. Newman and Sonya Rosenberg,
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To borrow from Amelia Earhart, "preparation is two-thirds of any venture." Carefully assessing potential risks — and ensuring that appropriate insurance and personnel and other policies and practices are in place — are among the most important measures a company can take to mitigate against some of the greatest legal risks manufactures face. Yet, time and again we see companies taking shortcuts with this preparation, only to end up in costly, protracted litigation.

This article pools our collective experiences to tell you what manufacturing companies can do now to put into place appropriate protections and guard against legal problems before they arise.

Does the company's insurance program meet its needs?

An obvious starting point in any discussion of effective risk management is insurance. And while most manufacturers purchase several lines of insurance, it is our experience that a number of manufacturers do not regularly reevaluate their insurance needs. We recommend that companies regularly review their existing program, with an eye toward the past (to assess the most prevalent source of claims) and toward the future (to assess potential future exposures based on planned growth, new product lines, and legal developments). A periodic insurance audit should result in a more effective renewal process and insurance program more carefully tailored to the company's needs.

When beginning an insurance audit, consider the following types of questions and issues, as a starting point for effective discussion with insurance brokers, counsel, or both. These points go beyond the general (and more usual) consideration of the adequacy of policy limits, policy language, trigger issues, exclusions, products completed issues, and batch clause issues.

1. Claims history and risk assessment. The company should review its recent claims history, including claims based on employee relations issues. Identify the areas of greatest legal risk, which will aid in the evaluation of areas of exposure that might have been overlooked during previous insurance renewals.

2. Current and future operations. What are the contours of manufacturing operations? Does the company intend to expand and, if so, where and how? If plans include acquiring stock or assets of another business, due diligence should go beyond the usual products liability questions — it should include insurance and indemnity. The company should consider how any indemnity arrangements will work, and whether they will be enforceable as a practical matter after the purchase (e.g., are there dollars to back them up). The company should obtain a copy of the target's insurance policies that may respond to any claim — and keep them so that it may tender new claims. Last, the company also should consider whether and how the policies being renewed will offer coverage for a newly acquired business.

3. Outsourcing issues. The insurance implications of doing business abroad can be complex. To the extent the company is manufacturing its products in any other country or otherwise outsourcing, evaluate whether a policy written in the United States will provide coverage abroad, and whether the law of the jurisdiction(s) in which the company is doing business imposes any additional insurance requirements (many do). The penalties for failing to comply with some countries' requirements can be quite severe.

4. Named insureds. Who are the intended insureds under each policy? If the company has subsidiaries, are they intended to be covered under the policies, or do they have their own coverage? Does the company use the services of independent contractors? If so, consider whether they should be covered under EPL, D&O and/or CGL policies (the answer is not necessarily "yes"). Do vendor or other contracts require the company to provide insurance coverage? If so, the manufacturer should ensure that its "Additional Insured" endorsements are correct and that the policy otherwise satisfies its obligations to those third parties. By the same token, if any of the manufacturer's contracts require another company to provide insurance, the manufacturer should obtain copies of the relevant policies — with endorsements — with every policy period.

5. Duty to defend and retentions. Most general liability policies require the insurer to defend the company against lawsuits. Manufacturers in certain sectors that face repeated litigation in which litigants claim high-dollar value catastrophic personal injuries or assert high-dollar value property damage claims might prefer to control the defense. An insurer might be willing to permit the insured to control the defense, subject to certain conditions such as defense counsel or a third-party administrator periodically updating an assigned claims adjuster on the status of all litigation, and/or a

large self-insured retention for each occurrence.

Thoughtful consideration of these types of questions should guide an effective evaluation of the entire insurance program, and help determine whether it meets the company's existing and anticipated needs during the next policy period.

Other proactive risk mitigation — products liability

In addition to taking steps to button up insurance coverage issues, manufacturers can be proactive in other ways to mitigate the risks posed by the creative plaintiffs' bar. We offer a few suggestions for consideration, which are part and parcel of the exposure evaluation described above.

1. Evaluate and assess exposure. Just as proper insurance is a useful tool in protecting the company's bottom line when faced with products liability litigation, so too is an evaluation of exposure to that litigation in the first instance. Conducted proactively — that is, before a lawsuit is filed — such an evaluation can help identify the scope of exposure. More importantly, it can help a company identify where changes can be made to decrease exposure.

