



# OSHA 30/30

A thirty minute update on OSHA law every thirty days

with **Manesh Rath**



## FEDERAL COURT DECLINES TO ENJOIN ENFORCEMENT OF THE NEW ANTI- DISCRIMINATION PROVISIONS IN OSHA'S INJURY AND ILLNESS RECORDKEEPING RULE

December 7, 2016  
1001 G Street NW, Ste. 500 W,  
Washington, D.C.



[www.khlaw.com](http://www.khlaw.com)

**Presented by:**

**Lawrence P. Halprin**

Partner

[halprin@khlaw.com](mailto:halprin@khlaw.com)

**Manesh Rath**

Partner

[rath@khlaw.com](mailto:rath@khlaw.com)

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**Please Don't Forget to Dial-In:**

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An audio recording and slide deck will be provided post-webinar on  
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# MANESH K. RATH

Manesh Rath is a partner in Keller and Heckman's litigation and OSHA practice groups. He has been the lead amicus counsel on several cases before the U.S. Supreme Court including *Staub v. Proctor Hospital* and *Vance v. Ball State University*.

Mr. Rath is a co-author of three books in the fields of wage/hour law, labor and employment law, and OSHA law. On developing legal issues, he has been quoted or interviewed in *The Wall Street Journal*, Bloomberg, *Smart Money* magazine, *Entrepreneur* magazine, on "PBS's Nightly Business Report," WAVY-TV and C-SPAN. He was listed in *Smart CEO Magazine's* Readers' Choice List of Legal Elite.

Mr. Rath has extensive experience representing industry in OSHA rulemakings. He has successfully represented employers—including some of the largest in the country—in OSHA citations and investigations before federal OSHA in regions across the country and in state plan states.

Mr. Rath currently serves on the Board of Advisors for the National Federation of Independent Business (NFIB) Small Business Legal Center. He served on the Society For Human Resources (SHRM) Special Expertise Panel for Safety and Health law for several years. He is the editor and co-author of the OSHA chapter of the *Employment and Labor Law Audit* (9<sup>th</sup> and 10<sup>th</sup> Editions) and a co-author of the book *Occupational Safety and Health Law Handbook* (2001).



**Manesh Rath**  
Partner  
rath@khlaw.com  
202-434-4182

# LAWRENCE P. HALPRIN

Lawrence Halprin is a partner in Keller and Heckman's workplace safety and health, chemical regulation and litigation practice groups. He is nationally recognized for his work in workplace safety and chemical regulation. His workplace safety and health practice covers all aspects of legal advocacy, including: representing clients in OSHA and MSHA investigations and enforcement actions; providing compliance counseling and training; conducting incident investigations, compliance audits and program reviews; participation in federal (OSHA, MSHA and NIOSH) and state rulemakings and stakeholders processes; bringing and intervening in pre-enforcement challenges to final agency rules; advising on legislative reform and oversight; and participation in the development of national consensus standards under the ANSI process, and TLVs under the ACGIH process.

Mr. Halprin's engineering and financial background and extensive knowledge of OSHA rulemakings have greatly enhanced his ability to provide compliance counseling and represent clients in enforcement actions, and evaluate and critique rulemaking proposals and suggest alternative approaches. On behalf of one or more clients, Mr. Halprin has participated in almost every major OSHA rulemaking over the past 25 years as well as numerous Cal-OSHA rulemakings.



**Lawrence Halprin**

Partner

[halprin@khlaw.com](mailto:halprin@khlaw.com)

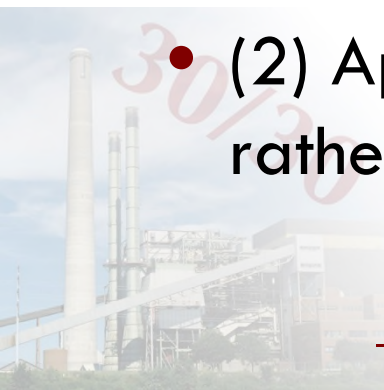
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# TOPICS TO BE DISCUSSED

- OSHA's position on disciplinary programs, drug testing and safety incentive programs
- Plaintiff's claims and motion for a preliminary injunction
- Overview of the federal court's limited decision
- Practical tips on how to craft compliant disciplinary, drug testing policies and incentive programs
- Defending existing policies

# BACKGROUND: OSHA DRUG TESTING AND INCENTIVE POLICY

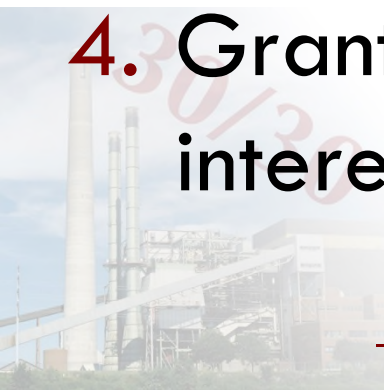
- Revisions to 1904.35 (b): Must be reasonable procedure for reporting work-related injuries/illnesses
  - Not reasonable if would deter or discourage reporting
- Preamble:
  - (1) No blanket drug-testing
    - Only if drugs/alcohol is likely contributor
    - “Should” identify impairment at time of accident
    - Can’t be perceived as punitive or embarrassing
  - (2) Appears to prohibit incident-based incentive plan rather than plan based on leading indicators



# PRELIMINARY INJUNCTION

## CRITERIA FOR PI

1. Likelihood movant will prevail on merits
2. Irreparable harm if no preliminary injunction
3. Threatened injury to movant greater than to defendant
4. Granting preliminary injunction is in public interest



