Recent Criminal Prosecutions Related to OSH Act

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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.

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 was voted by readers to *Smart CEO Magazine’s Readers’ Choice List of Legal Elite*; by fellow members to *The Best Lawyers in America*; selected by *Super Lawyers*; and by corporate counsel as the 2017 Lexology winner of the Client Choice Award.
JAVANEH S. NEKOOMARAM

Javaneh Nekoomaram is an associate in the environmental and workplace safety and health (OSHA) practice groups at Keller and Heckman. Ms. Nekoomaram practices in all areas of environmental law as well as occupational health and safety law, and chemical control law. She routinely advises clients on a broad range of environmental health and safety compliance issues.

Prior to joining Keller and Heckman, Ms. Nekoomaram served for three years as Counsel for the American Coatings Association. She provided regulatory compliance and advocacy on a number of issues on behalf of the coatings industry including TSCA, Prop 65, hazard communication and labeling, state chemical regulation, hazardous waste, air and water quality, occupational health and safety, and chemical safety regulations. She also served as Advocacy Counsel for the Graffiti Resource Council, an organization supported by the aerosol coatings industry that provides anti-graffiti strategies for cities across the country.
OSHA 30/30
A thirty minute update on OSHA law every thirty days
with Manesh Rath

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WHAT WE WILL DISCUSS TODAY:

- OSH Act Criminal Violations
- Recent Criminal Prosecutions
- Criminal Enforcement Related To Workplace Safety
- What Employers Should Do
OSH Act Criminal Violations

- In history of OSH Act:
  - 400,000 workplace fatalities
  - OSHA: more than 4,500 workers die on the job each year
  - Less than 90 OSH Act criminal cases prosecuted

- OSHA has made few criminal referrals to DOJ
  - 2010: 14 referrals
  - 2011: 10 referrals
  - 2012: 13 referrals
  - 2013: 3 referrals
OSH Act Criminal Violations

Penalties: Section 17(f) of the OSH Act

(f) Any person who gives advance notice of any inspection to be conducted under this Act, without authority from the Secretary or his designees, shall, upon conviction, be punished by a fine of not more than $1,000 or by imprisonment for not more than six months, or by both.
Penalties: Section 17(g) of the OSH Act (g) Whoever **knowingly** makes any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained pursuant to this Act shall, upon conviction, be punished by a fine of not more than $10,000, or by imprisonment for not more than six months, or by both.
OSH Act Criminal Violations

Penalties: Section 17(e) of the OSH Act

(e) Any employer who willfully violates any standard, rule, or order promulgated pursuant to section 6 of this Act, or of any regulations prescribed pursuant to this Act, and that violation caused death to any employee, shall, upon conviction, be punished by a fine of not more than $10,000 or by imprisonment for not more than six months, or by both; except that if the conviction is for a violation committed after a first conviction of such person, punishment shall be by a fine of not more than $20,000 or by imprisonment for not more than one year, or by both.
OSH Act Criminal Violations

- Must consider criteria when investigating possible criminal/willful violations:
  - Employer violated OSHA Standard
  - Violation was willful
  - Violation caused death of employee

- Sentencing Reform Act of 1984
  - Standardized penalties and sentences for federal offenses
    - OSH Act penalties for willful violations resulting in loss of life increased to $250,000 for individuals and $500,000 for organizations
Criminal Enforcement Related to Workplace Safety

- OSHA makes criminal referrals to DOJ
- DOJ concerned over:
  - High rates of workplace fatalities
  - Few criminal prosecutions under OSH Act
  - Penalties not deterring criminal violations
- DOJ and DOL initiative to increase the use of enforcement in cases involving workplace safety
**RECENT CRIMINAL PROSECUTIONS: FEDERAL**

**U.S. v. DNRB d/b/a Fastrack Erectors (January 2017)**

- Company found guilty of violating OSHA regulation causing death of employee
- Ruling: Co. did not comply with fall protection requirements
- Allowed employee to not wear proper fall protection
- Evidence that supervisory personnel knew and were plainly indifferent to violations
- Not sentenced yet – face maximum criminal fine of $500,000
Recent Criminal Prosecutions: State

- OSH Act does not preempt states from prosecuting under general criminal laws
  - i.e. Reckless endangerment, manslaughter, criminally negligent homicide
Recent Criminal Prosecutions: State

Commonwealth v. Atlantic Drain Services (2017)

- Two employees killed when trench collapsed
- OSH Act alleged violations: 18 willful, repeat, serious and other than serious violations
  - Over $1.4 million in proposed penalties
- Company and owner both criminally charged for:
  - Manslaughter (2 counts)
  - Misleading investigator
  - Concealing a record (6 counts)
- Owner faces up to 20 years in prison for each manslaughter count
- State law sets max penalty for corporate entity convicted of manslaughter at $1,000
- Case still active. Owner pleading not guilty
Recent Criminal Prosecutions: State

People v Harco Construction
- Trench collapse, meatpacking district, Manhattan
- Worker crushed, killed
- State criminal charges and conviction: manslaughter, criminally negligent homicide, reckless endangerment
- Alleged failure to address unsafe conditions – failing to heed repeated warnings from safety consultant
- Sentenced to air bilingual PSA print and TV ads – in lieu of jail and fines
WHAT EMPLOYERS SHOULD DO

- Following the death of an employee, employers should be aware:
  - OSHA inspectors may look for possible criminal violations (including duty to preserve record)
  - OSHA inspectors may look for possible Title 18 or other environmental violations
- Report fatality to OSHA within 8 hours
- Preserve all evidence surrounding fatality
- Consider legal counsel
- Defense in OSHA investigation affects criminal rights
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