

Announcer. [\(00:00\)](#):

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Adam Roseman [\(00:39\)](#):

Good afternoon, Workplace Safety Review Podcast stans. This is our end of year special. It is now December of 2022. And rather than a special guest, like we have almost every week or every few weeks, you get the pleasure of listening to your fantastic host talk through what has happened in 2022, and then more importantly, what we expect to see from the Occupational Safety and Health Administration in 2023. I am your co-host, Adam Roseman. I'm here along with my friend, colleague, and co-host, Michael Taylor.

Michael Taylor [\(01:19\)](#):

The Batman and Robin of the Workplace Safety and Health. Right, Adam?

Adam Roseman [\(01:22\)](#):

That's exactly right.

Michael Taylor [\(01:26\)](#):

To follow up on Adam, thank you to our loyal listeners for the year. We really appreciate you listening in. We wanted to dedicate this podcast to a fellow colleague who just passed away. His name is Art Sapper. Art, for those of you that may or may not know, he has been practicing workplace safety and health law for well over 30 years. He was a general counsel of the Occupational Safety and Health Review Commission back in the mid '80s, and this guy has made a significant contribution to workplace safety and health law in a wide range of topics and arenas.

[\(02:05\)](#):

I mean, the guy's testified before Congress. He's taught law at Georgetown University. He has been involved in some of the most high profile workplace safety and health litigation matters from states to federal courts. The high profile stuff, you name it, Art has been involved in some form or fashion. We are very sorry and sad to hear of his passing and wanted to dedicate this podcast to Art.

Adam Roseman [\(02:37\)](#):

Thanks, Mike. Art was a titan in this field and the cases for which he is associated precede him. They're all the big cases that set new ground in this area. With the dedication, obviously. Let's jump right into it, Batman, and let's first talk about briefly what we saw in 2022 from this agency, which is now in its second year of being run by Doug Parker.

Michael Taylor [\(03:09\)](#):

A former guest on the show, I might say

Adam Roseman [\(03:12\)](#):

Actually two-time guest, I should say.

Michael Taylor ([03:13](#)):

That's right.

Adam Roseman ([03:14](#)):

Two-time guest, Doug Parker. I guess that's actually how he should go by that now. Mike, let's start with I know the pandemic is not officially over, but certainly our lives are sort of getting back to normal. Let's talk about where OSHA was with COVID in 2022.

Michael Taylor ([03:34](#)):

That's a good topic, Adam. It looks like, for the most part, unless you're in California, we're out of COVID land, as well as the healthcare industry. OSHA has been in the process and continues to be in the process of finalizing a permanent COVID-19 rule for healthcare facilities. When that will happen, I'm not entirely sure, but that's been going on for a few months now. Federal OSHA is a little bit behind California OSHA.

Adam Roseman ([04:06](#)):

I think it's worth noting that the at least scuttlebutt has been that the permanent rule will be somewhat similar to the temporary rule or the emergency temporary standard that was in place from June until December of 2021, which really was not the subject of a ton of litigation or big time controversial fights. Mike, don't you think a lot of these hospitals and healthcare systems are probably doing the things that the standard's going to require anyway, maskings and quarantining patients, things of that nature?

Michael Taylor ([04:39](#)):

I do. The cynical part of me suggests or thinks that the reason why OSHA's doing this is that the hospitals tend to not push back like other industries may do. That's my sense as to why OSHA's going forward in doing this, as well as trying to repair their reputation of what happened during COVID.

Adam Roseman ([05:05](#)):

That's right.

Michael Taylor ([05:07](#)):

To me, it would've made more sense to initiate and work on the infectious disease standard first, which I know is a priority for Doug Parker. For those of you who may not know, California OSHA has an infectious disease standards on the books. Be that as it may, I would've thought that OSHA would've focused on that first rather than another standard for COVID.

