

Speaker 1: [inaudible]

Speaker 2: Welcome to the performance review, Greenberg Traurig labor and employment law podcast, where we discuss some of you important trends and topics for California employers. That's how the spine by cook and Phillip person.

Speaker 3: Welcome back to the performance review. I'm joined by my cohost Ryan Bykerk. And before we go any further should note that we are eligible for MCLE credit, and that is for self-study credit. [00:00:30] So you can go back and binge all of the, your favorite podcast episodes that we've recorded in the past and get MCLE credit. But as for today's episode, we will be discussing what employers can expect when Cal OSHA suddenly appears at the workplace and starts asking questions. Our guest today is Michael Taylor, the chair of Greenberg Traurig's labor and employment practices. OSHA group, Michael is an expert to have on speed dial and we call him often. But for those who don't know you, Michael, can you please describe your practice? [00:01:00] You

Speaker 4: Bet. And thank you for having me. It's an honor, and a pleasure. You know, I do lots of OSHA litigation all over the country in a broad range of industries, as well as a broad range of issues. I also provide OSHA inspection, counseling, catastrophic management, whistleblower representation, when dealing with OSHA related issues, OSHA compliance audits, and OSHA compliance counseling as well. So it's [00:01:30] a wide range of services and I'm a little unique in the sense that I focus my practice exclusively on workplace safety and health. And there's not many people out there like me. We understand you also served as general counsel to the federal occupational safety and health review commission in 2003 and under the second Bush administration. So for those of us who are not familiar with the, well, I don't know what you call yourself, the OSHA, but those of us who maybe aren't familiar with that, can you just please tell us what, what that [00:02:00] does and what you did?

Speaker 4: Is there a general counsel? You bet the federal occupational safety and health review commission is a separate body from OSHA. It's not housed under the department of labor, and it's an agency where you adjudicate citations where OSHA issues to employers for a range of issues. It's comprised of three commissioners or two commissioners and a chairperson. And there are about 12 to 14 administrative law judges that [00:02:30] hear these cases with offices in Atlanta, Denver, and the Boston area. While I was there, my job was to provide counseling to the commissioners and the chairperson at the time, which was Scott Railton about certain dispositions of the case. So I saw a wide range of issues during my tenure at the review commission.

Speaker 3: It sounds like we got the right person for the podcast today. Today,

Speaker 4: I'll be focusing on [00:03:00] CalOSHA what you all call CalOSHA. It's equivalent of Cal's equivalent of OSH. Rick is the Cal appeals board. In my experience, I've found that employers would much rather prefer not to have to litigate their appeals there. It's better to nip workplace safety issues in the bud. So to speak. I often tell clients you're better off spending a dollar on the a day in, uh, being proactive rather than \$3 a day on me being reactive. [00:03:30] When OSHA is at the door, I bet it gets

Speaker 3: Pretty expensive on the back end, but let's set the scene right now. Let's say I'm a line manager at a food processing facility and a colleague taps me on the shoulder and says, Cal OSHA inspector is here. And they'd like to speak to me after I start sweating a little bit. The inspector comes over. He has a helmet eye goggles, nice N 95 respirator. Uh, I'm talking the whole nine yards here. I see the clipboard [00:04:00] camera and it really looks like he means business.

Speaker 4: What you got in your hands there is what's called an unprogrammed inspection. Uh, this is an unanticipated inspection by Catalonia, which is really what it is typically comes about after employee has filed an informal complaint with the agency. Most of the time they're anonymous or Cal OSHA has gotten wind of a, a hazard for example, or an alleged violation in your workplace, perhaps [00:04:30] through the media, which can happen quite often. Other times you would have a good idea that they may be coming to conduct an inspection because the company may have had to report for let's say, a serious injury or illness that unfortunately occurred at work. Uh, for example, a fatality or maybe the union said they would file a formal complaint with Cal OSHA over a safety issue. Okay. So Michael, you've talked about like, there's an unprogrammed at spectrum. There might be other reasons you might've expected [00:05:00] it, but, um, if you've got a line manager who has a Cal OSHA inspector show up, can that, can that line manager just to kind of say, you know what, today is really not a great day.

