

Mike Taylor:

Hello everyone. And welcome to the next episode of the workplace safety review podcast. I'm your host, Mike Taylor chair of the OSHA practice group at Greenberg Traurig based out of our Washington DC and Northern Virginia offices. I've been practicing OSHA law for roughly about 20 years now. And if you want to find out more about me or our OSHA practice group, you can go to www.gt.law.com. Uh, accompany me is Adam Roseman. We are part of the OSHA practice group at Greenberg Traurig. This podcast is a little different in the sense of we're not interviewing an outside person to get their insights on what's going on in the EHS world, Adam and I are kind of going to give you an overview of what we think is going to come, uh, with a new Biden in administration and OSHA. And with that, I'll turn it over to Adam to talk about the agenda.

Adam Roseman:

Thanks, Mike, and, uh, really excited to do this. Um, and so really the agenda, um, really is broken up into three parts with the last part, really being the focus. So before you can talk about where we might be going, it's important to talk about where we've been, uh, in the OSHA world. So we want to chunk it out in two segments in that respect, sort of 2017 to 2019, and then OSHA in 2020, which of course was related to the pandemic. And then after that, we'll go into 20, 21 and beyond. So when we look back between 2017 and 2019, what we saw was an administration, uh, an occupational safety and health administration, uh, I should say that remained relatively steady and status quo. The number of inspections were remained pretty much a normal well over 30,000. Um, but the real big, um, sort of Corker or change from previous administrations was that there was never an assistant secretary of OSHA or head of OSHA under the entire Trump administration.

Adam Roseman:

Um, and that certainly wasn't for lack of trying as, uh, the administration did nominate, uh, Scott Mungo, who's the former vice president of safety at FedEx ground that express, but he ultimately withdrew his nomination. And since then, Lauren sweat, the deputy assistant secretary of labor, uh, has run the organization. Um, and like I said, that the aid, the agency was relatively status quo. It was, uh, to the most frequently cited standards from previous years where were essentially the same things like fall protection, scaffolding, lockout, tagout powered, industrial trucks. Um, but this of course is not to say that the agency do anything new or different. Um, they ultimately finalized revisions, um, to the construction and general industry beryllium standard. And they were actually in the process of requesting information, uh, to revive certain, uh, often cited standards like powered industrial trucks and lock out tag out.

Adam Roseman:

Um, of course, um, once, uh, the end of the first quarter of 2020 rolled around everything changed and the public eye, uh, turned quickly, uh, as the pandemic, um, if the American, uh, it hit America to OSHA and generally speaking, at least initially, or in the initial months of OSHA was criticized for not doing more, uh, related to the pandemic, including creating a temporary emergency standard. And we'll get into that a little bit later. Um, and not surprisingly that led to a number of lawsuits, uh, from labor organizations and other entities to try to force OSHA, to create an emergency temporary standard related to COVID. And those were largely unsuccessful as courts generally defer to the, to, to OSHA as they have the safety and health expertise and, uh, rule in OSHA's favor. Uh, there is one current, uh, lawsuit pending in the ninth circuit related to a COVID emergency temporary standard.

Adam Roseman:

Uh, that case remains pending and is likely not going to be resolved, uh, if at all until, uh, the, uh, latter half of the first quarter of 2021, if not later. So rather than implement an emergency temporary standard, what OSHA decided to do related to COVID was issued non mandatory guidance. And they did that in the form of a longer guidance documents and frequently asked questions. And those frequently asked questions really applied across, uh, across all workplaces and they related to cleaning and disinfection face coverings, other PPE record keeping and things like that. And the specific guidance related to specific industries that were particularly vulnerable to the pandemic, meat, packing, healthcare, nursing homes, uh, manufacturing and other similar industries. But again, this guidance wasn't mandatory. Um, it doesn't mean that it had no force, but it, it wasn't a, an official OSHA standard. In addition to the guidance, OSHA issued nine enforcement memos related to COVID-19 and it is worth noting that eight of those nine were actually issued before June 1st.

