



OSHA 30/30[®]

A thirty minute update
on OSHA law every thirty days

with
Manesh Rath

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Criminal Liability for Individual Executives Following OSHA Inspection

March 27, 2024

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 2024, and in 2023, selected in his field as Lawyer of the Year; 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.



What We're Going to Talk About Today

- ◆ The Didion Milling Explosion
- ◆ Combustible Dust
- ◆ The OSHA Inspection and Didion's Logbooks for Cleaning and Maintenance
- ◆ The Indictment Against Didion and Six Executives
- ◆ What Employers Should Do



The Didion Milling *Explosion* Background

- ◆ Grain mills contribute grain dust in high volumes.
- ◆ Dust accumulates on horizontal surfaces and in air handling systems.
- ◆ Dust also collects inside dust capture receptacles.
- ◆ Inside an air filter, an explosion was set off. Deflagration spread in waves to the general work area, setting off further deflagration throughout the inside of the mill.
- ◆ Five workers died. Many injured, some severely.



Combustible Dust as Regulated by OSHA (1)

- ◆ OSHA Standard = Grain Handling Standards
 - ◇ Requires written housekeeping program to manage dust
 - ◇ Regular frequency, sufficient methods for managing dust accumulation
 - ◇ Filter collectors, baghouses, capture dust. Negative pressure pulls dust into baghouse, filtered, air exits
 - Focal point for combustibility hazard
 - Locate outside of facility or installed with suppression system or explosion venting.
- ◆ Grain is organic, capable of catching fire



Combustible Dust as Regulated by OSHA (2)

- ◆ When grain dust is sufficiently fine, it can be suspended in air and, if concentrated enough, can cause an explosion, a flash fire.
- ◆ Deflagration can kick up more dust and ignite it. Successive explosions.
- ◆ Sanitation schedule for accumulated grain dust is essential
 - ◇ To address environmental emission, combustibility, infestation, mold, pathogens
- ◆ Sanitation schedule records
 - ◇ Signed off by shift superintendent, then food safety superintendent



OSHA's Inspection After the Explosion

- ◆ When conducting investigation, OSHA examined the sanitation logbook,
- ◆ Conducted interviews. (We don't know what information OSHA learned during confidential interviews.)
- ◆ Then it asked for email correspondence.



The Discovery

- ◆ Supervisors shared the auditor's tour route to staff in order to clean those areas up ahead of time
- ◆ Supervisors shut down or limited normal operations to address pre-audit issues
- ◆ Forged initials on the sanitation logbook, looking like cleanings had been done.
- ◆ Backdated shift superintendent sign-offs
- ◆ Backdated food safety superintendent sign-offs



The Discovery (2)

90. **Overt Act Number 6:** On or about February 12, 2016, LENZ emailed the December 2015 baghouse log – which contained about 130 blank entries that were shaded red – to HESS, NIEMEYER, CLARK, and others. LENZ wrote “I need the red areas filled in and sent back to me.”

The Discovery (3)

93. **Overt Act Number 9:** On or about October 19, 2016, MESNER emailed NIEMEYER and others directing them to “bring the MSS book up-to-date” because it would be looked at during a food safety audit the next day and to leave the logbook on MESNER’s desk “once completed.”

The Discovery (4)

95. **Overt Act Number 11:** On or about January 27, 2017, with the understanding that the superintendents would backfill the blank entries, MESNER emailed HESS, NIEMEYER, CLARK, and others stating that the “normal missing tasks and superintendent sign-offs are present” in the MSS logbook.

Grand Jury and Criminal Indictments

- ◆ Grand jury in the U.S. District Court for the Western District of Wisconsin
- ◆ Indicted Didion and six management officials at the corn mill
- ◆ Nine criminal counts
 - ◇ Willful violations of OSH Act
 - ◇ Conspiracy to commit fraud
 - ◇ Conspiracy to conceal violations and unsafe conditions
 - ◇ Hess, Clark and Didion obstructed justice by providing false and misleading testimony after the explosion



Outcome in Criminal Charges

- ◆ Vice President Derrick Clark: Convicted. Conspiracy to falsify logbooks; false compliance certifications; obstructing OSHA investigation.
- ◆ Environmental Mgr. Joseph Winch. Pleaded guilty. Conspiracy to falsify compliance certifications.
- ◆ Food Safety Superintendent Shawn Mesner convicted of conspiracy to commit fraud and to falsify the sanitation log.
- ◆ Shift Superintendents Anthony Hess, Joel Niemeyer, and Michael Bright. All convicted. Crimes re falsification of sanitation log.



Outcome in Criminal Charges (2)

- ◆ Nicholas Booker pleaded guilty previously to making false entries in Didion Milling's cleaning logbook and false entries in baghouse log.
- ◆ Didion the company pleaded guilty to falsifying environmental and sanitation logs. Sentenced to pay \$10.25 million in restitution to the victims of the May 2017 explosion, a \$1 million fine, as well as to serve five years of probation with special conditions related to oversight of Didion's operations



What Employers Should Do:

- ◆ Compliance and Governance Policies
- ◆ Training for managers on how to handle inspections
- ◆ Training for managers on document management, recordkeeping
- ◆ In-house or outside counsel should participate in responding to inspection requests, subpoenas, discovery requests





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Record**

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