



OSHA 30/30[®]

A thirty minute update on OSHA law every thirty days

with Manesh Rath



RECENT REVIEW COMMISSION DECISION ON "REPEAT VIOLATIONS" AND POST- VIOLATION COMPLIANCE EFFORTS

October 24, 2018
1001 G Street NW, Ste. 500 W,
Washington, D.C.

KH KELLER AND HECKMAN LLP
SERVING BUSINESS THROUGH LAW AND SCIENCE[®]

www.khlaw.com

Presented by:

Manesh K. Rath

Partner

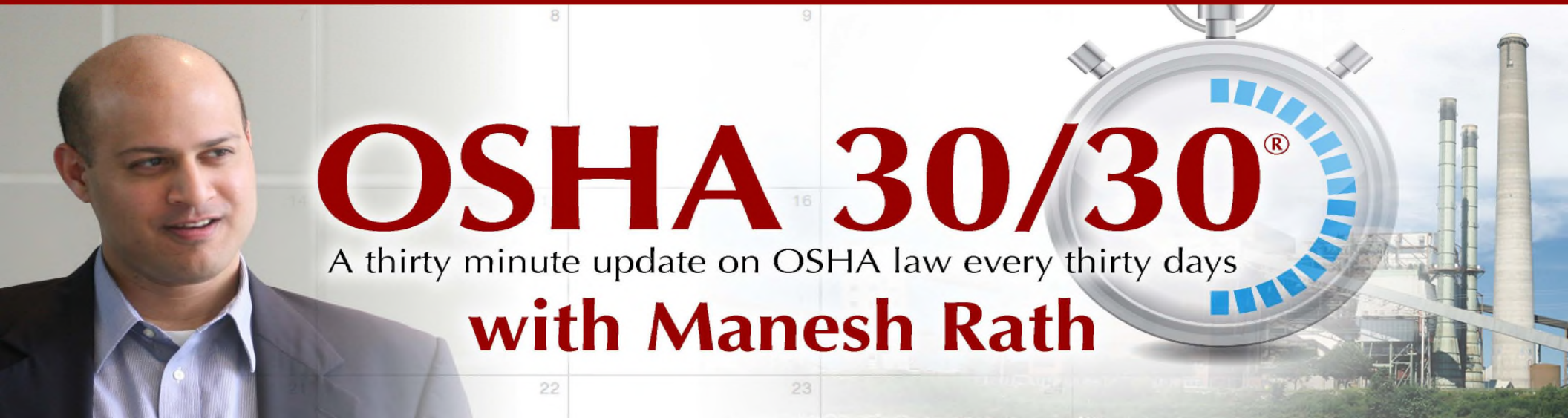
rath@khlaw.com

John B. Gustafson

Associate

gustafson@khlaw.com

Copyright © 2018



OSHA 30/30[®]

A thirty minute update on OSHA law every thirty days

with Manesh Rath

Please Don't Forget to Dial-In:

Conferencing Number: (800) 768-2983

Access Code: 434 4318

(View the slides via webinar, and the sound via phone, above)

An audio recording and slide deck will be provided post-webinar on

www.khlaw.com/osha3030

KH[®] **KELLER AND HECKMAN LLP**
SERVING BUSINESS THROUGH LAW AND SCIENCE[®]

www.khlaw.com

Copyright © 2018

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. He has been quoted or interviewed in *The Wall Street Journal*, Bloomberg, *Smart Money* magazine, *Entrepreneur* magazine, on "PBS's Nightly Business Report," and C-SPAN.

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 2016, 2017 and 2018; selected by Super Lawyers 2016 – 2017, 2017 – 2018; and by corporate counsel as the 2017 Lexology winner of the Client Choice Award.



JOHN B. GUSTAFSON

John Gustafson practices in the environmental, workplace safety and health, and litigation groups at Keller and Heckman. Specifically, John addresses issues that arise under FIFRA, TSCA, the OSH Act, California Proposition 65, and in standards development organization and labor and employment contexts.

John also assists clients on litigation matters and has experience in both trial and appellate settings.



John B. Gustafson

Associate

gustafson@khlaw.com

202-434-4204





**View the entire library of prior
OSHA 30/30s here:**

www.khlaw.com/OSHA3030



TOPICS TO BE DISCUSSED

- Facts – *Angelica Textile Services* – Commission case
- OSHA's "repeat violation" standard
- Analysis of decision – *Angelica Textile Services*
- Decision's impact on the ability to avoid repeat violations
- What employers should do



FACTS OF THE CASE – *ANGELICA TEXTILE SERVICES*

- Commercial laundry facility
- Long-tunnel combined batch washers (CBWs) with electrical, steam, water, natural gas, chemical, and mechanical components
- Several types of hazardous energy and materials
- Described as a complex dry-cleaning system involving many gauges, switches, knobs, etc.



