



OSHA 30/30[®]

A thirty minute update
on OSHA law every thirty days

with
Manesh Rath

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Recent ALJ Decision Evaluated Liability For Exposing Employees to Workplace Violence

May 19, 2021

Manesh K. Rath

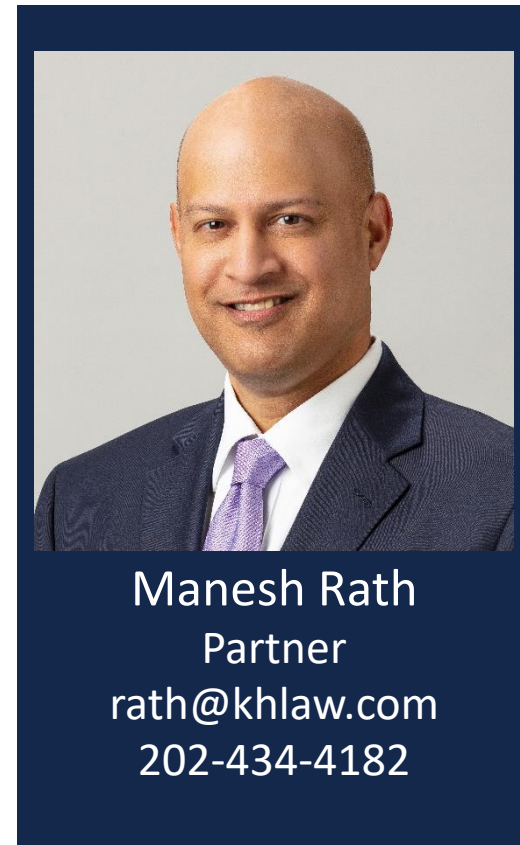


Manesh Rath is a partner in Keller and Heckman's litigation and OSHA practice groups. He has been the lead amicus counsel on several cases before the U.S. Supreme Court including *Staub v. Proctor Hospital* and *Vance v. Ball State University*.

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.



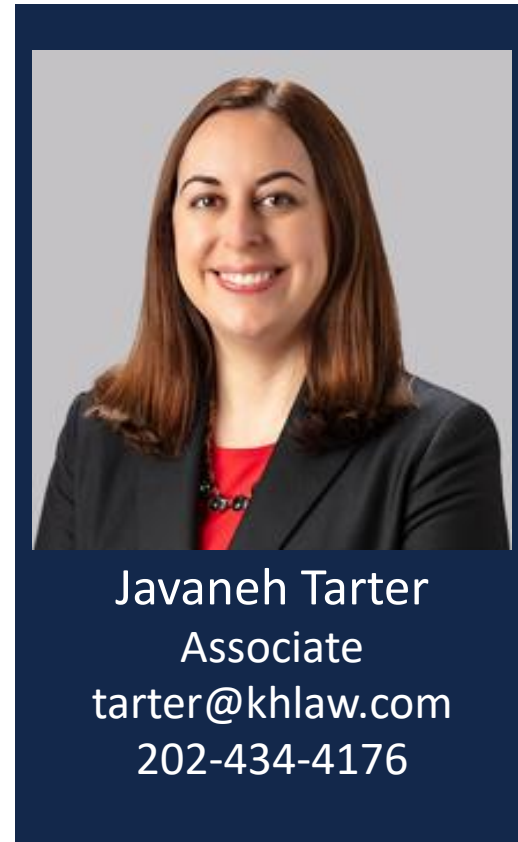
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Javaneh Tarter is an associate in the environmental and workplace safety and health (OSHA) practice groups at Keller and Heckman. Mrs. Tarter practices in all areas of environmental law as well as occupational health and safety law, and chemical control law. She routinely advises clients on a broad range of environmental health and safety compliance issues.

Prior to joining Keller and Heckman, Mrs. Tarter served for three years as Counsel for the American Coatings Association. She provided regulatory compliance and advocacy on a variety 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

- ◆ COVID-19 Updates from CDC and OSHA
- ◆ Overview of Facts in Recent ALJ Decision
- ◆ Application of General Duty Clause to Workplace Violence
- ◆ Impact of Charges of Bad Faith Destruction of Evidence
- ◆ Congressional Efforts on Workplace Violence Prevention
- ◆ What Employers Should Do

Other News

- ◆ CDC revised guidance for persons fully vaccinated
- ◆ OSHA issued a notice stating:
 - ◇ OSHA is reviewing the recent CDC guidance and will update our materials on this website accordingly. Until those updates are complete, please refer to the [CDC guidance](#) for information on measures appropriate to protect fully vaccinated workers.



Secretary of Labor v. UHS of Delaware, Inc.

- ◆ OSHA received complaint in 2015
 - ◇ Alleged workplace violence at Suncoast Behavioral Health Center
 - ◇ OSHA investigated, issued hazard alert letter
 - ◇ Suncoast replied, following OSHA's recommendations in hazard alert letter
- ◆ Additional incidents occurred
- ◆ OSHA issued NOI



