

## Work Place Safety Review Episode Seventeen

### Speaker 1

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### Michael

Hello. Everybody. Welcome to the next episode of the workplace safety review podcast. I'm Michael Taylor chair of the Greenberg Traurig OSHA practice group. I'm based out of our Washington DC Northern Virginia offices. My cohost is Adam Roseman, a member of the GT OSHA practice group. Adam is based out of our Philadelphia office. If you would like to learn more about me, Adam, or the capabilities of our GT OSHA practice group, please go to [www.gtlaw.com](http://www.gtlaw.com). Our special guest today is Mr. Jess McCluer. Jess is the vice president safety and regulatory affairs with the National Grain and Feed Association.

### Michael

Jess is responsible for directing and managing the NGFAs wide ranging operation programs for grain elevators, feed mills and grain processing plants. Jess also oversees the activities regarding employee safety and industrial health and environmental issues, grain handling, facility design and equipment, grain inspection, and weighing issues. Grain and feed quality and agro terrorism. Facility security related issues. Jess also serves as the chairman of the board of directors for the agricultural safety and health council of America. Prior to joining NGFA in 2007, Jess was a program analysis at OSHA's office of outreach services and alliances. In 2001, Jess was awarded the leader in the field by the journal of agro medicine. The journal gave him the award, recognizing him for his significant contributions in agricultural safety and health practice policy and research. Welcome, Jess.

### Jess

Michael. Nice to hear your voice.

### Michael

Hey, nice to chat with you again. It's been a while. A lot's been going on since you and I last spoke. I want to ask you about this award that you just received. Can you tell the audience a little bit about it?

### Jess

Sure. Well, I appreciate the opportunity to participate in your podcast. Appreciate the introduction. Yeah. This award it came as a surprise to me and it primarily is my role as the chairman of the board for the agricultural safety and health council of America. And it's a great opportunity because that's a coalition of the agricultural business leaders, producers association, risk

managers, and other groups in addition to academia. And the purpose behind the organization is, sharing of information between academia and research and those within agriculture.

Jess

So by being involved in that and rising to the top, they said, we appreciate your service, especially during everything that we had to deal with last year during the pandemic. But I was quite impressed when I saw some of the previous recipients and the journal of ag or medicine, obviously, that's the quarterly journal and they come out with just an update on a lot of the research that's going on in the field. But when I saw that the former Senator Tom Harkin from Iowa was one of the recipients and I was also one, I was like, okay, well, I guess this is a pretty sufficient award. So I did appreciate that. And one of the organizations that we work with through OSHA, Marshfield research and they're located in Wisconsin. And, and obviously they do a lot of work with youth ag safety. And so that's where, and they're really behind all of the journal as well.

Adam

Jess, I want to take you back and we'll certainly get into your work for the National Grain and Feed Association. But before that, like we said, in the opening, you worked for OSHA as a program analyst. And help our listeners understand what did you do at OSHA? And I think most employers and listeners see OSHA as an enforcement agency. But it looks like you were more, you were with OSHA's office of outreach services and Alliance. What is that and what did you do for OSHA?

Jess

Sure. Well, I was a bureaucrat. No, just, yeah, and actually I got, I had my chance to, for those outside the beltway. I'm here inside the beltway. So it was a great opportunity to go. Personally thought it was a great opportunity to get experience working in the government, seeing how the whole process works. And by being a part of that, what that would mean. If I wanted say, career as a civil servant or go back to the private sector. So it was a great opportunity with OSHA because previous job that I had working for a trade association, the ship publish council of America, we were one of the first organizations to sign an Alliance with OSHA. And this was back in the 2002, 2003, and then the Bush 43 administration, they had created the program. And it was more focusing on the outreach part of it.

Jess

So by being part of that, there's an opportunity to work for it. And I thought it was a great opportunity because it was a brand new program. A brand new department and not oftentimes if you have that opportunity. So when I got in there basically, my job, however you want to describe it, an Alliance

coordinator was like an account executive. So I would be the one that would be coordinating with all these organizations that want to sign the Alliance. I'd be the one directing traffic, so to speak. So at the time we were having meetings nonstop and I was coordinating over 30 something alliances. So I was working with national association of home builders. I worked with the American petroleum Institute and the national fire protection association.

