



OSHA 30/30[®]

A thirty minute update
on OSHA law every thirty days

with
Manesh Rath

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Recent State Court Criminal Sentencing of Construction Company Owner

August 25, 2021

Manesh K. Rath

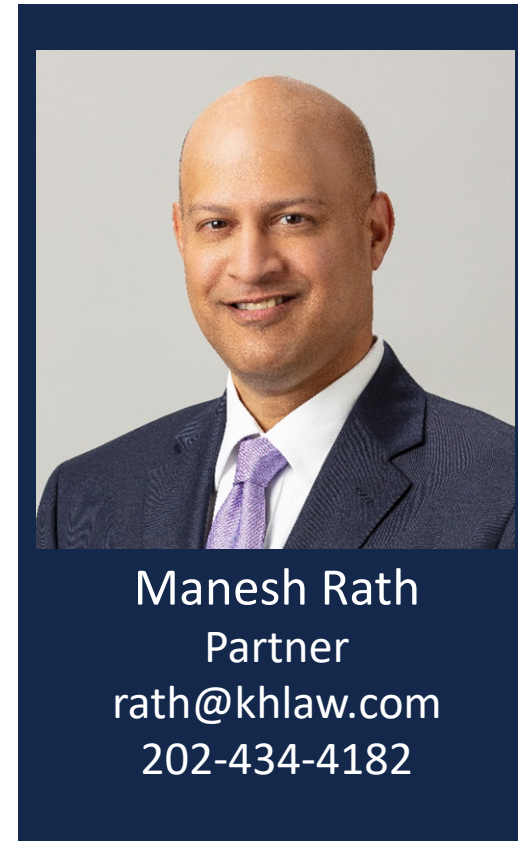


Manesh Rath is a partner in Keller and Heckman's litigation and OSHA practice groups. He has been the lead amicus counsel on several cases before the U.S. Supreme Court including *Staub v. Proctor Hospital* and *Vance v. Ball State University*.

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.



Javaneh S. Tarter



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

- ◆ Review of trench collapse involving a construction worker
- ◆ Summary of OSHA inspection
- ◆ Overview of OSHA referrals to state prosecutors for workplace violations
- ◆ Analysis of recent Colorado state court's sentencing of construction company owner
- ◆ What employers should do
- ◆ New section: Off the Record Conversation for Live Participants Only

Trench Cave-In at Granby, CO Site

- ◆ ContractOne hired workers for a residential construction site in Granby, Colorado in June of 2018
- ◆ Rosario Martinez initially for drywall, carpentry work
- ◆ While Martinez was in a trench attaching copper piping to the main water line, the trench collapsed
- ◆ He was buried and the accident caused fatal injuries



OSHA Investigation

- ◆ OSHA began investigation after the fatality was reported
- ◆ According to OSHA, ContractOne failed to train Martinez and other workers to identify or avoid trenching and excavation hazards.
- ◆ OSHA discovered the trench collapsed the day before and ContractOne did not incorporate additional safety measures
- ◆ Citation sought \$57k penalties



OSHA Citation

- ◆ OSHA issues citations for serious violations of the construction excavation standards
- ◆ ContractOne was cited for a willful violation for failure to have an adequate protective system to protect employees from cave-in



- ◆ OSHA also cited ContractOne for serious violations of the general construction safety standards
- ◆ October 2018 OSHA NEP on Trenching, Excavation

OSHA and State Authority to Impose Criminal Penalties

- ◆ Section 17(e): criminal penalties for willful violations of an OSHA standard that result in death
- ◆ OSH Act does not preempt states from prosecuting under general criminal laws
 - ◇ Reckless endangerment, manslaughter, criminally negligent homicide, criminal conspiracy, assault
- ◆ Can be prosecuted under both OSH Act and state law



State Prosecution of Company Owner

- ◆ August 2019: Grand County, Co. prosecutors brought criminal charges against ContractOne company owner Bryan Johnson
- ◆ State criminal charges
 - ◇ One count: criminally negligent homicide (later dropped)
 - ◇ Two counts: reckless endangerment
 - ◇ One count: third degree assault
- ◆ June 2021: Johnson pled guilty to charges to reckless endangerment and third degree assault



Criminal Sentencing



10 months in prison



Three years probation



Restitution to Martinez family



Allow inspections of worksites without administrative warrant



Undergo safety training



Charitable contributions



100 hours of community service



Participate in DOL's Workers Memorial Day ceremony



Cannot personally commit any willful or serious OSHA violations

OSHA Press Release on Johnson's Criminal Sentencing:

“Criminal enforcement is an effective enforcement tool. The timely prosecution of an individual within the community in which they work, and where the victim often resided, has a strong deterrent effect in the industry and sends a signal to the regulated community that certain behavior, such as that which results in significant harm to workers, will not be tolerated.”

What Employers Should Do

**Train
workers
who are
reassigned
to
trenching**

**Train
properly re
trenching,
excavation,
retain
training
records**

**Report
fatality to
OSHA
within 8
hours**

**Be aware that
OSHA
inspectors may
look for
possible
criminal
violations and
make criminal
referrals
following
employee
fatality**

**Preserve
any
available
evidence**

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Manesh Rath, David Sarvadi, Larry Halprin,
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Please join us
at 1:00 PM Eastern U.S.
September 22, 2021
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Next session to be scheduled
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Thank You

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