



# OSHA 30/30

A thirty minute update on OSHA law every thirty days

with **Manesh Rath**

**Manesh Rath**  
Partner  
(202) 434-4182  
[rath@khlaw.com](mailto:rath@khlaw.com)

## **OSHA Review of Whistleblower Complaints Alleging Retaliation for a Safety Complaint**

**January 15, 2014**

1001 G Street NW, Ste. 500W, Washington, D.C.  
(202) 434-4182



[www.khlaw.com](http://www.khlaw.com)

**David Sarvadi**  
Partner  
(202) 434-4249  
[sarvadi@khlaw.com](mailto:sarvadi@khlaw.com)



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**Please Don't Forget to Dial-In:**

**Conferencing Number: (800) 768-2983**

**Access Code: 434 4318**

**(View the slides via webinar, and the sound via phone, above)**



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# Topics to be Covered

1. OSHA's role in whistleblower laws in a number of industries;
2. OSHA's investigation process;
3. Understanding this recent critical OSHA enforcement action;
4. Challenging OSHA's finding and defending employers; and
5. The current Administration's recent statements relating to increased enforcement and what you can do about it.

# 1. OSHA's role in whistleblower laws in a number of industries



# OSHA Has Oversight Over Whistleblower Provisions In 18 Statutes:

- Occupational Safety & Health Act (OSH Act)
- Surface Transportation Assistance Act (STAA)
- Asbestos Hazard Emergency Response Act (AHERA)
- International Safety Container Act (ISCA)
- Energy Reorganization Act of 1974 (ERA)
- Clean Air Act (CAA)
- Safe Drinking Water Act (SDWA)
- Federal Water Pollution Control Act (FWPCA)
- Toxic Substances Control Act (TSCA)
- Solid Waste Disposal Act (SWDA)
- Comprehensive Environmental Response, Compensation & Liability Act (CERCLA)
- Wendell H. Ford Aviation Investment and Reform Act for the 21<sup>st</sup> Century (AIR21)
- Sarbanes-Oxley Act (SOX)
- Pipeline Safety Improvement Act (PSIA)
- Federal Rail Safety Act (FRSA)
- National Transit Systems Security Act (NTSSA)
- Consumer Product Safety Improvement Act (CPSIA)
- Food Safety Modernization Act (FSMA)