Areas of inquiry should include: (a) product design and testing (including design drawings, design changes, testing documents and interviews by counsel of key personnel involved in both); (b) product certifications (i.e., U.L. and others) and the implications thereof; and (c) for existing products, prior incident reports (including informally reported incidents, previous litigation regarding the same product, discussions during risk management or similar committee meetings, etc.).

It is easy to see that the results of any such evaluation and assessment would be a discovery gold mine in the event of litigation. Care should be taken in selecting who will conduct the evaluation, how they will do so, and how and to whom the results will be communicated, to preserve the attorney-client privilege.

2. Instructions and Warnings. Manufacturers should consider having a risk manager as well as legal counsel review all instruction manuals, labels, warnings, warranties and the like, and revise them to ensure that they comply with the law of the relevant jurisdictions. Should anything be printed in another language? It also is important to periodically re-review warnings to take into account whether the warnings are adequate in light of subsequent developments since the product's initial release. If the product is distributed and/or used in other countries, the company needs to consider whether a warning written for the U.S. market is sufficient for those other markets (and, again, whether it should be written in another language for those markets).

3. Actively — even aggressively — participate in claims investigations. One of the worst things a manufacturer can do from a risk management standpoint is to gain a reputation for "rolling over" and quickly settling claims. Although it takes time, manufacturers can shed themselves of that reputation, which may well make them a less frequent target of the plaintiffs' bar. Shedding that reputation can directly impact the bottom line, both in terms of reducing resources directed to defending litigation, dollars spent on retentions or deductibles under insurance policies, and in terms of policy premium dollars. If a manufacturer receives notice of an investigation of an incident — whether it is a scene investigation or a lab exam — evaluate the likely exposure and decide how actively to participate. Over time, becoming a regular presence at investigations (and later, aggressively defending rather than settling lawsuits) may go a long way to convincing the plaintiffs' bar that the manufacturer will no longer so readily settle claims, and ultimately, prompting them to turn elsewhere.

These are only a few suggestions to evaluate and mitigate exposure to a products liability claim. One of the keys to effective risk management is to recognize that products liability need not, and should not, be a reactive business. Instead, companies can work with their counsel to evaluate and minimize litigation risks posed by existing products, and as they prepare to bring new products to market.

Good, proactive employee relations practices = Lower risk of litigation

Just as smart insurance and products liability practices are essential in effective risk management by manufacturers, so are good, proactive employee relations practices. Often overlooked, such practices can play the deciding role in helping to prevent or, at a minimum, helping a company successfully and efficiently defend against, a legal claim from a rogue employee that otherwise might be a source of tremendous financial, operational and public relations stressors on a company. From the employee relations perspective, effective risk management must include a thoughtful audit of a company's personnel policies and relevant training history, and a working plan for effective implementation and enforcement going forward.

The easiest place to start an employment audit is by reviewing current employee-related policies. In that respect, a good employee handbook is a must. Though the content of the handbook will differ depending on the culture, needs and locale(s) of a business, every handbook should contain the following "Top-5" policies, and risk managers should ensure they are drafted to comply with applicable law:

1. At-will employment. An employee handbook should convey the general policy of at-will employment, reflecting that either the employer or the employee may terminate the employment relationship at any time, for any lawful reason, with or without notice. While an at-will employment policy has long been the staple of any employee handbook, the National Labor Relations Board ("NLRB") recently put this policy to the test, questioning whether it might be interpreted as interfering with employees' rights to discuss and attempt to change their work conditions, including through joining a union.

Regardless of whether the company is unionized, a poorly worded at-will policy may draw unwanted attention from the NLRB. Thus, it is important to review the company's at-will policy with fresh eyes to ensure it serves its purpose in a legally compliant manner. On a related note, an employee handbook also should contain: (i) a prominent disclaimer that it is not intended and should not be interpreted as creating a contract of employment for any set

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be classified as a consumable. These types of determinations depend upon a number of issues, and the treatment of one item can vary depending upon the specific facts and circumstances.

Packaging. The exemption for packaging materials and containers is similar to the resale exemption in that items purchased for sale to others can be purchased by the manufacturer exempt from tax. In Illinois, sellers of containers to manufacturers who sell tangible personal property contained in such containers to others are deemed to make sales of such containers to purchasers for purposes of resale if the purchasers of such containers transfer the ownership of the containers to their customers together with the ownership of the tangible personal property contained in such containers. The theory driving this exemption is that the packaging is an inseparable part of the product being purchased. Conversely, returnable containers, or containers where ownership does not transfer to the purchaser will generally be subject to the sales tax.

