

OSHA 30/30[®]

A thirty minute update on OSHA law every thirty days

with **Manesh Rath**

DC CIRCUIT ORDER UPHOLDING OSHA DECISION TO NOT ISSUE EMERGENCY TEMPORARY STANDARD FOR INFECTIOUS DISEASES

June 17, 2020

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

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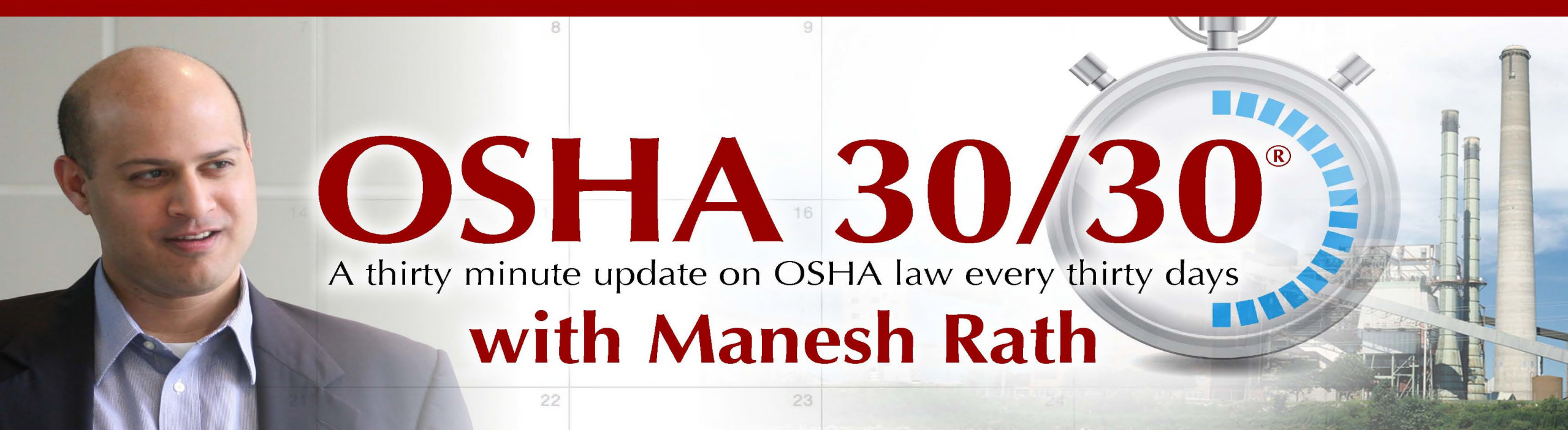
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MANESH K. RATH

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.



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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

- Background on AFL-CIO emergency petition
- Understanding OSHA Emergency Temporary Standards
- Agency deference
- OSHA's approach to COVID-19
- What employers should do



AFL-CIO PETITION FOR EMERGENCY TEMPORARY STANDARD

- March 6, 2020: AFL-CIO petitioned OSHA to issue ETS
 - Infectious diseases, including COVID-19
 - OSHA's evolving voluntary guidance "no substitute" for standard
 - OSHA took no formal action on ETS petition
- May 18, 2020: AFL-CIO filed petition for a writ of mandamus in D.C. Circuit to compel OSHA to issue ETS within 30 days
- May 29, 2020: OSHA formally denied petition for ETS

