

# OSHA 30/30<sup>®</sup>

A thirty minute update on OSHA law every thirty days

with **Manesh Rath**



## RECENT REVIEW COMMISSION DECISION OUTLINING ELEMENTS OF PROOF FOR OSHA CITATION

September 27, 2017

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



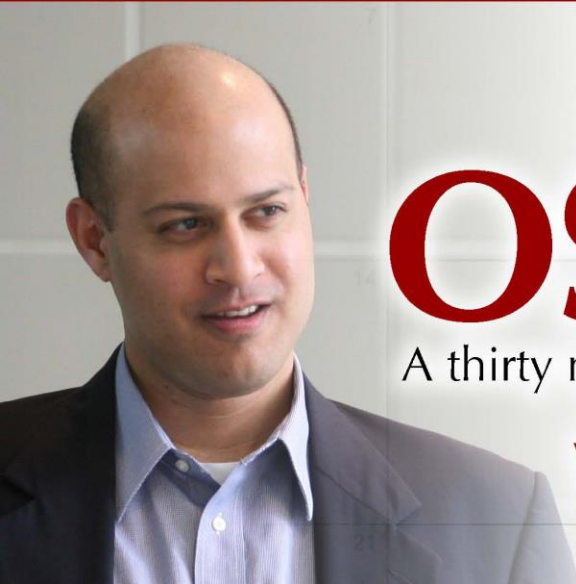
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**Presented by:**

**Manesh Rath**  
Partner  
[rath@khlaw.com](mailto:rath@khlaw.com)

**Lawrence P. Halprin**  
Partner  
[halprin@khlaw.com](mailto:halprin@khlaw.com)

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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.



**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

202-434-4177

# 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.



**Javaneh S. Nekoomaram**

Associate

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

202-434-4176



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# TOPICS TO BE DISCUSSED

- Elements OSHA must prove to establish violation of standard
- Facts in recent Review Commission ALJ case
- OSHA's elements of proof and the employer's defenses
- Review Commission ALJ decision and its reasoning
- What employers should do



# ELEMENTS OSHA MUST PROVE TO ESTABLISH VIOLATION OF STANDARD

- The standard applies
- Non-compliance with the terms of the standard
- Exposure to violative condition
- Knowledge of the non-compliant condition
  - Actual knowledge
  - Constructive knowledge -- reasonable diligence
- Serious: likely to result in serious physical harm
- Repeat: violation of same or substantially similar requirement (by the same employer, within 5 years)



# SECRETARY V WALMART STORES EAST, LP

## Facts:

- Serious Injury Response Team (SIRT)
  - Associates could volunteer
  - Provides first aid to employees
  - After treating the employee, the SIRT volunteer completes a SIRT Patient Information form.
  - The SIRT form has an entry for “Bleeding Control” as part of its checklist under “Treatment.”
  - 25 SIRT members, at least two on duty at any time.

# FACTS IN *WALMART STORES EAST, LP*

- Nature of activities and equipment at site
  - The Walmart distribution center is a warehouse
    - Industrial equipment
    - Industrial trucks, overhead doors
    - Box cutters
  - Contact with blood in providing first aid is “reasonably anticipated”
  - Associate SIRT members’ statements describe actual exposure

# FACTS IN RECENT OSHRC CASE

## ■ Wal-Mart BBP Vaccination Program

- Company's BBP Program required:
  - HBV vaccination series to be offered within 10 days of assignment
  - three doses at zero, one, and six months to SIRT volunteers
- Four employees were overdue on dose 3 at time of inspection and subsequently given 3<sup>rd</sup> dose
- Some SIRT employees were not offered HBV vaccinations
- Wal-Mart quarterly BBP audit
  - Audit acknowledgement of training, but not vaccinations
- SIRT supervisor disclosed to auditor he was behind in vaccinations.
  - Wal-Mart directed him to follow up
  - Did not to take formal disciplinary action

# FACTS IN RECENT OSHRC CASE

- Complaint-based inspection
- OSHA issued two citations under bloodborne pathogen standard
  - Serious: Failure to administer Hepatitis B vaccination (HBV) series per CDC recommendations (\$5,000)
  - Repeat: Failure to make HBV available to employees within 10 days of initial assignment (\$25,000)
  - Repeat based on similar citation in Rochester, NY in 2013

# OSHA'S ELEMENTS OF PROOF: CITATION 1

- Did cited standard apply?
  - Contact with blood reasonably anticipated
- Was there non-compliance with standard?
  - Four employees did not receive 3<sup>rd</sup> dose of HPV series per CDC recommendations (0, 1 and 6 months)
  - *Requirement to follow CDC recommendation*
- Employees exposed to non-compliant condition?
- Employer knew of non-compliant condition?
- Serious? – likelihood of resulting in serious physical harm

# EMPLOYER'S DEFENSES: CITATION 1

- Wal-Mart Defenses:
  - CDC recommendations not mandatory
    - Incorporates by reference current medical practice
  - Unpreventable employee misconduct
    - Rule/Policy/Procedure – yes
    - Communicated – yes
    - Monitor for compliance -- no
    - Discipline non-compliance -- no
  - De Minimis violation
    - No, some safety & health impact
  - Collateral duty exemption
    - Discretionary
    - Not applicable to this requirement or these facts

# WHAT EMPLOYERS SHOULD DO

1. Realistically identify tasks with reasonably expected exposure to blood
2. Carefully review standards that incorporate third party recommendations
3. Audits for compliance with each element of standard
4. Appropriate discipline is critical factor in employee misconduct defense
5. Identify all evidence to be submitted into the record – all witnesses, documentation
6. Consider separately incorporating businesses to reduce risk of repeat citations

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**Catch Manesh Rath on Twitter:**  
**@RathManesh**



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**Please join us**

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

**Wednesday, October 25, 2017**

**[www.khlaw.com/OSHA3030](http://www.khlaw.com/OSHA3030)**



# *Thank you!*

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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

202-434-4182