Adam Roseman:

So since June 1st, we've seen very few enforcement guidance, uh, enforcement memos, uh, related to COVID. And most of those memos, uh, perhaps rightly so in the beginning of the pandemic or related to respirators and in 95 and their usages, especially because there was a shortage of them, but it is worth pointing out two really important memos that applied across, um, across more places. And the first was a memo explaining, um, OSHA would take employers, good faith efforts to comply with the OSH act, the occupational safety and health act in light of the pandemic. OSHA seemed to recognize that as the pandemic empty and flowed, there were openings and closings of businesses, and that it would take the good faith efforts of businesses into account when say doing annual recertification safety training and things like that. So that's the first, that was the first memo. And the second one was a memo from mid may, um, directing area offices to use their discretion, to limit onsite inspections. And in some, what that enforcement memo said was that OSHA was going to use their discretion in doing onsite inspections related to COVID and mainly to protect their own compliance officers and to protect the general public and that the priority would be on, on, uh, fatalities and imminent danger exposures to COVID, but in sort of lower or in what they deemed to be lower risk situations, they would not do an onsite inspection and instead send a letter and ask the employer to respond to it that way

Mike Taylor:

Time. And oftentimes in response to the letter, the OSHA compliance officer, you know, based on our experience has been opening up inspections and doing the inspections just over the telephone,

Adam Roseman:

Right? Including doing employee and management interviews over the telephone, which makes it a challenge, employers and OSHA. Um, the other, the other issue that really has challenged employers is recording and reporting COVID illnesses. This will remain an issue for employers until there's significant distribution of the vaccine. And the challenge is that OSHA has determined that COVID 19 is a reportable illness on employers, um, OSHA injury and illness logs. If it's a confirmed case, if it's work-related and involves one of one or more of the general reporting criteria in OSHA's recordkeeping standard, the million dollar question of course for employers is how do we determine if a COVID-19 case is work-related and OSHA guidance has, has given tips and factors, but they've acknowledged there's no ready formula for this. And it's a fact intensive inquiry, and they've charged employers to investigate the relatedness of a case before making a decision with that said, they have said that if an employer cannot

determine that it's more likely than not that an exposure in the workplace played a causal role in the COVID-19 illness, then the employer doesn't have to record the COVID illness.

Adam Roseman:

Now, this is particularly challenging when there's significant community spread to determine whether workplace played at any cause a role, um, in an employee's COVID-19 case. And it's important to understand this. Isn't just an academic question because if a COVID-19 cases work-related and employer has to log it on their injury and illness log, and it could impact whether they're they're inspected under OSHA site specific targeting program, um, in the future, because the site specific targeting for a gram basis inspections on high injury and illness rates, um, in certain industries on top of that, those injury and illness logs could impact, uh, your workers' compensation premiums. So these are an academic discussions. These are real, tangible issues that stem from trying to make a work relatedness determination on a COVID-19 illness. And like I said, this will continue to be a thorn in employer sides until widespread spread distribution of the vaccine.

Adam Roseman:

Now, unsurprisingly, the pandemic has had a trickle down effect, so to speak for OSHA enforcement, uh, beyond just the pandemic itself and COVID-19 cases, as we've seen a sharp decline in work-site inspections in 2020, I, and interestingly enough, we've seen where employers do receive an OSHA citation. They there's a decline in them actually, um, appealing it and litigating it instead, deciding to, uh, take maybe a small monetary reduction and accepting the penalty and, and at resolving the case early now it's unsurprising, of course, that OSHA has received a wave of COVID-19, but lated, uh, safety complaints they've received over 12,000, um, and much like at OSHA inspection. What we've seen is that OSHA sends a letter to the employer. The employer responds via letter attaching relevant policies or practices. And in many scenarios, that response is sufficient to essentially close, uh, OSHA's inquiry. And that's, that's essentially what we have seen in terms of OSHA citations, actual enforcement citations. We've seen an uptick recently in the last few months of COVID related citations. Um, the total monetary penalty for COVID related citations is inching to four close to 4 million. But while that is, that sounds like a large number, most citations have, have rendered a monetary penalty of less than \$30,000. And OSHA has, has, uh, faced significant criticism for that. But of course the challenge is that there is no COVID 19 standards. Yeah.

