



# OSHA 30/30<sup>®</sup>

A thirty minute update  
on OSHA law every thirty days

with  
**Manesh Rath**

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**Landmark Case on OSHA "Single Employer" Test  
to be Decided in 3rd Circuit**

December 21, 2022

# 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.



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# 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.



# Topics to be Discussed

- ◆ Review of UHS Corporate Structure
- ◆ Background of Investigation/Citation
- ◆ Analysis of Review Commission Decision
- ◆ Briefs before the Third Circuit
- ◆ Discussion of Single Employer Test
- ◆ What Employer's Should Do
- ◆ Off the Record

# Corporate Structure



**Universal Health Services  
(UHS)**

**UHS of Delaware, Inc.**

**UHS Westwood Pembroke**

**Westwood Lodge**

**Pembroke Hospital**

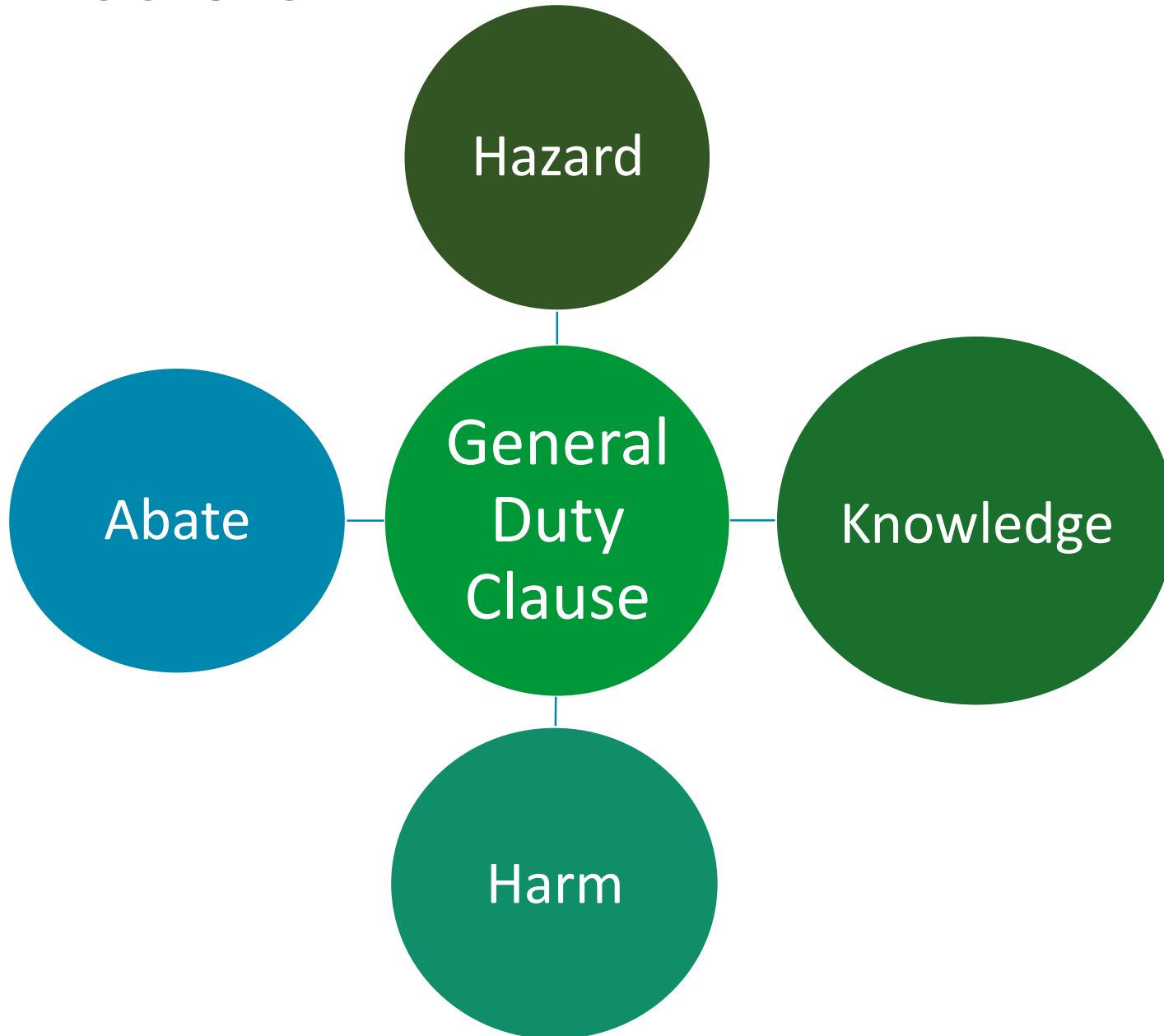
**Lowell Treatment  
Center**

# Facts of the Investigation/Citation



- ◆ OSHA received multiple complaints of patient-on-staff aggression resulting in staff injuries
- ◆ Inspections of Pembroke Hospital in 2015, 2016, and new complaints in 2017
- ◆ OSHA issued a citation under the general duty clause to UHS Pembroke and UHS DE
- ◆ Citation classified as repeat due to previous GDC citation issued to Lowell Treatment Center

# ALJ Decision



ALJ found that the Secretary proved all four elements of the General Duty Clause

# OSHA's Single Employer Test

**Share a common  
worksite**

**Have interrelated  
and integrated  
operations with  
respect to safety  
and health matters;  
AND**

**Share common  
president,  
management,  
supervision, or  
ownership**



# ALJ Discussion of Single Employer

**Pembroke and UHS  
DE have different  
worksites – no UHS  
DE employees were  
exposed to the  
hazard**

**Related but distinct  
businesses (patient  
care v. management  
consulting); AND**

**No daily oversight  
by UHS DE, UHS DE  
with its own  
management  
structure and  
separate leadership**

# Review Commission Decision – Single Employer



**UHS DE employees onsite at Pembroke, mutual access to a hazard is not a prerequisite**

**UHS DE with direct supervision over staff, providing care, policy development, and finances; AND**

**Pembroke's CEO and CFO are UHS DE employees, UHS DE integrally involved in day-to-day management**

# Review Commission Decision – Characterization

- ◆ Review Commission affirms the citation as repeat
- ◆ Pembroke Hospital and Lowell Treatment center incidents involve employees exposed to an almost identical hazard
- ◆ Burden shifts to Respondent to rebut Secretary's prima facie showing of similarity
- ◆ Respondent fails to do so as arguments focus almost exclusively on abatement



# Appealed to 3<sup>rd</sup> Circuit Court of Appeals

- ◆ Case is appealed to 3<sup>rd</sup> Circuit Court of Appeals
  - ◆ UHS – Commission decision represents a “seismic shift in the law” and is arbitrary and capricious
  - ◆ OSHA – RC followed single employer test which would be drastically weakened if RC decision is overturned
- ◆ Court will rule on single employer issue as well as characterization of citation



# What Employers Should Do

OSHA's failure to issue citation in prior inspection may not be an effective defense

Citations issued to "related" entities *could* lead to repeat classification

Control over day-to-day operations and finances can lead to single employer determination

Management company's employees onsite by clear contractually defined role

Management company should have defined powers with respect to operational decisions

Shared safety procedures should be republished at the entity level



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Please join us  
at 1:00 PM Eastern U.S.  
January 25, 2023

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Please join us at 1:00 PM Eastern U.S.  
Wednesday, January 11, 2023  
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Please join us at 10:00 AM Eastern U.S.  
Wednesday, February 8, 2023  
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Next session to be scheduled  
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Stick around for Off the Record

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