

ExecutiveMemo

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A newsletter of the Illinois Manufacturers' Association

November 4, 2009

BRIEFLY

Exports Live — Successful small business export strategies

The SBA and five other federal agencies have created a series of interactive seminars designed to educate small businesses about export opportunities and how they can be used to grow their businesses, grow the economy and create jobs. At each event, attendees will learn about the government products and services that are available to help them succeed in the global marketplace.

There will be a **half day seminar in Chicago at the Fairmont Hotel on Tuesday, November 10 from 8:30 a.m. to 1:30 p.m.** Marketing efforts will target "export-ready" small businesses that have either just begun to export or are looking to export in the future. A coordinated joint-marketing effort to reach these businesses is underway and will include the Export-Import Bank of the U.S., the U.S. Department of Commerce, the SBA, U.S. Trade and Development Agency, Office of the U.S. Trade Representative and the Overseas Private Investment Corporation. For more information or to register, please visit www.export.gov/exports_live or call toll free 888-966-2009.

IMA's Annual Luncheon Friday, December 4, 2009 Hotel InterContinental, Chicago Honoring "Women in Manufacturing"

Chicago Sun-Times financial columnist
Terry Savage to offer keynote address. Her



book, *The New Savage Number: How Much Money Do You Really Need to Retire?*, was released in September. This new edition of her previous book is climbing the best-seller lists.

Register online at

<http://www.ima-net.org/annual09.cfm> or contact Kimberly McNamara at 800-875-4462, ext. 2109, kmcnamara@ima-net.org, for additional information.

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Affordable Health Care for America Act aims to impose surtax on small and medium sized manufacturers

The House of Representatives Affordable Health Care for America Act (H.R. 3962) that was introduced October 29, 2009 will impose a new surtax on small and medium sized manufacturers. This new \$460 billion tax increase will make it even more difficult to operate a business in the current economy and will cost jobs.

Nearly 70 percent of all manufacturers are organized as "S" corporations or other flow-through entities and pay income taxes at the individual rate. The new surtax, coupled with tax increases that will go into effect in 2011 as well as state and local taxes could send the top tax rate for small manufacturers above 50 percent throughout much of the country. Furthermore, the

surtax would apply to adjusted gross income, so it would occur before most deductions occur (including the mortgage deduction) and would include income from capital gains and dividends. In effect, Congress would be increasing the tax rate on investment income.

Small manufacturers face unprecedented challenges in this economy including exorbitant costs for energy and healthcare, as well as a heavy tax burden. Legislation enacted since 2001 — notably lower individual tax rates — has been extremely helpful to smaller companies. Contact your members of Congress now to express your opposition to the surtax.

Source: NAM

Alchemy Systems honored with American Meat Institute 2009 Supplier of the Year Award

The American Meat Institute (AMI) announced IMA member Alchemy Systems as the 2009 Supplier of the Year at the Worldwide Food Expo in Chicago on October 30th. The award was presented during AMI's International Meat, Poultry & Seafood Convention & Exposition, part of Worldwide Food Expo, Oct. 28-31, at McCormick Place in Chicago.

The Supplier of the Year Award is given to a supplier member of AMI that truly partners with meat and poultry processors to help achieve industry goals. Under the leadership of Jeff Eastman, Alchemy Systems, based in Austin, Texas, provides innovative training technology solutions for the global workforce. Their SISTEM™ training and compliance management platform is used in over 500 food manufacturing plants in the United States, Canada and

Mexico. With SISTEM, companies train, document and evaluate their personnel on a wide range of food and workplace safety topics. Multilingual courses are delivered and managed through SISTEM's unique group-based training platform or as individual e-learning. Government-conducted surveys have shown SISTEM to play a key role in reducing food safety incidents, worker accidents and employee turnover, while also having a positive impact on worker morale and productivity.

Alchemy Systems is an active member of AMI and strong supporter of the meat and poultry industry. Their generous support and participation has helped elevate the outreach and participation of the AMI Foundation. In 2009, Alchemy sponsored two Listeria conferences, as well as the

See **ALCHEMY**, page 2

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Of 838 clients surveyed, 98% say Plante & Moran is responsive to their needs.