Enterprise Zone Credits. An enterprise zone is a specific area designated by Illinois in cooperation with a local government to receive tax incentives and other benefits to stimulate economic activity. For all manufacturers located within the boundaries of an Enterprise Zone, there is a state sales tax exemption for building materials permanently affixed to the property in a project that is certified by the particular zone administrator.

There are also two additional tax exemptions that a manufacturer in an enterprise zone may qualify for under certain conditions. First, for manufacturers that apply and qualify, there is a state sales tax exemption on purchases of tangible personal property to be used in the manufacturing or assembly process or in the operation of a pollution control facility within an Enterprise Zone. Eligibility is based on making a minimum investment in the Enterprise Zone and creating or retaining a minimum number of full-time-equivalent jobs. Second, for manufacturers that apply and qualify, there is a state utility tax exemption on gas, electricity and the Illinois Commerce Commission's administrative charge and telecommunication excise tax. Eligibility is based on making a minimum investment in the enterprise zone and creating or retaining minimum number of full-time-equivalent jobs.

Local Sales and Use Taxes

Illinois manufacturers that are located in the City of Chicago or in Cook County should be aware of potential tax issues in both of those jurisdictions. All local sales and use taxes in Illinois are administered by the Illinois Department of Revenue, with the exception of Chicago and Cook County. Dealing with a locally imposed tax that is administered locally can create additional layers of opportunities and risks, and should be analyzed to the same extent as taxes administered at the state level.

Chicago. The Chicago Department of Revenue administers over twenty five separate taxes. Three taxes that manufacturing companies located in Chicago typically should be paying are the Use Tax for Non-Titled Personal Property (Use Tax), the Personal Property Lease Transaction Tax (Lease Tax) and the Employers' Expense Tax. The Use Tax is a tax on the purchase of non-titled tangible personal property for use in Chicago from a retailer located outside Chicago. The tax is one percent of taxable purchases with the first $2,500 of purchases each year exempt. The Lease Tax applies to businesses or individuals that either are a lessor or lessee of personal property used in Chicago. The tax is eight percent of receipts or charges. The Lease Tax also applies to software licenses that are exempt under the Illinois sales tax law. The Employers' Expense Tax generally applies to businesses that employ 50 or more full-time workers or employees that perform 50 percent or more of their work in the City of Chicago. The tax is $2 per employee per month.

Cook County. Effective April 1, 2013, Cook County imposes a use tax upon the privilege of using in the county non-titled personal property that was purchased outside of the county. The tax rate was initially set at 1.25 percent of the non-titled property's value when it is first used within the county. The rate was lowered to .75 percent on June 19, 2013. Several lawsuits were filed challenging the validity of this tax. On July 24, 2013, the Judge hearing the consolidated Non-Titled Personal Property Use Tax cases granted a preliminary injunction against Cook County for collecting this tax. This is an ongoing issue that has not been resolved. Manufacturing companies located in Cook County should monitor developments.

Conclusion

Illinois manufacturers face a number of highly complicated tax issues. This article provides a high level summary of some of these tax issues, and presents some of the opportunities and risks related thereto. An Illinois manufacturer should consider reviewing its tax processes and positions in relation to its current facts and circumstances to determine whether it is fully taking advantage of these and other opportunities and mitigating its tax risks.

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ENERGY EFFICIENCY

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Option 3: In-Electric Rate Funding

With in-electric rate funding, no upfront capital is required. Relatively low-capital cost energy efficiency improvements are funded via energy cost savings over a relatively short-term contract (typically 3-5 years). The ESCO handles project design, procurement, construction, commissioning and may assist with arranging financing. Primary markets for this option are commercial and industrial enterprises, healthcare, and private higher education. The remainder of this white paper focuses on this option.

Strategic integration of energy initiatives

To optimize the benefits of energy efficiency initiatives, a holistic energy approach is recommended that accounts for a broad range of considerations. An integrated, strategic energy plan that incorporates demand-side and supply-side solutions including commodity procurement, energy efficiency and load response can yield significant results. Working with an integrated energy supplier will allow companies to understand the options available and how the pieces of the 'energy puzzle' fit together. Here are some important questions an integrated energy supplier can help answer to help you make sure your supply-side and demand-side initiatives are working in concert.

Will energy reduction impact your existing commodity or load response contracts?

An existing electricity contract with your energy service provider may pose energy bandwidth constraints. Bandwidth is the allowable deviance from a historical baseline in electricity usage.