Adam Roseman ([05:34](#)):

It's interesting with the infectious disease standard, to your point, that Doug is kind of in a unique position given he was the chief of Cal/OSHA, so sort of has a framework from which to work. OSHA has announced that at least it's targeting a notice of a proposed rulemaking for the infect for its infectious disease standard sort of in the middle of 2023. Whether they stick to that or not, who knows? But I think what will be interesting at least will be really twofold.

([06:04](#)):

One, what infectious diseases are they going to focus on, tuberculosis maybe, other kinds of respiratory diseases, and then what employers are going to be subject to it? Is it just going to be healthcare, and could it seep into densely populated workplaces like your meat and poultry factors and things like that? I think that's something to look out for and it's always been on OSHA's radar and I think certainly on Doug's radar.

Michael Taylor ([06:33](#)):

Yes. If I had to guess, it will probably mirror what California has on its books and be very broad, if you will, to cover a lot of different industries, because they're going to have a standard on the book absent any rulemaking challenge with the healthcare industry. I think that it's going to cover a broad range of industries, meaning employers, as well as a broad range of diseases. Because let's face it, it's not a matter of if, it's really a matter of when the next pandemic is going to hit. They want to get out in the forefront of this before the next one hits.

Adam Roseman ([07:12](#)):

That's right. Moving past, I think we've spent so much time on COVID and respiratory illnesses the last couple years. I think it's sometimes easy to forget that OSHA really has continued its blocking and tackling, so to speak, of safety and health enforcement. I guess the question for our listeners, Mike, is what are we seeing trend-wise from a citation perspective? I know that trenching is something you and I anecdotally see, but just walk our listeners through what you're seeing citation-wise from OSHA this year and what you think you're going to see next year.

Michael Taylor ([07:53](#)):

Well, this year I've seen probably even more than in the past more trenching violations and roofing violations because it's all over the workplace safety and health news world. I'm puzzled that these things still are occurring, particularly when citations have been issued for these topics for, well, seems to be like a gazillion years, right? OSHA came up with the first trenching National Emphasis Program in 1985, and here we are many moons later and we're still seeing these violations all over the news.

([08:32](#)):

Not only violations, alleged violations, if you will, but fatalities and accidents that are associated with them. It seems to me that it should send a signal to somebody within the agency that maybe what enforcement that they're doing right now and have been doing is not working and to go to the drawing board and come up with something new, because to see this over and over again is quite troubling.

Adam Roseman ([09:02](#)):

For sure, for sure. The other thing is, what I've also seen, though not in as big abundance I guess as years past, really one of our favorite topics, I wouldn't just say my favorite topic is just OSHA's press releases. I think overall, unless you disagree, Mike, I think we've seen a slight downtick in the amount of press releases OSHA has put out regarding alleged safety violations or safety and health violations. But I guess really for our listeners, the question is, do we expect more press releases in 2023? What do you see when you talk to clients? What's the impact of those press releases to them?

Michael Taylor ([09:46](#)):

That's a good question because since Doug has been in office, for the lack of a better word or phrase, there hasn't been a lot of press releases. Although in the last couple of months, particularly the

summertime, I've seen an uptick in some of these press releases. Not as many as there were under Dr. Michaels', if you will, when he first became the head of OSHA, but I do expect more and more of those press releases to be issued.

(10:14):

The impact, probably the most important impact that these pressure releases do is not necessarily negatively impacts the perception or the public viewpoint of the particular employer involved because you have this press release that comes out and that says this particular employer doesn't care about safety and they violate all these rules and OSHA says this without the employer having its fair day in court, right? I think the bigger impact that these press releases have is that other companies within the industries don't want these press releases.

(10:48):

They take it upon themselves to work internally, hire outside consultants, hire lawyers like us and help them with the compliance front so that it keeps them out of the news cycle of these negative press releases, which can have a devastating impact on your brand and whatever you do for a living.