Worker Safety, Human Resources and Environment Conference.

AMI President and CEO J. Patrick Boyle applauded Alchemy, saying "Alchemy has both satisfied and impressed the AMI members that have utilized their training services."

AMI represents the interests of packers and processors of beef, pork, lamb, veal and turkey products and their suppliers throughout North America. Together, AMI's members produce 95 percent of the beef, pork, lamb and veal products and 70 percent of the turkey products in the United States. The Institute provides legislative, regulatory, public relations, technical, scientific and educational services to the meat and poultry packing and processing industry.

Alchemy is dedicated to providing clients technology and multimedia tools that foster the ongoing professional development of the global workforce. Through Alchemy's training solutions, clients are able to effectively deliver, document and manage important training fundamentals for their employees in an efficient manner. Alchemy's goal is to solve the challenges most companies face as they try to balance production demands and increasingly strict regulatory requirements.

For more information, visit Alchemy online at <http://www.alchemysystems.com>.



Agriculture — it's a-changing. Concepts, such as globalization, integration, infrastructure and intellectual property have morphed the image of the farmer into an entrepreneurial, smart-minded businessman, linked to his heritage and to the land. And agricultural businesses are quickly becoming super-enterprises, integrating their processes and extending management and manufacturing internationally to capture efficiencies.

Greg Webb, Vice President for State Government Relations for Archer Daniels Midland Company said, "There is awareness in agriculture that its producers are not competing with the neighbor in their county, but their neighbors around the globe and businesses around the globe."

Illinois is currently one of the top two states in the U.S. in crop production efficiency, and fourth in the U.S. in value of its crop and animal production. While the state is very good at producing crops, other countries, such as Brazil, stand to

threaten the state's rank.

Leaders in Illinois' agricultural industry have viewed these challenges as an opportunity to capture a vision for the state's agricultural industry that will give Illinois a competitive advantage. Their vision: an industry-wide economic development program for agriculture, and strategic direction for the state's industry.

The vision statement reads: "**To be a global leader of profitable food and agricultural production.**" The group includes IMA member companies ADM, Bunge, John Deere, Monsanto and Kraft Foods. These companies and more have aggressive goals for this vision:

1. To grow agricultural exports to a top three ranking;
2. To enable food manufacturing growth to a top three ranking; and
3. To lead the U.S. in renewable energy and alternative energy technologies and growth of renewable energy production.

Kendall Cole, a farmer from Virden, Illinois, said he is supportive of such a plan, and the plan is taking advantage of strong markets and aiming them in the right direction. "There is excitement, especially about the bio-energy industry. It allows a lot of potential and has meant real dollars and cents to our farming operation personally," he said. Cole noted that a new ethanol plant in East St. Louis has meant an increase in basis prices in his area that makes corn production even more profitable.

Vision for Illinois Agriculture participants have outlined the next steps they, and other Illinois agencies, companies, universities and organizations, will follow in working toward the common goals:

- Streamline the permitting process for new agricultural production facilities, such as ethanol plants, seed production facilities, and others.
- Build awareness and support for the **Illinois Smart Agenda**. The Smart agenda outlines eight elements of a successful state business climate, including fiscal responsibility, transportation and

communication infrastructure, regulatory processes that welcome businesses, and a high level of support for education and training.

- Expand broadband access to rural communities and inner city areas.
- Support entrepreneurship programs and projects for ag start-ups.

For more information about the Vision for Illinois Agriculture, visit www.illinoisagriculturevision.org.

U.S. manufacturing at a crossroads, *The Facts* shows

The 8th edition of *The Facts About Modern Manufacturing*, released October 6, illuminates a critical reality in the future of U.S. manufacturing: while domestic manufacturing continues to be a cornerstone of the U.S. economy, it faces significant challenges that threaten its health as the current economic climate intensifies external costs and competition from abroad. *The Facts*, produced in partnership with the U.S. Department of Commerce and the Manufacturers Alliance/MAPI, provides a glimpse into the strengths of the manufacturing sector as it has kept pace with the overall economy, maintaining a consistent 22 percent market share and increasing its GDP by over seven times since 1947.

