

ExecutiveMemo

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A newsletter of the Illinois Manufacturers' Association

December 2, 2009

BRIEFLY

NAM's 2nd Annual Manufacturing Summit:

April 14-15, 2010, Washington, DC
With Congress considering legislative action on a host of anti-competitive measures, it is critical that legislators understand the manufacturing industry's role in driving jobs, wealth, training and innovation. The NAM will host the 2nd Annual Manufacturing Summit April 14-15, 2010 in Washington, DC. Participate in small-group lobbying visits with members of Congress where you can communicate how federal policy affects you and your business back home.

Share your story at NAM's second annual Manufacturing Summit. Plan to attend and help move manufacturing toward a prosperous future. Join the NAM as we show the Congress a united manufacturing front!

For more information or to register, please visit www.nam.org/mfgsummit or contact Tara Smith, the NAM's Director of Public Affairs, at 202-637-3014 or tsmith@nam.org.

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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Bullock completes his term as IMA Board Chairman

The two-year term of IMA Board Chairman Ron Bullock will come to a close on December 31, 2009 making way for Janice Christiansen to succeed him as the first female Board Chairperson in the 116-year history of the association. Bullock leaves as one of the most active leaders of the IMA Board of Directors.

"At a time when the U.S. has undergone significant changes in national leadership, and closer to home where our state's chief executive officer has been removed from office, Ron Bullock has remained focused on meeting the needs of

manufacturers in Illinois," said Greg Baise, President & CEO of the Illinois Manufacturers' Association. "Ron's leadership in the areas of education and workforce preparation are a proud legacy upon which we will continue to build."

During Bullock's term as Chairman, the IMA was successful in launching efforts to implement Manufacturing Skills Standards Certification (MSSC) in Illinois. The IMA Board of Directors endorsed MSSC and adopted a resolution encouraging manufacturers to give additional consideration

See **BULLOCK**, page 2

EPA proposes a new sulfur dioxide air quality standard

The EPA is proposing a new, more stringent, sulfur dioxide air quality standard. This new standard will show up in the federal register in the next few weeks and comments will be received for 60 days. The EPA is under a legal obligation to promulgate a new standard by June 2010.

The EPA is proposing to revoke the current annual standard and 24-hour standard and replace it with a one hour standard in the range of 50-100 parts per billion. Currently, all areas of Illinois attain the annual and 24 hour standards. Under a 100 ppb standard the following six counties would be in violation based on 2006-2008 data: Cook, LaSalle, Madison, Sangamon, Tazewell and Wabash. If the standard were set at 50 ppb, the following additional two counties would be in violation: Peoria and Will.

The EPA will also consider comments raising the standard to 150 ppb. In that case, the following Illinois counties would be the only ones in violation based on 2006-2008 data: LaSalle and Tazewell.

Based on techniques used to estimate the relationship between a one hour average and a 24 hour average, the 24 hour

average would be expected to be about 40 percent of the 24 hour average. With the current 24 hour standard of 140 ppb, a comparable one hour standard would be 350 ppb. At this level, no area of Illinois would be in violation which is the current situation. Another approximate way of viewing this is to think of EPA as changing the current 24 hour standard from 140 ppb to between 20 and 40 ppb (based on a proposed one hour standard of 50-100 ppb).

The projection of the 2005-2007 SO₂ data to 2020 shows that the following two counties would still be in violation of the 100 ppb standard: Cook and Tazewell. In addition, the following five counties would be in violation of the 50 ppb standard; Madison, Sangamon, St. Clair, Wabash and Will. It is not immediately clear from the EPA's analysis as to whether they incorporated the impact of the Illinois and federal CAIR regulations. If they did, the analysis shows that even further emission reductions will be needed.

Author Dave Kolaz is the IMA's environmental consultant. He can be contacted by email at davekolaz@gcctv.com.

IMA'S EXECUTIVE MEMO IS UNDERWRITTEN BY:



EXPERIENCE RESPONSIVENESS.