Jess

So a lot of these larger trade groups within the area in groups that I had contacts with, I was the point person working with them. And it was very interesting to see how the whole program developed. And obviously the Alliance program now is a lot different than it was when it started. But being there right there at the beginning and seeing how it all was processed and getting to know and work firsthand, with some of the, some of the senior leaders too, was interesting as well. Like Jonathan Snare, who used to be the acting administrator. I remember putting together all the talking points and being in there for the meetings. So anyway, that's-

Adam

Jess to tell you, well, one follow up, but just as that you mentioned John Snare. I actually worked with him as a younger lawyer and knew him quite well. But let me ask you, this is just a follow-up and then we'll go on to something else. How did you help build or convince those association to trust the federal agency. Right? When I think their members, right? Those trade associations members, probably take a pretty, they're probably pretty guarded when it comes to OSHA and the trust. So how do you build that trust to make that Alliance a successful Alliance? Right?

Jess

Oh, yeah. And that's a very good question. That was quite a challenge. And I think that's where with everything else that we have to deal with when it comes to, into Washington and working with government agencies and also a lot of that is personality and building that trust. The challenge was with the program when it began, is that trying to be the facilitators, so to speak, with the different departments. Right? So trying to be a facilitator between construction, between standards, between enforcement and that's how the program changed. Because it used to be, industry wanted OSHA to do everything. Right? When I first started, it was like, "Hey, you OSHA develop the safety tip sheet, not us." And then it flipped and OSHA said, no. Because then the staff, the manpower and everyone else was like, no, it's not going to work this way.

Jess

And then trying to get through the politics as you well know if you worked with Jonathan and the solicitor's office? Well, everything had to be finally approved

going through all the steps. Those on the outside are like, why is this taking so long? It's like, well, we got to run it through the chain. And I think that was part of the challenge, is everyone understanding how that whole process worked with the government because they thought, well, if we're getting an Alliance. Right? While we get it done. Now not necessarily. And one other thing to add to that we found out while doing through that, there was a lot of those groups that just wanted it to do the photo op. They weren't really seriously behind the efforts to really work on developing and educating. And I think that's really what a lot of the larger groups wanted to do is, they wanted to be involved in that education process with OSHA staff to make sure they had a clear understanding of how the industry works. So they, where the real hazards are.

Adam

Yeah. Now that's helpful. I'm sorry. Did you have a question?

Michael

Yeah. And I think that's very crucial because I've been representing clients in litigation against OSHA, if you will, for the last 18 so years. And one of the big problems that I've seen over the years is this lack of knowledge by the OSHA compliance officers of the business that they're actually inspecting. And I know a lot of my clients over the years would rather have an experienced or knowledgeable compliance officer do an inspection than someone that's never been into an oil refinery before, for example.

Jess

And that's a good point. And that's something, as we get to it. I can tell you coming into the grain industry too, that's a lot of the feelings. And I worked at OSHA just like with a lot of the agencies, there are some very smart, talented, hardworking people. The challenges is, there's so many specific industries, right? You have so many industries that have a lot of vertical standards, right? And for those of you out there, not quite familiar of your horizontal general industry standard, and you're talking 1910 general industry, but you talk a vertical, like in 1910 to 72 for the grain handling industry. Right? So you talk about that.

Jess

And it's like, there are very few that have that really specific. So when, if you're going to go in just like, as you well know with process safety management and all of that. They may know construction, they may know general industry, but if they were to go into a facility and what are the real true hazards, right? Is it the machine guarding in one millimeter that we're familiar with. Those the real hazards that they should be aware of or those just checking the box so to speak. So they can go back and just say, okay, well this is a programmed inspection, I've done it. On to the next.

Michael

Right. That makes sense. Switching topics here for just a second, Jess. The elephant in the room COVID-19 right?

Jess

Never heard of it.