Adam Roseman (11:12):

I will note that it's not just the press releases. The press release is one thing, but what I've often found is that if a press release comes out for an employer, it's not only the press release that you see on Google or online, but usually local news links to that press release and the press release generates news articles. It's this cascading effect.

Michael Taylor (11:35):

Absolutely, yeah. It can have a domino effect, if you will.

Adam Roseman (11:41):

While press releases have gone down a bit, one thing that OSHA did in the middle of 2022 and certainly they're going to really expand on it in 2023 is the expansion of the Severe Violator Enforcement Program, which is called SVEP, not the coolest acronym I guess. But Mike, you have always called it the Hotel California. Can you explain to the listeners why you call it that and what happens if you get in it.

Michael Taylor (12:12):

Yeah, that's a good question. I've always called in Hotel California because once you get in, you ain't leaving, right? I'll tell a quick story to the audience that I had a client in Houston, a construction contractor, that got some trenching violations, two of them that were serious, and the penalty was like \$30,000. They reduced the penalty, OSHA did, by 15 grand. The client paid [inaudible 00:12:36] Didn't want to make OSHA mad, paid the fine and moved on. Six months later at a different site in Texas, they found the same similar site allegations. This time they were called repeat, but the penalty was the same as the ones that were issued for the serious citations in the first go around.

(12:55):

Well, once again, they got the penalty reduced in half, was thrilled to death, didn't want to make OSHA mad and paid the fine and moved on. What the client didn't know is that since they had two repeat violations that they accepted as written and it involved trenching, it put them in the Hotel California. How they found out is they went to go bid on a job, a \$50 million job, at Houston Hobby Airport and didn't get the gig because the contractor told them that they were on this Severe Violator Enforcement Program list on the web, which they didn't know anything about.

(13:33):

This is something that every employer should be aware of, particularly when you're getting citations to evaluate if you accept the penalty and the fine and move on, you could be exposing yourself to being in this program and talk about damaging your ability to gain future clients or keep current clients depending on what you do for a living.

Adam Roseman (13:57):

I think the biggest thing now is not only is SVEP challenging enough, but they've even expanded it. It used to be limited in terms of the types of repeats and willful violations. Now it's really almost any type of repeat or willful violation at the same work site if you have two or more. And then the consequences, that's really the Hotel California, you're subject to significant follow-up inspections, which are time consuming and painful and challenging, and you can't be off from the program for three years after receiving verification that you, the company, has abated all the program related hazards. Mike, in your example, the trenching related hazards.

(14:40):

I mean, the only other way you get out of it in less than three years is you can get out of it in two if you consent to significant enhanced safety processes and procedures that OSHA wants you to do. There's a lot of challenges, a lot of cost, a lot of pain, a lot of reputational damage associated with SVEP. I think, Mike, to your point is every employer likes to say it's not going to happen to them and you pay that initial citation penalty and move on. But I think what I'm hearing you say is, well, employers should really think about this. What's the likelihood of having this cascade and turn into a Hotel California situation?

Michael Taylor (15:23):

Right. If you think about it, if you get the citations that qualify you to be in the program, you got two options. You can hire a lawyer and litigate and try to get the qualifying criterion withdrawn or vacated through a trial, or you work with the agency to prove your innocence for about three years. In other words, OSHA's going to be camped out in your backyard for many years. Talk about being nervous. That's just something that you don't want, right?

Adam Roseman (15:50):

For sure. Hey, before an employer could even get into SVEP, one thing I always get from clients is, does OSHA just randomly come on site? How do they know to come on site? I walk them through obviously the ways in which an OSHA inspection might occur. I always mention National, Regional, or Local Emphasis Programs. You're on a list is really kind of what an emphasis program is. But Mike, can you give us the skinny on what an emphasis program is, and then we can talk about what are some of the big emphasis programs that OSHA has forward in the last year and that we'll see in 2023?