FACTS OF THE CASE – *ANGELICA TEXTILE SERVICES*

- OSHA Inspection – 10 serious citations and 4 repeat citations
- Administrative Law Judge – affirmed 2 serious, vacated 12
- 2 serious citations affirmed:
 - Lockout Tagout standard (LOTO); and
 - Permit-Required Confined Spaces standard (PRCS)
- Secretary appealed vacatur of repeat citations of the 2 affirmed serious citations



OSHA "REPEAT VIOLATION" STANDARD

- **A repeat violation exists** “if, at the time of the alleged repeated violation, there was a Commission final order against the same employer for a **substantially similar violation.**” – *Potlatch Corp.* (OSHRC 1979)
- **Substantial similarity**
 - Requires that violations resulted in substantially similar hazards
 - Current and past violations are for failure to comply with same standard
 - Little or no improvement over previous violation
 - Rebuttable by evidence of disparate conditions/hazards

ANGELICA TEXTILE SERVICES – DECISION

Commission affirmed serious citations and **absence of repeat violations**

- Previous LOTO Violations – site-specific *and* machine-specific issues
 - ATS addressed site-specific and most machine-specific issues
- Previous PRCS Violation – included failure to address employee entry into CBWs
 - ATS created new comprehensive machine entry PRCS procedures

ANGELICA TEXTILE SERVICES – DECISION (CONT.)

- Previous violations: “a nearly complete failure to comply”
- Current violations: “only minimal deficiencies”
- OSHA grants more flexibility to “performance-oriented standards” where an employer has to seek out, identify, and minimize hazards rather than adopt cookie-cutter compliance measures
- “Facts do not indicate a failure to learn from experience”

ANGELICA TEXTILE SERVICES – DISSENT:

- Employer has “greater obligation” to comply after first violation – first violation alerted employer to OSHA standard and employer’s deficiencies
- Origin of “substantial similarity” – violations of the same standard are already *substantially similar in nature*
- *Potlatch* (definitive test) rejected the idea that an employer’s attitude or good faith effort is relevant
- Dissent argues that Majority effectively rewards worse first-time violations

EFFECTS OF DECISION

- Efforts to come into compliance impact repeat classification
- Violation of same standard is not automatically a repeat violation; therefore
- OSHA's burden to establish repeat violation is more clearly defined
- Pro-employer decision that stands as Commission precedent; Sec. of Labor has not appealed the decision to federal court



WHAT EMPLOYERS SHOULD DO

- Develop robust procedures to comply with LOTO and PRCS
- Make and document substantial changes after incurring a first violation
- Document training and preserve checklists and test materials
- Audit procedures and training (outside counsel can preserve privilege)



MORE FROM THE OSHA 30/30:



Catch Manesh Rath on Twitter:
@RathManesh



Listen as a Podcast:

The OSHA 30/30 is now available as a Podcast!

Find it at:

- Khlaw.com/osha3030
- Or on any podcast streaming service (iTunes, Podcast Addict)



Connect with us on LinkedIn:

1. Manesh Rath, David Sarvadi, Larry Halprin, Javaneh Nekoomaram, John Gustafson
2. Keller and Heckman Workplace Safety and Health





OSHA 30/30[®]
A thirty minute update on OSHA law every thirty days
with Manesh Rath



**Please join us
at 1:00 PM Eastern U.S.
Wednesday, November 28, 2018
www.khlaw.com/OSHA3030**





Please join us at 1:00 PM Eastern U.S.
Wednesday, November 28, 2018
www.khlaw.com/OSHA3030



Please join us at 1:00 PM Eastern U.S.
Wednesday, November 14, 2018
www.khlaw.com/TSCA3030



Please join us at 1:35 PM Eastern U.S.
Wednesday, December 12, 2018
www.khlaw.com/FIFRA-3030



Please join us at 1:00 PM Eastern U.S.
TBD
www.khlaw.com/REACH-3030



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



Manesh Rath

Partner

rath@khlaw.com

202-434-4182



John B. Gustafson

Associate

gustafson@khlaw.com

202-434-4204