Speaker 4: Could you come back tomorrow? You know, could you tell your, your, your management onsite to say, you know what, just politely and firmly tell the OSHA inspector, you know what, my supervisor's not here. My supervisor handles all the CalOSHA inspections. Can you just come back another time? Like, is there any leeway to do that? Well, the answer to that is yes and no. Remember [00:05:30] the goal here is to reduce the legal risks associated with the inspection and possibly a subsequent citation and penalty. Right? The second goal was to minimize the interruption to the business itself. Look, the business can always say no, but under the fourth amendment, Cal OSHA is prohibited from conducting unreasonable searches and seizures. And so the company can indeed require the inspector to come back with a warrant. However, there are a few questions that [00:06:00] companies should ask itself before refusing an inspection. How would a refusal look to the public? What about the effect on labor relations? What would that do? Do we want to lose all control over the inspection? I think about this. Do you really want to pick off the person who's about to inspect the company's workplace and who has been delegated with the authority of the state to issue the citations? Meaning if you make them go get a warrant, they're going to come back with a vengeance.

Speaker 3: [00:06:30] Ooh, vengeance. That's that sounds pretty scary, but sounds like you would recommend that the company consent to the inspection then

Speaker 4: Generally. Yes. If the company plays nice, so to speak, it could get some cooperation from CalOSHA with some of its ground rules for the inspection. In other words, I'm going to consent to the inspection on the condition that you comply with some ground rules that I have, meaning the employer such as [00:07:00] escorting the inspector around the facility, according to the company's preferences and how and where an employee

interview can take place. But keep in mind that if the company allows the inspector to immediately start and inspection, it should also be aware of what's called the plain view doctrine. If she sees it, she'll inspect it. So, in other words, if they're going to look at a piece of equipment in the back of a manufacturing plant, anything they see along the way is fair [00:07:30] game in terms of issuing a citation,

Speaker 3: Yes. Allow the inspection, but there could be a compelling reason to ask Callow should have come back with a warrant or asked to reschedule it. Um, we'll will accompany have a chance to ask what the inspection is about or will inspect or not show their hand and just start digging into things.

Speaker 4: Based on my experience, Cal OSHA will ask to meet with the highest ranking rep available at the work site and try to explain the purpose [00:08:00] and scope of the inspection. They'll also caution the company about workers' rights, such as the rights of employees to be free from retaliation, for reporting a workplace safety hazard. But it's unlikely. The inspector will tell you who made the complaint or any specific item of the complaint itself. And before the walk around the work site, Cal OSHA will want to review the company's permits, registrations work, coverage and records [00:08:30] relating to occupational safety and health. Most importantly, the company should have its injury and illness prevention program ready and updated. It's one of the very first documents that Cal OSHA asks for when inspection is being conducted. Is that a formal part of the visit or is this just something that in practice you just see, you know, look typically, this is how this goes down.

Speaker 4: It's the opening conference at the opening conference. The best practice is to ask the inspector for [00:09:00] copy of the complaint. If one is made and make sure to get the idea of the inspector in case you need to contact him or her down the road and make sure the business understands what the scope of the inspection is here. For example, are they there to conduct a wall to wall audit or are they there to look at a particular machine, uh, for guarding issues, for example? Got it. Okay. So after they've done that after that opening conferences happened, I mean, [00:09:30] it is generally right after that there's there's the walk-around or the inspection occurs that's right. The company's rep in Cal OSHA is inspector and any company members of her team will walk around the work site, depending on the safety issue or the hazard involved inspector may pull out camera or a tape measure and write down his or her findings.

