



OSHA 30/30[®]

A thirty minute update on OSHA law every thirty days

with **Manesh Rath**



D.C. CIRCUIT DECISION ON OSHA'S RE-INTERPRETATION OF THE PSM RETAIL EXEMPTION

February 22, 2017

1001 G Street NW, Ste. 500 W,
Washington, D.C.



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LAWRENCE P. HALPRIN

Lawrence Halprin is a partner in Keller and Heckman's workplace safety and health, chemical regulation and litigation practice groups. He is nationally recognized for his work in workplace safety and chemical regulation. His workplace safety and health practice covers all aspects of legal advocacy, including: representing clients in OSHA and MSHA investigations and enforcement actions; providing compliance counseling and training; conducting incident investigations, compliance audits and program reviews; participation in federal (OSHA, MSHA and NIOSH) and state rulemakings and stakeholders processes; bringing and intervening in pre-enforcement challenges to final agency rules; advising on legislative reform and oversight; and participation in the development of national consensus standards under the ANSI process, and TLVs under the ACGIH process.



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Mr. Halprin's engineering and financial background and extensive knowledge of OSHA rulemakings have greatly enhanced his ability to provide compliance counseling and represent clients in enforcement actions, and evaluate and critique rulemaking proposals and suggest alternative approaches. On behalf of one or more clients, Mr. Halprin has participated in almost every major OSHA rulemaking over the past 25 years as well as numerous Cal-OSHA rulemakings.

MANESH K. 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. On developing legal issues, he has been quoted or interviewed in *The Wall Street Journal*, Bloomberg, *Smart Money* magazine, *Entrepreneur* magazine, on "PBS's Nightly Business Report," WAVY-TV and C-SPAN. He was listed in *Smart CEO Magazine's* Readers' Choice List of Legal Elite.

Mr. Rath has extensive experience representing industry in OSHA rulemakings. He has successfully represented employers—including some of the largest in the country—in OSHA citations and investigations before federal OSHA in regions across the country and in state plan states.

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 is the editor and co-author of the OSHA chapter of the *Employment and Labor Law Audit* (9th and 10th Editions) and a co-author of the book *Occupational Safety and Health Law Handbook* (2001).



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TOPICS TO BE DISCUSSED

- Background on the PSM “Retail Exemption”
- OSHA’s “Reinterpretation” of the Exemption
- Decision on Petition for Review
- Implications for OSHA’s enforcement and rulemaking activities
- What Employers Should Do



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OSHA PSM RETAIL EXEMPTION

- 1992, OSHA issued Process Safety Management (PSM) Standard, 29 CFR 1910.119
- Exemption for “retail facilities” 1910.119(a)(2)(i)
- Preamble: chemicals in retail facilities are in small volume packages, making large releases unlikely
- 1992 Interpretation Letter: “Retail facility” is defined as an establishment at which more than half of income is obtained from direct sales to end users



WEST, TEXAS INCIDENT

- **4/17/2013:** ammonium nitrate explosion at a fertilizer storage facility
 - 15 deaths, 160 injuries, 150 buildings damaged
- **8/1/2013:** E.O. 13650 directs Labor Dept. to identify changes needed in PSM retail exemption
- **3/9/2015:** *Perez v. Mortgage Bankers* overruled *Paralyzed Veterans*
- **2015:** OSHA responded with 3 memos: reinterpreting retail exemption, adopting EPA's 1% threshold rule and redefining RAGAGEP

7/22/2015 RETAIL EXEMPTION MEMO

■ Action

- Redefined “retail exemption” and revoked all prior interpretations, effective immediately

■ Explanation

- 50% test created an exemption for retailers handling threshold quantities of highly hazardous chemicals (HHC)
- “Directly contrary to OSHA’s original intent” to create exemption because of small containers



7/22/2015 OSHA MEMORANDUM

■ OSHA Concession

- New position changes long-standing policy on this issue
- For the first 6 months, “OSHA plans to use its enforcement discretion when inspecting facilities formerly covered by the old policy and will generally not cite those facilities during this period to give them time to come into compliance”
- Approximately 4,800 sites subject to PSM for the first time



PETITIONS FOR REVIEW

- Legal challenges to all 3 PSM memos
 - Petitions for review – DC Circuit
 - Settlements: 1% rule and RAGAGEP
 - Retail exemption memo litigated by agricultural sector – *Agricultural Retailers Assn*
 - Industry groups asserted OSHA amended the rule and needed to make changes through rulemaking



OSHA's ARGUMENT:

- The OSHA Memo is an interpretation, not a new/revised standard
- The Administrative Procedure Act (APA) permits an agency to issue an interpretation, or an “interpretative rule” without rulemaking. 5 USC 553(b)(3)(A)
- *Mortgage Bankers* held the APA permits an agency to reinterpret its ambiguous rules w/o rulemaking and defers to agency interpretation of rule subject to lack of notice and detrimental reliance

OSHA REGULATIONS V. STANDARDS

REGULATION

- Collecting info, administrative, procedural
- Adoption and legal challenge governed by APA
- Challenge in U.S. District Court

STANDARD

- Correction of an identified hazard
- Adoption and legal challenges **governed by OSH Act** at 655(b)
- Challenge in U.S. Court of Appeals

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D.C. CIRCUIT ANALYSIS

- The effect of the retail memo was to expand the application of an OSHA standard addressing chemical hazards to a large number of facilities.
- Therefore, the memo was a standard improperly adopted without the rulemaking process required by the OSH Act, which preempted the APA and does not provide for interpretive rules.
- *Paralyzed Veterans* reborn for OSH Act cases



D.C. CIRCUIT ANALYSIS

- History of Agricultural Retailers Assn
 - Rehearing denied
 - Rehearing en banc denied (Dec. 2016)



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WHAT SHOULD EMPLOYERS DO

- Future OSHA Interpretations
 - Follow? Ignore? Challenge?
- Enforcement proceedings
 - Does OSHA's interpretation make sense?
 - Has OSHA consistently held that position since standard was adopted?
- Future rulemakings
 - Effectively participate to nail down OSHA positions.



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