Michael

I must say that Adam and I predicted that OSHA will never come out with a temporary COVID standard and we're right so far. Right?

Jess

Well, I... There's everyone's, it's the \$64,000 question, right? What's going to happen next? I mean, and I think everyone has their own opinion. And I think, I have my personal opinion. Now I'll give you my personal opinion. This is a no way, an official opinion on behalf of whom I work for. But I think this is where the politics really comes into play here. And I think that even though, anywhere you look, you can look, see the numbers dropping. The numbers are dropping daily with the number of cases, number of fatalities. Everyone's saying the pandemics over, the masks. So how does this justify, is this truly an emergency? Because it's totally an emergency to justify this. However, this was a huge political issue for labor and labor was a very strong supporter of the current administration.

Jess

They tried to get something passed in the previous Congress, when the Republicans were in control of the Senate, they tried to get something passed in the house. They try to have the lawsuit that they lost to the DC circuit. All of the political part comes in. They got to do something to appease, they being the administration who a peace labor. So what does that appeasement going to be is the question. From what I've heard is that, it may just be something to incentivize vaccination, right? Maybe incentivize vaccination in some way, or I've heard others, the other scuttlebutt is, is that it could be a precursor to an infectious disease standard, if they come out with some type of emergency standard. Because you know, the day as I'm sure your firm is well aware, before the ink dries on the federal register notice there's going to be legal challenges filed, right? And once those challenges are filed, can this, whatever standard this is, stand up in court?

Adam

I think Jess, you hit it on the head. Which is, it's going to be hard for an agency to say this as an emergency. When another federal agency like the CDC says is, if you're fully vaccinated you don't have to wear your mask outside or indoors. And the challenge, it's with each, Mike and I always joke. With each passing day, the argument of an emergency becomes less and less. And that is really where the rubber meets the road with this. But to your point, it was a very hot political issue. Right. And we didn't know what life was

going to look like in May, back in January. When things were very different. Right? And it's, so it's an interesting thing. And I think Mike and I took the minority view that it was going to be tough road for the new administration. And I think so far we've been Nostradamus on this. This is a challenge.

Jess

And you're exactly right. When you see that from what I heard. As I understand when the announcement came out at the end of April, that secretary of Walsh was reviewing it, is like, the only reason I made public is because he was having calls with the labor groups. Right? And that's how it made the news. Because I think that's something that you can see in your right to having the executive order coming out the first day of the administration about this plan of public work safety. I mean, you can tell that's where the labor groups are having a very key role, but I don't know. I get asked this by the members on a daily basis. And I said, the only answer I can give you on this issue is it's your own decision. That's really the only answer I can give you. I said, there's so many other rules that are out there, guidelines that, you all have to make that decision though.

Adam

Jess, putting the emergency standard off to the side for a minute, whether it happens and does it, which like you said, is the \$64,000 question. How would, because you are in a unique industry that maybe not all of our listeners are deeply familiar with. How has COVID impacted your members. Right? And I know that's a broad question, but where have you sort of seen the biggest impact?

Jess

Yeah. It's been very interesting and just the background to the grain handling industry. So when you think of grain handling, right? So the National Grain and Feed Association, this was our 120 fifth year anniversary. We're talking grain elevators, feed mills, oil, seed, processing facilities. Also milling, dry and wet corn and wheat milling, and also exports. So it's a big part of the value chain within the ag industry. So when you think about all this, just think of a farmer, grain that he takes to a grain elevator, right? They store make it into to the food. And it's been very interesting because the one thing that everyone dealt with at the beginning is PPE and PPE was critical. This was food mag were a critical part of the sector, right?

Jess

If you don't have grain, how are you going to have any food products. Right? Both human and animal. And so that's why the challenges that talking with many of the members were facing was just trying to meet these local and state requirements. Those were the challenges, right? The good thing is within our industry, a lot of these facilities, newer facilities are so much more

automated, not as many are working there. And certainly it depends on the sector and depends the facility can vary. But the PPE area was the issue. I remember getting calls, how did they deal with inspections? You had an employee complaint about something trying to do a virtual inspections, which I'm sure you all know about. And then trying to keep the PPE supply was a huge issue. Some areas, I talked with members, had no problem.