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

to job applicants possessing MSSC certification. Currently the state's community college system, working with the IMA is preparing curricula to deliver the education and training statewide.

Bullock also was responsible for the rejuvenation of the IMA Education Foundation, the association's not-for-profit entity dedicated to providing grant money to local educational efforts to prepare young people for rewarding careers in manufacturing.

Additionally, during Bullock's tenure, the IMA worked in collaboration with the Illinois AFL-CIO and others through the Chicago Manufacturing Renaissance Council to create and open Austin Polytechnical Academy (APA) on Chicago's Westside. APA is the first high school in Illinois focused solely on preparing students from impoverished inner-city neighborhoods for careers in manufacturing. The first class of freshmen began their studies in fall of 2008. The school currently enjoys a 97 percent retention rate in a school system that generally experiences dropout rates in excess of 50 percent.

"Ron Bullock's time as Chairman has also seen revitalization of our Small Manufacturers Council and creation of the IMA Young Leaders Council," noted Baise. "And in the area of advocacy, whether it was being among industry leaders meeting with President George W. Bush at the White House, going toe-to-toe with Governor Pat Quinn or meeting with Illinois legislative leaders on pending statehouse issues, Ron Bullock has been a forceful advocate for the IMA membership. On behalf of the 4,000 members of the Illinois Manufacturers' Association, we offer our thanks and deep appreciation for Ron's service and leadership in 2008 and 2009."

Bullock is currently Chairman of Bison Gear & Engineering in St. Charles, Illinois and will remain an elected member of the IMA Board of Directors.

Benchmarking: A key to helping ensure 401(k) plan fees are reasonable

It's no secret that 401(k) plan fiduciaries are tasked with a number of complex responsibilities, as the Employee Retirement Income Security Act (ERISA) and the Department of Labor (DOL) hold fiduciaries to stringent standards. From understanding ERISA and DOL regulations to applying appropriate due diligence in the monitoring and selecting of investments, the responsibilities can be enormous. Still, we haven't yet

touched on one of the more challenging fiduciary responsibilities: understanding plan fees and ensuring they're reasonable.

What fees are associated with 401(k) plans?

Most fiduciaries do not have a complete understanding of all of the fees associated with their plans. While participant fees and investment fees are expected and typically well-disclosed, many fees are not as transparent. Other fees common in 401(k) plans include recordkeeping, administration, custody, trustee, 12b-1, Sub-transfer agent, and revenue-sharing.

Some of these fees may be buried within the investment products themselves. For example, fees may be layered in group annuity products and not fully disclosed to participants. Mutual funds come in different share classes and have different fee structures that could have participants paying more than necessary. For example, and in particular, the Sub-transfer agent fee may be part of a fund's expense ratio and yet may not be in each fund offered in your plan. Therefore, participants investing in funds that have Sub-transfer agent fees or other sources of revenue sharing may be paying more than participants invested in funds that don't provide any revenue sharing.

How do you ensure proper fee disclosure?

With all of the various and often hidden fees, how can you make sure your fees are properly disclosed and reasonable? Begin with these steps:

1. Ask your service providers to provide you with a breakdown of all plan sponsor fees. Those are the fees that are generally invoiced to the company/plan sponsor.
2. Ask about the plan-level fees. Those are the fees that are deducted out of plan assets.
3. Ask your service providers if they are receiving any other revenue from the mutual fund companies, such as Sub-transfer agent fees, and to identify what funds have them.
4. Consider having your fees benchmarked so that you can evaluate if your plan fees are reasonable.

Why have fees benchmarked? First and foremost, ERISA requires fiduciaries to account for and control expenses; benchmarking your plan will give you the information you need to ensure your plan fees are reasonable. Second, benchmarking allows you to compare your plan's data to similar organizations to determine if your fees are in line with theirs. Finally, benchmarking provides plan sponsors with a paper trail showing their process for comparing fees and plan data. If conducting your own analysis seems too complicated, consider working with a dedicated retirement plan investment consultant — some-

one very knowledgeable about qualified plans, investments, and the various service providers in the marketplace.

