



OSHA 30/30®

A thirty minute update
on OSHA law every thirty days

with
Manesh Rath

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OSHA Citation Vacated On The Grounds That Cited Entity Was Not An Employer

November 16, 2022

Taylor Johnson



Taylor Johnson is an attorney in Keller and Heckman's litigation and OSHA practice groups specializing in the area of employment law, workplace safety and health, 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, 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.



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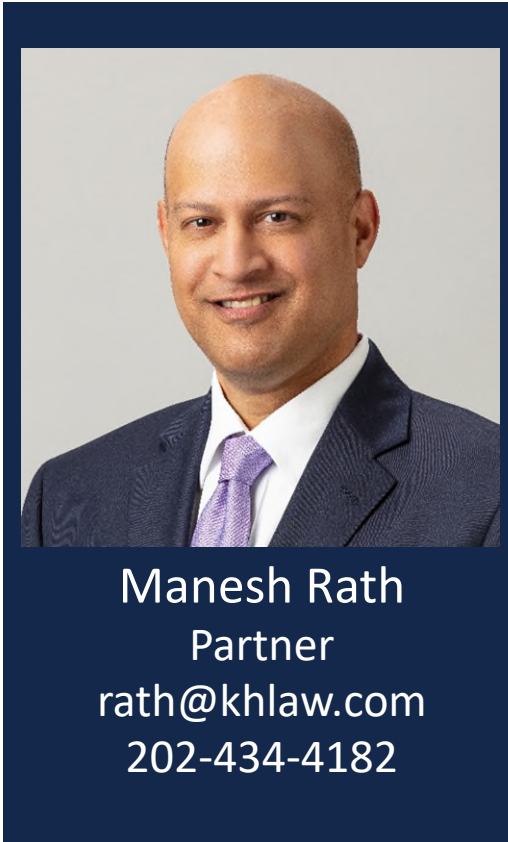


Manesh Rath is a partner in Keller and Heckman's litigation and OSHA practice groups. He has been the lead amicus counsel on several cases before the U.S. Supreme Court including *Staub v. Proctor Hospital* and *Vance v. Ball State University*.

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.



Topics to be Discussed



- ◆ Background Regarding the Incident
- ◆ Discussion of Definition of Employer
- ◆ OSHA's Arguments
- ◆ Respondent's Arguments
- ◆ Darden Test
- ◆ ALJ Decision
- ◆ Update on Independent Contractor Classification
- ◆ What Employers Should Do
- ◆ Off the Record

Background of the Incident

- ◆ On June 29, 2020 a Compliance Safety and Health Officer in Columbia Station Ohio investigated a worksite where Mr. Nemeckay was working on a roof
- ◆ The CSHO noticed three people working on the roof without apparent means of fall protection
- ◆ After his investigation, the CSHO issued Mr. Nemeckay four serious violations regarding:
 - ◆ Protective helmets;
 - ◆ Eye protection;
 - ◆ Fall protection; and
 - ◆ Portable ladders
- ◆ Total penalties amounted to \$12,144; Mr. Nemeckay contested the citation



Background of Incident



- ◆ Mr. Phil Nemeckay is the sole proprietor of Nemeckay's Roofing
- ◆ He was asked to install shingles purchased by the Homeowner; this agreement was never put in writing
- ◆ On June 29, 2022 Nemeckay arranged for two other individuals to assist him with this project
- ◆ He represented himself throughout these proceedings

What is an Employer?

- ◆ Section 3(5) of the OSH Act defines employer as **“a person engaged in a business affecting commerce who has employees”**
- ◆ Only an employer as defined may be cited for an OSHA violation
- ◆ The Secretary bears the burden of establishing whether or not a respondent is an employer
- ◆ In the instant case, Mr. Nemeckay denied that he was the employer of the other two workers



Arguments

OSHA Argued:

- Nemeckay agreed to work for profit and to perform that work, he enlisted the assistance
- Therefore, Armstrong and “Worker Two” were employees of Nemeckay Roofing

Nemeckay Argued:

- He is not engaged in business affecting commerce because Nemeckay Roofing is a small sole proprietorship
- Armstrong and Worker Two were not his employees

Darden Test

The judicial precedent established by Darden incorporates traditional agency law criteria for identifying employer-employee relationships

Darden establishes eleven specific factors courts use when evaluating an individual worker's status

Crucial factor is the hiring party's right to control the manner and means by which the product is accomplished

