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A thirty minute update
on OSHA law every thirty days

with
Manesh Rath

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North Carolina ALJ Dismissed 27 Citation Items After NC OSH Destroyed Evidence

March 19th, 2025

Manesh Rath

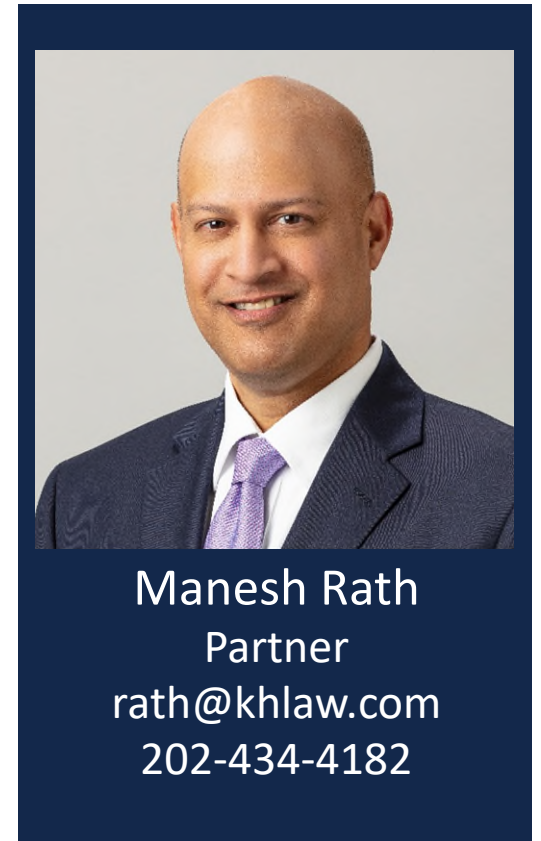


Manesh Rath is a partner in Keller and Heckman’s litigation and OSHA practice groups. He has been the lead amicus counsel on several cases before the U.S. Supreme Court. He has been called to testify before Congress in several hearings relating to OSHA law.

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.



Manesh Rath
Partner
rath@khlaw.com
202-434-4182

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.



Topics to Be Discussed

- ◆ *North Carolina v. Harris Teeter* – Facts of the Case
- ◆ Discovery Stage
- ◆ Applicable Law
- ◆ Harris Teeter’s Arguments
- ◆ North Carolina OSHA’s Defense
- ◆ Judge’s Holding
- ◆ What Employers Should Do



North Carolina v. Harris Teeter – Facts of the Case

- ◆ Several Inspections
- ◆ Over 25 citations issued
- ◆ Multiple establishments involved
- ◆ Cases were consolidated
- ◆ Harris Teeter contested the charges



Pre-Trial Discovery And Trial

- ◆ Parties engaged in discovery
- ◆ Harris Teeter asked for the official inspection report
- ◆ NC OSHA did not supply underlying field notes such as witness statements
- ◆ At trial, when asked by Judge, NC OSHA said that notes are shredded once they are reduced to an inspection report
 - ◇ One inspector, however, preserved three pages of notes



Applicable Law

- ◆ Ten days prior to hearing, Harris Teeter was entitled to official inspection reports
- ◆ NC Public Records Act: Requires preservation of public records
- ◆ Field Office Manual
 - ◇ All notes shall be recorded on the violation worksheet or attached to it
- ◆ NC Rules of Evidence: Must make underlying data available to the opposing side



Harris Teeter's Arguments

- ◆ Harris Teeter argued that it was prevented from fully preparing for a hearing or cross-examining the CSHOs without the field notes



North Carolina OSHA's Defense

- ◆ NC OSH argued that the citations had been properly issued
- ◆ NC OSH said that Harris Teeter was seizing on an unjustified procedural issue
- ◆ NC OSH further argued that field notes are not public record because they are *transitory* records
- ◆ Anything that was relevant in the field notes was transferred to the official record: If it was not transferred, it was not relevant



North Carolina OSHA's Defense (2)

- ◆ NC OSH stated that they have been shredding field notes for decades without any issues
- ◆ NC Department of Labor Chief of Staff said that data in the field notes that supports an employer's affirmative defenses, and which does not support NC OSHA's four elements "can be destroyed," without being preserved in the official report



North Carolina OSHA's Defense (3)

- ◆ NC OSH argued that taking a formal statement is not practical because:
 - ◆ Language translation is costly and burdensome
 - ◆ Difficult to get employees pulled from the line to sign their statements
 - ◆ Employees have concerns regarding their confidentiality



Administrative Law Judge's Holding



- ◆ The ALJ did not accept that the field notes held little evidentiary value
 - ◇ Found that there was nothing “transitory” about the field notes
 - ◇ The three pages that were preserved by one CSHO were found to have value
- ◆ NC Public Records Act: in inspections, no destruction of records may take place if litigation is pending or reasonably anticipated

Administrative Law Judge's Holding (2)

- ◆ The need to preserve field notes is apparent because they contain the observations made by investigators during the time of the investigation
- ◆ Statements by a witness that NC OSHA intends to call or who might support employer's defense must be produced
- ◆ Defendant is best positioned to determine the relevance of a witness statement to their case
- ◆ Since Harris Teeter was deprived of due process of law, the ALJ had no choice but to dismiss all four cases and all citations



What Employers Should Do

- ◆ Promptly issue a records preservation request
- ◆ In discovery, request field notes
- ◆ Request catalog of all documents in inspection file – past or present
- ◆ Ask CSHOs to provide detailed description of their information gathering processes
- ◆ Request that underlying data not be redacted merely because it could be identifying



What Employers Should Do

- ◆ Use motions practice to obtain fair and effective discovery
- ◆ Interview as many potential witnesses as possible





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at 1:00 p.m., Eastern Time

April 16th, 2025

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Thank You

Manesh Rath

Partner

1001 G Street N.W. Ste. 500W

202.434.4182

rath@khlaw.com



Benjamin Idzik

Associate

1001 G Street N.W. Ste. 500W

202.434.4308

idzik@khlaw.com