Coming in 2010

401(k) plan fee disclosure will soon be mandatory both at the participant and plan sponsor level. Although regulations and guidelines have not been finalized regarding fee transparency, they are expected to roll in 2010. Benchmarking is the best place to start to ensure your plan fees are reasonable. For more information on plan fee benchmarking or fiduciary responsibilities in general, please contact Kimberly Little, Plante & Moran, PLLC, at 312-602-3639.

Favorable R&D case opens opportunities on supply costs

The Tax Court has issued a new ruling, *TG Missouri Corp. v. Commissioner*, 133 T.C. No. 13 (Nov. 12, 2009), that is highly favorable for taxpayers looking to claim the R&D tax credit. In a case of first impression, the Tax Court ruled that molds used for production, if not depreciable by the taxpayer, may be eligible for the credit. The IRS had previously disallowed the cost of such supplies for the R&D credit.

TG Missouri made automotive parts on a contract manufacturing basis. For each part that it manufactured, TG Missouri made a mold. Often, the company contracted with outside manufacturers to produce an initial mold. TG Missouri then altered these molds to suit its needs. In many instances, once the mold was finished, TG Missouri's customers would take title to the mold while TG Missouri retained possession of the mold in order to produce the relevant part.

Under §41(b)(2)(C), the cost of property that is of a character subject to depreciation cannot be claimed as a qualified research expense. The IRS has long contended that depreciable property is not allocable to the R&D tax credit, regardless of who owns the depreciable property. The taxpayer in this case contended that §41(b)(2)(C) applies only if the property is depreciable in the hands of the taxpayer claiming the credit.

The Court sided with taxpayers in ruling that TG Missouri could claim the cost of molds owned by its customers for the research credit because the property was not depreciable in TG Missouri's hands. In doing so, the Court effectively overruled previous IRS guidance on the interpretation of the phrase "property of a character subject to depreciation."

The *TG Missouri* case is big news for contract manufacturers, tool and die

See **OPPORTUNITIES**, page 3

OPPORTUNITIES, continued from page 2

shops, and anyone else that uses property depreciable in the hands of another taxpayer in their R&D activities. Furthermore, the case disputes the IRS' notion that supplies must be consumed or destroyed in order to qualify for the credit. The molds at issue were sold to customers and used in TG Missouri's production operations. Thus, the Tax Court's ruling with respect to supplies should cause many taxpayers to reevaluate the costs that they have claimed for the R&D credit.

This decision may have a wide-ranging impact on all industries in determining supply costs that are eligible for the R&D tax credit. Continuing a trend of taxpayer-friendly R&D cases that have been issued this year, *TG Missouri* represents another step forward for taxpayers seeking to claim the research credit under §41.

Author Rick Meyer, CPA, MBA, MST is a member of the ICPAS Business Tax Committee. He is a Director for alliant-group, a national R&D tax consulting firm serving as support for CPAs to identify and maximize R&D tax credit opportunities for their business clients. He can be contacted at rick.meyer@alliantgroup.com.

Are you missing an opportunity to protect your competitive advantage?

Protecting confidential information, trade secrets, and customer relationships from former employees and competitors is critical to a manufacturer's business, particularly in light of the challenges posed by the intense competition in the current economy. As a result, effective use of non-compete and other restrictive covenants with employees to protect manufacturers' interests has become even more important.

For nearly three decades, Illinois employers have been told that, in order to enforce a non-compete agreement, they must demonstrate a "legitimate business interest" in preventing employees from competing. Based on this requirement, some Illinois employers have chosen not to enforce, or forego completely, non-compete agreements, particularly with regard to sales employees or similar positions. The Illinois Appellate Court recently gave Illinois employers a reason to re-think their opportunities for non-compete agreements.

