Mike Taylor:

Hello, everyone. Welcome to the Greenberg Traurig workplace safety review podcast. I am Mike Taylor, the host of the podcast. I'm The chair of the Greenberg Traurig OSHA practice group. And I'm based out of our Northern Virginia and DC offices. Adam Roseman, my colleague, and part of the workplace safety and health group here at Greenberg. Traurig is also with us today and he's out of our Philly office today. We have the pleasure of having Greg Greg Richey on our podcast. Welcome Greg.

Greg Richey:

Thank you, Mike. Glad to be here.

Mike Taylor:

It's a pleasure to have you here. I know that we've worked together in the past and a couple high profile OSHA litigation matters as well as some compliance counseling issues. So we're very lucky to have you here. Greg is Greg, is the principal or was the principle owner of cold incorporation, which is based out of Philly. And you were, the Greg was the owner from 1997 through 2016, but still works for Colton corporation. Greg has been practicing HSE related issues for about 40 years. Now. He's a certified industrial hygienists, a certified safety professional, and he's a fellow American industrial hygiene association. And again, Greg, we're very, very happy that you're with us here today. And as you know, OSHA has issued a handful of guidelines dealing with various COVID-19 related issues. And the latest one that they issued, uh, is entitled guidance on returning to work. This was issued on June 18th, 2020, and it provides guidance to the regulated community on nonessential workers coming back to work.

Mike Taylor:

The, there are several questions within the guidelines that are a little puzzling to me, it says that OSHA, or I'm sorry, it says that employers should perform a hazard assessment. We know that in the HSE world, generally speaking, a hazard assessment involves assessing where, whether there's a condition or practice in the workplace that exposes employees to significant risk of injury or illness, because it has to be something in the workplace. How would employer go about determining whether COVID-19 is actually in the workplace, particularly when the virus is invisible to the naked eye, and there are no instruments available to test the atmosphere for the virus or before some kind of wipe sample on a hard surface to determine if the virus is on the surface?

Greg Richey:

Well, the, the goal of course is to keep the virus out of the workplace, or if it's in the workplace to keep it from spreading now because you can't detect it or see it. And you don't always know who's infected because there are asymptomatic, uh, workers who are people who are infected. You have to assume that it's present in the workplace. You just have to make that assumption and take precautions to prevent it from spreading the, uh, on a, on an individual basis. The precautions that a person an employee can take. Well, there are three pillars of safety with respect to that, that would be face covering social distancing and frequent hand-washing. Those three things have proven to be very effective at preventing the spread of COVID-19, uh, both in the community and in, and endorsed, found it on a wide basis. The, the, uh, precautions that a facility could take would be to, uh, monitor the incoming employees for the, the symptoms that might be present to indicate, uh, an infection that would be temperature taking and, uh, SIM symptoms screening, asking the employees a series of questions.

Greg Richey:

And this doesn't have to take a long time, uh, about the symptoms. There are 12 symptoms, uh, ask them if they're, if they're experiencing any other symptoms and if they experienced one or two, um, that might be normal for them. Uh, that, that kind of thing has to be evaluated, uh, and, uh, a determination made whether they enter or, or, or, or not. And, uh, also on a facility wide basis, the controls should be implemented, uh, maximize the introduction of outdoor air, for example, um, re uh, range work stations to keep employees further apart were practical and, uh, implement, uh, sanitation, uh, program that, that effectively clean surface, high touch surfaces that that might be contaminated.

Mike Taylor:

Right. But at the end of the day, though, um, you said basically, because there's no way to determine whether the virus is in the workplace. Employers should assume that it's there and then figure out to what extent abatement measures or corrective action measures or preventative measures they should implement, right? Yes. Yeah. So when OSHA says, go out and do a hazard assessment, it's not a hazard assessment. You and I normally think of because you can't really do it because you don't know where the virus is. Am I right on that?

Greg Richey:

Correct. You have to assume that it's there. Um, now to some extent, you know, that the presence in the community is going to be proportional to the risk inside the plant, right? Uh, at some, at some level, you know, you have to, you have to assume it's present and take precautions to prevent it prevented spread. Right.