## 2. OSHA's investigation process

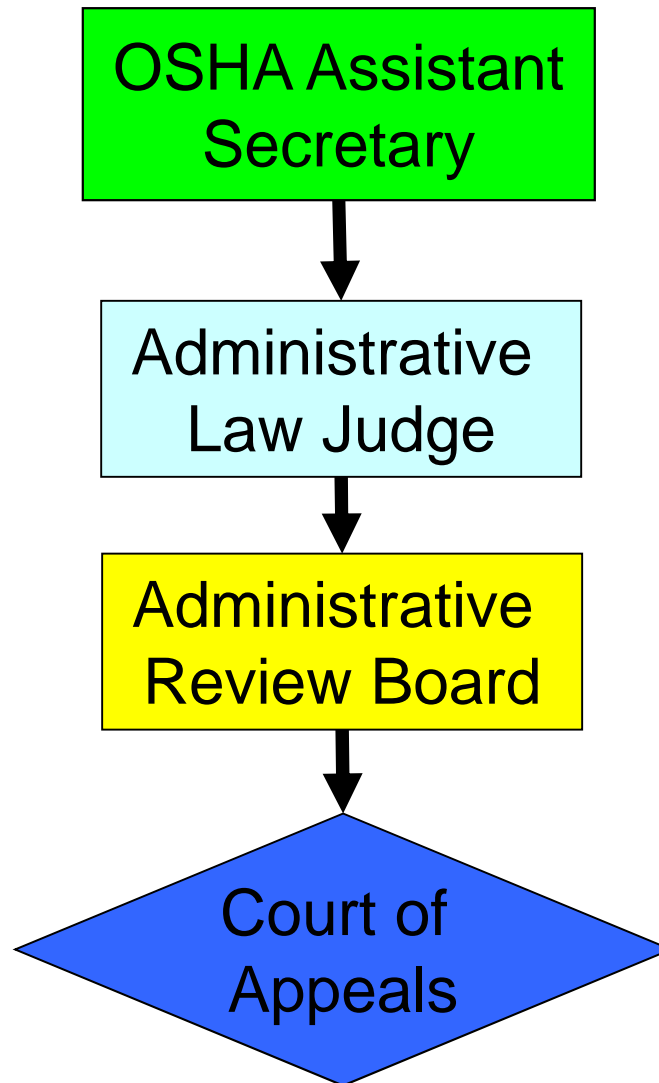


# OSHA Internal Organization

- Directorate of Enforcement Programs, Office of the Whistleblower Protection Program
  - formerly Office of Investigative Assistance
  - <http://www.whistleblowers.gov/index.html>
- State plan states
  - Equivalent procedures for OSHA 11(c) violations
  - Federal enforcement only for the others
- Investigators assigned through regional offices
  - Different organizational structures
  - Detailed descriptions of procedures followed in the manual
- CPL 02-03-003 Whistleblower Investigations Manual
  - [http://www.osha.gov/OshDoc/Directive\\_pdf/CPL\\_02-03-003.pdf](http://www.osha.gov/OshDoc/Directive_pdf/CPL_02-03-003.pdf)



# OSHA Structure





# Complaint Process

- An employee may lodge a complaint with OSHA within specified number of days of any violation.
- OSHA must investigate every employee complaint that alleges a violation.
- OSHA requests that employer respond w/in 20 days of complaint.



# Employee Filing Time Limits

- OSHA 11(c) – 30 days
- Clean Air Act, CERCLA, Safe Drinking Water, Solid Waste Disposal, TSCA – 30 days
- Federal Railroad Safety – 180 days
- Moving Ahead for Progress in the 21<sup>st</sup> C – 180
- NTSSA, Pipeline Safety Improvement, Surface Transportation Act – 180 d
- Affordable Care Act – 180
- Consumer Financial Protection – 180 d
- SOX – 180 d
- Consumer Product Safety Improvement Act – 180
- Food Safety Modernization Act – 180 d

# Kickout Provision

- Some statutes permit an employee to exit OSHA's investigatory process and proceed directly to court
- No Kickout Provision:
  - OSHA 11(c)
  - Environmental
- Kickout Provided:
  - STAA (210 days)
  - SOX (180 days)
  - Federal Railroad Safety (210)
  - CPSIA (210 or w/90 d of OSHA finding)
  - ACA (210 or w/90 d of OSHA finding)
  - CFPA (210 or w/90 d of OSHA finding)
  - FDA Food Safety Modernization Act (210 or w/90 d of OSHA finding)

# Complaint Process

- OSHA's findings and preliminary order become a final order of the Secretary of Labor unless objections are filed within 30 days.
- Either party may request a hearing before an ALJ of the US Department of Labor.
- Either party may seek a review of the ALJ's opinion before the DOL Administrative Review Board.



# 3. Understanding recent critical OSHA enforcement action

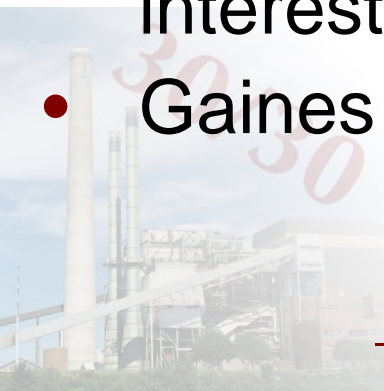


## ***Gaines Motor Lines, Inc.***

- Four drivers participated in a FMCSA audit.
- FMCSA found that drivers, including those four, falsified logs and timesheets.
- Gaines had performance problems with them.
- 12-14 people were laid off due to economic conditions. 15 trucks were pulled off the road.
- The three who participated in the FMCSA audit were among those terminated very shortly after complaining.
- One was offered a different position at full time and declined, preferring part time work.
- Gaines: those three were selected due to driving records or timely deliveries problems.

## ***Gaines Motor Lines, Inc. (cont'd)***

- All three brought a whistleblower complaint to OSHA
- OSHA alleged that terminations were retaliatory, mainly due to temporal proximity.
- OSHA interviewed many workers, including owner, CEO.
- Each of the three complainants had differing testimony, evidence in favor of whistleblower retaliation was poor and inconsistent.
- OSHA ordered reinstatement and \$1M in back pay, interest, compensatory, and punitive damages.
- Gaines has filed for review by a DOL ALJ.



