



OSHA 30/30[®]

A thirty minute update
on OSHA law every thirty days

with
Manesh Rath

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Imminent Danger Clause Under the OSH Act

TAYLOR JOHNSON

1001 G STREET NW STE. 500W
WASHINGTON, DC 20001

202.434.4255
JOHNSONT@KHLAW.COM

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MANESH RATH

1001 G STREET NW STE. 500W
WASHINGTON, DC 20001

202.434.4182
RATH@KHLAW.COM

Manesh K. Rath

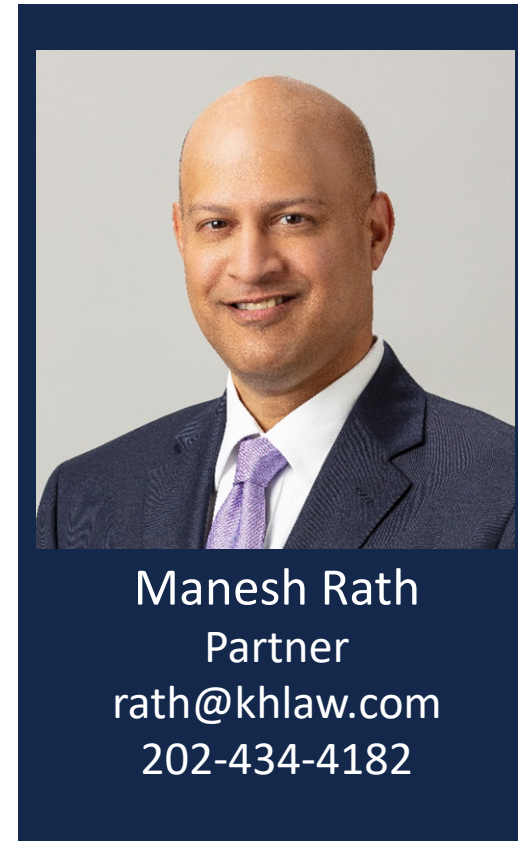


Manesh Rath is a partner in Keller and Heckman's litigation and OSHA practice groups. He has been the lead amicus counsel on several cases before the U.S. Supreme Court including *Staub v. Proctor Hospital* and *Vance v. Ball State University*.

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 served 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
202-434-4182

Taylor D. Johnson



Taylor Johnson is an environmental lawyer specializing in the area of environmental regulation of products, including chemical control, pesticides, energy efficiency regulation, and importantly, domestic and international transportation of hazardous materials. Mr. Johnson also advises clients on community-right-to-know laws, Proposition 65, occupational safety and health matters, and supports a wide variety of commercial tort and other litigation issues.

Mr. Johnson has special expertise in the area of hazardous materials transport, including enforcement defense and compliance counseling. Mr. Johnson helps companies secure competent authority approvals, special permits, and letters of interpretation from regulatory authorities around the world. He has also prepared successful petitions to PHMSA on behalf of shippers seeking regulatory relief.

Prior to joining Keller and Heckman, Mr. Johnson promoted the development of energy and environmental legislation and policy at the state level.



Topics to be Discussed

- ◆ Facts in Landmark Federal Court Decision
- ◆ Background on OSH Act Imminent Danger Clause
- ◆ OSHA's Position on Employee Right to Bring Direct Suit
- ◆ Understanding Federal Court Ruling On Employee Right to Sue
- ◆ Other COVID-19 News: White House, Congressional, OSHA, and State COVID-19 Developments
- ◆ What Employers Should Do

Jane Does, Justice at Work, et al. v. Secretary

- ◆ Employees of meatpacking plant
- ◆ Maid-Rite Specialty Foods in Dunnmore, PA
- ◆ Alleged that conditions at the plant posed an imminent danger:
 - ◇ Alleged failure to provide cloth face coverings
 - ◇ Alleged failure to implement social distancing protocols on production line
 - ◇ Allegedly insufficient handwashing opportunities
 - ◇ Commingling of workers from other locations



Jane Does, Justice at Work, et al. v. Secretary (2)



- ◆ Employees filed an administrative complaint with OSHA under the OSH Act
- ◆ OSHA conducted an on-site inspection
- ◆ Maid-Rite identified its extensive safety efforts
- ◆ Employees sued OSHA under Section 13
- ◆ OSHA did not issue a citation
- ◆ Case of first impression

OSH Act– Imminent Danger Clause

- ◆ Section 13 of OSH Act
 - ◆ Employees can petition Secretary of Labor if they believe imminent danger exists
 - ◆ If OSHA inspector concludes imminent danger exists, will recommend to Secretary that relief be sought
 - ◆ If Secretary fails to act, arbitrarily or capriciously, employee can seek injunctive relief



Arguments on Employee's Right to Bring Suit



Employees' Arguments

- ◆ Case is ripe for review – Court can order OSHA to abate the imminent danger
- ◆ OSHA's failure to intervene at the plant is arbitrary and capricious
- ◆ Congress would not limit the authority of a politically accountable official based on recommendations received from his or her subordinates

