



OSHA 30/30[®]

A thirty minute update
on OSHA law every thirty days

with
Manesh Rath

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Second Circuit Ruling Has Critical Implications for All
Warehouse, Distribution, and Transportation Operations

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Manesh 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.



Manesh Rath

Partner

rath@khlaw.com

202-434-4182

Taylor 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

- ◆ Background of the Incident
- ◆ OSHA's Investigation
- ◆ ALJ Decision
- ◆ OSHRC Decision
- ◆ Second Circuit Ruling
- ◆ What Employers Should Do
- ◆ Off the Record

Background of the Incident

- ◆ In a Walmart Distribution Center in Johnstown, NY, pallets are placed on “selective racking,” back-to-back on orange load beams
- ◆ Each racking system is placed directly on top of each other, leaving a 42-inch gap under each pallet
- ◆ Pallets are stacked 40-50 feet high
- ◆ Merchandise is unloaded through aisles between stacked pallets



Background of the Incident



- ◆ On February 25, 2017, an employee of the distribution center was seriously injured after she was struck by falling pallets
- ◆ The pallets were pushed from the highest rack by a forklift operated by another employee
- ◆ After the merchandise fell 40-50 feet, it struck the employee on the head, shoulders and back
- ◆ The employee was diagnosed with long term damage to her neck and spine

OSHA's Investigation

▲ Keller&

Employees admitted
products regularly fell
through the storage racks
and landed in the aisles.

General Manager indicated
that he was aware of the
condition of stored material
falling through the racking

OSHA issued a citation for
exposing employees to being
struck by “unstable material
storage”

OSHA issued a \$10,864.00
penalty

Materials Handling and Storage Standard

- ◆ 29 C.F.R. 1910.176(b) states that storage of material shall not create a hazard
- ◆ Bags, containers, bundles, etc., **stored in tiers** shall be stacked, blocked, interlocked and limited in height so that they are stable and secure against sliding or collapse.
- ◆ Thus, for standard to apply, materials must be **both** 1) **stored**, and 2) **in tiers**



ALJ Decision

Walmart

- Argued that pallets were not “stored” but “in the process” of being stored
- Work rules to keep employees from the forklift area
- Manager looked into alternatives

OSHA

- Alleged exposure to violative conditions
- Employee complaints and testimony to prove knowledge
- Argued feasible means of abatement

ALJ

- Found standard applicable because the material was on a storage rack
- Affirmed the citation, penalty
- Denied grace period to abate