Speaker 4: They may wish to speak with an interview employees, both hourly and management. [00:10:00] It's important here to note that the company can let an hourly employee know that they can have a coworker management or even counsel present during the interview. Also, they can say no to Cal OSHA recording the interview or to request for a signed statement. These same suggestions can be required of management employees interviewed by Cal OSHA. So he must be permit and management employee or counsel to be present during the interview. And [00:10:30] they must say no to Cal OSHA recording the interview, or either by audio recording or videotaping, or even if they're asked to sign a statement. Got it. Okay. So after they've done that after that opening conferences happened, I mean, it is generally right after that there's there's the walk-around or the inspection occurs that's right. The company's rep in Cal OSHA is inspector

and any company members of her team will walk around the work site, [00:11:00] depending on the safety issue or the hazard involved inspector may pull out camera or a tape measure and write down his or her findings.

Speaker 4: They may wish to speak with an interview employees, both hourly and management. It's important here to note that the company can let an hourly employee know that they can have a coworker management or even counsel present during the interview. Also, they can say no to Cal OSHA recording [00:11:30] the interview or to request for a signed statement. These same suggestions can be required of management employees interviewed by Cal OSHA. So he must be permit and management employee or counsel to be present during the interview. And they must say no to Cal OSHA recording the interview, or either by audio recording or videotaping, or even if they're asked to sign a statement.

Speaker 4: So what happens, [00:12:00] uh, if Cal OSHA inspector sees something that like, it's just a clear hazard. I mean, it, I guess maybe the word would be imminent hazard. Yeah. That's one of the biggest concerns of Catalonia and the M of the hazard is a condition or practice in the workplace. Um, that poses a hazard to employees that could reasonably cause death or serious physical harm immediately. It's not something that [00:12:30] happened over time where you're exposed to concentrations of benzene in the air, which may cause you to have cancer 10 years down the road, if Cal OSHA spots hazard, or if a hazard can't be eliminated through normal enforcement procedures, they will yell tag it. So what does this mean? Well, that means that until Cal OSHA says, so the company its employees can't use the area or the equipment that's been tagged, this could be a very serious business [00:13:00] interruption and pose the potential of shutting down the operations.

Speaker 4: Yeah. I mean, I suppose if, if a critical machine gets shut down, that's a, about as disruptive as it could be to a business. So, um, Michael, you mentioned, you know, inspector's going to come around and they can look around and, and indicate even make it mention ticket photographs. So what do you do for clients or what would you recommend for clients who have maybe trade secret concerns? You know, some of them have, uh, [00:13:30] maybe the machine that's that's even in question might be part of a trade secret and, and these, these clients would prohibit even their employees from, from using their cell phone cameras or sharing any pictures like that. Cause it's that sensitive to, can a company ask Cal OSHA to not take photos? Does that have any ability to protect those trade secrets during a Cal OSHA inspection? That's a great question.

Speaker 4: A company can't prohibit CalOSHA from taking photographs or video tape of the equipment inside [00:14:00] the work site. Uh, and this is often a big concern of my clients. Here's what I tell them, allow the photographs or videotape to be taken, but make sure you tell the inspector that he or she's taking photos of confidential trade, secret information that if revealed could harm the company while the inspector will keep this information confidential, it might be disclosed to other Cal OSHA staff or in a proceeding before the appeals board [00:14:30] standards board, or even the director of industrial relations. The company should make sure that the administrative law judge

handling its OSHA case issues necessary protective orders to regard in regarding the confidentiality of the company's trade secrets, where necessary.

Speaker 3: This is great information, Michael, what comes next after the walk around?

Speaker 4: Well, after the walk around, you're almost home free, but not without some, some potential bad [00:15:00] news. After the walk rounds completed Cal OSHA, we'll meet once more with the company to inform it of any preliminary findings of violations. Inspector will also give the company an idea of when the closing conference will take place. This is where the inspector meets with the company to discuss any enforcement actions, including potential citations of alleged violations here. See he or she saw during the walk around, [00:15:30] uh, they'll also discuss the penalties associated with the citations and other directives. Cal OSHA expects the company to follow. These are things like posting requirements of violations, abatement require mints, any follow-up inspections and even notifying the employer of its right to appeal. One more thing Cal OSHA will likely ask for after the walk-around ends are documents. They're almost always need additional documents or records to [00:16:00] fully complete their inspection.