Mike Taylor:

And Adam, you know, I was going to say, you know, I think one of the big reasons why they're doing lots of COVID related inspections now is that by August or September, uh, for example, you know, OSHA considered that most employers should know by that point, what to do and what not to do to try to protect folks from getting COVID in the workplace, along with the fact that they were getting a lot of public shaming by not doing anything during the initial few months.

Adam Roseman:

Yeah, I think that's right. I think, I think when OSHA walks into a workplace and they see, for example, maybe some, some amount of employees without face coverings, or maybe a lack of social distancing that provides a more solid predicate for us, a COVID related citation than maybe exists back in March or April or may when, when the science and the mitigation efforts seem to be changing, um, you know, on a more routine basis. Um, it is perhaps the most interesting thing related to the pandemic is that we have seen state plan states, uh, sort of fill the gap, so to speak, um, with their own emergency

temporary standards. And today there are four states that have issued their own COVID-19 emergency temporary standard, Virginia and Michigan, Oregon, and California, and they, for the most part track, a similar trend where they require employers to assess the job risks of COVID-19 in the workplace, create mitigation plans, provide training to employees and develop processes for screening employees and reporting positive cases.

Adam Roseman:

Uh, it is worth noting that Cal OSHA, um, has probably developed the most robust, uh, standard. Um, it, it requires employers to create a comprehensive COVID prevention prep program, offer testing to employees. Who've had COVID exposure at the workplace and provide testing to employees in the event of a COVID outbreak at the work site, which is defined as three or more cases in a 14 day period within the exposed work site. So with all of that lead up, it is worth Mel asking, where do we go from here? And so the first question we've sort of heard and we've thought about is, you know, where, where does the new administration start? And the obvious the obvious sort of inquiry to that is do they pick up where the Obama administration left off and we'll get into that. And I think right now it's, it's hard to say, but they may even go beyond what the Obama administration left off.

Adam Roseman:

The very first thing is we know for sure there will be an assistant secretary of labor for occupational safety and health. And we suspect that will, that will be coming in rather short order under the new administration, especially since, um, pres president elect Biden has already nominated a secretary and individual for the secretary of labor position. Well, we see four potentially top priorities and then a few secondary priorities, at least in the first year or two of the Biden administration, which is increased enforcement, potentially a temporary emergency COVID standard and infectious diseases standard, and then enhanced the whistleblower protection. So before we get into that, though, the question is who's going to run this agency and there have, of course been, uh, names bandied about, and what we think will likely occur is that we'll see either someone from, um, you know, organized labor or someone, um, that worked in the Obama administration under Dr. David Michaels, who formerly ran the occupational safety administration, uh, occupational safety and health administration, or we could see the Biden administration pluck someone from a state plan, state

Mike Taylor:

Adam. One of the questions that has been arising from some of my clients has been well, how soon will this take place? And, you know, I talked about this going back to the Obama administration. I believe Dr. Michaels was nominated in April and, but wasn't confirmed until December later on that year. However, that may not be the case here. It could move a lot quicker, but, uh, you know, just by way of example, Dr. Michaels didn't take over until December of the year that he was nominated

Adam Roseman:

That's right. And, and what we generally see in, in, in transition from administration administration is that not a ton of significant movement gets done until there is a head of that agency. But again, all that somewhat goes out the window with a pandemic that's still very present in everyone's life. So in terms of the actual priorities, we do think there's going to be increased enforcement, but it is worth noting that again, until we have a significant distribution of the vaccine, which may not be late until late 20, 21 or early 2022, that we'll see an increase in enforcement consistent with that timeframe. Um, on top of that, if, if the new administration hires more compliance officers, it's going to take time to train and get

those compliance officers up to speed before they send them out in the field to do inspections. Um, and we also think there's going to be an increased emphasis on egregious cases and high dollar cases.

