



# OSHA 30/30®

A thirty minute update  
on OSHA law every thirty days

with  
**Manesh Rath**

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## Judge Rejected OSHA's Claim that Employer Should Have Recognized Violence as a Hazard Under the General Duty Clause

April 16<sup>th</sup>, 2025

# 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. He has been called to testify before Congress in several hearings relating to OSHA law.

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 interviewed in The Wall Street Journal, Bloomberg, Smart Money, Entrepreneur, on PBS's Nightly Business Report, and C-SPAN.

Mr. Rath served on the Board of Advisors for the National Federation of Independent Business (NFIB) Small Business Legal Center and on the Society For Human Resources (SHRM) Special Expertise Panel for Safety and Health law for several years.

He was voted by fellow members to The Best Lawyers in America 2016-2025 (in 2024, was voted as Lawyer of the Year); selected by Super Lawyers 2016 – 2023; and by corporate counsel as the 2017 Lexology winner of the Client Choice Award.



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# Benjamin Idzik



Benjamin (Ben) Idzik advises Keller and Heckman clients on regulatory compliance matters under state and federal environmental, occupational safety and health, transportation, and employment laws.

Specifically, Ben assists clients on issues arising under the Occupational Safety and Health (OSH) Act, Federal Motor Carrier Safety Administration (FMCSA) regulations, and U.S. Environmental Protection Agency (EPA) regulations, such as the Toxic Substances Control Act (TSCA) and the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).

Prior to joining Keller and Heckman, Ben focused on regulations affecting trade associations and their members. While in law school, Ben served as a legal intern for an advanced nuclear reactor and fuel company and was the Note & Comment Editor for the Catholic University Law Review. He also completed a clerkship at the Montgomery County Circuit Court.



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# Topics to Be Discussed

- ◆ Secretary v. Professional Security Consultants Inc. – Background
- ◆ The Facts of the Case – Interactions with the Shooter
- ◆ A History of OSHA's Revolving Position
- ◆ Elements of General Duty Clause
- ◆ OSHA's Allegations
- ◆ ALJ's Holding
- ◆ What Employers Should Do

# Secretary v. Professional Security Consultants Inc. - Background

- ◆ Boise Towne Square Mall is a significantly sized mall
  - ◆ 130 boutiques and several anchor stores
- ◆ The owner, Brookfield Properties, engaged Professional Security Consultants Inc. (PSC) as the security firm for the mall
- ◆ On any shift, there may have been three guards staffing the mall, and one over night



# Secretary v. Professional Security Consultants Inc. - Background (2)

- ◆ Guards are trained on de-escalation tactics and active shooter events
- ◆ The mall prohibited firearms on its premises
- ◆ Guards were unarmed and did not wear bullet proof vests



- ◆ The Boise Police Department stated that it would not respond to calls about customers violating the firearms ban

# The Facts of the Case – Interactions with the Shooter

- ◆ By June 2020, Jacob Bergquist had become well known to PSC guards
  - ◇ He would frequently enter the mall brandishing a firearm
  - ◇ Guards would inform him of the ban and he would leave
  - ◇ He claimed that he working with the Boise police to see how people would respond to a former felon carrying a firearm. (Boise police informed PSC that this was false)
- ◆ This type of encounter occurred many times over the next year, and each time, Bergquist left the mall upon verbal warning

# The Facts of the Case – Interactions with the Shooter (2)

- ◆ In October 2021, a guard was patrolling and spotted Bergquist with a firearm
  - ◇ She radioed to her dispatch, then advised Bergquist of the Mall's ban on firearms
  - ◇ Bergquist started to walk away, then suddenly turned, drew, and fired
  - ◇ In seconds, he had killed the guard and shot several other people, killing one
- ◆ OSHA came, conducted interviews, and issued a citation to PSC under the General Duty Clause



# A History of Violence – OSHA's Revolving Position

- ◆ OSHA interpretation in Field Inspection Manual: workplace violence is inherently unforeseeable
- ◆ 2017 FOM. OSHA: In some industries, workplace violence is an occupational hazard that can be avoided or minimized with precautions
  - ◇ Late night retail, social service, health care, correctional facilities
- ◆ 2019 onward, OSHA has used General Duty Clause



# Elements of General Duty Clause

A condition exposed workers to a hazard

The hazard was recognized in the industry

Likelihood that hazard could lead to death or serious harm

A feasible means exists for correcting the hazard

# OSHA's Allegations

- ◆ **OSHA** - PSC should not have allowed its guards to approach individuals like Bergquist
- ◆ **OSHA** - Bergquist's repeated violations of the ban his argumentative behavior, and his bizarre comments to guards created a recognizable hazard
- ◆ **Citation:** Four abatement steps
  - ◇ Develop a workplace violence program
  - ◇ Implement an effective system to track repeat offenders of the mall's firearms ban
  - ◇ Train guards to enforce a no-approach policy for repeat offenders
  - ◇ Conduct re-training for violence in retail



# Administrative Law Judge's Holding

- ◆ **Court:** OSHA did not offer any guidance as to when interactions with customers might fall outside of OSHA's jurisdiction
- ◆ The Act does not create a strict liability standard
  - ◇ The general duty was intended to be an achievable one
- ◆ Bergquist's type of violence is not legally cognizable because it is inherently idiosyncratic



# Administrative Law Judge's Holding

- ◆ Citing an employer for the hazard posed by a mass shooter is outside the scope of OSHA's delegated authority
- ◆ Violence in public places is a risk that is not particular to the workplace
- ◆ PSC recognized violence as a potential hazard and had a system in place to address it
- ◆ But no evidence that PSC knew that approaching an armed patron to discuss the Mall's firearms ban would result in a mass shooting event



# What Employers Should Do

- ◆ Evaluate Historical Patterns of Workplace Violence
  - ◇ At the Establishment
  - ◇ In the neighborhood
  - ◇ For similar employers
- ◆ Double check state plan states and state legislation
- ◆ Develop Training
  - ◇ For reporting threats
  - ◇ Handling emergencies



# What Employers Should Do (2)

- ◆ Develop Security Systems
  - ◇ Training on systems
  - ◇ Periodic Testing
  - ◇ Reevaluation based on ongoing hazard analyses
- ◆ Work with workplace security consultants, law enforcement
  - ◇ Maintain correspondences in records





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at 1:00 p.m., Eastern Time

**May 21<sup>st</sup>, 2025**

[www.khlaw.com/OSHA3030](http://www.khlaw.com/OSHA3030)



Please join us at 10:00 AM Eastern U.S.

June 11<sup>th</sup>, 2025

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Please join us at 1:00 PM Eastern U.S.

June 11<sup>th</sup>, 2025

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# Thank You

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