Jess

Others were like struggling to meet them. So how can you keep everything running if you don't have that? So those are the primary. We're very fortunate, I should say. You hear so many other stories like when the healthcare industry and some of these others. But they're in so many different locations. Being in rural areas and not working as closely with government agencies. Some of our export facilities, that was a challenge way to do it because they work with federal agencies on inspection and international type requirements. So those were some challenges had to deal with there, with government officials working there. But all in all, it wasn't, they didn't have as great of challenges to say, other industries.

Adam

That makes sense.

Michael

Hey Jess, during the Obama administration there was a big push to conduct, I guess, as many inspections as possible it seemed, in the grain industry. Primarily focusing on combustible dust, as well as guarding related issues. Do you see the Biden administration picking up where the Obama administration left off in terms of the grain and feed association work?

Jess

Yeah. If I have to be, as you said, Nostradamus, my Nostradamus reading for our industry during this current administration is going to be a significant increase in inspections. And within the grain feed industry, we are on the regional local enforcement programs for regions five, six, seven, nine, and 10, I'm sorry. Eight and 10. So regions five, six, seven, eight, and 10. We're on the REP and the LEPs. And those are five years, right? Because of the memorandum they came out with. So they're going to be coming out and inspecting us. The areas obviously, what we're really concerned about with this new administration. So it's going to go backwards to the Obama administration. Where it's going to be basically, if they did a citation at a facility in Kansas and they had them for machine guarding and then they do one at the same company in Nebraska, that's going to be a repeat violation, right?

Jess

That's a big concern that we can see coming down the pipe. The issues for our industry are, grain bin entry in Golf Mint. And Golf Mint are very high

profile. Oftentimes, I mean, a vast majority, 70% concur on a farm. But the PR guess what? OSHA doesn't have the authority to, they don't have the authority to inspect or site a farm. So they'll increase inspection at commercial facilities. Combustible dust is a big issue for us, as you said, we're the only industry regulated by OSHA for dust. The grain handling standard. And as I mentioned offline, we submitted comments today. On the proposed amendments to the house, come standard. Where they wanted to find us. So there's a lot of issues we see coming. And we try to be very proactive because guess what we have in Alliance with OSHA in NGFA and the grain elevator and process in society and grain handling and safety council, we all work together because we're trying to promote safety and show them the resources that we have and how much, how important it is.

Michael

I see. Another question I have is the grain handling standard was promulgated what, in the mid '80s. I think. Right?

Jess

88. It was 88.

Michael

88. What part of the grain handling standard do you think is broken and needs to be fixed? Meaning if you had your magic pen and could rewrite it, are there anything that sticks out in your mind that you can say, hey, yeah, definitely?

Jess

Talking with members, I mean the grain handling standard, I mean, there are some obviously parts of it that are a bit dated because of the change in technology. But overall the standard, it is specific for our industry. I mean, as far as the dust issue goes. It's perfect because that standard is specifically for our industry. It's not a one size fits all. And I think that's the key issue right now with what we can see happening with a lot of agencies, OSHA, EPA and so forth. These standards they're trying to develop are not industry specific. And that's the real challenge because we don't want to be a sub chapter and a general combustible dust standard where combustible dust in the oil refinery is a lot different than combustible dust to the grain handling facility.

Jess

So why should we be having to comply with these same requirements when it's totally different? So they OSHA did a review. They did it actually hard to believe. You don't hear this very often a section 16 review of the grain handling standard. And if I recall it was 95 ish, I'd have to double-check. So don't quote me. For the record. But it run 95 ish. And they said, Hey, this standard is doing fine. So you think about OSHA developed it. And we worked with them very closely, did the research, in NGFA being we. And it's a great example of industry and the agency working together. But as I said, my



greatest fear moving forward is that these older standards, these industry specific, I can see them trying to be just put together as a dumb group of a larger chapter.