Speaker 3: Michael, I'm not sure if you knew the performance review is a family-friendly show and you said a bad word on here. You said penalties. We don't like penalties. Can you give us an idea of the range of penalties, a state may assess to a company, uh, to pay for these alleged violations?

Speaker 4: Sure. It, you know, it, it really depends on the severity of the violation, uh, and what's [00:16:30] at stake. And whether an employee, the employer failed to abate of previous violation involving the same condition or hazard, there are they're categorized as regulatory, uh, general violations, serious violations. You can be characterized as a repeat violation or even a willful violation of the law. Then there are also various multipliers for more serious penalties. So spill, these can vary greatly. [00:17:00] It could range anywhere from 500 bucks to \$140,000 per violation. We're talking about some serious money here. So it's very important for a company to take workplace safety seriously, in order to reduce the likelihood that the inspector showing up at your door. Yeah, Matt, 500 to 140,000 per penalty is a violation. Um, that's some serious money, so yeah, thank you. That's really helpful. [00:17:30] Um, and, and I'm sure like, like with any area of law, right?

Speaker 4: This is, we've only been talking for a few minutes here. I'm sure this is the tip of the iceberg. So I, I suppose, uh, you know, is it fair to say OSHA, like, like any other legal issue is it's just, it's going to be nuanced. It's going to be, it's going to have some complications and a company's just going to be best served consulting counsel on these kinds of issues. Is that fair? You bet. You bet. And you know, it can affect a business in various ways. It [00:18:00] could also affect a business. Let's say they're going to do government contract work. And if they have a series of citations on their record, their competitors are more likely than not going to point that out in a bid for, let's say a government job. And it may, may end up meaning that a company could lose a 10 million, \$10 million government contract based on their OSHA citation history.

Speaker 3: Michael, you've been providing great information here. [00:18:30] And now's the time for me to do a shameless plug, because I don't know if we talked about your podcast here to hear more information about the workplace safety issues. Uh shouldn't they use the listeners should subscribe to your podcast, which is the workplace safety review podcasts, right?

Speaker 4: You bet I've had some really fantastic guests on my podcast. Some of the foremost experts on OSHA, speaking on really interesting issues associated with workplace safety [00:19:00] and health, including the impact of COVID-19 and the workplace. Now that's actually, you've mentioned COVID-19 and before we let you go, we do want to get a quick take from you on California's recent COVID 19 regulations. Can you just share with us the key points of, of the COVID-19 emergency temporary standard or ETS and how it's going to affect employers doing business here in California? The first thing that employers should know is that if there's more than one employee actively [00:19:30] working in the workplace, be it an office warehouse or whatever, then these emergency temporary standards apply almost without exception. The second point is that for an employer to be in compliance with the emergency temporary standard, it has to create and implement a COVID-19 prevention program, or have common elements of such a program and as existing injury and illness prevention program, which is required under Cal OSHA [00:20:00] regulations in the first place.

Speaker 4: Now, what are those elements there in part preventive measures we already know about that have become ingrained in our personal lives to avoid infection. Like for example, putting on a mask, whenever we go grocery shopping, you know, the COVID-19 prevention program requires an employer to require physical distancing of at least six feet and the use of face coverings. In most circumstances among employees [00:20:30] in the workplace, other elements include, for example, communicating COVID-19 prevention procedures to employees, identifying COVID-19 hazards, providing training, uh, providing testing for employees in the workplace and even maintaining records of COVID-19 cases at work.

Speaker 3: I think I said this on another episode, that COVID is the gift that keeps giving. [00:21:00] Is it fair to say that implementing this COVID 19 prevention program at work is a little bit more complicated than preventing infection at home?

