A man in a blue suit and purple tie is shown from the waist up on the left side of the image. Behind him is a calendar with dates 14, 15, 16, 21, and 23 visible. The background on the right is an industrial facility with tall chimneys and a sunset sky.

OSHA 30/30[®]

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Manesh Rath

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Eleventh Circuit Considered Economic Feasibility Defense for Employer's Alleged Failure to Supervise Subcontractor

March 25, 2026

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 2023, 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.



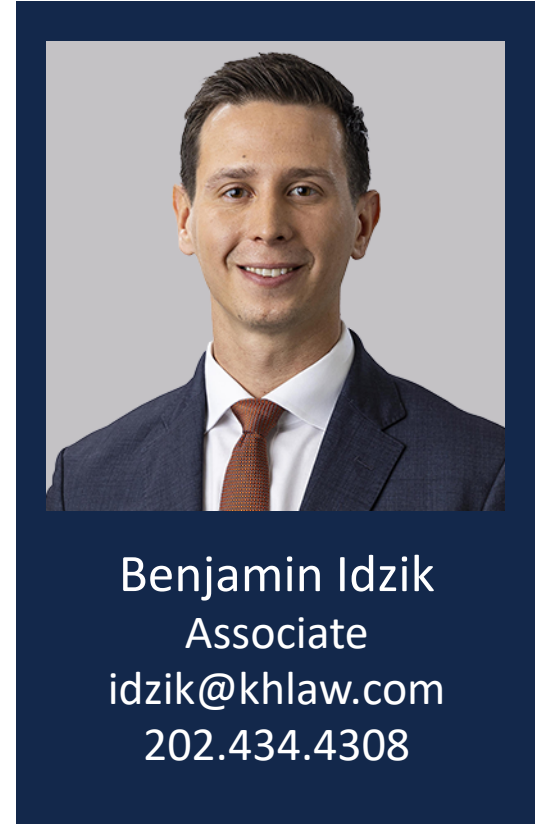
Benjamin Idzik



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

- ◆ Facts of *Fama Construction, LLC v. U.S. Occupational Safety and Health Review Commission*
- ◆ Multi-Employer Worksite Doctrine
- ◆ Economic Infeasibility Defense
- ◆ Fama's Arguments
- ◆ OSHA's Arguments
- ◆ 11th Circuit's Decision
- ◆ What Employers Should Do

Facts of the Case

- ◆ Fama served as a middleman subcontractor between construction companies and roofers
- ◆ Fama obtained an exclusive roofing contract to build roofs for a townhouse development in Dawsonville, Georgia
- ◆ March 2019: an OSHA inspector drove past the worksite
- ◆ Observed a worker on a roof without fall protection



Facts of the Case (2)

- ◆ Inspector entered the worksite and confirmed that the work crew was associated with Fama
- ◆ Issued two citations
 - ◆ Fall protection
 - ◆ Hard hats
- ◆ History of citations for similar citations



Procedural History - ALJ

- ◆ Fama contested the citations
 - ◇ Challenged use of Multi-Employer Worksite Doctrine
 - ◇ Economic Feasibility Defense
- ◆ ALJ affirmed:
 - ◇ Multi-employer citation policy challenges rejected
 - ◇ Economic feasibility defense rejected
- ◆ Fama appealed ALJ's ruling to the full Commission



Procedural History - OSHRC

- ◆ Commission affirmed that Fama was the controlling employer but remanded the case back to the ALJ after finding that applied incorrect legal standard associated with granting summary judgment in favor of OSHA
- ◆ On remand, ALJ again affirmed
- ◆ Fama again appealed to the Commission



Multi-Employer Citation Policy

- ◆ If OSHA finds a hazardous condition on a multi-employer worksite, two-step process to determine which employer must be cited
 1. Whether the employer is a “creating, exposing, correcting, or controlling” (“CECC”) employer
 2. Whether the CECC employer met its obligations or failed to do so warranting the citation for the hazardous condition.
 3. At issue in Fama: Whether Fama was the controlling employer



Economic Infeasibility

- ◆ Affirmative defense
- ◆ Compliance with a particular standard either is impossible or will render performance of employer's work impossible; and
- ◆ The employer undertook alternative steps to protect its workers (or that no such steps were available).



Fama's Arguments:

- ◆ OSHA's definition of a "controlling employer" violates the APA
- ◆ A reasonable interpretation of "controlling employer" is limited to general control and contractors with actual control over the worksite
- ◆ Maintaining a safety program, requiring workers to wear fall and head protection would require Fama to hire a supervisor, which it could not afford



OSHA's Arguments:

- ◆ Fama was the controlling employer because Fama's management admitted that it had control over the roofing work crews, though it did so only occasionally in practice
- ◆ Fama limited its involvement "likely in an attempt to avoid OSH Act liability"



11th Circuit's Decision:

- ◆ Barring “extraordinary circumstances,” OSH Act’s judicial review provision precludes a federal court from considering an objection that was not raised before the Commission
- ◆ Fama did not raise argument against multi-employer citation policy with the Commission
- ◆ The court only reviewed the Commission’s decision with respect to Fama’s economic infeasibility defense



11th Circuit's Decision (2)

- ◆ Fama's economic infeasibility defense improperly assumed that hiring a supervisor was the only way to protect workers from hazards on the worksite
- ◆ Citations affirmed



What Employers Should Do

- ◆ General contractors should review subcontractor safety policies and records before engagement
- ◆ Both general and subcontractor should maintain their own safety programs and retain appropriate records
- ◆ Ensure that, on multi-employer worksites, responsibility for monitoring for safety is allocated by contract
- ◆ RFP and bid process should account for monitoring activity
- ◆ When contesting citations, work with counsel to preserve record for appeal
- ◆ Cited employers should press OSHA to identify its cause of action and theories of liability





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Thank You

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