Michael

Right. So was the grain handling standard a negotiated rulemaking?

Jess

Well, I don't know if it wasn't a neg reg as I understand. I mean, a negotiated rule making processes is my understanding. When everything happened. There was a series of explosions in the late '70s. Very catastrophic explosions of grain elevators, OSHA. Pretty much, fairly new agency. Then that's when they began working in NGFA. We had, many of our members contribute a large sum of, to our fire and explosion research council. To do a lot of the research. Gather the information. And it was a lot of back and forth and trying to come to work together on developing. Like anything else, a lot of public meetings. I'll throw a name out there. And this was all stories that I've heard I wasn't in person. But you may know somebody named Debbie Berkowitz. Have you heard that name before?

Michael

Oh, yeah.

Jess

Yes. Guess what? I guess she was representing a Miller's union. That when, as I, from the stories that I've heard, it's like when they had the public meetings, it would be there on behalf of the Millers union. Talking about how they didn't think that the proposed rule was stringent enough. So anyway, but it all worked out in the end. And that's why I guess it'd been an industry specific. And I think many of our, it's done and you see the results have been significant. If you look at the reduction in the number of grain dust explosions and the number of fatalities and injuries. I mean, we have data on our webpage. I mean, it's significant decrease. It's been very effective.

Adam

Yeah. So it does sound like Jess, that if you had your wand, you would actually be more industry specific standards for other industries. That this is actually working quite well. Which is interesting because I guess it gives your members, it gives them a cheat sheet on compliance. Right? And you don't have to fit a square peg in a round hole.

Jess

Yep. Exactly. But the real challenge of that, like I mentioned earlier, being a vertical standard industry specific is, not a lot. There are very few OSHA inspectors that really have that type of knowledge. So that's the double-edged sword, which is why we have programs like the Alliance to work with them, to educate them more.

Adam

Hey, Jess, I want to ask you just one final question. A new term that I think Mike and I haven't really encountered quite as much and probably our listeners haven't. I know you do a lot of employee safety and health. But I saw that you're doing a bit of facility security and agro terrorism. And so what is agro terrorism? I think we can understand the term. But what does that mean and what's your investment?

Jess

So that goes back, agro tourism facilities security, after 911. And there was a lot of the concern of what could be a potential terror threat on the industry. So again, just as an example, as they call it. Like intentional adulteration. What happened if somebody came to a grain handling facility and were to put rice into store grain, what would the impact of that be? Or the same thing at a food manufacturing facility? That's what they call the adulteration near contaminating. So those are the type of things, facilities, security. You always have to, facility security people don't think about it in rural areas. You need to keep it limited access because people can climb to the top. Sometimes an elevator might be the tallest structure that could be out there.

Jess

People may have want to hurt themselves or hurt others. And so there's a lot of things from facilities, security wise, you need to think about. So, and again, the agro terrorism part of it, that's where, how could food supplies or the supply chain be contaminated or impacted? From a resiliency standpoint, like what happens if the Mississippi river, all the bridges collapse and the locks are broken and you can't move grain on a barge. Right? What do you do to address those types of issues? So does that, hopefully that...

Adam

No, I think that's really helpful. It's just something that I think now many of our listeners are thinking too much about.

Jess

Correct. And also, when you think about it too, if you think about, okay, if people don't really think about this, it's like, okay, if somebody were to contaminate, say a 500,000 bushel, or a tank of grain, how much rice and would that take to have an impact on a lot of people, right? If you put a small amount, it's a lot different than if you were to go to say a buffet at a restaurant.

Michael

Right.

Adam

Understood. That makes sense.

Michael

Hey, Jess, thank you so much for being on the show. This has been awesome. We really appreciate it. And whenever this pandemic is officially over, we should meet in DC and have a cup of coffee.

Jess

I agree. It's great talking to you. I appreciate the invitation and any time.

Adam

Thank you so much, Jess.

Jess

All right. Thank you.

Michael

And there you have it. Jess McClure of the National Grain and Feed Association and stay tuned to the next episode of the workplace safety review podcast. Goodbye everybody.