Speaker 4: Unfortunately, yes. That's fair to say, because there hasn't been much guidance for employers. Employers may ask, how does an employer supervisor and forced the physical distancing requirements? Who does the employer contact to set up testing in the workplace? Do the face coverings for employees have to be in 95 respirators [00:21:30] as always new regulations result in lots of questions. And the emergency temporary standard has existed for about two months. We'll start hearing about Cal OSHA enforcement actions in the coming weeks and months, which should give us a clear picture of what businesses can expect. In the meantime, it's imperative for a business to get a COVID-19 prevention program drafted if it hasn't already. All right. So, Michael, I don't know if [00:22:00] we mentioned this to you in advance, but as we always do on the performance review podcast, we always ask our guests to share a while deployment story, either from your own practice where the course, the names

changed to protect the innocent or the guilty as the case may be more from the news or from history or from wherever. So we always like to get wild stories, and we're hoping that you've got one too

Speaker 3: And not to add pressure, but you're going to be the first story for 2021. So make it good.

Speaker 4: Wow. Um, [00:22:30] I have lots of very interesting stories. Uh, probably the most interesting case I ever had was about 10 years ago. I see the telephone call on Saint Patrick's day from a client in new deal, Idaho. And it was a grain elevator company. They, uh, it's a small grain elevator company. They told me that one of their employees went inside a grain bin, um, and got engulfed. [00:23:00] And the rotating auger at the bottom did its job on the deceased employee, unfortunately. And it was a very, very slow death. The client asked that I'd be on the next flight to Idaho. And I said, well, okay, sure. Because OSHA was on its way. Uh, the client then told me we have a problem while I'm thinking, well, you just told me your problem.

Speaker 4: The client told me that, that they thought the name [00:23:30] of the deceased employee was Richard Jones. I don't remember the exact name, but that wasn't his real name. And I asked the client, well, how did, how did you know that? And the client said that they called the next of kin and on record. And the next to Ken said, it could not be ourselves. And our son was in the federal penitentiary in the state of Texas. It was an undocumented worker. Um, and it turned out that his real name was one Gonzalez. [00:24:00] Uh, and I found out, we found out that, uh, the Mr. Jones had the identity of a federal inmate. Uh, and, um, so the, the question that came from my client was, well, whose name do we actually record on the injury and illness slog? I mean, my job is never boring. I can say that. Certainly.

Speaker 3: Certainly, certainly I wasn't expecting that when you [00:24:30] started off the story, talking about somebody being engulfed in a grain bin, but you never know how the story will spin out.

Speaker 4: Yeah. Never boring. All right. Well, Hey, thank you, Michael. That's a fantastic story to kick us off in 2021. Thank you so much for that. Thanks for joining us here on this, on this episode of the performance for your really, we really appreciate it. Hey guys, thanks for having me on. It's nice to be on the other side of the mic for once and, and great, great to have you. So it was quick reminder for our listeners. You can email us@performancereviewatgtlaw.com [00:25:00] with any questions you have suggestions for future topics, wild stories of your own. See if you can beat that one till then. Thank you so much for listening to the performance review and we'll catch you on the next one. Thank

Speaker 2: You for joining us on this episode of the performance review, California employers face many challenges, and we want to help let us know which labor and employment topics are important to your company. So we can give them a performance review. You can email us at performancereview@gtlaw.com. If you like what you hear, feel free to share. And please subscribe on Spotify, [00:25:30] apple podcasts, Stitcher, or at gtlaw.com. This podcast is eligible for California self study. CLE credit certificates of attendance will

This transcript was exported on Jun 28, 2021 - view latest version [here](#).

not be issued. California attorneys are responsible for self-reporting the amount of time they listened for all other jurisdictions. Please contact your state's MCOE board or committee for guidance on their rules and regulations as it relates to the self study credit. This content is for informational purposes only and does not contain legal or other advice and or opinions for more information, please visit B I T dot L Y slash GT [00:26:00] law disclosures.

Speaker 1: [inaudible].