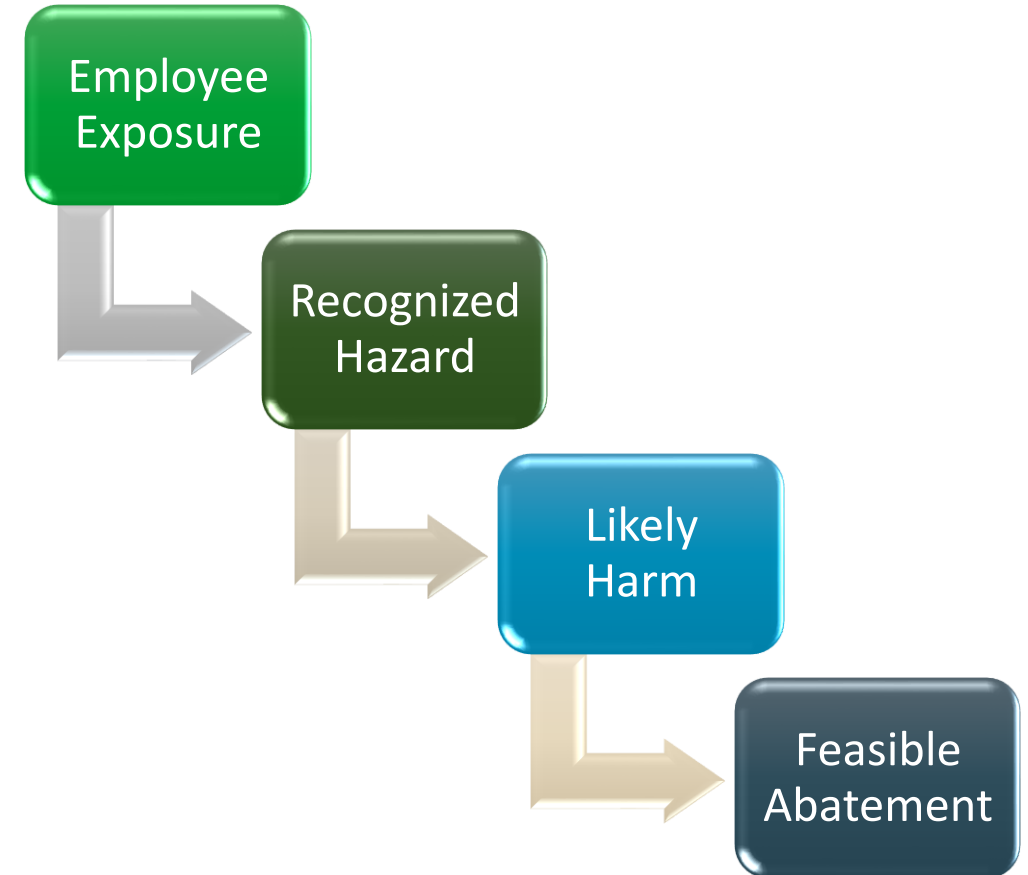
Secretary of Labor v. UHS of Delaware, Inc.



- ◆ OSHA requested injury logs and photos
- ◆ OSHA much later subpoenaed for videos
 - ◆ Suncoast preserved 6 videos
 - ◆ Did not produce
 - ◆ Suncoast did not prevent destruction of videos of incidents occurring after receiving subpoena
- ◆ OSHA issued citation for multiple violations of General Duty Clause

Elements to Prove General Duty Clause Violation

- ◆ Employees were exposed to a hazard
- ◆ The hazard was recognized
- ◆ The hazard caused/was likely to cause harm
- ◆ A feasible and useful action could have been taken to correct or remove the hazard



Abatement Efforts OSHA Deemed Inadequate



According to Employer:	ALJ Concluded :
A workplace violence prevention plan was created	No documents or witnesses listed elements of program
Employee training was conducted	Training materials and policies were inadequate
The facility held post-incident briefings	Employees not aware they could participate in meetings
Programs were continuously evaluated	Policies did not directly address patient on staff violence
The facility had a relationship with local law enforcement	The facility was understaffed and dangerously configured
Risk Factors were identified during intake	Employees were not informed about violent patients
The facility conducted “Environment of Care” rounds	The facility did not adequately protect employees
“Code Grey” procedures for escalating incidents	“Code grey” procedures were not used

Charges of Bad Faith Destruction of Evidence

- ◆ OSHA filed motion to compel production of videos
 - ◇ Suncoast provided the six videos it preserved and alleged other videos were written over after 30 days
- ◆ ALJ held videos were relevant, discoverable, and should have been preserved:
 - ◇ Suncoast had duty to preserve videos
 - ◇ Should have known videos were relevant
 - At time of initial hazard alert letter
 - ◇ Ordered payment of attorney's fees
 - ◇ Permitted inferences in favor of OSHA



Congressional Efforts on Workplace Violence Prevention Legislation



- ◆ H.R. 1195
 - ◇ Passed House 254-166 on Apr 16, 2021
 - ◇ In Senate Committee on Health, Education, Labor and Pensions
- ◆ If passed by Senate, OSHA must:
 - ◇ Issue interim standard on workplace violence within 1 year
 - Requires employers in healthcare and social services sectors to develop and implement WVPP (based on OSHA guidelines)
 - 30-day comment period
 - ◇ OSHA must issue proposed standard within 2 years

What Employers Should Do

- ◆ Determine if Workplace Violence Prevention Program is needed
- ◆ Perform incident investigations following workplace violence incidents
- ◆ Provide opportunities for employee engagement
- ◆ Communicate information about identified threats or risks
- ◆ Litigation holds, preserve all evidence



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Please join us
at 1:00 PM Eastern U.S.
June 16, 2021
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Wednesday, June 16, 2021
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Next session to be scheduled
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Thank You

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Off Record with Manesh Rath

Pre-submit your questions to osha@khlaw.com

Pre-submitted Questions

- ◆ Since the CDC updated its guidance regarding mask wearing, can we now require employees to show proof of their vaccination status?

Thank You

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