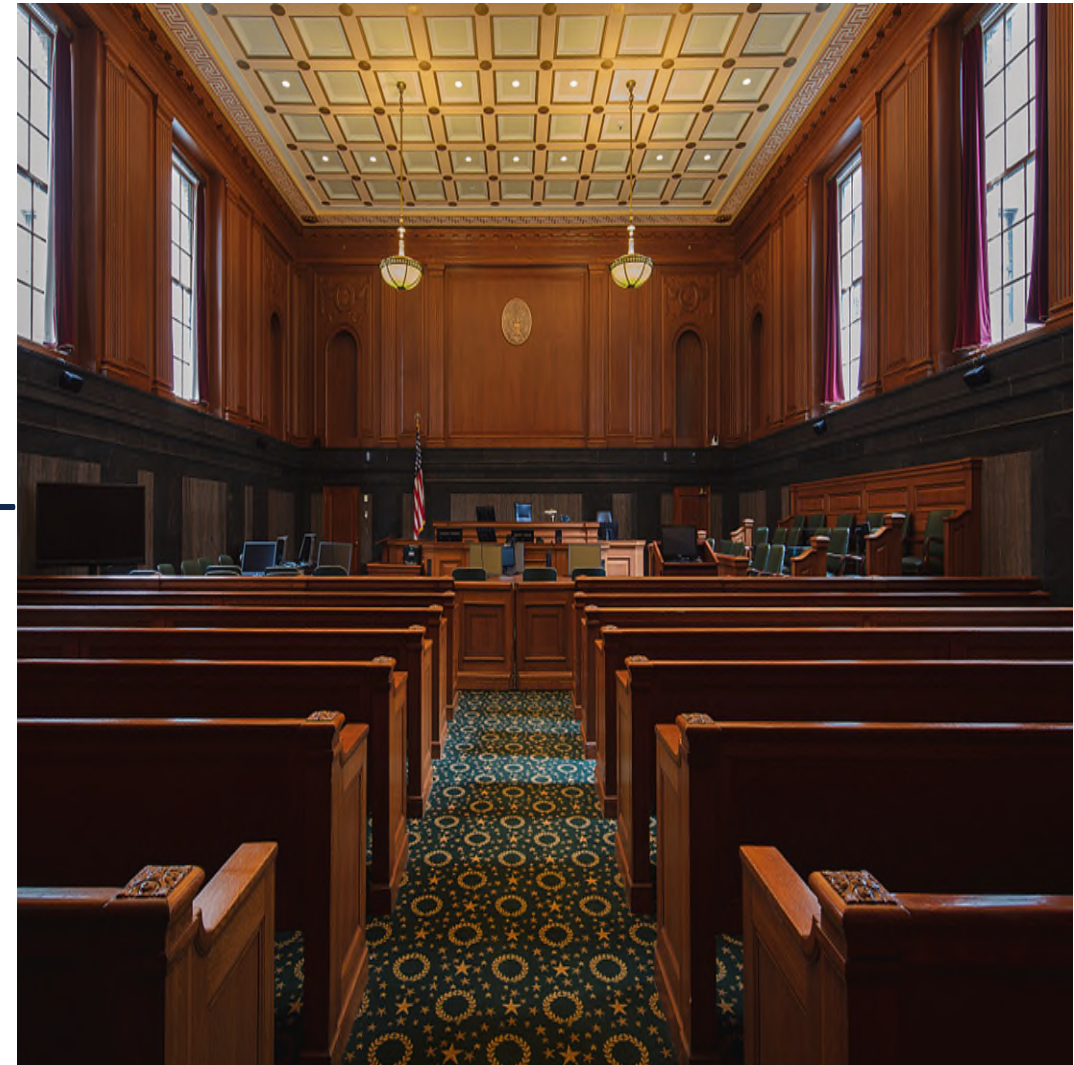
Review Commission Decision



- ◆ Std: introduction is overbroad, std only applies to material “stored in tiers”
- ◆ Relied on Webster’s Dictionary definition of “tier” and “layer” in that definition
- ◆ Walmart’s storage system included space between the top of the merchandise on each pallet and the bottom of the next rack level
- ◆ Found that standard did not apply
- ◆ OSHA appealed the RC decision

2nd Circuit Decision

- ◆ Stated that the RC cherry-picked the word “layer” from the definition of “tier”
- ◆ Court uses definition of “tier” from other dictionaries published around the time the standard was published – “one of a series of rows placed above one another”
- ◆ Drafters of the standard did not use the word “tierable”



2nd Circuit Decision



- ◆ The standard does not limit applicability to items placed directly on top of one another
- ◆ Secretary's competing interpretation of the language of the standard is reasonable (Auer deference)
- ◆ Remanded to the OSHRC for further proceedings
- ◆ Commission did not reach the issue of whether there was sufficient record evidence of a violation because it only ruled on applicability

What Employers Should Do



Material stored on pallets on shelves or support rails: subject to OSHA's Materials Handling and Storage Standard

Stacked, blocked, interlocked, and limited in height so that they are stable and secure against sliding or collapse.

Cordon off space below during material handling task

Inspect pallet loads to confirm the do not exceed rail capacity, shelf capacity, or pallet load capacity.



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Stick around for Off the Record

Manesh Rath

Partner

1001 G Street N.W. Ste. 500W

202.434.4182

rath@khlaw.com



Taylor Johnson

Associate

1001 G Street N.W. Ste. 500W

202.434.4255

johnsont@khlaw.com