OSHA EMERGENCY TEMPORARY STANDARDS

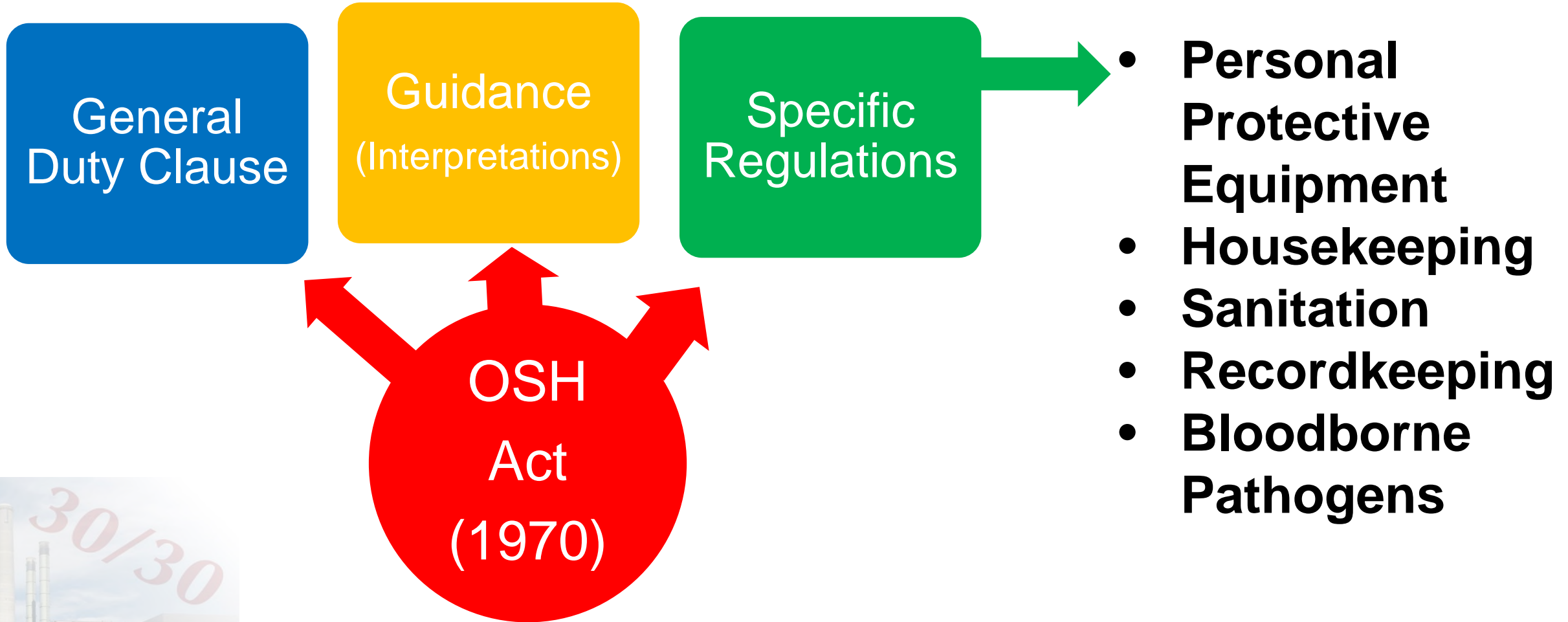
- OSH Act provides for ETS if Secretary determines:
 - Employees are exposed to grave danger from new hazards
 - ETS is necessary to protect employees from such danger
- AFL-CIO: employees are in grave danger due to COVID-19
 - Essential workers
 - Health care providers, nursing home aides, first responders
 - Workers going back to work as stay-at-home orders are lifted
 - “A stunning act of agency nonfeasance”

AGENCY DEFERENCE ON ETS DECISIONS

- “The OSHA’s decision not to issue an ETS is entitled to considerable deference.”
- *Pub. Citizen Health Research Grp. v. Aughter* (D.C. Cir. 1983)



STRUCTURE FOR OSHA REQUIREMENTS



AGENCY DEFERENCE ARGUMENTS

- OSHA:
 - Existing standards, voluntary guidance, and General Duty Clause adequately protect workers from COVID-19
- AFL-CIO claims:
 - Existing standards do not impose specific measures
 - Guidance not mandatory
 - General duty clause violations difficult to prove
- D.C. Circuit: OSHA “reasonably” determined an ETS not necessary

OSHA'S APPROACH TO COVID-19

- Enforcement of existing standards and General Duty Clause
- Compliance assistance
- Responding to complaints
- New guidance
 - Guidance for Preparing Workplaces for COVID-19
 - Respirators (5)
 - Reporting and recordkeeping (3)
 - High risk industries (9)
 - Enforcement policy
 - Procedures for complaints, referrals, and severe illness reports

OSHA'S APPROACH TO COVID-19 (CONT'D)

- General Duty Clause elements:
 - Employer failed to keep workplace free of hazard that employees were exposed to
 - Recognized hazard
 - Hazard caused or was likely to cause death or serious physical harm
 - There was a feasible and useful method to correct the hazard
- What are “feasible and useful” methods to address COVID-19?
 - Recommendations from state and local authorities, agencies, industry
 - Available guidance “enhances” power of GDC

COVID-19 LITIGATION

- Wal-Mart
 - Wrongful death suit (Illinois) for allegedly failing to adhere to CDC and OSHA guidelines
- McDonald's
 - Lawsuit in Chicago (state court) seeking preliminary injunction
 - Public nuisance claims for creating unsafe workplace
- Smithfield
 - Public nuisance lawsuit in Missouri (dismissed in federal court)
 - Case being investigated by OSHA
- Amazon
 - Public nuisance suit in New York

WHAT EMPLOYERS SHOULD DO

- Develop an exposure assessment and control plan
- Continue to follow:
 - CDC and OSHA guidance
 - Other agency guidance
 - State and local regulations
 - Monitor as guidance evolves
- Tailor employee protections to specific industry and circumstances
- If requiring certain precautions (social distancing, face masks, testing, disinfecting procedures, etc.) document source of recommendation and date of source

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