

Speaker 1: [inaudible] welcome to legal environmental.

Speaker 2: Welcome to getting through the Greenberg Traurig podcast for environmental issues during the pandemic. I'm your host, Bernadette Rappler. And I'm so excited today to be joined by my friend and [00:00:30] colleague and partner, Mike Taylor, who, uh, focuses his practice on occupational safety and health issues in our DC and Northern Virginia offices. Mike, welcome to the show. Thanks Bernie. Thanks for having me. Yeah, I'm so glad you can be here today because these issues regarding safety in the workplace have obviously been top of mind, uh, for, for many people. And [00:01:00] while I feel pretty sure I know how you would answer this question, I'll ask. Anyway, how would you say that the issues arising now during the COVID pandemic compared to issues you've seen in the past, are there any points of reference for what you're seeing now?

Speaker 3: That's a good question. Bern, compared to handling, uh, HSE issues in the past employers in all industries are being forced to assess [00:01:30] and address COVID-19 issues in a very short period of time. Uh, and unlike airborne contaminants that have a permissible exposure level for the health and safety of employees, there's really, there's no monitoring device that employer could use to detect the presence of the virus in the workplace. What does that mean? Well, it means it's, it'll make it, it'll be very, very difficult for employers to determine one. [00:02:00] If the virus is actually in the workplace, uh, and to implement the appropriate controls, to protect workers from the virus, could it be in the workplace?

Speaker 2: I've heard you talk before about controls and particularly about a hierarchy of worker protection controls. Can you describe what that means?

Speaker 3: You bet in the HSE world, the hierarchy of controls as a well-recognized concept, it suggests that when [00:02:30] dealing with airborne contaminants employers should use certain measures to protect workers who are exposed to those contaminants. For example, the number one hierarchy is to try to engineer it out that is, can you add or change equipment to minimize the risk of workers? And if that doesn't eliminate the hazard, the next implementation is work practices or administrative controls to minimize the risk work practices would be, um, you know, moving people around, um, doing different [00:03:00] jobs. Administrative controls would be, for example, uh, I'm going to work four hours at this particular location and I'm going to go outside and do another job for another four hours so that they're not working in one space for eight hours. And when all that fails and you still can't, um, get below the permissible exposure level, whatever that is and keep in mind, COVID, doesn't have one. Um, you rely on personal protective equipment to protect workers.

Speaker 2: Got it. [00:03:30] So does the impossibility of being able to monitor in real time for the virus, does that make it more likely that one of these kinds of controls will predominate over the others? I've only seen a few references to basic engineering controls like partitions, um, and Stankard some staggered work practices, but because of the lack of monitoring, the ability [00:04:00] to monitor in real time, does that suggest that one kind of controls likely to predominate?

Speaker 3: I think so. I think in this instance, we're going to start with the reverse where employers are going to start with PPE and go up the chain as opposed to starting with environmental controls and going down the pyramid, if you will. But at the end of the day, I think it's going to really depend on the type of industry in which the employer is and, um, what they're in and quite [00:04:30] frankly, how much they're willing to implement. And even if it's just to alleviate the fear from some employees about coming back and staying at work.

Speaker 2: So what are the main considerations for companies and organizations as they prepare to reopen after some of the stricter social distancing measures are eased?

Speaker 3: I think the first thing that they'll have to consider, which is in the OSHA slash NIOSH last CDC [00:05:00] guidance document that applies to everyone is to consider and monitor what their own community COVID-19 stats are. In other words, if you were in the Western part of Maryland, um, which is predominantly countryside, your risk is not going to be the same as if you were, let's say in prince George's county, Maryland, where, uh, the rates are somewhat high still. Um, so you really have to figure out what your risk is, uh, to workers. If you're [00:05:30] in a high risk area where there's lots of hospitalization rates, for example, employers may want to consider taking temperatures of workers before they come into work, uh, mandate employees wash hands on a regular basis, um, install hand sanitizing stations and try to exercise some kind of social distancing without causing undue hardship to the business and the psyche of the workers.