In *Sunbelt Rentals v. Ehlers* (Ill. App. 4 Dist. 09/23/2009), the Fourth District of the Illinois Appellate Court rejected the "legitimate business interest" test, which generally required the former employer to establish

that the non-compete agreement was drafted to protect confidential information or long-term customers. Instead, the Illinois Appellate Court held, "When presented with the issue of whether a [non-compete agreement] should be enforced, [the court] should evaluate only the time-and-territory restrictions contained therein."

Applying its new standard, the Illinois Appellate Court enforced a one-year non-compete agreement prohibiting a former sales representative from working for any competitor within 50 miles of the former employer. Significantly, the former employer was not required to establish that the sales representative had access to confidential information or long-term customers. The Illinois Appellate Court reasoned, "[the sales representative] had two options if he thought the restrictive covenants in his employment contract with [the former employer] would cause him undue hardship. He could have (1) opted not to sign the employment agreement or (2) asked [the former employer] to eliminate or modify the terms of the restrictive covenants."

Based on the reasoning in *Sunbelt Rentals*, the former employer always will have some interest to protect and courts need to assess only the reasonableness of the activity, time and geographic restrictions. Thus, the court still would have to determine an employer's interests in order to decide whether the activity, time and geographic restrictions were reasonable.

Sunbelt represents a split in the Illinois Appellate Court that the Illinois Supreme Court will have to resolve. *Sunbelt* also represents a whole new class of employees, those without access to confidential information or long-term customers, who may be required to sign enforceable non-compete agreements. While Illinois manufacturers and other employers wait to see if the Illinois Supreme Court addresses this issue, they should consider three important questions:

1. If the primary consideration in determining the enforceability of a non-compete agreement is limited to an assessment of the time and territory restrictions, are the time and territory restrictions in your non-compete agreements reasonable?
2. Should you require a broader range of employees, and in particular sales employees, to sign a non-compete agreement using the reasoning in *Sunbelt*?
3. If you are hiring an employee or recently hired an employee, did you check to determine if the employee has a non-compete agreement that previously might not have been enforceable but might be enforceable now?

See **ADVANTAGE**, 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

December 4, 2009

IMA's Annual Luncheon — Hotel InterContinental, Chicago

Join hundreds of your fellow manufacturers for our Annual Luncheon saluting "Women in Manufacturing." Sponsorships are now available. Individual tickets are \$150 and can be reserved online. To register visit <http://www.ima-net.org/annual09.cfm>.

December 8, 2009

IMA-MIT Event: Assertive Communication Skills: Communicating with Authority & Impact, DePaul University O'Hare Campus, 3166 S. River Rd., Des Plaines

There are many critical challenges facing the business presenter today. This interactive, energetic workshop will provide the business presenter with all of the necessary skills required to deliver a winning presentation. The workshop will introduce and reinforce these skills by having the participant deliver three videotaped presentations.

December 15, 2009

IMA-MIT Event: Effective Presentation Skills, DePaul University O'Hare Campus, 3166 S. River Rd., Des Plaines

At the core of effective communication is the ability to communicate "assertively," using skills that portray us as trust worthy, confident, credible, direct and results oriented. This interactive one day workshop will provide professionals at all levels with easy-to-implement techniques to increase communication and listening skills. Participants will learn to communicate positively, respond productively and improve work relationships.

January 22, 2010

IMA-MIT Event: Time Management and Personal Effectiveness, DePaul University O'Hare Campus, 3166 S River Rd, Des Plaines

There is no easy or simple solution for employees dealing with an ever increasing workload. The bottom line for most organizations is the work "must" get done in a timely manner and get done right. Increasingly, organizations are looking to provide a "lifeline" for their employees and equip them with the skills and knowledge to manage their personal effectiveness in order to dramatically improve their productivity while coping with the resulting stress.

February 9, 2010

IMA-MIT Event: World Class Negotiating Skills, DePaul University O'Hare Campus, 3166 S. River Rd., Des Plaines

This interactive, one-day workshop will consider both the selling and purchasing aspect of business negotiations. It will provide effective solutions and settings in which to practice negotiating skills. Attendees will learn how to formulate strategies, overcome potential difficulties and apply proven principles to make business transactions more productive for all involved.