In some cases, an electric supply contract will impose a fee if a company's actual electricity demand or usage exceeds or drops below the allowable bandwidth. As an example, if the electricity supply contract imposes a 10 percent bandwidth, then a 20 percent reduction in energy use may not be advantageous, depending on the terms and penalties of the electricity contract.

Similarly, reducing energy usage may adversely impact existing or planned load response contracts or opportunities. If the penalties and terms of these contracts or opportunities are excessive, alternative opportunities for cost savings may be warranted. In any case, the energy efficiency company should consider the financial implications (and net costs and benefits) of deviating from these constraints.

How will energy reductions impact your new commodity contracts?

In most cases, if you are going to be entering a new electric contract and are planning to implement energy efficiency measures, you are likely not able to capture all of the benefits of those decreases in energy uses.

Typically, most retail energy providers will not deviate from your historical usage and demands when providing new pricing.

However, since the energy improvements and the retail energy are being delivered by the same provider, there is the necessary understanding of their interaction to fully maximize the situation. Therefore, improvements to load profiles and reductions in demand can be recognized throughout the term of the contract.

Rebates, incentives and capacity credits

To maximize savings, companies considering energy efficiency initiatives also need to be aware of federal, state, local, and utility rebate and incentive programs, as well as efficiency capacity credits from the regional independent system operator (ISO) or regional transmission organization (RTO). Also, utility rebate programs, deadlines, and levels of funding are changing constantly. Some utility rebate agreements prohibit the capture of efficiency capacity credits, while others allow companies to capture both capacity credits and realize energy savings.

Understanding these various components and the constantly changing offerings is imperative to maximizing the return on your project as well as prioritizing when there are multiple opportunities in different marketplaces.

An energy efficient supply chain

Many companies are seeing increasing pressure from customers and occupants to be more energy efficient. Companies renting office space to government entities, are often required to administer energy audits and achieve minimum Energy Star ratings.

For example, the U.S. General Service Administration requires buildings to have an Energy Star rating of 70 or higher in order to be considered for leasing.

Similarly, if the organization is renting or supplying to particular commercial/industrial companies with efficiency requirements, consideration of these is needed to optimize benefits.

Many Fortune 500 companies require property managers or suppliers to demonstrate certain levels of energy efficiency in order to conduct business with them. Hence, attaining this level of efficiency may enable establishment of beneficial business relationships.

Working with an integrated supplier

An integrated supplier (ESCO) provides expertise, knowledge, and resources for all portions of the energy value chain. Integrated suppliers offer power and gas supply, renewable energy solutions, and demand side offerings such as load response programs and energy efficiency projects.

Such a supplier can help companies take advantage of market prices, reduce energy bill line item charges (e.g., capacity, transmission, and demand tags), and avoid potential penalties due to commodity contract terms and conditions. Harnessing energy data for strategic energy planning and management is another key aspect to achievement of energy related goals.

Customers that work with integrated suppliers can have better access to historical energy usage data, compare usage to industry benchmarks, and build a plan that incorporates forecasted market prices. Integrated suppliers may also be able to tailor a program to a company's specific needs, help them meet sustainability goals, and better navigate complicated energy markets.

About efficiency made easy

While facing rising costs and budget constraints, many businesses are looking for ways to fund energy conservation measures. Efficiency Made Easy (EME) is a unique solution that combines a commodity price with high-impact energy efficiency measures without utilizing limited capital. This allows businesses to realize cost savings through a reduction in energy consumption over time. ■

Learn more about Constellation's energy efficiency solutions. Call 888-312-1563 or visit constellation.com/IMA.

HARASSMENT

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ees. The Illinois Human Rights Act also prohibits discrimination in the workplace. However, the provisions that prohibit sexual harassment apply to employers with one or more employees. The Human Rights Act also provides for individual liability for sexual harassment, while Title VII does not. As a result, all Illinois employers, regardless of size, are covered by laws prohibiting harassment; and all managers in Illinois can be held individually liable for their actions.

Another significant difference between federal and state law is the issue of an employer's liability if a supervisor engages in sexual harassment. Under the U.S. Supreme Court precedent from the cases of *Burlington Indus., Inc. v. Ellerth,* 524 U.S. 742 (1998) and *Faragher v. City of Boca Raton,* 524 U.S. 775 (1998), an employer is liable for co-worker on co-worker harassment only if the employer knew or should have known of the harassment and did not take prompt and effective corrective action. But if the individual who is accused of harassment is a supervisor, then the employer can be subject to liability, even if the employer was unaware of the harassment; this is called vicarious liability. However, if the harassment did not result in a tangible employment action (such as a termination), then an employer may be able to defend against the claims by showing that it had in place procedures to prevent and correct harassment and that the plaintiff failed to make use of the procedures. The U.S. Supreme Court just addressed the question of who is a "supervisor" — a question that had divided lower courts. In *Vance v. Ball State Univ.* 570 U.S. (June 24, 2013), the Court ruled that an employee is a "supervisor" for purposes of vicarious liability for harassment under Title VII if he or she is empowered by the employer to take tangible employment actions against the alleged victim of the workplace harassment.