Speaker 2: I can imagine there might be some employees that [00:06:00] could balk at being subject to those kinds of restrictions in the workplace too. Do employers have an unfettered right to require workers to undertake these basic precautions

Speaker 3: From an OSHA perspective? Yes. As long as those measures do not create a greater hazard,

Speaker 2: Right? I can, well, imagine that myself, having just gone for walks now outside with a mask [00:06:30] when it's been quite hot and humid and, uh, it's sometimes it's difficult to breathe. So I can imagine that would be, uh, it could be a stress for workers in a workplace. What if workers say we're not going to do it? They, they balk at the, the PPE requirements or other, uh, controls that the employer wants to impose.

Speaker 3: Well, um, there's nothing under the OSH act [00:07:00] that would allow them to refuse to work, um, in this kind of scenario. Um, and employers could actually follow whatever disciplinary procedure they have in place.

Speaker 2: So from your perspective, what do you think companies can do right now in a situation like this, where our information about the virus and the disease and how it spreads, where [00:07:30] that information is rapidly evolving? I mean, obviously it's only been about six months or so since, uh, China first disclosed that this was, uh, a problem. And, uh, there's certainly going to be a lot left to learn. What, what should companies do in this sort of rapidly evolving framework?

Speaker 3: That's a great question. My recommendation [00:08:00] is, um, keeping abreast of what NIOSH and OSHA are recommending and their guidance materials. Uh, that's the starting point along with working with experienced legal counsel in this area, they'll all. And what I mean by looking at their guidance materials, keep in mind that the guidance materials are not a rigid one size fits all approach. They're really designed to allow employers [00:08:30] to use as a tool to brainstorm, to figure out what might work under their, uh, in their circumstances and pick and choose from those things. Um, so they could protect workers as opposed to thinking it's this, I've got to do a, B, C, D type thing of whatever's in these guidance materials.

Speaker 2: So do you think that OSHA or the occupational safety and health agencies [00:09:00] are likely to issue rules now, or do you think most of the standard setting I use that term advisedly will be done via guidance?

Speaker 3: My sense is that there'll be, there'll be some states that will try to propagate a standard covering COVID-19, but I don't believe they're going to be successful. Uh, as I said before, [00:09:30] one thing for a state or federal OSHA to have jurisdiction over is you actually have to have the virus in the workplace. It can't be this, it could be there type thing. And because the virus is invisible, there are no instruments that we can use to either test the atmosphere or take a wipe sample on a desk to determine that COVID is there, uh, it's B it would be very, very difficult for OSHA to promulgate a one size fits all approach standard for this, in my opinion,

Speaker 2: [00:10:00] I read in the trade press a week or two ago that I believe some trade unions and other groups have sued to compel OSHA to issue rules for COVID-19. What can you say about that?

Speaker 3: Well, I believe that OSHA is pushing back on that and saying that they do not [00:10:30] want to promulgate a standard and it's not necessary. You know, I don't know what the DC circuit will rule, but my sense is from talking to folks that I know within the agency is that, like I said before, the virus is invisible. There's no way for an employer to know where the virus is in any given time, as a result of that, it's really hard for an employer to be forced to do certain engineering work, practice, or PPE [00:11:00] type of controls in that type of normal hierarchy. I told you about when the virus is invisible.

Speaker 2: So would you say given all the uncertainties that we're likely to see significant civil litigation over workplace conditions, once people really start going back to work?

Speaker 3: I think you'll see lots of, um, litigation, lots of [00:11:30] probably whistleblower complaints, primarily where employees may try to refuse to go to work and if they get discharged or have adverse employment action. Um, I also think that there's going to be quite a bit of probably recordkeeping litigation. I believe there's going to be quite a bit of litigation this fall, uh, coming on these issues because a lot of the workers and members of the public are really scared and rightfully so. I understand it.

Speaker 2: [00:12:00] Yeah, me too. Well, listen, Mike, thank you so much for your time here today. It's been really informative. I know a lot of our listeners will be excited to hear, uh, this

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discussion. Um, and I want to thank our listeners for tuning in and, uh, until we get a chance to talk again, please stay safe and take care. Thanks.

Speaker 1: [inaudible].