Mike Taylor:

I know in one of the guidance materials, OSHA says, Hey, look, to see what the, um, exposure rate, if you will, is in your community. Well, would the community be a certain zip code? Would it be a county? For example, Montgomery county, Maryland has, um, several hundred thousands of people in there, but the zip codes in the county, if you look at them, if you look in the infection rate, um, in one county, they've had maybe two or three, which is in the Western part of Maryland, but in the, um, major city area of Montgomery county city areas of Montgomery county, the infection rate is much higher.

Greg Richey:

Yes. Employees can come from anywhere, uh, long distances, quite often. They can even cross state boundaries, different states have different, uh, rules on things like mask or face cover wearing. Uh, so you have to look at in a broad sense, and, and there are, there are very good maps available that show the, uh, current condition of, uh, presence of, uh, COVID-19 disease in the various, in the various counties. So, uh, that information is readily available in, but you have to look at it from a broad perspective.

Mike Taylor:

Right? Right. So, and one of the things that the OSHA says is that after you do this hazard assessment, um, which you've indicated as not really a formal hazard assessment that is normally known in the HSC world, you should have your employees wash your hands, use hand sanitizer. And I think in there, they talk about performing enhanced cleaning and disinfecting high traffic traffic areas. Uh, how do you go about determining how many hand-washing facilities you need, how many hand sanitizer stations you

need, and what is this enhanced cleaning and disinfecting in high traffic areas that OSHA is talking about? Well, um,

Greg Richey:

Different employers are going to have different situations. I refer to, to a facility I was in, uh, recently, and I'm talking about pre SARS cov two days, where before the pandemic, uh, we would deal with, of course with, uh, factories that produce toxic materials are dealt with toxic materials, such as lead or silica. One such facility had a, an excellent floor cleaning program that I ride on top of wet scrubber that was in continuous operation and the floors were spotless, but they didn't have a good handle on controlling fugitive emissions of lead from, from such things as they're machines, they're, they're open surface tanks, they're, uh, filter presses and, and their smelters. So, uh, the air was contaminated to an extent that it wasn't acceptable. Plus those fugitive emissions were settling out on, on everything. And, uh, the cleaning effort was compromised. So, uh, control has to be widespread, has to be total. It has to be, it has to be looked at from a, from a total viewpoint. Now you ask what our enhanced cleaning, uh, facilities, uh, yes, you need a sufficient hand-washing facilities. And, you know, I can't, I can't give you a number in terms of how many hand-washing stations you should have for a employee or per per number of employees. Uh, we do have a client that installed hand-washing facilities right on the floor, uh, hand-washing stations, right on the plant floor. So that, that has been done. Um,

Mike Taylor:

What are you seeing with, or hearing about folks in terms of disinfecting high traffic areas and how often are they doing that? Yeah,

Greg Richey:

That varies again. Now I've seen a direction from, uh, each year, each year, each year. So a high touch surface has to be cleaned to, uh, several times a day. So it's, it's kind of vague. Um, yeah, I would say somewhere in between those two should be done by several times a day. You know, I, I don't think, I don't think you're talking about a number here. I think you're talking about a person assigned to, uh, continually clean, um, countertops and break areas, uh, vending machine buttons, microwave ovens, uh, those kinds of things that are common to just about every facility. Another common area is restrooms. Now restrooms pose a relatively higher risk, uh, of, uh, of, of exposure in terms of contaminated surfaces and really airborne exposure than, uh, than other other areas of a facility. Um, so they need extra attention as well.

Mike Taylor:

Right. So it sounds, it sounds like some of your clients is that are already have, let's say housekeeping programs in placed. Um, they're kind of, uh, doubling down on housekeeping, um, by extra cleaning, if you will. Is that right?

Greg Richey:

Oh, yes. Yes. That's definitely a call for using disinfectants that are, have been shown by the EPA to be effective against the virus and a list of those disinfectants, it available it's called list and the letter in, uh, on the web.

Mike Taylor:

Right. And I would Sue assume that, um, I don't know, but if, if you're don't have a, a dirty manufacturing facility, um, that it may be harder for an employer to do this cleaning and disinfecting. In other words, they may not already have a vigorous housekeeping program in place because they don't, they didn't need one pre COVID-19. Does that make sense?