Once again, the rules under the Illinois Human Rights Act are more stringent for employers. The Illinois Human Rights Act imposes strict liability for sexual harassment where a supervisor is the perpetrator. That means that an employer is liable for the actions of a supervisor without the possibility of using the company's anti-harassment policies and procedures as an affirmative defense. Moreover, the Illinois Supreme Court has ruled that supervisory liability will apply even if the supervisor in question has no supervisory powers over the victim but is a supervisor in a different department. *Sangamon County Sheriff's Dept. v. Illinois Human Rights Commission,* 233 Ill. 2d 125, 908 N.E. 2d 39 (Ill. 2009).

For Illinois employers, training and accountability for all employees is important, but especially so for supervisors due to the strict liability standard.

With these legal standards in mind, let's turn to the benefits of ensuring that policies and procedures are in place and that employees are trained.

While placing a dollar figure on litigation can be challenging, legal fees and defense costs for a single-plaintiff harassment case can easily run up to $100,000, and a multiple-claimant case or class action can top that figure by a wide margin; and these amounts do not include damages paid to the successful plaintiff. Yet the savings in litigation costs are just one reason that companies need to stay up to date in preventative measures.

Other benefits, while hard to measure, include improved morale, greater productivity, and less employee turnover. Employees who are subjected to workplace harassment can be distracted and disgruntled, the effects of which can spread to others in the workforce, lowering morale and decreasing productivity. Time spent on workplace investigations also distracts from other pressing projects. And once a lawsuit is filed, a great deal of time must be devoted to litigation defense. Litigation of this nature almost always involves management and even top management which distracts them from running the company's business.

So how best to ensure policies and procedures will pass muster? Consider the *IHOP* case a cautionary tale. In that case, the Court of Appeals emphasized that a reasonable jury could find that the employer's preventative measures were inadequate, noting that a non-harassment policy in and of itself does not shield an employer from punitive damages in a sexual harassment case. New employees had training that consisted of watching a video, reading a copy of the policy, and signing it. Yet the complaint procedure was not available in print for employees to refer to during their employment, and employees who subsequently moved into managerial positions did not receive training or instruction on managerial responsibilities with respect to complaints of harassment.

Other highlights from the case are likewise instructive: (1) the mere creation of sexual harassment policy is not enough — it must provide a meaningful process for employees to express their concerns, with a reasonable complaint process; (2) there must be effective training and accountability for managers who are in charge of enforcing the policy; (3) prompt investigation of employee is "a hallmark of reasonable corrective action; (4) there must be a clear path for reporting harassment. In the IHOP case, the employer's policy was faulted because it included no names or contact information at all.

In contrast to the policy and cursory training that the court (and jury) found deficient, a comprehensive anti-harassment program may include the following: (1) training for all new hires; (2) training for all newly promoted or newly hired supervisors that is specific to their supervisory duties and responsibilities and periodic "refresher" training for all supervisors; (3) training that is geared toward front-line employees, ensuring that it is in language that is understandable to the audience (which may, in some cases, mean translation and documentation in a language other than English); (4) posters, handbooks, intranet reminders, an 800 number for complaints and other communications that ensure employees have access to the information they need to make a complaint — including specific people to whom complaints

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JOE RADLOFF

Build a high performance organization with the high performance equation

In today's world, organizations of all types and sizes are looking for the winning formula or equation. They want a formula that allows the organization to be flexible, empowered, adaptable to change, and drives continued success. As organizations seek out this winning formula they must remind themselves to never overlook the basics. That's why, from Newton's Laws of Motion to the KISS principle ("Keep it super simple") and block and tackling metaphors, you will find all types of formulas, equations, and models that can lead organizations and businesses to success, winning, and High Performance. I have found, through my work experience and educational experience (my working MBA), the following "High Performance Equation," that mirrors the KISS principle, does not defy the laws of motion, and provides the block and tackling needed to elevate organizations to a level of High Performance.

