



OSHA 30/30[®]

A thirty minute update
on OSHA law every thirty days

with
Manesh Rath

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Is OSHA Using the General Duty Clause to Cite Employers for COVID-19?

February 16, 2022

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.



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.



Taylor Johnson
Associate
johnsont@khlaw.com
202-434-4255

Topics to Be Discussed:

- ◆ Review Supreme Court Decision
- ◆ Elements of Alleged Violation
- ◆ OSHA's Suggested Abatements
- ◆ Cases Prior to Supreme Court Decision
- ◆ What Employers Should Do
- ◆ Off the Record

Review of Supreme Court's *Per Curiam* Decision



- ◆ Court Decided:
 - ◆ Applicants likely to prevail, agreed with trial court's grant of a stay
 - ◆ Although COVID–19 is a risk that occurs in many workplaces, it is not an occupational hazard in most
 - ◆ An ETS was tantamount to a *public* health mandate, which would exceed OSHA's statutory power
 - Absent clear statutory delegation to the agency, the agency's power to regulate issues of exceptional political or economic consequence must not be inferred.

Sanoh America Citation



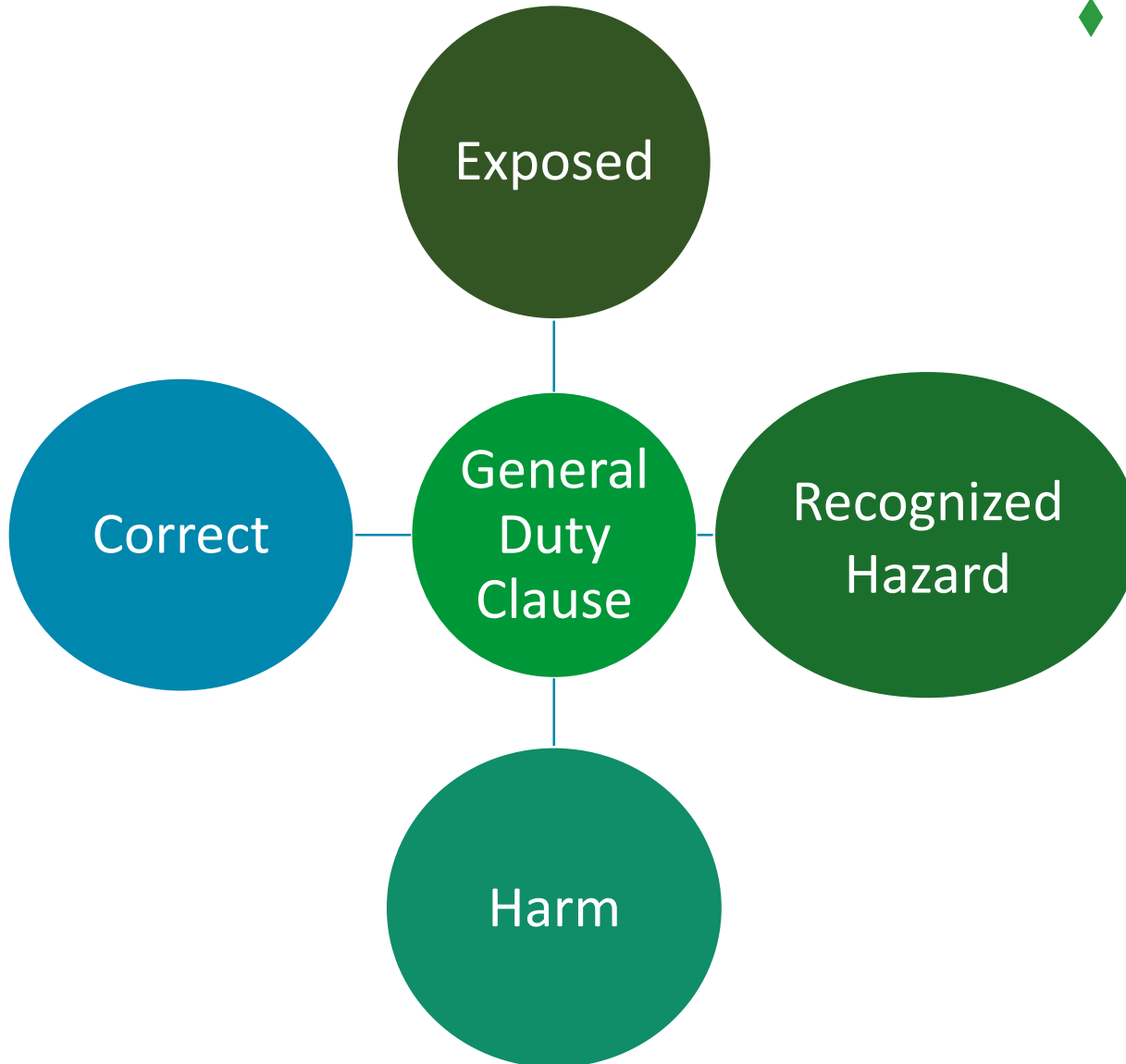
- ◆ A complaint filed to OSHA:
 - ◆ Alleging that employer ignored guidelines to limit employee exposures to covid
 - ◆ Alleging it did not enforce its own policies
- ◆ OSHA inspected.
 - ◆ 65 employees positive during inspection
 - ◆ 23 more in next three weeks
 - ◆ Five hospitalized, two died
 - ◆ OSHA claimed one death was work related
- ◆ OSHA found:
 - ◆ Distancing policy
 - ◆ Mask wearing policy
 - ◆ Failure to identify and remove exposed employees