Michael Taylor (16:28):

You bet. A National Emphasis Program is a document that's generated by the National OSHA Office that targets a particular hazard or industry, and then they spell out how they're going to go about doing these inspections. The inspections are supposed to be randomly based, meaning they can't just go through a list and say, "Okay, we're going to go after company A, B, C." It's got to be some kind of neutral way of selecting folks to go about doing this. There's probably anywhere from 10 to 12 National Emphasis Programs on the books any given year. And then you have what's called Regional or Local Emphasis Programs, which are region-based or downright local-based.

[\(17:16\)](#):

It could be two districts in Texas, if you will, where it'll just be an inspection program going after employer or a hazard in that geographical region. It could have anywhere from 120 to 140 Regional or Local Emphasis Programs ongoing at any given time. That's the gist of what these programs are. There are ways for OSHA to utilize its resources and inspect areas where they think hazards exist or industries in which hazards tend to exist based on injury and illness data, prior inspections, newspaper reports, those kind of things.

[\(18:04\)](#):

We've seen a couple new emphasis programs here that's been developed this year that just have been launched. My guess is we're probably going to see another National Emphasis Program or two coming up in 2023.

Adam Roseman [\(18:19\)](#):

Mike, there's really two that I think are particularly interesting. One national and one regional. National, it's kind of funny to talk about it right now as you and I sit on the East Coast, but the Heat National Emphasis Program. I don't think we're feeling a lot of heat right now, given it's 25 degrees outside. But it's interesting that OSHA issued a National Emphasis Program on heat. The focus is, as you would expect, waste collection, warehousing and storage, motor vehicle manufacturing, and it's national. This applies whether you've got a work site in Texas or, gosh, in Pennsylvania or New York or anything like that.

[\(19:01\)](#):

It really is OSHA focusing on heat stress, which has been a subject of significant litigation by OSHA, even though there's no specific standard on it. And then the other one, Mike, I know you and I have talked about it, is the warehousing operation Regional Emphasis Program in Region III, where I am, and really it's a focus on warehousing operation hazards, right? Powered industrial trucks, storage, means of egress. I think they have seen, at least according to their documents, a significant uptick in injuries in warehousing operations. This is the natural result of the injury and illness trends that they're seeing.

Michael Taylor [\(19:44\)](#):

OSHA's tried to litigate this issue a couple times and have been shot down by the Review Commission, the agency where I used to be the general counsel, where you litigate cases if you can't settle them with OSHA. I think one of the reasons is that you have to have a hazard in the workplace and query as to whether heat from the sun is a hazard in the workplace. And if it is, how do you correlate that with a particular illness or an injury from someone? Meaning how could you ever prove that, okay, it was heat from the sun. That may be a little different than let's say you're in a warehouse somewhere and you're working next to heavy machinery and the machinery's 150 degrees.

[\(20:28\)](#):

You might be able to concoct a citation in that aspect, but still it's pretty difficult to prove, particularly when an employer has water available and provides breaks and those kind of things. Because there could be lots of other things outside of the workplace that could contribute to someone, let's say, being dehydrated. Maybe they went out all night and drank and didn't hydrate themselves when they came in. I mean, it's just a lot of variables, and it's something that I'm surprised that OSHA's focusing on because it's going to be very hard to uphold citations if they're challenged.

Adam Roseman [\(21:08\)](#):

What's interesting is OSHA has had very little success in the last we'll say five, six, seven years litigating that issue, and yet what we have seen is they've moved full steam ahead, so to speak, with a National Emphasis Program on the very topic that they've had a hard time in litigation with. One other standard, Mike, that really is I think one of the more complicated, but also probably outdated standards that is due for a bit of a facelift is Process Safety Management or PSM. Can you tell us a little bit about those changes and what that's going to look like for the PSM standard and employer subject?

