



OSHA 30/30[®]

A thirty minute update
on OSHA law every thirty days

with
Manesh Rath

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NLRB and OSHA Enter Pact to Share Resources and Increase Enforcement

December 13, 2023

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 through 2023 (and Lawyer of the Year in 2023); 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

- ◆ OSHA and NLRB Memorandum of Understanding
- ◆ Section 7 of the NLRA and Section 11(c) of the OSH Act
- ◆ NLRA Rights to Discuss Safety and Health
- ◆ How Do Weingarten Rights Apply?
- ◆ Surveillance and Confidentiality
- ◆ Impact on Unionization Efforts
- ◆ What Employers Should Do

OSHA and NLRB Memorandum of Understanding (MOU)

- ◆ Effective: Oct 31, 2023
- ◆ Sharing of information
- ◆ Coordinated investigations and enforcement (overlapping statutory violations)
- ◆ Reciprocal training, education, and outreach
- ◆ Expected cooperation in state plan states



How Will the MOU be Used? - Sharing of Information



- ◆ OSHA will provide “potential victims” of unfair labor practices who have not filed a complaint with NLRB with NLRB contact information
- ◆ If employee files an untimely 11(c) complaint, OSHA will recommend that the employee file a charge with the NLRB
- ◆ NLRB will share information related to safety/health hazards with OSHA

OSH Act 11(c): What Types of Whistleblowing Does MOU Cover?

- ◆ Employers may not discharge or discriminate against employees who:
 - ◆ File an OSHA complaint
 - ◆ Cause or initiate a proceeding under the OSH Act
 - ◆ Testify to OSHA
- ◆ 30 days file a complaint with the Secretary
- ◆ In addition to 11(c), Secretary of Labor has delegated to OSHA enforcement of protections for employees who suffer retaliation for engaging in protected activities under more than 20 federal laws



NLRA Section 7: Concerted Activities



- ◆ "Employees shall have the right to ... engage in **concerted activities** for the purpose of collective bargaining or other mutual aid or protection...."
- ◆ MOU states that "both NLRA and OSH Act protect the right of employees to complain to management about unsafe or unhealthful working conditions"
- ◆ Discussing salary/benefits is also protected

NLRA Section 8(a)(1) – What Employers Can't Do

- ◆ Threaten employees with adverse consequences if they engage in union or other concerted, protected activities
- ◆ Interrogate employees about union activities
- ◆ Promise benefits to employees if they reject the union
- ◆ Surveillance of employees engaged in protected activities



Weingarten Rights



- ◆ Section 7 gives union-represented employees the right to have their representative present during an interview
- ◆ An employee's requested representative, which may be a union steward, business agent or officer, or fellow employee, is often referred to as a "Weingarten representative."
- ◆ Union representatives may not tell an employee what to say

Surveillance Restrictions

- ◆ *Memorandum GC 23-02* - restrictions on employers engaging in surveillance of attempts to organize a union, unlawfully taking pictures of employees engaged in protected activity, and reviewing employee social media
- ◆ Employer's interests must be balanced against the rights of employees to exercise their Section 7 rights



Confidentiality of Accident Investigations



- ◆ Under OSH Act: Employers have a duty to investigate workplace incidents
- ◆ NLRB 2019 decision - confidentiality mandates during the course of workplace investigations are presumptively lawful
- ◆ Legitimate and substantial business justification for the decision to restrict employees' discussions of the incident and investigation.

Promoting Unionization

- ◆ Recent joint fact sheet issued by NLRB and OSHA touts that "unions can add tremendous value to health and safety programs at all stages."
- ◆ OSHA's proposed walkaround rule – comment period has closed, and finalization is pending



What Employers Should Do

Cross-train safety and health team on Section 7 duties

Review employee handbook for confidentiality clauses

Develop policy around electronic communication/social media

Revisit investigations standard operating procedures

Investigations focused on safety and health should not encroach on other terms or conditions of work

Reevaluate structure, practices, composition of safety committees

Safety investigations that could result in discipline may affect employee's right to have rep present



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January 2024 OSHA 30/30 Date Coming Soon!

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Stay Tuned for
2024 Dates!



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when you receive
them.



Thank You

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