OSHA's Arguments

- ◆ Case is moot – OSHA completed an investigation and did not issue a citation
- ◆ Arbitrary and capricious test in Section 13 only applies if Secretary arbitrarily and capriciously fails to act
- ◆ Congress intentionally made section 13 a “high bar”

Court's Ruling



- ◆ Court agreed with OSHA's reading of Section 13 – motion to dismiss was granted
- ◆ Employees can only sue if inspector finds imminent danger *and* Secretary arbitrarily or capriciously fails to act
- ◆ The entirety of Section 13 must be read as a whole – it grants OSHA powers in event of imminent danger and 13(d) applies only to use of those powers
- ◆ Otherwise, employees could sue OSHA in every instance of an OSHA inspector finding no imminent danger

COVID-19 Update: State ETS

◆ California

- ◆ Mandatory testing, paid time off and a duty to investigate cases

◆ Virginia (permanent)

- ◆ Mandatory COVID hazard assessment for all job tasks

◆ Michigan (extended to Oct. 2021)

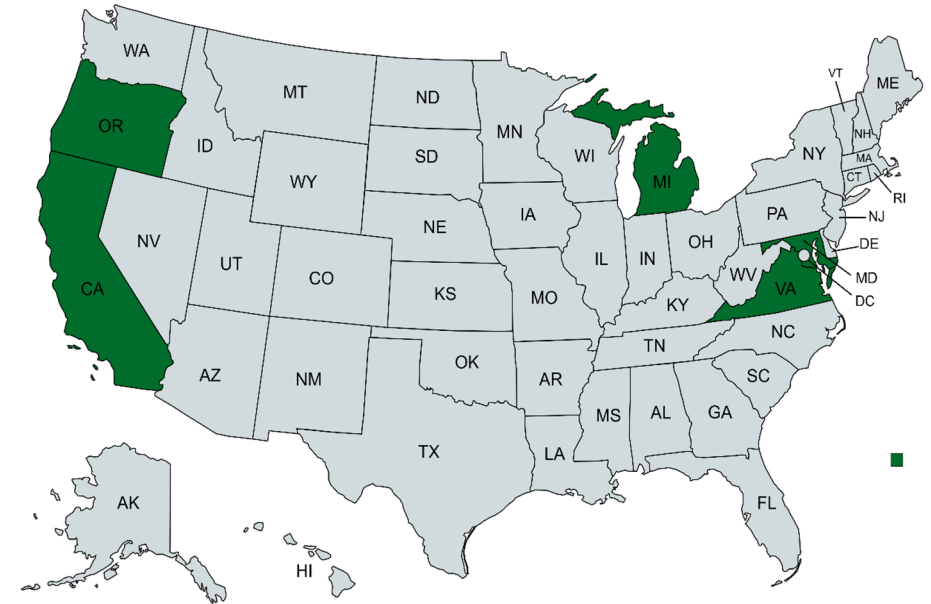
- ◆ Mandatory COVID preparedness and response plan

◆ Oregon

- ◆ Mandatory 24-hour notification period for COVID cases

◆ Maryland (bill passed)

- ◆ Legislature passed bill requiring Maryland OSHA to implement an ETS – Governor has yet to sign



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COVID-19 Updates: White House

- ◆ Marty Walsh sworn in as Labor Secretary
- ◆ Doug Parker announced to head OSHA - current head of CAL/OSHA
 - ◇ California one of four states that have issued emergency temporary standards
- ◆ January 21st Executive Order calls for OSHA to determine if a national emergency temporary standard is necessary by March 15th



COVID-19 Updates: Congress



- ◆ Congressional hearing regarding COVID-19 Emergency Temporary Standard (ETS)
 - ◆ ETS would create an unchangeable standard based on constantly evolving science
 - ◆ Employers can adapt to deploy effective interventions more rapidly as scientific and healthcare understanding of the disease and interventions evolves
 - ◆ OSHA has stepped back from finalizing an ETS for now

COVID-19 Updates: OSHA

- ◆ Agency put Emergency Temporary Standard on hold to “reflect the latest scientific analysis of the state of the disease” (Apr 6)
 - ◇ Unclear at this point if an ETS will be issued
- ◆ National Emphasis Program
 - ◇ Unprogrammed inspections based on employee allegations
 - ◇ Targeted Inspections at specific worksites such as:
 - Health Care
 - Meat Packing
 - Supermarkets
 - Tax prep firm, Massachusetts, \$136k proposed fine



What Employers Should Do



- ◆ Continued revisions and implementation of mitigation policies and return to work policies
- ◆ Develop practices relating to ongoing vaccination
- ◆ Prepare, based on industry, for inspections under national emphasis program or arising from complaints
- ◆ Good faith effort to accommodate employees who decline to get vaccinated



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Thank You

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Manesh Rath

Partner

1001 G Street NW Ste. 500W

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rath@khlaw.com