# PLAINTIFF'S MOTION FOR TEMPORARY INJUNCTION

- Incentive and drug testing programs reduce injuries
- 95% of members surveyed have post-accident drug testing and 81% have safety incentive programs
- 89% believe these programs help
- OSHA: Plaintiff can't show irreparable harm, merely conjectural harm

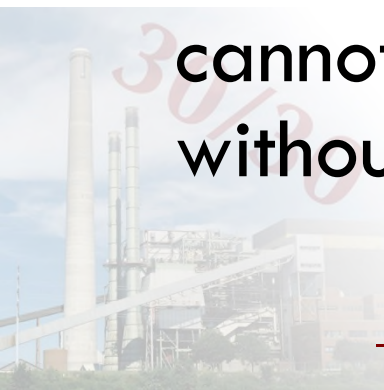




# COURT HOLDING

*Texo ABC/AGC Inc., ABC, NAM, Great America et al v. Perez*

1. Inadequately supported belief in an increase in injuries is not sufficient for preliminary injunction
2. Plaintiff's declarations didn't establish that potentially banned aspects of existing programs caused reduction in injuries
3. Plaintiffs have not shown that their programs cannot be modified to comply with new rule without losing effectiveness



# WHAT EMPLOYERS SHOULD DO

- Court ruling focused on irreparable harm and the public interest; ruling on underlying merits still to come
- Review drug testing policy
  - Post-accident?
  - Reasonable belief that impairment caused incident?
  - Everyone involved in an incident gets tested?
  - Tests influence at time of incident (where possible)?
  - Is the test punitive or embarrassing?
- Review incentive plans
- Look at disciplinary policy
- Look at injury data before and after implementation

**OSHA 2017:  
PREDICTIONS FOR OSHA LAW AND POLICY  
UNDER THE TRUMP ADMINISTRATION**

Presenters: Manesh Rath  
David Sarvadi  
Marc Freedman

**Time: 1:00-1:30PM EST**



**Please join us next Thursday,  
December 15<sup>th</sup>, 2016  
[www.khlaw.com/events](http://www.khlaw.com/events)**



# **Our Next OSHA 30/30**

**Please join us at**

**1:00 PM Eastern U.S.**

**Wednesday, January 25<sup>th</sup>, 2017**

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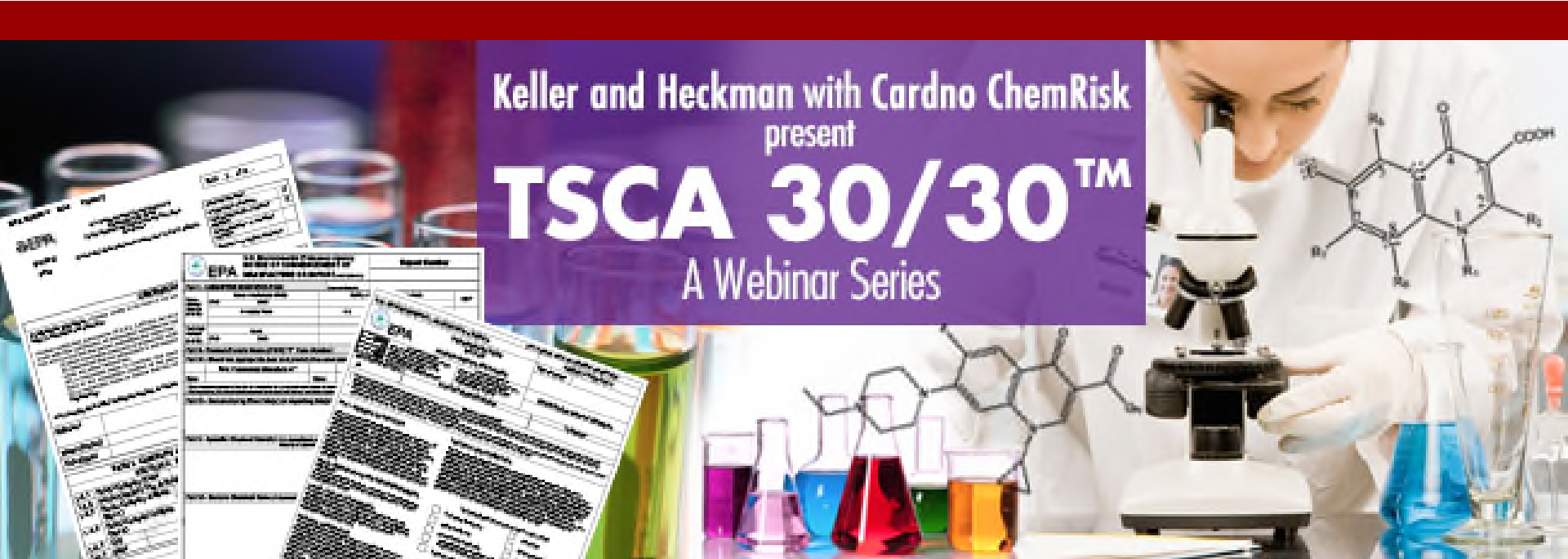


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**Please join us for TSCA 30/30  
Wednesday,  
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# *Thank you!*

Please take a moment to fill out the survey on your screen.

Keller and Heckman LLP  
1001 G Street NW  
Suite 500 West  
Washington, DC 20001

(202) 434-4182  
rath@khlaw.com



**Lawrence Halprin**

Partner

halprin@khlaw.com

202-434-4177



**Manesh Rath**

Partner

rath@khlaw.com

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