High Performance = People + Processes + Productivity + Profitability

In order to better understand the high performance equation, it's critical to understand the 4P's. They are their own variable, but also dependent on each other as you develop your High Performance Organization. It seems obvious that each one of the 4P's are dependent on the others. But in real life situations, we often treat them independently as we look at ways to improve our organizations. When implementing the High Performance Equation, you must define your current state and future state, measure, and continuously improve all 4P's in order to keep the equation balanced. Some organizations have several tools in their toolbox that could help them in defining their current state, measure, and continuously improve all four variables in the High Performance Equation, while other organizations have a few tools in their toolbox. The key to using any tool to help you in achieving your goals is knowing what tool to use, when to use it, and how to use it. Using the wrong tool, the wrong way, and at the wrong time can cost organizations millions dollars in profits. So, as you develop your strategy around the High Performance Equation make sure you define current and future state, select the correct tools, improve and develop current state, and measure all the 4P's of the equation, while remembering all 4P's are not independent of each other. In order to become a High Performance Organization you must develop high performance culture in all areas of the high performance equation, and that starts with its people.

People are the key ingredients in human capital, which is also the backbone of every organization. Human capital is a measure of the economic value of an employee's skill set. This measure builds on the basic production input of labor measure where all labor is thought to be equal. The concept of human capital recognizes that not all labor is equal and that the quality of employees can be improved by investing in them. The education, experience, and abilities of an employee have an economic value for employers and for the economy as well. It is critical for organizations to clearly understand the value of its people. In order to do so, organizations must continue to evolve from the human resources mindset to the human capital approach. Human Capital gains or loses value depending on how much is invested. While Human Resource is a great resource for supply, it must be supplemented with knowledge, creativity, and have the ability to perform labor to produce economic wealth in order to evolve into human capital. The continuous process of developing and improving your employees and recruiting the right employees helps organizations to improve and evolve their culture.

Since people directly impact the three other P's of high performance, developing and improving the human capital will be the key to the organization's success. What are your short and long-term plans for developing and improving your human capital? What are your short and long-term goals for your human capital and how will you measure your success? What tools are you going to use to develop and improve your human capital?

Here are some thoughts and ideas on how you may be able to find answers to these questions.

- People are assets that must be valued, measured, developed and rewarded. These four areas must be part of a short and long-term strategy.
- Unlike capital assets, people do not depreciate and can increase in value if developed, measured and rewarded.
- Employee assessments, succes-

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HIGH PERFORMANCE

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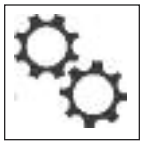
sion planning, high payoff hiring, high performance leadership training and development, skills for high performance teams, change management, the trust factor and employee engagement are just a few tools that can help you develop your people into a high performance organization.

- Short and long-term goals for human capital can be defined and measured in employee retention, employee engagement scores, succession planning, employee training and people productivity.

High performance organizations recognize that developing, improving and valuing their people is critical to improving the value of its human capital. They know that while most other assets are replaceable and become obsolete, the development and nurturing of their people is key to becoming a high performance organization.



As I mentioned earlier in the article each P in in the High Performance Equation is it's own variable, but each being dependent on each other and with people having the largest impact on the other three P's in the equation. The faster you get your people moving in the direction of high performance the greater impact you will have in moving your process and productivity to a high performance state. There are several tools that can be used to improve process and productivity, but none can be successful without the involvement of well-trained people.

Lean Manufacturing is a very effective system of Productivity/ Process/Quality improvement techniques developed for manufacturing environments, but can be used by all organizations when it comes to continuous improvement. Again, people are the key to success for productivity and process improvement. Lean Manufacturing techniques can be used as a very effective tool for all types of businesses and organizations by helping them identify and eliminate waste. These techniques are constantly improving the process and productivity and are absolutely dependent on well-trained people. Therefore, it is critical that all people in an organization be well trained in their work and develop a clear understanding of the continuous improvement. With that being said, it is critical for leadership at all levels in an organization be trained and educated in making the High Performance Equation part of their culture.