Michael Best's Trade Secret Protection and Non-Competition Team frequently counsels employers regarding the drafting and enforceability of restrictive covenants and the protection of confidential information and trade secrets. If you do not know the answers to the questions contained in this article, or any other non-compete questions, please feel free to contact Daniel A. Kaufman at Michael Best, dakaufman@michaelbest.com or 312-836-5077.

Survey results: mergers and acquisitions industry

Dykema, a national law firm, recently announced the results of its 2009 M&A Outlook Survey at its Annual Mergers and Acquisitions Seminar in Detroit. The fifth annual survey of industry leaders examined how changing public policy, the U.S. economy, financing challenges and other domestic and global matters will impact the M&A industry in the coming year. Executives are split on whether the federal government's actions over the past year have made any impact on the industry and are cautiously optimistic for the months ahead.

"Confidence in the U.S. M&A market is starting to improve; 81 percent of industry executives surveyed are expecting the market to be neutral or strong over the next 12 months," said Dave Cellitti, leader of Dykema's M&A practice. "When we asked the same question a year ago, almost half of respondents predicted the market would be weak in the following year."

In spite of the cautious optimism regarding the future of the M&A market, turmoil in the global financial markets continues to make financing challenging, and 80 percent of respondents predict an increase in distressed transactions in the coming year.

"Industry executives believe a number of distressed transactions remain in the pipeline which means opportunities will be available in 2010 for buyers with cash and financing," said Dykema Corporate Finance practice group Member Jin Koh.

"About half of the survey respondents said they were involved in a deal that didn't close over the past year, and more than three quarters are seeing deals structured differently in the current economic climate. To take advantage of opportunities in the coming year, buyers and sellers will need to be flexible and creative in their approaches to get deals done," added Koh.

In September and October, Dykema

distributed the survey via e-mail to a group of executives, bankers and advisors. Survey respondents were asked about the future of the market, cross-border deals and the general strength of the economy. Some survey highlights include:

Confidence in the U.S. M&A market is starting to improve. In 2008, only 16 percent believed it would be strong in the following year, down from a high of 63 percent of respondents in 2006. This year, 28 percent of respondents predicted a strong market and just 19 percent had a weak outlook.

Like the U.S. M&A market, confidence in the economy continues to strengthen. In 2005, 51 percent had a positive outlook on the economy, but that number dropped to just eight percent last year. Thirty-five percent of respondents to the 2009 survey have a positive outlook on the U.S. economy in the coming year.

Respondents are split on the issue of how the federal government's actions within the past 12 months have impacted the U.S. M&A market. Twenty-seven percent think the federal government has made a positive impact/increased activity, 22 percent think it has made a negative impact/decreased activity, and 50 percent think the government's actions have made little to no difference.

Deals are not closing due to financing issues and material adverse changes in business. Forty-nine percent of respondents were involved in a deal that didn't close, primarily due to financing or a material adverse change in business.

There is a continued expectation that

financial buyers will again decrease their presence in the market more than strategic and foreign buyers. Fifty-four percent predict financial buyers will further decrease their role and 51 percent believe strategic buyers will increase their presence in the M&A market.

For a copy of the full results of the survey, please contact Laura Miller at Dykema, 312-252-4104 or (lmiller@green-target.net) or visit www.dykema.com/corporate.

SBA: Advocacy's blog celebrates a birthday



The Office of Advocacy's blog, The Small Business Watchdog, just celebrated its first birthday. During the first year, helpful features like the regular Capitol Hill Connection have been added. These posts list important congressional hearings on issues that concern small business.

Drop by Advocacy's blog and find out more about the office's day-to-day activities and add your own views. The Small Business Watchdog is a place where you can ask questions about small businesses' contributions to the economy, discuss the impact of regulations on your business or industry, and connect with the small business community in your state or region, or around the country. In other words, the blog is another way of becoming a more effective Small Business Advocate.

Visit The Small Business Watchdog at <http://weblog.sba.gov/blog-adv>.

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