"The facts clearly illustrate that manufacturing is central to America's economic future," says Emily Stover DeRocco, president, The Manufacturing Institute. "The United States has the largest manufacturing economy in the world, producing \$1.6 trillion in goods annually. Productivity growth is higher in manufacturing than in other sectors, holding down inflation and contributing to a higher standard of living. And one in six U.S. jobs is in or directly tied to manufacturing, which still pays premium wages and benefits."

While highlighting U.S. manufacturing

See **THE FACTS**, page 3

Webinars for manufacturers: "Topics 4 the times" from PlanteMoran —

Prepare for the upswing . . . What's new on the tax front?

Thursday, November 17, 2009 — 1:00-2:00 pm CST

A team of experts specializing in federal, state, local, and international tax law will cover issues that will affect your business profits and your personal income. You can depend on them to take the mystery out of year-end tax planning and explain the impact of emerging legislation. They have been watching the tax code evolve and will talk about amending old strategies to reflect the changes and adopting new strategies in response to new laws. For more information and to register, visit <http://www.plantemoran.com/topics-4-the-times/whats-new-on-the-tax-front/Pages/Home.aspx>

For additional "Topics 4 the times" Webinars from PlanteMoran, visit http://www.plantemoran.com/topics-4-the-times/Pages/home.aspx?WT.mc_id=topics4thetimes

as the world's largest manufacturing economy, *Facts* also narrates a real-time story of how it must navigate the turning tides of government policy, an increasingly integrated and complex global economy, and the new demands for a skilled 21st century workforce.

"This positive portrait of the domestic manufacturing industry cannot overcome the doubts about its future; the Recession has resulted in a tremendous loss of jobs, investment, and creative energy in 2008 and 2009," DeRocco says.

Facts reveals that now, more than ever, the United States must focus on a significant re-investment in the manufacturing industry in order to drive critical innovation, develop the skills of the next generation of workers, and effect policies that sustain a favorable business climate. On the horizon, industrial powerhouses like China, Brazil, India, and the Asian Tigers, and established high-tech industrial leaders in Germany, Japan, and the Nordic countries, threaten to surpass the United States on a competitive world stage.

The history of the New York Mercantile Exchange

Commodity exchanges began in the middle of the 19th century, when market forums were organized to make buying and selling commodities easier. In 1872, a group of Manhattan dairy merchants got together and created the Butter and Cheese Exchange of New York and ten years later the name officially changed to the New York Mercantile Exchange (NYMEX), as trade had expanded to include eggs, dried fruits, canned goods and poultry. As centralized warehouses were built into principal market centers such as New York and Chicago in the early 20th century, exchanges in smaller cities began to disappear, giving more business to the exchanges such as the NYMEX in bigger cities. Today, the NYMEX is the world's largest physical commodity futures exchange, handling billions of dollars

worth of energy products, metals, and other commodities being bought and sold on the trading floor and via electronic trading systems. The prices quoted for transactions on the exchange are the basis for prices paid for various commodities throughout the world.

Natural gas accounts for nearly a quarter of all U.S. energy consumption and the NYMEX natural gas futures contract is widely used as the national pricing benchmark. Natural gas futures are traded in monthly intervals on the NYMEX for the current calendar year plus the next twelve years. The shape of the forward futures curve is important to natural gas market participants, with an upward sloping curve defined as contango and a downward sloping curve defined as backwardation.

Contango is considered "normal" for a non-perishable commodity and in the case of natural gas incorporates costs associated with storage, insurance, shrinkage, length of time until delivery, and the cost of money. The technical theory is that in times of supply-demand equilibrium, market participants will expect prices to remain in some form of historical trading range with risk premiums awarded to future months. The natural gas market currently reflects this type of mentality, with forward months and years trading at a premium to the prompt-month, but no contract trading at an exorbitantly high level relative to the historical range. On the other hand, backwardation is a signal that the commodity is perceived to be in short supply in the near term, driving the price of nearby futures above deferred months.