With people, process, and productivity training and improvement programs in place, the organization will now see how these variables can directly improve profitability in their organization. Not only will an organization see the improvement in the bottom line of their P/L, they will also see improvement in all their KRI's (Key Results Indicator). Improvement in the organization's KRI's is a direct correlation to the improved profitability of the organization. Leaders must remember the K.I.S.S. principle when establishing KRI's for their organization. Key Results Indicator should be limited to the most important indicators that drive the business and its profitability. For example a few KRI's that I measured during my career as a leader in manufacturing environment were OSHA recordable and LTA's; Quality Performance in PPM defective; Employee Engagement including training, hiring, retention, and succession planning; Daily Productivity Performance; Monthly Spending Variance and Cost Savings. Improved profitability is a direct function of an organization selecting the right KRI's, measuring, and making improvements to those KRI's in order to ensure continued success. After you establish your KRI's for your organization, you will notice that people have the biggest impact to the improvement of every KRI that you establish for your organization.

As you start to use the High Performance Equation in moving your organization to High Performance Organization, you must keep in mind that High Performance is a direct reflection of your people and is an ongoing continuous improvement vision. Just like Newton's laws of motion and the K.I.S.S. principle, the High Performance Equation never changes but allows organizations to continuously improve in the four key areas of its business. One other thing to remember is that becoming a High Performance Organization is a journey and you must continue to evolve during each leg of the journey. One may ask, is the journey ever complete when it comes to high performance? With that question in mind, you must challenge yourself to define your current and future state of how you and your organization are going to use the High Performance Equation in helping you to set your long & short-term vision and developing your strategic plan for High Performance. Let the journey begin, so start "planning your route and welcome to the journey of High Performance." ■

HARASSMENT

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should be raised, and alternatives should the employee need to skip a level to report a supervisor's harassing conduct. In addition, attendance sheets, signed acknowledgement forms, and other records should be kept to ensure an employer can prove that it provided training in the event that its policies and procedures become the centerpiece of litigation — and a shield against a multi-million dollar verdict.

Employers should not ignore this area. All employers should place a comprehensive review of their harassment complaint procedures high up on their " to do" list. A failure to act now could result in significant losses and embarrassment in the future. Now is the time to act! ■

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term; and (ii) well-worded disciplinary policies giving management the flexibility to take appropriate corrective action, if, when and as appropriate on a case-by-case basis, without being held to a progressive discipline procedure.

2. Equal employment opportunity/non-discrimination. These policies also are a "must-have" for any employee handbook. Just as it is relatively easy to write these policies correctly, it also is easy to get them wrong, including by failing to include the appropriate protected categories or a mandatory complaint procedure to report any related complaints and concerns.

3. Anti-harassment. A harassment lawsuit, particularly a sexual harassment lawsuit, can involve protracted litigation and greatly damage a company's reputation. An updated, compliant anti-harassment policy should help prevent harassment from occurring in and, to the extent such conduct does occur, to mitigate its harmful effects through mandatory internal reporting, investigation and remedial action procedures. In federal litigation, maintaining and consistently enforcing a well-written anti-harassment policy can make all the difference between whether the company will be held liable for the alleged conduct, or whether the suit will be dismissed before it gets to a trial.

4. Wage and Hour. Often neglected or boiler-plated in an employee handbook, these policies are essential in establishing and enforcing effective, legal time management and pay practices, and in providing a defense to companies in lawsuits over the payment of wages and benefits. As such claims are frequent contenders for class actions targeting manufacturers given the nature of their business, it is imperative to ensure that the company's wage and hour policies — including policies as to employee classification, recording of time, overtime, and paid time off — are in good working order.

5. Communications systems and social media. In the last two decades, rapidly evolving technologies have entirely transformed how businesses, and their employees, operate and communicate. Yet — incredibly — many companies continue to rely on archaic systems communications policies that focus more on telephones and facsimiles than computer systems and related email, texts and Internet and social media posts and activities that have come to define modern communication. It is essential to have updated communications systems and, often, social media policies in place to effectively communicate to employees what they can and cannot do, and what they should expect relative to privacy and potential disciplinary ramifications when they use company-provided computer communications systems.

It should be noted that such policies have also recently generated a great deal of unwanted attention from the NLRB, so it is important to write them in with the eye toward ensuring that will not be deemed to inappropriately interfere with or chill employees' rights to discuss their terms and conditions of work.

Of course, a good handbook is hardly worth the paper it is written on unless it is consistently and effectively enforced. Policy enforcement should begin with the company's leadership, and specifically the leadership's awareness of and commitment to upholding and enforcing personnel policies in a consistent and effective manner. That requires risk managers to communicate key handbook policies whenever new employees join the company, and also during periodic training intervals thereafter. Though often dreaded, policy training really does not have to be, and should not be, "boring" or "tedious." If done well, it should be informative and insightful in helping management and subordinate employees to recognize and resolve workplace issues before they turn into legal problems.