Adam Roseman:

And you're going to see, uh, uh, more, uh, aggressive enforcement arm of, of OSHA. So this, this now takes us to the, the, uh, the million dollar question is, will there be an emergency temporary COVID-19 standard? And if there is what the heck will, it will look like so many have predicted that the new administration will push this right away and organize labor has certainly pressured, uh, president elect Biden to keep his word on, on attacking and being really forceful about the COVID-19 pandemic, but from a timing perspective, it may not, it may not occur again, like, uh, what Mike said was that if there is no head of OSHA for a couple of months there, by that point, there may be significant vaccine distribution, thus lessening the need for an emergency temporary standard. Um, on top of that, the question then becomes one, will it face litigation from the business community?

Adam Roseman:

And I think unquestionably, the answer is going to be, well, it depends what what's actually in the standard. And we think there is a based on what the states have done. We think a standard could include some combination of, um, requiring employers to create a preparedness plan, mandatory social distancing, employee, temperature screening, and symptom screening, face coverings, workplace evaluation, to assess exposure risk, and some kind of training. Um, it is worth noting that if the administration does not implement an emergency temporary standard, we think that they're going to be more aggressive in using the existing standards to inspect employers related to COVID-19. Um, and we could see the increased use of, of OSHA sort of ultimate Trump card of the general duty clause to cite employers, um, for COVID-19 related hazards in the workplace that have yet to be seen.

Adam Roseman:

So if there is no emergency temporary COVID 19 standard, or if the timing of that standard, um, doesn't jive with the administration's priorities, especially if the vaccine, uh, is distributed, uh, at an even faster pace. What we think will happen is that there will be a push, uh, from OSHA, uh, to, to revamp or restart, um, the rulemaking process for infectious diseases standard. And under the Obama administration, they started that process, um, for a new infectious diseases standard and the Trump administration halted it. Um, and so whether the Biden administration goes back to it or not, it's an open question, but we suspect that there'll be a good, that they will have a good argument to, to establish such a standard in light of not only the COVID-19 pandemic, but pandemics or, or smaller pandemics that came before it like H one H one N one or MERS or SARS.

Adam Roseman:

Um, so we think that that may be the course that this administration takes just given the timing associated with getting a new administrations, uh, OSHA staffed up. And the big question in, in developing such a standard will be, will accompany 19 vaccine, uh, be addressed in either an emergency temporary standard or the infectious diseases standard. Um, and that's to be seen, but OSHA is not working from a blank slate here. Um, it could build upon its current bloodborne pathogen standard, which does require employers to offer the hepatitis B vaccine to employees who may come in contact with blood or other, um, or other material. And they either have to give them the vaccine or send them to a place to get the hepatitis B vaccine or ask employees to sign a declination letter saying they don't want the vaccine. So we could see OSHA, uh, model, uh, either an infectious diseases standard or an

emergency temporary standard, um, off that language and the bloodborne pathogen standard. Like, did I kind of summarize that, right?

Mike Taylor:

Yeah. I think you're dead on with that. And to me, it's, I think more likely than not that OSHA will focus on the infectious disease standards rather than an emergency temporary standard, but we'll see what happens.