Sanoh America Citation



- ◆ Day after SCOTUS decision, OSHA issued citation under General Duty Clause
- ◆ OSHA alleged employer “did not furnish...a place of employment which [was] free from recognized hazards...in that employees were not protected from the hazard of contracting the virus, SARS-CoV-2... the cause of the COVID-19 disease”

General Duty Clause

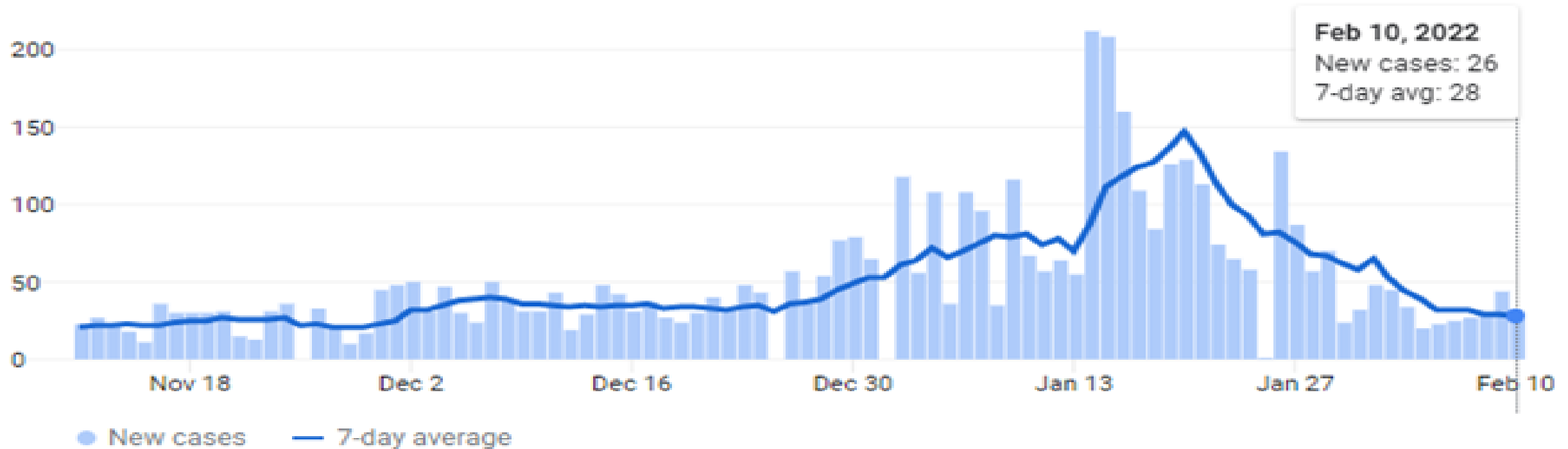


- ◆ OSHA must meet these four elements:
 - ◆ Employee must have been exposed to a hazard
 - ◆ Alleged Hazard must be recognized
 - ◆ Alleged hazard caused or was likely to cause death or serious physical harm
 - ◆ A feasible method exists to correct the alleged hazard