When natural gas began trading on the NYMEX in 1990, price volatility was limited and the forward curve was relatively flat. However, as significant contango and backwardation started to appear, some market participants looked to take advantage of the spread between futures contracts. One such process is arbitrage, or the purchase and sale of an asset simultaneously in order to profit from a difference in price, and it is often utilized with regard to natural gas storage. If nearby prices are cheaper than deferred months, market par-

See **MERCANTILE EXCHANGE**, page 4

DATES OF NOTE

More information/events may be found at <http://www.ima-net.org/calendar.cfm> and <http://www.ima-net.org/MIT/open.cfm>
Email: jstanley@ima-net.org

November 5, 2009: Illinois Sales & Use Tax Northern Illinois University–Naperville campus 1120 E. Diehl Rd., Naperville, 8:30 am–12:30 pm

The Manufacturers Purchase Credit, Graphic Arts Machinery & Equipment exemption, and Investment Tax Credit will be available through 2014. Join your peers and find out more about Illinois taxes specific to manufacturing. Joe Bigane, Wolf & Co. will once again lead an informative and up-to-date discussion. Cost: \$125 IMA members; each additional attendee \$100; \$150 Non-members. For more information, contact: Kimberly McNamara, 800-482-0462, Ext. 2109, email: kmcnamara@ima-net.org.

November 6, 2009

IMA's Small Manufacturers Council, Oak Brook

The Small Manufacturers Council provides a forum for key representatives of small manufacturers to meet and discuss industry trends from a governmental standpoint as well as innovations that can effect day to day efforts. Join us for informative meetings that provide substantive information you need in today's competitive manufacturing environment. You'll be glad you did. For more information, contact: Kimberly McNamara, 800-482-0462, Ext. 2109, email: kmcnamara@ima-net.org.

November 13, 2009

IMA-MIT Event: Consultative Selling Skills for Sales Professionals — DePaul University O'Hare Campus, 3166 S. River Rd.

The goal of any selling process is to earn and sustain a loyal and partnership-minded client base that will keep coming back. Be ready to turn your "lean and mean" sales team into 'customer friendly' advisors your clients will trust to help them make complex buying decisions. Get a better grasp of the needs and vision of your customers, and leave with tools you need to develop great working relationships with key decision makers. Participants will be able to determine how their company's product can provide meaningful value to a client, even in a competitive or saturated market.

November 18, 2009

IMA-MIT Event: Project Management for the Non Project Manager — DePaul University O'Hare Campus, 3166 S River Rd.

Objectives • To provide non-project managers with the project management knowledge, skills, tools and techniques to make the transition to a project leadership role and ensure optimum project execution. • To increase the competence to manage a project through all project stages: initiating, planning, delivering, monitoring and completing. Approach • A basic overview approach to be adopted that will allow first time project managers to practice their project manager role with confidence. • Practical checklists and/or tools to be used throughout. • Project management practice applied to each stage.

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ticipants are motivated to stockpile the commodity while locking in the future sale price. This can lead to aggressive storage injections during summer months and if contango remains in place, such a practice could occur this year.

To learn more about the NYMEX, please contact Constellation NewEnergy Gas Energy Sales Consultant Jeff Abeln at 312-704-8527, or via email at jeff.abeln@constellation.com.

When payroll gets personal: Three areas where corporate executives face personal liability in Illinois

Corporate executives can avoid liability for their corporation's actions under many laws and circumstances. However, as discussed below, there are three areas in which corporate executives might not be aware that they can be held personally liable for acts of the corporation.

Illinois Wage Payment and Collection Act

The Illinois Wage Payment and Collection Act ("The Act") applies to employers, which are defined in the Act as "any individual, partnership, association, corporation, business trust, or any person or group of persons acting directly or indirectly in the interest of an employer in relation to an employee, for which one or more persons is gainfully employed." Therefore, corporate executives face potential exposure for any wage and hour violations relating to employees who report to them directly. The Act also provides: "Any officers of a corporation or agents of an employer who knowingly permit such employer to violate the provisions of this Act shall be deemed to be the employers of the employees of the corporation." As a result, corporate executives may be personally liable for wage and hour violations when they are aware of a violation even if it does not involve employees who report to them directly.