Michael Taylor ([21:48](#)):

Yeah. OSHA has been working on PSM since I think 2013, trying to come up with data, proposing certain things, sending their ideas out to the regulated community for comment that recently had a stakeholder meeting. They've published things that they're thinking about doing, but they haven't yet promulgated a notice of proposed rulemaking, which is this is what we're going to do, please comment on it and we'll have some hearings, and then we'll huddle, and then we'll promulgate a final rule. They've been dancing around the issue by having stakeholder meetings and getting some input.

([22:31](#)):

Some of the big changes that they're trying to do or thinking about doing is adding chemicals to what would normally be a part of a covered process. In PSM, you have a list of chemicals in the appendix that says... I'll give you an example, like formaldehyde. If you have a thousand pounds of formaldehyde on site, you have a cover process. One of the things they're thinking about doing is lowering the threshold for some of these things, and also adding new chemicals to that. I would say that in order for that to survive judicial scrutiny, they'll have to do significant risk analysis for each chemical that they want to lower the threshold or add new chemicals to this list.

([23:20](#)):

It's going to be interesting to see what they do, but I know they're anxious because EPA is... For whatever reason, the EPA is always out in front of OSHA on these issues. I think I do know why. OSHA has a lot of hurdles to jump through based upon what's in the OSH Act, based upon internal rules that they've set for themselves, as well as some of the limits and mandates that Congress has imposed upon them, coupled with the fact that they're way understaffed right now, not only from the rulemaking perspective, but the enforcement perspective.

Adam Roseman ([23:54](#)):

Right. Speaking of that, listen, obviously Congress deals with money. It is worth noting that the Department of Labor and OSHA has asked for a significant increase in of funding for 2023, and a lot of that is going to go to hiring more compliance officers, which at least in my view is a step in the right direction to have more bodies to go out and inspect facilities. But I think the devil's in the details, right, Mike, which is you can't just hire a compliance officer and say, "Have at it."

([24:26](#)):

The ramp up time is so significant. You and I have spoken with some guests on this podcast, both on the pod and offline. Former OSHA leader Rich Fairfax said to me once, he said, "It takes three years to get a compliance officer really up to speed and good at their job." That's the challenge they face, as well as the understaffing.

Michael Taylor ([24:51](#)):

It depends on what you define good as, right? I mean, let's face it, they're behind the eight ball even if you think they're good. Because they're asked to go in an oil refinery one day, a bakery the next, a

construction site the next, a warehouse, the next. They're asked to be experts in all these areas, which is virtually impossible. If I had my magic wand and I was the head of OSHA, one thing I would significantly revamp and which I think may end up happening sooner rather than later is changing and updating and modernizing their training of their personnel.

[\(25:30\)](#):

I mean, now is the time, because they had a mass exit of compliance officers, maybe about 200 I think, that retired and they're trying to fill that gap. Because for example, let's say if they do get PSM on the books and they've wholesale changed a lot of this, who's going to go out and enforce it? You got to have somebody that knows what PSM is and who's been in an oil refinery before. That's not going to happen until you get these new people on the payroll and adequately trained. Not only just one time before they show up taking a 40 hour course, but I'm talking about being trained on a regular basis while they're within the agency.

Adam Roseman [\(26:14\)](#):

And how to conduct an inspection. I mean, you and I always talk about OSHA compliance officers often try to focus on everything they see at a work site. Sometimes the better and more logical move is to focus on one or two big things and really dive in and do a deep inspection, because that ends up being the more successful cases, at least from OSHA's side, maybe not from our side, obviously.

Michael Taylor [\(26:39\)](#):

Right. That's another big change I see coming in 2023 is more inspectors and a revamp of their training from the bottom up, if you will.

Adam Roseman [\(26:53\)](#):

I know you said if you had the magic wand, but we'll do it this way. If you had a crystal ball, do you see OSHA focusing or do you see any industries that are particularly ripe for OSHA enforcement that maybe haven't been particularly targets before? Just curious where OSHA can lay new ground that maybe there's some employers that maybe think they're not really at risk for an OSHA inspection, but really are.