Risk management through effective restrictive covenant agreements

In addition to ensuring that the business has solid employment policies and procedures in place, manufacturers should be proactive about the measures being taken to protect the company's proprietary information, products, customers and employees from the competition. Well-drafted, enforced — and enforceable — restrictive covenant agreements are essential in helping a company to achieve these important goals.

In reviewing restrictive covenants, manufacturers should keep in mind that restrictive covenant law is constantly evolving, and can vary significantly state-to-state. A restriction that is certain to be upheld in one state may be deemed a patently overbroad and unlawful in another. In Illinois, restrictive covenants have been routinely enforced so long as they have been appropriately tailored in time and scope, and based on a legitimate business interest. Just recently, however, one Illinois Appellate Court ruled that a restrictive covenant will be enforced only if supported by a minimum of two (2) years of continued employment as consideration — an offer of employment or employment lasting less than two years will not suffice. *Fifield v. Premier Dealer Services, Inc.,* No. 10-CH-9204, 2013 Ill. App. 120327 (1st Dist. June 24, 2013).

Thus, crafting an enforceable restrictive covenant is a fine art, and should be done by experienced, competent attorneys who are not only familiar with the applicable law, but who will take the time needed to understand the company's business and what protections are appropriately required to stave off harmful disclosure, solicitation and competition activities.

In conclusion

Experienced, successful risk managers at manufacturing companies know that effective risk management requires constant vigilance and proactive follow-up. Taking effective, efficient steps now to ensure that the business is protected with appropriate insurance coverage, smart products practices, and working employee relations policies and practices can make all the difference in preventing expensive, protracted and image-damaging legal claims later. ■

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2013-2014 Calendar of events

November 14, 2013
IMA's Annual Sales Tax Seminar
8:30 am to 12:00 noon CST, NIU-Naperville Campus, 1120 E. Diehl Road, Naperville
A Sales Tax Seminar specifically for manufacturers. JoAnna Simek, Tax Manager with Wolf & Company, will update you on recent tax law changes, how manufacturers are impacted by sales and use taxes, review exemptions, deductions and exclusions. She'll also discuss manufacturers' purchase credit and multi-state taxes.

December 6, 2013
IMA's 2013 Annual Luncheon
10:00 am-2:00 pm, JW Marriott Chicago Hotel, 151 West Adams Street, Chicago — Keynote speaker: Darren Woods, President, ExxonMobil Refining & Supply Co., Vice President, ExxonMobil Corporation. Topic: "Energy Forecasting and its impact on manufacturing."

December 13, 2013
Lean Overview with Simulation
Presented by IMEC. 8:00 am–4:30 pm, NIU Rockford, 8500 East State Street, Rockford. $279 per person. Meeting today's manufacturing challenges demands a lean enterprise — streamlining product design and manufacturing by applying lean manufacturing principles concepts and techniques. Fees include lunch and all training materials. Register at www.imec.org/events.cfm or contact Roger Shrum, IMEC Business Development Specialist at 815-298-7134 or rshrum@imec.org.

January 15, 2014
IMA Breakfast Briefing: Addressing the Future for Union & Non-Union Companies
8:00-10:30 am CST, Mon Ami Gabi Restaurant, Oak Brook Center Mall, Oak Brook. Several recent NLRB decisions and the 2012 elections have changed the labor law landscape for union and non-union employers. Unionized employers will need deeper labor contract understanding to protect their contractual rights and reinvigorated unions make non-union employers more vulnerable to organizing.

February 25-26, 2014
Today's Challenge, Tomorrow's Reward Disadvantaged Business Enterprise (DBE) Conference
The Department of Transportation's Office of Business and Workforce Diversity (OBWD) will soon open up registration for the 2014 Today's Challenge, Tomorrow's Reward Conference (TCTR). The statewide event, hosted by OBWD, will be held at the Abraham Lincoln Hotel and Conference Center in Springfield. Last year, the event attracted over 365 participants with representation from agencies including Central Management Services, Small Business Administration, the U.S. Department of Transportation and the Department of Commerce and Economic Opportunity. This year, participants can expect one-on-one opportunities with prime contractors, workshops on topics specific to the Disadvantaged Business Enterprise (DBE) community and a networking event. For more information, contact Dana Goodrum at 217-524-7793.

Visit http://www.ima-net.org/calendar-of-events for information, pricing, registration, etc., related to all IMA events. For more information, contact Kimberly McNamara at kmcnamara@ima-net.org, 800-875-4462, ext. 9371

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