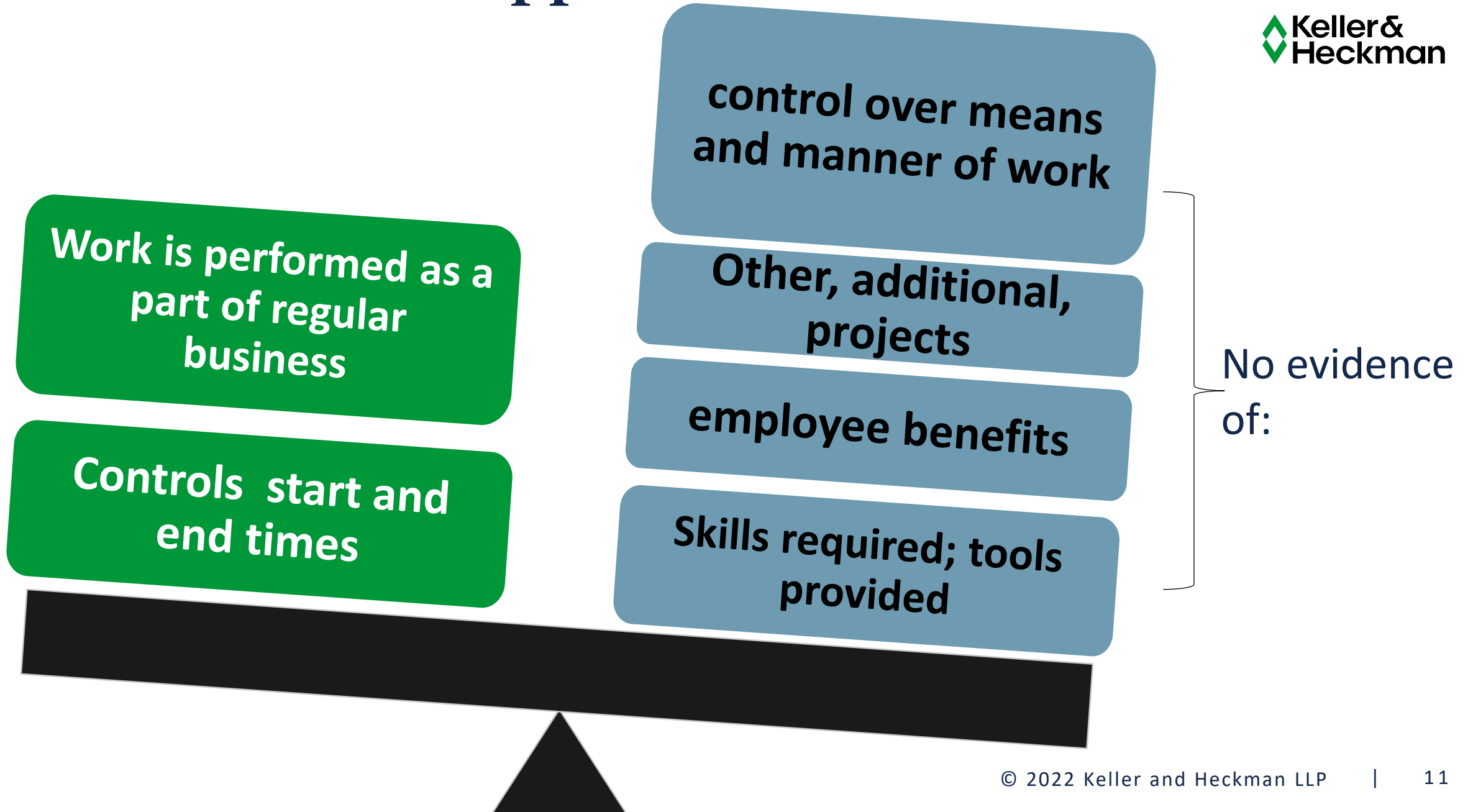


ALJ Decision

- ◆ Nemeckay did engage in business affecting commerce
- ◆ To be an “employer”, one must have control over workers, not just the results of their work
- ◆ After analysis of Darden factors, found a lack of evidence to establish a “master-servant” relationship



Darden Factors Applied



Update on Independent Contractor Classification

- ◆ Under the Fair Labor Standard's Act, independent contractors are distinct from employees
- ◆ The Department of Labor issued a Notice of Proposed Rulemaking on October 13, 2022
- ◆ This new proposed rule would change the factors that determine IC status
- ◆ Comment period is open until November 28, 2022



What Employers Should Do

Darden factors apply to specialists, consultants, and third-party vendors	Remember Darden factors when drafting contracts	Comment and monitor DOL Proposed Rule
Tell the truth	Consider risks of representation pro se	Contractual representations about workers' ability to accept other jobs
	Contractual terms allocating control over how tasks are performed	



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