Michael Taylor [\(27:21\)](#):

Yeah, that's a good question. One thing I wanted to touch on before that is that the listeners that may not know, OSHA is in the middle of trying to revoke Arizona's State Plan status, which rarely happens. They try to do it away with California. To make a long story short, each state can have its own occupational safety and health statute, regulations, standards, if you will, as long as they're equally effective as what federal OSHA has on its books. Whatever a state's budget is, federal OSHA tends to pay half of that budget. But if they believe the state is not actually enforcing things and not living up to snuff in terms of being equally effective, they will go after you and try to revoke your plan.

[\(28:12\)](#):

But it's rare it's happened. That's something that I think that's going to spill over in 2023 because it started in 2022. But in terms of new industry focus, one of the industries that I see that could possibly see an uptick in OSHA enforcement is the cannabis industry. You're starting to see a lot of manufacturing facilities pop up almost daily in a lot of different states. We've seen a couple fatalities recently that have resulted from the manufacturing setting of these. I haven't personally been in one,

but there have been fatalities associated with that. This interesting dichotomy, because federal law says that this is illegal, but certain states have it says, "Well, it is legal."

[\(28:59\)](#):

I think you're going to start to see more OSHA enforcement in this area the more manufacturing facilities that tend to pop up in 2023. I also think that you're going to see more inspections from OSHA at labs where they have and handle these viruses, right? Because let's face it, the idea is to prevent workers and the public, I guess, but more importantly because OSHA jurisdictions is workers is to prevent workers from being exposed to these viruses. I think one of the easiest ways you do that is develop a local or regional or National Emphasis Program on labs that contain these deadly viruses.

Adam Roseman [\(29:43\)](#):

Well, Mike, I think this has been a challenging year for OSHA. I think at least when we've had Doug on, he seconded that, and that was early on in the year. Is there anything that we didn't hit on that you're most looking forward to from OSHA in 2023? Because for me, really it's them getting back to the basics and stepping up enforcement. Not because it keeps us busy, because of course it does, but really because it's good for employees. It's good that OSHA's getting their army back, so to speak. That's at least one thing I'm really looking forward to is how quickly can they fill the vacancies in the compliance officer ranks and get people up to speed?

Michael Taylor [\(30:28\)](#):

Right. I think it's kind of equivalent of flying 20 hours somewhere and what we've been through COVID. We get off the airplane and OSHA's now off the airplane of dealing with COVID. It's kind of like, okay, what am I going to do this now? Trying to get your bearings, you've got jet lag, those kind of things. I think they're now starting getting back to normal, if you will, and focusing on business. Because that's evidence by the fact of them trying to do something with PSM, hiring more compliance officers to go out in the field, and then figuring out who do we want to go after, what industries, what employers.

[\(31:08\)](#):

They still have the enforcement mechanism where if you have an amputation in place, you got to call OSHA. They still have all those means to go out and inspect, but I think from a broader perspective, they're going to start to expand who they go after in 2023.

Adam Roseman [\(31:25\)](#):

Well, Mike, as we sit here, this is going to be our last podcast, I will let you do the honors as the sign off and wishing our listeners a Happy New Year and happy holidays. It's been an honor, I'll speak for myself, to continue to do this podcast with you as a friend, a colleague, and a mentor, but I will let you address our fans here. At least for me, we'll see on the other side in 2023.

Michael Taylor [\(31:52\)](#):

Thank you, Adam. Yeah, it's been awesome. We've had a blast doing this, learned a lot, had a lot of neat guests on this year. Very proud of what we're doing, our vision for the future in running the podcast, a lot of listeners that are listening in. I feel like we're very, very blessed about what we're doing with the GT Workplace Safety Podcast. I'm thrilled to have new guests on for the year. Again, thanks for all our loyal supporters. Just remember, everybody, stay safe out there.