OSHA's Seven Proposed Abatements for Sanoh:



1. Periodically review the community rates of COVID-19



OSHA's Seven Proposed Abatements for Sanoh:



2. Re-evaluate existing COVID-19 company procedures and retrain workforce



OSHA's Seven Proposed Abatements for Sanoh:



3. Implement contact tracing



OSHA's Seven Proposed Abatements for Sanoh:



4. Screen employees for COVID-19 exposure and symptoms



OSHA's Seven Proposed Abatements for Sanoh:



5. Follow and implement guidance from federal agencies



OSHA's Seven Proposed Abatements for Sanoh:

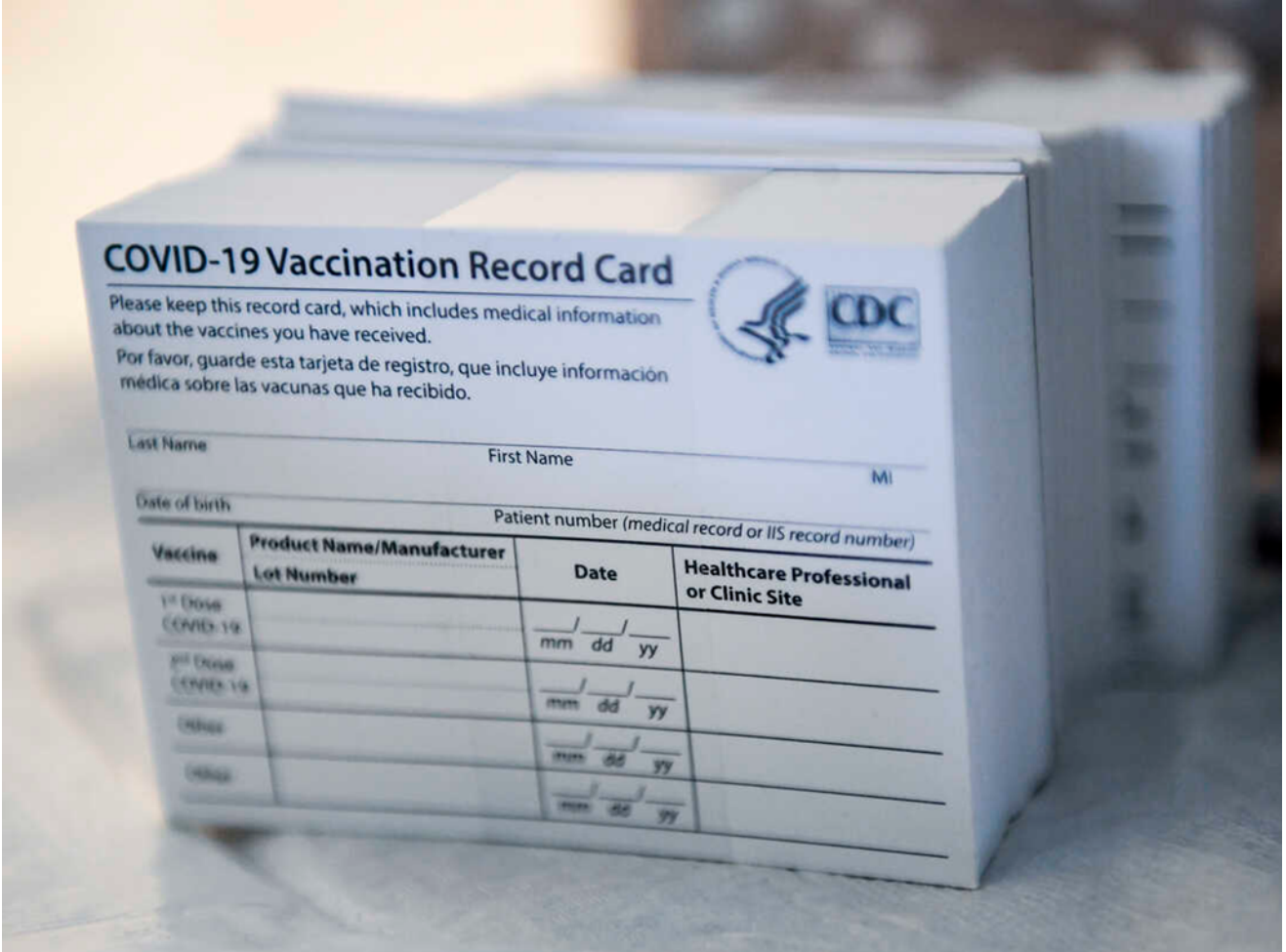
6. Enforce physical distancing:

- ◇ Install barriers
- ◇ Require face coverings




OSHA's Seven Proposed Abatements for Sanoh:

7. Facilitate vaccination of employees by granting paid time off



COVID-19 Vaccination Record Card

Please keep this record card, which includes medical information about the vaccines you have received.
Por favor, guarde esta tarjeta de registro, que incluye información médica sobre las vacunas que ha recibido.



Last Name _____ First Name _____ MI _____

Date of birth _____ Patient number (medical record or IIS record number) _____

Vaccine	Product Name/Manufacturer Lot Number	Date	Healthcare Professional or Clinic Site
1 st Dose COVID-19		mm / dd / yy	
2 nd Dose COVID-19		mm / dd / yy	
Other		mm / dd / yy	
Other		mm / dd / yy	

What Employers Should Do

For now – and this may rapidly change as community circumstances continue to change:

- ◆ Symptom screening still looks like it has a protective value, at least for the employer
- ◆ Isolating confirmed positive cases and persons who report symptoms
- ◆ To the extent recommended by the CDC, monitoring for mask usage and physical distancing
 - ◇ Record instances of verbal reminders
- ◆ Careful with remnant elements in policy
 - ◇ OSHA implicitly asserted that it could enforce company's policy





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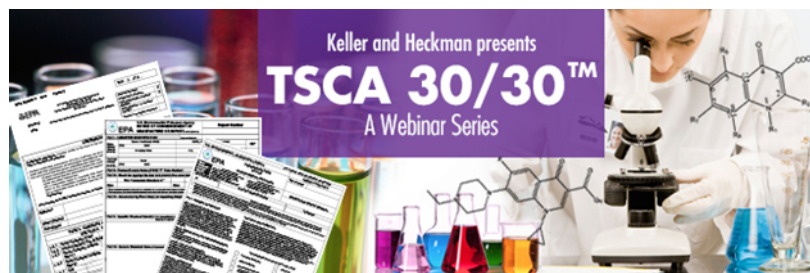
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at 1:00 PM Eastern U.S.
March 16, 2022
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Wednesday, March 23, 2022
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Next session to be scheduled
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Thank You

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Manesh Rath
Partner

1001 G Street NW Ste. 500W
202.434.4182
rath@khlaw.com



Off Record with Manesh Rath

Pre-submit your questions to osha@khlaw.com

Questions

Has OSHA used the General Duty Clause to cite employers for COVID-19 before now?

Questions

- ◆ Is there an update on OSHA's Healthcare ETS?

Question

- ◆ Can you comment on OSHA's new Letter of Interpretation on commute related accidents?

Thank You

Manesh Rath

Partner

1001 G Street NW Ste. 500W

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rath@khlaw.com

