



OSHA 30/30[®]

A thirty minute update on OSHA law every thirty days

with **Manesh Rath**



RECENT COURT DECISION ON OSHA'S INSPECTION AUTHORITY

November 28, 2018
1001 G Street NW, Ste. 500 W,
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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. 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.



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.



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TOPICS TO BE DISCUSSED

- Overview of facts of case involving OSHA inspection
- Background on OSHA inspections and OSHA's authority to obtain a warrant to inspect an employer's facility
- Discussion of lower court decision to quash inspection warrant
- Analysis of recent Court of Appeals Decision
- What employers should do



FACTS

- Employee of Mar-Jac Poultry injured while attempting to repair electrical panel
- OSHA inspection following incident
- OSHA sought warrant to conduct wall-to-wall inspection (based on Poultry REP)
 - Mar-Jac consented to limited inspection of electrical accident site and tools
 - Provided OSHA 300 logs
- OSHA found potential violations from physical inspection
 - Electrical safety, PPE, machine guarding and LOTO

FACTS

- Potential hazards directly implicated by accident
- Potential hazards implicated by OSHA 300 logs
 - Recordkeeping
 - Ergonomic hazards
 - Biological hazards
 - Chemical hazards
 - Struck-by hazards
 - Slip, trip and fall hazards
- Hazards identified by Poultry Regional Emphasis Program

OSHA INSPECTIONS - OVERVIEW

- If employer does not consent, OSHA may obtain a warrant
- Probable cause
 - Showing specific evidence of a likely violation
 - A reasonable legislative or administrative standard applied under a neutral administrative plan
- “Reasonableness” remains ultimate standard



OSHA INSPECTIONS - OVERVIEW

- Warrants for unprogrammed inspections
 - More individualized inquiry required due to concerns of abuse of discretion and intrusiveness
 - Scope of inspection must have appropriate relationship to violation alleged by the evidence



DISTRICT COURT DECISION

- Mar-Jac filed emergency motion to quash inspection warrant
- District Court Judge: quashed inspection warrant
 - OSHA demonstrated probable cause for hazards observed and recordkeeping violations
 - But, lacked reasonable suspicion for violations OSHA asserted were supported by OSHA 300 logs and hazards identified by Poultry REP

APPEAL TO 11TH CIRCUIT

- U.S. argued District Court improperly quashed warrant:
 - District Court applied more stringent standard
 - District Court misunderstood terms “hazard” and “violation”
 - OSHA demonstrated ample reasonable suspicion for the 5 hazards that the OSHA 300 logs indicated

APPEAL TO 11TH CIRCUIT

- 11th Circuit affirmed District Court's order quashing inspection warrant:
 - Magistrate's determination of probable cause should be paid great deference by reviewing courts
 - Mere presence of a reported injury on OSHA log does not support full-scale investigation for potential hazards related to that injury
 - Presence of hazards does not necessarily demonstrate violation of general duty clause or OSHA Standard
 - OSHA 300 data did not establish reasonable suspicion for each of the 5 hazards

Log of Work-Related Injuries and Illnesses

Note: You can type input into this form and save it. Because the forms in this recordkeeping package are "fillable/writable" PDF documents, you can type into the input form fields and then save your inputs using the [free Adobe PDF Reader](#). In addition, the forms are programmed to auto-calculate as appropriate.

Attention: This form contains information relating to employee health and must be used in a manner that protects the confidentiality of employees to the extent possible while the information is being used for occupational safety and health purposes.

You must record information about every work-related death and about every work-related injury or illness that involves loss of consciousness, restricted work activity or job transfer, days away from work, or medical treatment beyond first aid. You must also record significant work-related injuries and illnesses that are diagnosed by a physician or licensed health care professional. You must also record work-related injuries and illnesses that meet any of the specific recording criteria listed in 29 CFR Part 1904.8 through 1904.12. Feel free to use two lines for a single case if you need to. You must complete an Injury and Illness Incident Report (OSHA Form 301) or equivalent form for each injury or illness recorded on this form. If you're not sure whether a case is recordable, call your local OSHA office for help.

Form approved OMB no. 1218-0176

Establishment name

City State

Identify the person

Describe the case

Classify the case

SELECT ONLY ONE box for each case based on the most serious outcome for that case:

Enter the number of days the injured or ill worker was:

Select the "Injury" column or choose one type of illness:

Identify the person			Describe the case			Classify the case				Enter the number of days the injured or ill worker was:		Select the "Injury" column or choose one type of illness:					
(A) Case no.	(B) Employee's name	(C) Job title <i>(e.g., Welder)</i>	(D) Date of injury or onset of illness <i>(e.g., 2/10)</i>	(E) Where the event occurred <i>(e.g., Loading dock north end)</i>	(F) Describe injury or illness, parts of body affected, and object/substance that directly injured or made person ill <i>(e.g., Second degree burns on right forearm from acetylene torch)</i>	Death (G)	Remained at Work			Away from work (K)	On job transfer or restriction (L)	(M)					
					Days away from work (H)		Job transfer or restriction (I)	Other recordable cases (J)	Injury (1)			Skin disease (2)	Respiratory condition (3)	Poisoning (4)	Hearing loss (5)	All other illnesses (6)	
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WHAT EMPLOYERS SHOULD DO

- Determine the scope of consent
- Try to avoid situation where OSHA seeks warrant
- Estimate likelihood OSHA will seek warrant and legal basis to move to quash
- Immediately evaluate whether to file *emergency* motion to quash
- Ensure OSHA logs are accurate
 - Avoid over-recording
 - Used by OSHA to identify hazards in the workplace
 - Concurring opinion: the more a company's injuries exceed the industry average, the more likely that the OSHA logs can provide reasonable suspicion of existing violations

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

Wednesday, December 19, 2018

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