



OSHA 30/30[®]

A thirty minute update on OSHA law every thirty days

with **Manesh Rath**



AFFIRMATIVE DEFENSE OF RELIANCE ON AN EXPERT CONTRACTOR

February 19, 2020

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



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Presented by:

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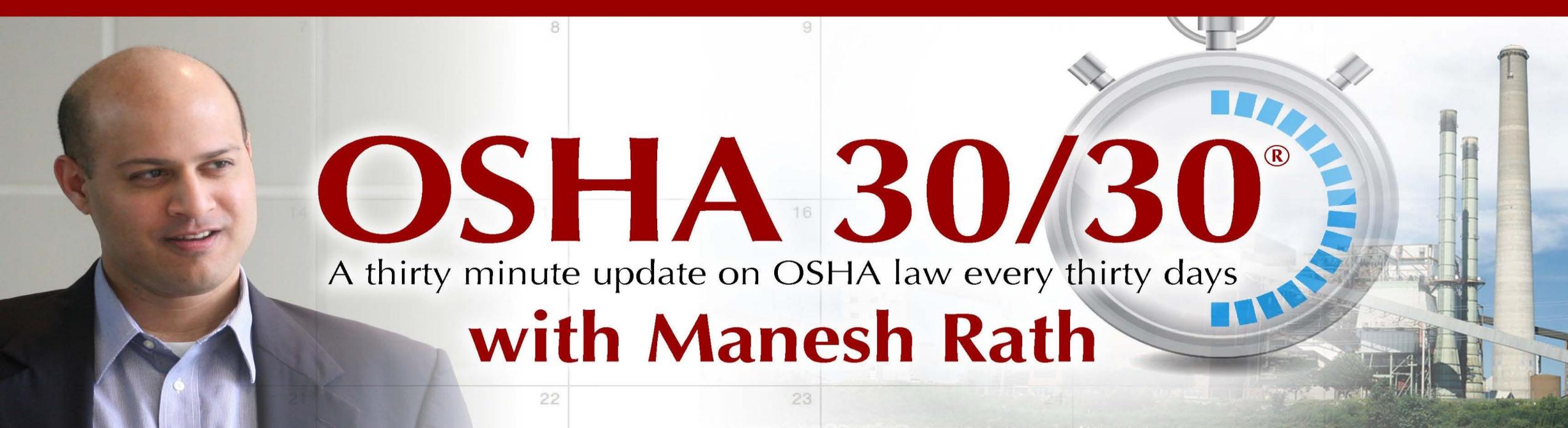
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MANESH K. RATH

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. 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

- Background on the facts of the case *Manua's Inc. v. Secretary of Labor* (D.C. Circuit)
- Review of *Sasser* OSHRC decision
- Overview of employer's reliance on contractor's safety expertise
- Understanding the D.C. Circuit's decision
- What employers should do

MANUA'S INC. V. SECRETARY OF LABOR: BACKGROUND OF FACTS OF CASE

- Manua's Inc. was expanding one of its retail stores
- Hired contractor APECS to remove steel beams from shipping containers by crane
 - Manua's provided employees to assist with project
 - Manua's did not ask APECS about safety measures it would take
- APECS did not measure the distance from the boom truck to the power line above worksite
- While unloading beams, APECS's crane touched live power line and electrocuted three of Manua's employees

FACTS OF CASE

- OSHA cited Manua's for several serious violations of Cranes and Derricks in Construction standard
- Manua's brought case before Administrative Law Judge (ALJ)
 - Argued that APECS was responsible for compliance with crane standard
- ALJ: Manua's was responsible for violations
- OSHRC: affirmed ALJ decision
- Manua's petitioned the D.C. Circuit for review of OSHRC decision

REVIEW OF *SASSER* OSHRC DECISION

- *Sasser* decision - narrow exception to rule that employer is responsible for OSHA violations
 - Employer reliance on specialty contractor for compliance with safety standards within contractor's expertise
 - Employer is justified in relying on specialist if:
 - the reliance is reasonable
 - employer has no reason to foresee that the work will be performed unsafely
- Employer hired crane operator to lift generator and place it on trailer
 - Crane operator touched live power line and caused death of *Sasser* employee

REVIEW OF SASSER OSHRC DECISION (CONT'D)

- OSHRC: Sasser's reliance on crane operator was reasonable
 - Sasser had no expertise in operating cranes
 - Only the operator was in direct control of crane
 - Entire job only took a few minutes (violation was sudden)
- D.C. Circuit contrasts *Sasser* exception with *Fabi Construction Co.* case
 - Employer's reliance on contractor was unreasonable
 - Employer could foresee danger to employees based on:
 - Employer's expertise
 - Employer's control of worksite
 - Duration of violation

D.C. CIRCUIT DECISION IN MANUA'S INC. V. SECRETARY OF LABOR

- Manua's: OSHRC's decision failed to follow *Sasser*
 - Crane operators in both cases hired with broad scope of work
 - Respective agreements did not mention safety standards
 - Neither *Sasser* nor Manua's asked crane operator about safety measures
 - *Sasser* and Manua's employees worked on the job at the direction of crane operator
 - Both *Sasser* and Manua's employees gave signals to crane operator

D.C. CIRCUIT DECISION IN MANUA'S INC. V. SEC.

- D.C. Circuit - this case is distinguishable from *Sasser*
 - Manua's employees more involved in work (whole crew, signaler)
 - Manua's and APECS shared responsibility for safety
 - First time Manua's hired APECS for crane work, so no history of safe crane practices
 - Duration of violative condition longer than in *Sasser*
 - Manua's had no agreement with APECS to be responsible for safety of project (unilateral and unjustified expectation)
 - Both Manua's and APECS decided where shipping containers were placed
- Manua's reliance on APECS for safety was unreasonable

WHAT EMPLOYERS SHOULD DO

- Use job bid process to evaluate contractor's ability to perform job safely and implement safety measures that will be used
- Ensure safety responsibilities are clearly defined in contracts
- Review contractor's safety history prior to selection
- Require contractor to provide only workers with safety training
- Notify contractor of known site hazards

WHAT EMPLOYERS SHOULD DO (CONT'D)

- Address safety hazards once recognized
- Clearly define employer's vs. contract workers' responsibilities if working together on project
- Require contractor to provide safety monitor
- Require contractor's employees to attend any job site safety meetings and job site hazard awareness training
- Reliance on experts is an affirmative defense

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at 1:00 PM Eastern U.S.
March 18, 2020**

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