

OSHA 30/30[®]

A thirty minute update on OSHA law every thirty days

with **Manesh Rath**



RECENT DECISION ON MULTI-EMPLOYER WORKSITE DOCTRINE

July 26, 2017

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



www.khlaw.com

Presented by:

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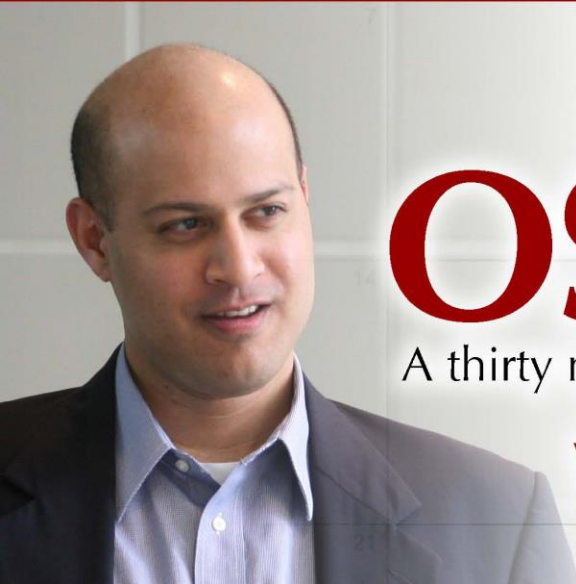
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MANESH K. RATH

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 is the editor and co-author of the OSHA chapter of the *Employment and Labor Law Audit* (9th and 10th Editions) and a co-author of the book *Occupational Safety and Health Law Handbook* (2001). 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.



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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.



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TOPICS TO BE DISCUSSED

- OSH Act Obligations
- Background on OSHA's Multi-Employer Citation Policy
- Appellate Courts' Holdings on OSH Act Liability at Multi-Employer Worksites
- Facts in recent OSH Rev. Comm. Case
- ALJ decision and its implications for employers
- What employers should do

OSH ACT OBLIGATIONS

- Suggests both narrow and broad interpretations of liability
 - Section 5(a)(1): each employer must furnish to each of *his employees*... [GDC]
 - Section 5(a)(2): each employer shall comply with OSH Act Standards



MULTI-EMPLOYER DOCTRINE

- On multi-employer worksites, more than one employer may be cited under Section 5(a)(2)
- Two-step process
 - Is employer a
 - Creating employer
 - Exposing employer
 - Correcting employer
 - Controlling employer
 - Did employer take sufficient steps to meet its obligations?

EXAMPLE FOR CONTROLLING EMPLOYER

- Construction Manager is contractually obligated to:
 - Set schedules and construction sequencing
 - Require subcontractors to meet contract specs
 - Negotiate with trades
 - Resolve disputes between subcontractors
 - Direct work and make purchasing decisions
- Construction Manager is controlling employer

APPELLATE COURTS' HOLDINGS ON MULTI-EMPLOYER LIABILITY

- Federal Courts Upholding or Supporting Some Form of Multi-employer Liability:
 - 2nd, 6th, 7th, 8th, 9th Circuits
 - D.C. Circuit
- Federal Courts that have limited multi-employer liability:
 - 5th Circuit

FACTS IN HENSEL PHELPS -- RECENT OSHRC ALJ DECISION

- Hensel Phelps subcontracted with Austin to build library
- Hensel Phelps had overall construction management authority over project
- CVI subcontracted to complete work on wall
- Two employees of CVI exposed to cave-in hazards

WHY WAS HENSEL-PHELPS CONTROLLING EMPLOYER?

- Hensel Phelps had authority to:
 - Stop construction work performed by subcontractors when hazardous conditions were found
 - Prevent subcontractors from continuing work due to safety concerns
- Onsite safety managers exercised control over jobsite safety
 - Stopped subcontractor work previously
- Superintendent and safety manager walked portions of project daily and were present when CVI employees were exposed to hazards

OSHRC ALJ DECISION AND IMPLICATIONS FOR EMPLOYERS

- OSHRC ALJ:
 - Hensel would be liable under controlling employer doctrine based on Commission precedent and decisions in most circuits
 - 5th Circuit:
 - OSHA regulations protect employer's own employees
 - Hensel's employees were not exposed to hazardous condition

WHAT EMPLOYERS SHOULD DO

1. Use contract as a vehicle to clearly allocate duties and control
2. Even if contract does not establish controlling employer, consider degree of control in practice
3. If organization has control or owns the property, inspect, monitor, disclose hazards at premises
4. Identify duties for reasonable standard of care
5. Use safety record, proposed safety controls when selecting contractors
6. Implement contractor quality assurance program

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**Please join us
at 1:00 PM Eastern U.S.
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Thank you!

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