Greg Richey:

Well, to some extent it does, but if it's a clean facility to begin with, that's not, that's not really going to, uh, affect the, uh, the deep cleaning that's needed to, uh, keep the virus off of purchases. You're still going to have to implement a, uh, enhanced cleaning process. That has to be pretty thorough,

Mike Taylor:

Right. So these are the, you have, so for those employers may have to develop a vigorous housekeeping program from scratch, I guess, is what I was trying to make it. Yeah,

Greg Richey:

Yeah, absolutely. They will. You can't just assume that the old, uh, if it's, if it's a dirty plant, the plant with the hazardous chemicals, you can't just assume that what worked for that hazardous chemical will work for, uh, the virus, the claim for the virus, really, it needs to be, uh, a PR, uh, program in and of itself.

Mike Taylor:

Sure, sure. OSHA also says in this newly issued guidance that employers should implement social distancing at the work site, and they note the six feet guidance from the CDC, even though I think that the world health organization has three feet, is this social distancing, a recommendation practical for every work site.

Greg Richey:

It's going to be practical a lot of the time, uh, employees should social distances, to the extent they can, uh, employers should set up a traffic patterns that put traffic patterns in its facility that will allow employees to stay apart and not pass each other closely too often. Um, there will be times when you can't keep the proper physical distance that you want to keep. Uh, examples of that would be, um, oh, uh, mechanics working together, uh, on a machine. They ha they might have to work in close proximity, uh, everything from lockout tag out to, uh, you know, removing bolts in and so forth and parts and taking, taking things apart. Um,

Mike Taylor:

Yeah, that makes sense. Yeah, that makes sense. Because you could have a group lockout tagout situation where, as you're mentioning, I think of this where you have six or eight people performing maintenance on a very large and complicated piece of equipment and OSHA regulations require those folks to de-energize the machine and put locks on the, on off button. So no one could start it up while they're working inside. So you may have eight people that are working closely together.

Greg Richey:

Yes, exactly. Um, now, if you can't keep a social distance in a facility like that, then you have to rely on the other two pillars that I was talking about earlier, which would be face coverings and, uh, well,

annotation, really, um, those things aren't always practical, either face coverings, aren't always practical, or he might have to, uh, talk to someone in a noisy environment. And, uh, uh, it might just have to see their, see their face to understand them. There are other alternatives that could be considered face shields, not as effective as face covering, but, uh, more effective than not to not. Um, and, uh, well, you know, other examples, you know, I, I kind of refer to the hierarchy of controls in, in the industrial hygiene field, which would be, uh, you know, a replacement of a process, um, and illimitable elimination of a process, first of all, or, or substitution with enough different process engineering controls, administrative controls, and finally personal protective equipment.

Greg Richey:

Uh, one thing that they should consider is can this process, can this task be deferred to a time when COVID is no longer a problem? And we hope that soon, can they do something else? Uh, that would be just to say, and, uh, require for example, only one person at a time, uh, doing during the work or, or as few people as possible doing the work, uh, can they implement engineering controls such as enhanced ventilation to pull away any aerosols that are generated, um, administrative controls, uh, uh, do the, do the process at a time when not very many people are around, for example, that might be a good administrative control and the personal protective equipment I've talked about. So, right.

Mike Taylor:

Uh, so when you're talking about administrative controls, is that one, could, one of those things be limiting the number of employees and customers that employer has inside of facility to allow for social pro a proper social distancing?

Greg Richey:

Yes, yes. That that would be an effective administrative control, um, employees that can work at home good. Much of the time work at home, uh, in a manufacturing environment. That's not always possible except for the, maybe the, uh, some of the administrative people and visitors to the plant. You mentioned that that again is important that, uh, contact with others, uh, be minimized and I'm thinking truck drivers, for example. Um,

Mike Taylor:

Yeah. Yeah, that's very, very interesting. Um, OSHA also says that employers should ask employees to evaluate themselves for signs and symptoms of the virus and stay home if they're not, well, I mean, this make, to me, it makes sense, but what will it create a situation where an employee may claim that they have symptoms when they don't out of fear of coming back to work?