Adam Roseman:

So beyond pandemic and infectious disease, there is still additional work to do at the agency though. It may not feel like it at the moment, um, at a couple other standards, um, that have been, uh, that have been talked about as, as potentially being introduced and implemented is a tree care industry standard, which, um, which Walt seems like maybe a smaller industry is an extremely dangerous one. And then we also may see the implementation or the rulemaking process of the heat stress standard. There've been significant calls to have such a standard because of the extreme summer heat and last year, the occupational safety and health review commission, uh, which is the appellate body, uh, that adjudicates, um, litigation related to OSHA citations vacated a general duty clause violation related to heat stress. And the commission in its opinion, essentially said that without a heat stress standard, it leaves employers completely confused and without any guidance, uh, regarding their responsibilities.

Adam Roseman:

So of course, um, if OSHA does engage or start the rulemaking process for heat stress standard, they'll likely look to, um, to entities that have developed similar, uh, documents or policies like the national Institute for occupational safety and health, um, to sort of jumpstart such a standard. And we would think of standard would include a training component, a hydration component monitoring and medical surveillance, um, beyond new standards. We think there is a good that we can see a push to, to continue to protect whistleblowers. Um, first in 2016, there was a final rule prohibiting employers from retaliating against employees for reporting work related injuries and illnesses. Um, the Trump administration, um, do recidivate or reverse the rule, but they didn't really enforce it. Um, and they actually issued a memo in October, 2018 clarifying and narrowing their position on the scope of that rule. So we think there's going to be a ping-pong back to the enforcement of that 2016 rule.

Adam Roseman:

More importantly, though, we think there could be a revamp of an expansion of the anti-retaliation occupational safety and health act, which is commonly known to call, uh, rule 11 C. Um, right now rule 11 C is a far weaker, uh, whistleblower anti-retaliation provision can similar provisions in other federal laws, um, that OSHA has jurisdiction over like Sarbanes-Oxley or Dodd-Frank, uh, and the two biggest flaws. So to speak in rule 11 C is that the statute of limitations to file a complaint with OSHA, um, is only 30 days and that there is no private right of action in federal court. Um, for, for employees meeting the secretary of labor has to bring a case on your behalf if they believe it is warranted. Um, there, there have been bills that have been passed or at least introduced in the house of representatives that could be revived or, or similar bills could be written that would seek to expand the statute of limitations for employees to file whistleblower complaints with OSHA, to permit them, to adjudicate their claims in front of an administrative law judge or the administrative review board, and would provide for a private right of action for employees who will not have safety and health, uh, you know, related issues in the workplace.

Adam Roseman:

And broadly speaking, almost all such a bill would do, okay, bring OSHA's 11 C provision or anti-retaliation provision in line with many other federal statutes anti-retaliation provision. So it wouldn't be a particularly, excuse me, uh, it shouldn't be a particularly controversial, uh, bill, but of course, the politics of the day and, and, and the challenges of getting major legislation pass are always, always hard, but the concepts really only bring an anti-retaliation provision in line with its, its uh, statutory cousins, so to speak. So beyond the top four, uh, OSHA priorities that we see, we think there are a couple, uh, secondary priorities that are gonna, that that will likely pop up under the new administration. So the first is, uh, the return of the 2016 and 2017 electronic reporting. Um, in 2017, OSHA began requiring large employers to report employee injury and illness information to OSHA and OSHA would post it on its website.

Adam Roseman:

The, the rule, um, was, was stalled through litigation. Um, and the Trump administration has delayed the implementation of the rule and then eliminated the requirement for large employers to electronically submit detailed injury and illness information. And after years of litigation, just recently, there seems to have been a resolution or we're getting close to a resolution. And, uh, just recently OSHA did post some injury and illness information from large employers that submitted it, um, from 2016 to 2018. And we think OSHA may resurrect the original version of the rule requiring employers to submit detailed injury and illness information and labor organizations maintain that this disclosure of this information, of course, while protecting employee privacy is key to understanding and informing the public about employer's injury and illness programs.