The Act governs all Illinois wage and hour issues, including payment of wages, overtime, and final payments. Any violation of the Act, willful or not, is enough to impose liability. For instance, a plaintiff can prevail against an executive merely by showing that the employer simply did not pay the employee amounts owed the employee by the next regularly scheduled payday.

Fair Labor Standards Act

Corporate executives who exercise some control over employment matters

may be named as a defendant in a Fair Labor Standards Act ("FLSA") lawsuit along with the employer. The potential personal liability arises from the extremely broad definition of employer found in the FLSA. The FLSA's definition of an "employer" includes "any person acting directly or indirectly in the interest of an employer in relation to an employee."

Generally, an individual's mere status as a company owner or majority shareholder is insufficient to be deemed an employer under the FLSA where there is no evidence of involvement in day-to-day operations or responsibility for supervision of the employees at issue. Instead, the court will use an "economic realities" test to determine whether a particular executive or supervisor meets the FLSA's definition of employer. The "economic realities" test focuses on a variety of factors, such as the individual's ownership interest, degree of control over the corporation's financial affairs and compensation practices, power to hire and fire employees, supervision or control over employee work schedules and conditions of employment, maintenance of employment records, and role in causing or not causing the company to compensate employees in compliance with the FLSA. The FLSA does not require the employer's conduct to be willful. A violation occurs even when the reason for the non-payment is financial difficulties. Additionally, inadequate accounting procedures are not a defense to liability under the FLSA.

Employee Salary Deferrals

Executives also might face personal liability for diversion of employee salary deferrals. The Department of Labor ("DOL") recently announced an enforcement initiative to criminalize failures by plan fiduciaries to forward participant contributions to retirement and health plans. The DOL regulations require employers to transfer employee salary deferrals to their 401(k) plans as soon as administratively feasible, and at least by the fifteenth business day of the month following the month in which the compensation was withheld from the employee's paycheck. If late con-

tribution occurs, the employer should report it on the plan's Form 5500, make additional plan contributions for any lost earnings, and submit the correction to the Department of Labor under the voluntary fiduciary correction program. In terms of criminal liability, enforcement will be sought against those corporate executives who embezzle plan assets, do not transfer the contributions to the plan, or knowingly file false Forms 5500.

Regarding late payment of health premiums, if the employer is insolvent and the insurance carrier has terminated insurance coverage due to non-payment of premiums, then the DOL does not typically seek to impose personal liability on any individual unless it is clear that the individual: (1) exercised discretionary authority in diverting funds that would otherwise have been applied to premium payments; and (2) either personally benefited from such diversion or purposefully misled participants or insurance carriers with respect to such payments. Individual liability generally is not pursued by the DOL, unless the individual actively and knowingly engaged in a breach of fiduciary duty over which the individual had some discretionary control. Such breaches can sometimes result in criminal liability if the individual does not immediately make the plan and affected participants whole. Individual participants also may pursue such fiduciaries in civil claims for which ERISA provides a federal cause of action. In all cases, the DOL finds it critical that corporate executives take reasonable steps to advise health plan participants of the termination of coverage at the first possible opportunity.

For assistance in understanding your potential exposure to civil and criminal liability for corporate actions or to take steps to minimize the risk of such liability, please contact co-authors Daniel A. Kaufman (Partner) and Charmaine M. Butler (Associate), who are with Michael Best & Friedrich. Their emails are dkaufman@michaelbest.com and cmbutler@michaelbest.com and they can be reached at 312-222-0800.



Benchmark with IMA publications IMA's 2009-2010 Annual Compensation Report and the 2008-2009 Benefits Report

Compiled by the Illinois Manufacturers' Association with assistance from RSM McGladrey, these Reports contain valuable compensation and benefits data specifically relevant to Illinois manufacturers.

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