



# OSHA 30/30®

A thirty minute update  
on OSHA law every thirty days

with  
**Manesh Rath**

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## STATE GUIDANCE APPLIED IN COVID-19 LAWSUITS IN OCCUPATIONAL SETTINGS

February 24, 2021  
1001 G Street NW, Ste. 500 W,  
Washington, D.C.

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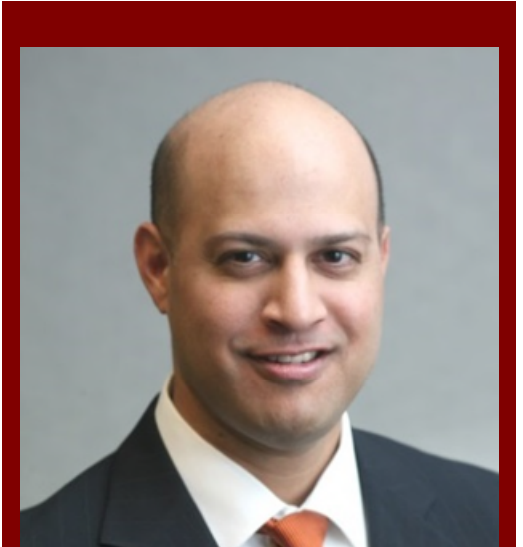
# MANESH K. RATH

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.



**Manesh Rath**

Partner

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

202-434-4182

# JOHN B. GUSTAFSON

John Gustafson primarily practices environmental law. He counsels clients on regulatory compliance and enforcement and litigates related matters.

Specifically, Mr. Gustafson assists clients with issues arising under FIFRA, TSCA, the OSH Act, and California Proposition 65. He has litigated at trial and appellate levels, participated in EPA and CDPR enforcement negotiations and arbitrations, and appealed standards developed by private standards development organizations. He variously assists clients with B-to-B contracting conflicts, advertising disputes, and labor and employment issues.



**John B. Gustafson**

Associate

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

202-434-4204



# TOPICS TO BE DISCUSSED

- Background on preemption & the OSH Act
- Facts of initial NY Employee disputes with Amazon
- Amazon's injunction suit against New York (federal law)
- New York's suit against Amazon (state law)
- How the preemption question impacts employers
- What employers should do



# BACKGROUND ON PREEMPTION & THE OSH ACT

- Preemption - Constitution's Supremacy Clause
- Can be express or implied
- OSH Act § 18: states may assume responsibility for occupational safety and health standards only by submitting a plan to the Secretary of Labor
- The OSH Act “‘unquestionably’ pre-empts” any state attempt to “establish[ ] an occupational health and safety standard on an issue for which OSHA has already promulgated a standard.”  
*Gade v. Nat'l Solid Waste Mgmt. Ass'n*, 505 U.S. 88, 97 (1992) (plurality)

# BACKGROUND ON PREEMPTION & THE OSH ACT (CONT'D)

- OSH Act does not preclude a state from asserting jurisdiction “over any occupational safety or health issue with respect to which no standard is in effect under [OSH Act] section 6.” § 18(a).
- OSH Act Savings Clause – Act shall not be construed to supersede common law or statutory rights, duties or liabilities of employers and employees under any law . . . § 4(b)(4)



# LAWSUITS – AMAZON, AMAZON EMPLOYEES, AND NY

Four NY lawsuits are putting OSH Act preemption at issue -

- Two Amazon Employee lawsuits (*Palmer* and *Smalls*)
  - Facts underpinning the Employee lawsuits precipitated New York Office of Attorney General (OAG) investigation into JFK8 and threats to sue Amazon
- Amazon filed federal suit to prevent imminent OAG enforcement through a declaration that New York law is preempted by OSHA
- Shortly thereafter, New York filed suit against Amazon alleging violations of New York law

# FACTS OF RELATED EMPLOYEE-AMAZON DISPUTES

Both suits filed by JFK8 Distribution Center Employees against Amazon

## Employee Civil Action 1 (*Palmer et al.*) -

- Action sought to have Court require of Amazon specific COVID protocol changes and COVID paid sick leave
  - Suspend counting of “time off task” or “TOT” against Employees for hand-washing, etc.
  - Provide Employees with tools and time to disinfect workstations; improve HVAC
  - Quarantine leave without adverse employment consequences; 48 additional paid hours for the year
- Action in federal court for declaratory judgment under state law
- Worker safety counts dismissed under the doctrine of “primary jurisdiction”

# FACTS OF RELATED EMPLOYEE-AMAZON DISPUTES (CONT'D)

## Employee Civil Action 2 (*Smalls et al.*)—

- One Employee (Smalls) had been in close proximity to an infected third-party Employee for 46 minutes
  - Next day, Amazon sent Employee home for 14 days paid quarantine with instructions not to return to Amazon property
  - Two days later, Employee attended a protest at the site
  - Amazon terminated Employee later that day
- Smalls filed federal action – discrimination, retaliation, Human Rights Law of NYC; action pending

# AMAZON ACTION AGAINST NEW YORK - FACTS

Employee suits led to OAG threats to sue Amazon

- OAG criticized Amazon's firing of Mr. Smalls in a tweet, called on NLRB to investigate
- OAG sent Amazon a letter announcing investigation of JFK8
  - Despite NYC Sheriff finding that JFK8 was meeting or exceeding protocols
  - Demanding specific relief: protocols changes, reinstatement of Smalls
  - Cited OSHA standards and General Duty clause
- OAG's updated demands include payments to Palmer and Smalls

# AMAZON ACTION AGAINST NEW YORK - LAW

- Amazon's case for preemption, relying on *Palmer* case decision and citing D.C. Circuit –
  - OSHA has made clear that existing federal standards and Employer obligations under the OSH Act's general duty clause govern employers' operations in response to COVID-19
  - This approach reflects OSHA's "reasonabl[e] determin[ation] that . . . it has existing regulatory tools at its disposal to ensure that employers are maintaining hazard-free work environments"
- OSHA COVID-19 response: 1,500 inspections, 300 citations, >\$4m in penalties for violations of existing standards

# NEW YORK ACTION AGAINST AMAZON

- NY brought suit Feb. 16 alleging that Amazon has violated:
  - NY Labor Law § 200 – New York's general duty clause
  - NY Labor Laws §§ 215, 740 – anti-retaliation and whistleblower protection laws
- Does not reference OSH Act or address likely preemption defense



# ANSWERING THE PREEMPTION QUESTION

- *Palmer* court held that the OSH Act *did not* preempt the NY general duty clause (NY Labor Law § 200)
  - Held that no OSH Act standard is “in effect” to protect against COVID-19 under OSH Act § 18
  - Held that NY Labor Law § 200 is codified common law, and thus is not preempted according to the OSH Act Savings Clause



# EMPLOYER IMPACT AND WHAT EMPLOYERS SHOULD DO

- A holding that the OSH Act does not preempt New York Labor Law § 200 would permit NY and other states to create disparate standards
- Review state, local, and federal guidance statements
  - OSHA, CDC
  - State regulations, guidance documents,
  - Governor Executive Orders
  - State Attorney General memoranda
  - Keep an eye on litigation filed in state and federal courts
- Consult counsel when subject to multiple standards or cited under state or federal law
- OSHA's anticipated emergency temporary standard may have a preemptive effect going forward



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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