



OSHA 30/30

A thirty minute update on OSHA law every thirty days

with **Manesh Rath**

OSHA ENFORCEMENT RELATING TO COMBUSTIBLE DUST

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LAWRENCE P. HALPRIN

Lawrence Halprin is a partner in Keller and Heckman's workplace safety and health, chemical regulation and litigation practice groups. He is nationally recognized for his work in workplace safety and chemical regulation. His workplace safety and health practice covers all aspects of legal advocacy, including: representing clients in OSHA and MSHA investigations and enforcement actions; providing compliance counseling and training; conducting incident investigations, compliance audits and program reviews; participation in federal (OSHA, MSHA and NIOSH) and state rulemakings and stakeholders processes; bringing and intervening in pre-enforcement challenges to final agency rules; advising on legislative reform and oversight; and participation in the development of national consensus standards under the ANSI process, and TLVs under the ACGIH process.

Mr. Halprin's engineering and financial background and extensive knowledge of OSHA rulemakings have greatly enhanced his ability to: provide compliance counseling and represent clients in enforcement actions; and evaluate and critique rulemaking proposals and suggest alternative approaches. On behalf of one or more clients, Mr. Halprin has participated in almost every major OSHA rulemaking over the past 25 years as well as numerous Cal-OSHA rulemakings.



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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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TOPICS TO BE DISCUSSED

- The facts and background behind *American Phoenix* (final ALJ decision) and *Cooper Tire* (on appeal from ALJ decision)
- Understanding the current OSHA standards that apply to CD
- An update on OSHA CD rulemaking
- Practical steps that employers can apply in light of these two recent cases

COMBUSTIBLE DUST REQUIREMENTS

- No existing OSHA standard specifically directed at combustible dust (Calif. has standard)
- OSHA National Emphasis Program (NEP)(2008)
 - OSHA Standards
 - General Duty Clause
 - References NFPA 654
- Rulemaking effort currently underway
- NFPA 652 and Updates to other NFPA standards

GENERAL DUTY CLAUSE

- A condition existed that presented a hazard
- The condition is recognized as a hazard by the employer or by industry
- Hazard is likely to cause death or serious physical harm
- A feasible and effective means of abatement is available

A CONDITION THAT IS A HAZARD

- “Combustible Dust” Explosion Hazard
 - Fuel
 - Oxygen
 - Ignition source
 - Dispersion (or concentration) at or above MEC
 - Confinement
- In addition, the particulate size, size distribution, chemistry, moisture content, and shape can impact combustibility
- Often MEC data can only be ascertained by testing

SECRETARY V. AMERICAN PHOENIX

- Originally OSHA entered premises under a noise complaint
- Noticed that the operation involved tire dust
- Returned to take samples in the dust collection system – ducts and bins
- American Phoenix had a system for dust collection to manage this hazard
- An outside consultant had earlier advised them to increase their maintenance activities for that system

SECRETARY V. COOPER TIRE & RUBBER CO.

- OSHA conducted inspection in Cooper Tire's Ohio facility, referral to conduct inspection of sister site in Mississippi
- Found accumulated dust on overhead beams, other structural elements
- CSHO selected those spots because that was "where the most dust was collected... and it was easier to get to."

OSHA'S PRESENTATION OF CASES

- Sample taken and tested by OSHA at some points in process was adequate to demonstrate combustibility of dust throughout process (representative)
- Even though there may be less explosive mixtures elsewhere, employer has not shown that the dust will always result in a non-explosive dust mixture
- Given the thickness of the settled dust at sample area, should presume it could be suspended in air in sufficient concentration to present explosion hazard
- Dust could, theoretically, ignite through static discharge or fire that started in other parts of plant

ALJ DECISIONS (BASED ON EVIDENCE)

- Must show that a hazard actually existed, not a theoretical hazard
- Burden rests on OSHA to demonstrate presence of five elements needed for explosion at cited location
 - Combustible dust:
 - OSHA cited combustible dust hazard in dust collectors but did not take samples there
 - All expert witnesses agreed that the dust chemistry varied from location to location
 - Airborne at MEC: MEC for dust sample was unknown, filter cake in dust collectors falls off in chunks

ALJ DECISIONS (BASED ON EVIDENCE)

- Presence of oxygen: only uncontested point
- Sufficient Ignition sources
 - Evidence that carbon black by itself requires very high ignition temperatures and historical lack of evidence of dust explosions
- Confinement: disputed whether dust collector would rupture or simply contain any explosion



FUTURE OSHA CD ENFORCEMENT

- Without evidence, court cannot extrapolate combustibility data from a sample to other parts of the plant
- Cooper Tire: 3 years of discovery
- Future Enforcement
 - OSHA has learned much from these cases
 - Options
 - Cite and settle
 - Cite and pursue intensive enforcement investigation
 - Develop standard to ease burden of proof

CURRENT STATUS OF OSHA RULEMAKING

- 2009: OSHA published an Advanced Notice of Proposed Rulemaking (ANPR) and requested comments
- 2009-2010: OSHA held stakeholder meetings in Washington, DC, Atlanta, and Chicago.
- 2011: OSHA held an “expert forum”
- Small Business Regulatory Enforcement Fairness Act (SBREFA) panel may convene February 2016.

WHAT CAN EMPLOYERS DO

- Assess workplace for potential combustible dust hazards (will require qualified expert not wedded to rote implementation of NFPA standards)
 - Info will be subject to discovery absent privilege
- Must include all relevant areas of workplace: pneumatic and manual conveying, ventilation, dust collection systems
- Compare dust management practices against best practices and current industry standards
- Be prepared to hire an expert to assist in contesting or settling citations

Next OSHA 30/30

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Wednesday, July 22nd, 2015
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The Employment Law Aftermath

**Thursday, July 30th, 2015
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