Greg Richey:

Um, I see what you're saying. Well, you know, I think, I think the big problem with illness of any kind, including COVID is employees coming to work when they're sick, as opposed to the opposite. And they do this very commonly, they are worried about keeping their jobs. They're worried about someone taking over their responsibilities, or they're, they're worried about getting a bad review when it comes to review time. So they come to work sick. Um, employees should, can, can, and should to a very large extent evaluate themselves. I mean, they're, they, they know if they have symptoms, whether their symptoms are, uh, for COVID or they're something that they always experienced. I mean, may wake up in the morning and have a headache. Is that a symptom of COVID? Well, if that happens frequently, no, that's not a symptom of COVID COVID 19. Uh, probably especially if they don't have a fever or any other

sentence. Um, now, uh, when there another, another possibility is an employee might pretend they're sick just to avoid, avoid work. I think malingering and that's that nature is, is, is not a very big problem, but, but you know what, um, that's always been somewhat of a problem even before COVID-19 the whatever policies to plan ahead in place prior to the pandemic, they should continue using to, uh, ferret out, uh, employees that are abusing the system.

Mike Taylor:

Right. Is it just, to me, it seems like, um, um, this is going to be a very kind of a walking a tightrope example in terms of balancing employee privacy and all those good things with, um, analyzing whether your folks are sick and how you're affirming that they are indeed sick or so show the signs and symptoms anyway, um, it, OSHA goes on to, in the guidance, the new guidance material and talks about you may want importance, may want to perform contract tracing, um, when someone is diagnosed as positive, uh, some questions I have about that, why would employer want to do that? Is it really the responsibility of an employer, as opposed to, let's say, a local government health agency, uh, and, and what would you do, you know, are any of your clients performing contact tracing and what would be a considerate, uh, what would be considered a sufficient contact tracing program? You think, I know I asked you a lot of questions there, but

Greg Richey:

Yeah. Um, OSHA can't require contact tracing. They suggest it and contact tracing for the employer would be advantageous really only to the extent that you know, what employees in your facility, which of your employees have been in contact with a, uh, a COVID 19, uh, the person with COVID 19, so that you can, uh, get those, those employees in quarantine. Um, as far as the over the community goes, uh, OSHA suggest, and this is good idea to, uh, that the employer should cooperate with the local state or local government in their contract tracing efforts. Um, just to, uh, slow down the, the, the, the spread in the community.

Mike Taylor:

Right. Right. I know OSHA talks about in the guidance material about the possibility or option of employer taking temperatures of employees, um, before they enter the workplace. My question is, how useful is that? Or would that be, do we know yet the likelihood of transfer from someone who is asymptomatic, in other words, is this really something of value that employers should consider?

Greg Richey:

Well, when looking at a symptom evaluation, which would include temperature taking, and all of the questions that are asked about the 12th symptoms, it it's the best we have is what it comes down to. Uh, there's, there's no good way of, uh, you can't, you can't test everyone for the presence of an infection of infection with COVID. You would need, if you tested everyone every day, every employee in the country, every day, you would need billions. And that wouldn't be possible, obviously. So, um, it's the best we have. And so it needs to be done to try to minimize the spread within the facility. Uh, and, uh, you, you, you, you just to, because it's the best we have,

Mike Taylor:

Right. Adam, do you have a question?

Greg Richey:

Ah, I want to turn briefly to enforcement now, ocean, they issue citations to employers. Don't have employees wearing PPA and then nine, excuse me, and then 95 respirator or a face shield, but is there any proof? And then 95 will protect a worker from getting the virus. And then 95 is more effective than just a cloth face covering. And then 95 is a, is a genuine respirator. Uh, and OSHA does have regulations on respirators from having a written program to, uh, requiring medical testing, the fit testing. Um, the N 95 has a protection factor of 10, which means, um, you will be, you will be protected, uh, the exposure to the chemical from which you are trying to protect yourself by a factor of 10, 10 times less likely to, to be, uh, affected than if you did not have the respirator. Uh, the material that respirator is made of the a 95 is a heap material that is very effective at removing the, uh, the virus.

Greg Richey:

However, uh, the weak link with the [inaudible] is the fit. Uh, it's, uh, you know, it's basically a piece of paper that, uh, it's hard to get to get a good fit with, but, uh, it's, it's better than a cost-based clubbing. I know from the congressional testimony that OSHA has issued, I think, one citation, but do you see an onslaught of, or just some uptick in OSHA citations related to employers providing improper or not enough PPE? I really don't, uh, as a former OSHA compliance officer myself, um, I think they, they issued that one citation to make a point. I don't think if it's challenged, I don't think it would have a great chance of, of standing up. Uh, it was for a reporting of, uh, hospitalizations of six employees in a nursing home. But how, how do you really tell whether those employees got the virus in the nursing home or in the community? Uh, I don't know. Uh, I don't personally see OSHA doing a whole lot of, uh, enforcement. Uh, I think employers have to view this as a problem with, uh, keeping the disease out of their facilities rather than compliance with OSHA.