# 4. Challenging OSHA's finding and defending employers





# Challenging an OSHA Finding

- Following an investigation, OSHA issues a preliminary *order*.
- Findings and any preliminary order will be effective 30 days after receipt unless an objection and request for hearing has been filed.
- An order for reinstatement will be effective immediately, however.
- Discovery is permitted – depositions, written interrogatories, document requests.
- Hearing.
- ALJ makes a *de novo* determination.
- May appeal ALJ decision to DOL Administrative Review Board within 10 business days or else becomes final – this is a review like an appeal – no hearing.
- May appeal ARB – petition for review in US Court of Appeals (not *de novo*, review is limited).

**5. The current Administration's recent statements relating to increased enforcement and what you can do about it**



# Current Enforcement

- 2013: Whistleblower claims before OSHA grew by 1%.
- This follows three years of 7-16% increases.
- OSHA determinations grew 14.2% in 2013.
- Congress increased OSHA's budget to \$15M for whistleblower efforts in 2013.
- White House proposed adding another \$6M and 47 new staff members to focus on whistleblower issues.



# Current Enforcement (cont'd)

## Merit:

- 2012: OSHA found merit in 1.6 % of all complaints
- 2013: OSHA found merit in 2.3 % of all complaints

## Dismissed:

- 2012: 58%
- 2013: 48.7%

Kickout (workers opt out of OSHA investigation and go straight to court, applicable only to some statutes):

- 2013: 2.3%

# What Employers Can Do

- Create a whistleblower procedure, internal complaint or suggestion hotline, etc.
- Develop a compliance plan.
  - Covered employees should be managed with involvement of HR, corporate or outside counsel.
  - Managers should receive basic whistleblower awareness training.
- Temporal proximity creates strong presumption
- Documentation and development of evidence is critical, given the standard (protected activity was a contributing factor).
- Keep deadlines for response to OSHA investigation, time to object and request hearing before ALJ, time to appeal to ARB.

# Upcoming Webinars:

## The Employment Law Aftermath

Tomorrow, January 16, 2014

at 12:00 noon Eastern U.S.

[www.khlaw.com/aftermath](http://www.khlaw.com/aftermath)

## Next OSHA 30/30

Please join us

at 1:00 pm Eastern U.S.

Wednesday, February 19<sup>th</sup>, 2014

[www.khlaw.com/osha3030](http://www.khlaw.com/osha3030)



# 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. On developing legal issues, he has been quoted or interviewed in *The Wall Street Journal*, Bloomberg, *Smart Money* magazine, *Entrepreneur* magazine, on "PBS's Nightly Business Report," WAVY-TV and C-SPAN. He was listed in *Smart CEO* Magazine's Readers' Choice List of Legal Elite.

Mr. Rath has extensive experience representing industry in OSHA rulemakings. He has successfully represented employers—including some of the largest in the country—in OSHA citations, investigations and appellate work before federal OSHA in regions across the country and in state plan states.

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 is the editor and co-author of the OSHA chapter of the *Employment and Labor Law Audit* (9<sup>th</sup> and 10<sup>th</sup> Editions) and a co-author of the book *Occupational Safety and Health Law Handbook* (2001).



**Manesh Rath**  
Partner  
rath@khlaw.com  
202-434-4182

# David G. Sarvadi

Mr. Sarvadi practices in the areas of occupational health and safety, toxic substance management, pesticide regulation, and product safety.

Mr. Sarvadi represents clients before a variety of federal and state enforcement agencies in legal proceedings involving OSHA citations, EPA Notice of Violations, TSCA consent orders, CPSC Notices, FIFRA Stop Sale Use and Removal Orders, and EEOC Charges of Discrimination. He works with clients in developing, reviewing, and auditing compliance programs in all of these areas, and in obtaining agency rulings on proposed or novel activities and questions, seeking interpretations of regulations as they apply to specific sets of facts. He has been counsel to the National Coalition on Ergonomics from its inception.

He has a background in occupational safety and health, having worked as an industrial hygienist for more than 15 years and became a Certified Industrial Hygienist in 1978, a designation he held until he voluntarily relinquished it in 2010. Prior to becoming an attorney, he managed a corporate industrial hygiene program for a Fortune 500 company. Mr. Sarvadi was selected by the National Academy of Sciences to participate in a panel of the Institute of Medicine that was asked to review a NIOSH study on the use of respirators. He was asked to participate because of his expertise in law and industrial hygiene.



**David Sarvadi**

Partner

sarvadi@khlaw.com

202-434-4249



# Thank you!

Keller and Heckman LLP  
1001 G Street NW  
Suite 500 West  
Washington, DC 20001

(202) 434-4182  
rath@khlaw.com



[www.khlaw.com](http://www.khlaw.com)



Manesh Rath  
rath@khlaw.com