



OSHA 30/30

A thirty minute update on OSHA law every thirty days

with **Manesh Rath**

U.S. SUPREME COURT TO EXAMINE AGENCY AUTHORITY TO REVERSE ITS OWN INTERPRETATION

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TOPICS TO BE DISCUSSED

- An understanding of the wage and hour case before the Supreme Court;
- How this case impacts the Occupational Health and Safety Administration (OSHA);
- How OSHA interpretations may vary from other Department of Labor agencies; and
- Practical tips for what employers can do.



ADMINISTRATIVE PROCEDURES ACT

- APA, § 553 Rulemaking:
 - Agency must provide notice of proposed rulemaking.
 - After notice, agency must give interested persons an opportunity to participate in rulemaking through:
 - Submission of written data
 - With or without opportunity for oral presentation
 - Right to petition for amendment or repeal of a rule
- *Bowles v. Seminole Rock & Sand Co.* (1945): no deference to an agency if the regulation is a sudden change in its interpretation.
- A rule is not enforceable if there is no way for a regulated entity to predict how the agency would have enforced it – unenforceable for ambiguity.

MARTIN V. OSHRC (1991)

- Supreme Court:
 - The agency's interpretation, and not the Commission's interpretation, must be given deference;
 - An interpretation issued in the context of enforcement "may bear on adequacy of notice."
 - Interpretation during enforcement "assumes a form expressly" authorized.



PEREZ V. MORTGAGE BANKERS ASSOC'N

Background:

- DOL regulation on the administrative exemption – non-manual work “directly related to management policies or general business operations.”
- 50 years
- Regulation contains examples, including “employees in financial services” whose duties include collecting customer info, determining best financial product, advising customer.

PEREZ V. MORTGAGE BANKERS ASSOC'N

Background (cont'd):

- DOL stood by this regulation for decades
- 2006 – DOL issued an opinion letter
 - Mortgage loan officers typically perform administratively exempt duties
- March 2010, DOL issued an “administrator interpretation” withdrawing the 2006 opinion letter.
- DOL concluded that the mortgage loan officer’s duties, though unchanged, are now not exempt.

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Procedural Posture:

- Trial Court: No one relied upon the 2006 memo, so we do not find it binding.
- D.C. Circuit: reversed. Relying on *Paralyzed Veterans*:
 - When an agency gives a definitive interpretation, and later significantly revises that interpretation, it has, in effect, amended the rule.
 - This is something it may not do without notice and comment.

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Procedural Posture (cont'd):

- Secretary of Labor petitioned the U.S. Supreme Court
- Supreme Court granted
- Fully briefed
- Argument set for December 1



IMPACT UPON OSHA RULES

- OSHA interpretations form a significant portion of OSHA law
- OSHA too has issued interpretations that either contradict a former position or that contradict well-established decisions by the OSH Review Commission



IMPACT UPON OSHA RULES

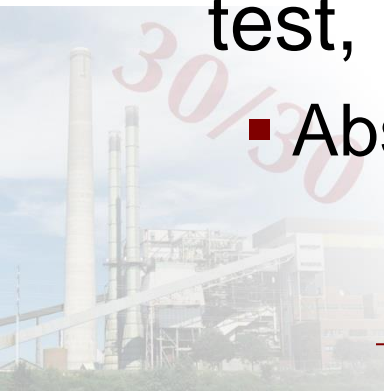
- **Who Must Pay For PPE**
 - Stanley Memo (1994): Employers must pay for personal protective equipment (PPE)
 - *Union Tank Car* (1996): OSHRC told OSHA that the Stanley memo was improper, as it comes “after twenty years of uninterrupted acquiescence in the interpretation the Commission announced in *Budd*.”
 - OSHA then promulgated the rule through traditional rulemaking



IMPACT UPON OSHA RULES

Single Employer Definition

- OSHA wanted to issue a “Repeat” violation to an employer based upon a historical violation of a sister company.
- OSHA wanted to use the standard for a single employer set forth by the NLRB.
- 2nd Circuit: OSHA has already adopted its own test, it is not able to depart from it now.
 - Absent rulemaking



IMPACT UPON OSHA RULES

Noise Standard

- OSHA historically said that an employer must implement engineering controls before resorting to personal hearing protection.
 - Hearing Conservation Amendment
- OSHA simultaneously issued an interpretation.
 - Personal hearing protection was suitable if the environmental noise was not in excess of 100dba, 8 hour TWA



SOLIS V. GRINNELL

- Fatality inspection, OSHA seeks loss prevention reports
- Insurer resists release
- Court enforces subpoena



SOLIS V. GREDE

- Foundry inspection, National Emphasis Program
- Open-ended, broad subpoena
- Audit policy protects audits
 - Adopted after *Hammermill Paper* case
 - “...will not routinely request self-audit reports when initiating an inspection, and that the agency will not use self-audit reports as a means of identifying hazards upon which to focus during an inspection.”
- Courts seeks OSHA’s reason for request
 - OSHA attorney refuses to be specific
- Court rejects subpoena
- Not the end of the case!

BP PRODUCTS NORTH AMERICA, INC.

- OSHA July 28 Final Policy: OSHA will not use an employer's own voluntary internal safety and health audit to identify hazards.
- OSHA intentionally violated its Final Policy by making "extensive use" of the employer's own audit report to identify and issue citations.
- ALJ: OSHA's actions were in "blatant contravention" of its Final Policy.
- (ALJ did not, however, vacate those alleged violations.)

WHAT EMPLOYERS SHOULD DO

- When an agency issues a new interpretation changing obligations:
 - Consider a challenge under the APA
 - *Perez v. Mortgage Bankers Assoc'n* – the association filed a complaint in district court alleging that the DOL had violated the APA
- When faced with enforcement in violation of established agency interpretation:
 - Moving for exclusion of improper agency interpretation



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.



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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 and investigations 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* (9th and 10th Editions) and a co-author of the book *Occupational Safety and Health Law Handbook* (2001).



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Please join us
at 1:00 PM Eastern U.S.
Wednesday, November 19, 2014
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The Employment Law Aftermath
Live Lunch Meeting
Tuesday, January 27th, 2014
at 12:00 noon to 2:00 pm Eastern U.S.

Web Encore
Thursday, January 29th, 2014
at 12:00 noon Eastern U.S.
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