Mike Taylor:

So I think what you're saying, Greg is, uh, as a matter of breast practice employers should do or consider doing the things that OSHA is suggesting or recommending in these guidance materials, is that right?

Greg Richey:

Yes. There are guidance materials. They're not regulations. OSHA has chosen not to issue an emergency temporary standard on, on, uh, SARS COVID too. So, uh, I think they're, they're, they're good guidance. They're kind of general. And then you have to kind of, uh, structured into, to match your own issues in your own facility, but they're not mandatory from a, from a legal standpoint, from a legal OSHA standpoint.

Mike Taylor:

So they're essentially kind of like brainstorming materials. Is that right? Things that you can do and brainstorm with folks like you consultants to come up with a robust COVID-19 plan, even though it's not a regulatory requirement.

Greg Richey:

Oh, she was kind of reverted to a consulting basis here, uh, and, uh, kind of thrown in the towel on their enforcement. I, I think, um, there, there's a lot of criticism of that in Congress. Uh,

Mike Taylor:

Yeah. Yeah. I've seen that in. Do you think, because you've been doing this for 40 plus years and used to work at OSHA, do you think that, that as a result of the virus being invisible and that we don't have instruments that we can use to test, let's say like air contaminants in the air, um, and determine if it's actually present in the workplace. Do you think that's probably the thing that's giving OSHA the most heartburn and why they're not issuing a standard?

Greg Richey:

I don't really think so. I, I think they just chose not to issue a standard. Uh, um, then they took that out, talks about, but COVID-19 places on employers, the additional burden, for example, their HSC employees or their HSC people are, are, are going to be, uh, overtaxed with dealing with training issues, training, training, employees to, uh, avoid the spread of COVID-19 will be very important. Uh, they, they believe that the availability of consultants will be spread thin. So they are, uh, kind of giving employees, uh, breaks employers, I should say, a break, uh, with COVID for those reasons. Uh, I don't think they feel that COVID-19 is difficult to regulate or is unimportant. Uh, they just, uh, think that, uh, because of the overwhelming, uh, effects of a pandemic, they need to, uh, give employers a break.

Mike Taylor:

Right. And is it also true because it meant, as we were talking about earlier, you were talking about earlier is not meant to be a one size fits all approach because you know, or refinery is completely different than let's say a baking company.

Greg Richey:

Yes, that's true of all OSHA regulations, however, and OSHA OSHA deals with that. They deal with it by issuing letters of interpretation and, uh, inspection guidelines for their inspectors and so forth. So, uh, they can issue an emergency temporary standard, even though, uh, one size doesn't fit all with, with the pandemic. Right.

Mike Taylor:

Adam, do you have any follow-up questions?

Greg Richey:

Yeah. The thing that's been getting some clients, uh, although heartburn is what OSHA is or is not saying about the employer's obligation to record COVID illnesses on OSHA laws and whether, uh, it requires employers to, uh, make work related determinations in the pre COVID world. If someone's finger finger was amputated on a machine at work, it's pretty easy to determine if that injury was work-related here, though. You've got a relatively ubiquitous virus. Are you working with any clients and advising them on how to make work relatedness determinations when there's an employee COVID case, because that's sort of caused some clients, some headaches from our, yeah, it seems to me to be very, very difficult to discern where exactly an individual contracts, the virus, whether it's in the community or the workplace. Right. Uh, I don't see how OSHA can discern that. Fortunately, uh, for our clients, we haven't had to deal with it yet. Our clients haven't had any, uh, any disease that they've reported to us anyway. Um, so I think the answer to that is, uh, up in the air, uh, I I'm wondering how I'm going to enforce this, uh, this one citation, this one mutually citation that they, uh, that they issued, how they're going to, uh, uh, make it stand up if it goes to, if citation two, if it goes to contest. Okay.

Mike Taylor:

Hey, Greg, we really appreciate you taking your time out to speak with us today to talk about a very important and timely subject COVID-19 and, uh, returning to work the non-essentials listeners stay tuned for the next episode of the workplace safety review podcast. Thanks.

Mike Taylor:

[inaudible].