Adam Roseman:

I think the next, the next big priority is, is something Mike and I have talked about a lot, which is the return of press releases and the policy under the OSHA, Bob OSHA Obama Obama administration, was that it issued press releases, um, about fines and citations of at least \$40,000. And what we saw over the last four years was a slowing of that. And then in September, 2020, the deputy secretary of labor advised those shifts to stop posting public stop publishing, excuse me, releases of funds and penalties against employers, absent extraordinary circumstances, and essentially, uh, the deputy secretary of labor halted, the, the, the, the practice altogether. And what's actually interesting is there are some studies that suggest that, that these press releases are, are beneficial to industries and they, they might even have the impact of over 200 agency inspections when it comes to compliance. And they serve as a reminder for companies to be aware of safety and to immediately change their practices because very few companies want to be named in it, occupational safety and health, uh, press release. But do you think we'll see a return of that? Um, in short order, given it's such an easy thing to return to?

Mike Taylor:

I definitely do. And, um, it's, it's like you said, it is a good tool, right? Um, I once was on a panel with Dr. Michaels and told him that in theory, I agree with what he's trying to do. They only have the resources to inspect about 1% of the workforce, right. But the way you can go around that is just not put the employer's name in the press release. If you're going to issue it just as soon as you issue the citations, because you could have a situation where you issue a press release, put the employer's name on it, and litigation accrues and OSHA ends up withdrawing the whole case. Meanwhile, this press remains, um, you know, lives forever on the website.

Adam Roseman:

Yeah. And that, and that's exactly right. And you know, our hope as, as OSHA practitioners is that they take a nuanced approach the best, because I think our, our theory of this is that it is a good thing. Um, but it's gotta be done in a fair and equitable way. And one way of course is the way Mike said, which is you just redact the name of, uh, the employer, because, you know, if you are in the oil and gas industry, you want to know about safety issues at other, at other work sites, and you want to correct it if you have it in yours. Um, but it, obviously there are some, there are some equities involved in naming, um, an employer, uh, in those press releases. And then finally, I at all, all end with a couple of sort of smaller priorities, which is that we could see a return to fully staffed OSHA advisory committees.

Adam Roseman:

As there we suspect there will be an appetite from the private sector and academic sector to sort of weigh in on occupational safety and health issues and help, uh, the agency especially respond to the, to the pandemic and get it behind us. Uh, we could see an emphasis on a, on national emphasis programs and that's particularly true if the new administration decides not to implement an emergency temporary standard. What we can see is national emphasis programs as a, as a vehicle to get OSHA, to inspect more of work sites that were particularly impacted by the pandemic places like nursing homes and meat, packing industries, play places like that. We could also see a national emphasis program on chemical refineries. Given those tend to produce more, uh, high dollar or egregious cases given how regulated they are. Um, so we, I think the point is we see a possibility where, uh, the new OSHA administration uses more surgical measures rather than blunt force in terms of enhanced enforcement.

Adam Roseman:

And then finally it is worth noting that although not right away in the middle of president, like Biden's new term, a term they'll have a chance to name a new member to the occupational safety and health review commission, which like I said, is the appellate body that adjudicates OSHA citations, um, chairman James Sullivan six year term expires in 2023. And it's likely that, um, president Biden's or the new administration will likely, um, select or nominate, um, a more pro employee friendly, uh, individual. But of course time will tell with that as well. Um, and with that, I, I don't have any other main priorities, Mike, if you, are we missing any, um, that we didn't cover?

Mike Taylor:

No, I think that pretty much covers it. Adam, I think you did a great job and we're really looking forward to, uh, more podcast in 2021. So stay tuned for many more to come. Um, our next guest is going to be a very special guest Richard Fairfax, who used to be the head of OSHA enforcement, uh, for many, many years. I think it was almost 30, some years before he retired in 2013. And Richard is going to talk to us about what he thinks has worked and has not worked with the agency over the last 50 years. So again, thanks for listening in and stay tuned for the next episode of the workplace safety review podcast.

Speaker 4:

[inaudible].