

Mike Taylor:

Hello, everyone. Welcome to the Greenberg Traurig workplace safety review podcast. I am Mike Taylor, the host of the podcast. I am the chair of the Greenberg Traurig OSHA practice group. And I'm based out of our Northern Virginia and DC offices. I focus my practice exclusively on workplace safety and health related issues. A big portion of that is enforcement litigation all across the country involving a broad range of industries and issues. I have defended well over a thousand OSHA citations during my 17 years in private practice, dealing with HFC issues prior to private practice, I was the general counsel for the federal occupational safety and health review commission, which is the agency that serves as the trial and appellate court. When you're challenging citations, when federal OSHA has jurisdiction also perform compliance, counseling, compliance, audits, inspection, counseling, due diligence reviews, whistleblower representation. When safety is at issue and catastrophic management, we have a very special guest with us today, Mr. Jess Lankford, who is the chief administrative officer of Nevada OSHA. Jess has been with Nevada OSHA for about 15 years and has over 20 years of HSE experience. So we are quite privileged to have Jess with us today. Welcome Jess.

Jess Lankford:

Thank you very much, Mike. I appreciate the offer to be here.

Mike Taylor:

Well, thank you for agreeing to talk with us today. I want to talk with you about what Nevada OSHA has been doing in response to COVID-19, which is kind of the elephant in the room with HSE matters today. Uh, you know, I've been doing a little research and it doesn't look like Nevada OSHA developed its own COVID standard, if you will, and, and went out and force that, um, formally, but the governor has given Nevada OSHA some enforcement authority in terms of some specific rules that he is implemented into the workplace, as well as Nevada OSHA. Is that right?

Jess Lankford:

That's correct. Um, early on in their response to the pandemic that governor in emergency decorations had identified that certain agencies would be responsible for enforcing guidelines and directives as they come out from either the governor's office or the agency themselves and Nevada OSHA was one of those agencies that had been set aside and delineated as one of the functioning group, trying to enforce emergency directors and some of the mandatory requirements of those directives. Right.

Mike Taylor:

And then what I can tell from the website is that you guys have a general set of rules in which employers have to comply with, and you also have some industry specific rules that are mandatory. Is that right?

Jess Lankford:

That's correct. Uh, during the, earlier on the governor was trying to roll out by using different phases, phase one and phase two, bringing different types and styles of business back in line. Each one of those phases came out with some mandatory Pacific guidelines for different styles of business, whether it was a gyms or pool settings or office complexes, things like that real early on when Nevada OSHA wrote its own guidance for all business and how they're to, um, try to protect their employees from the COVID or to spread the virus and, and have business help with, uh, preventing the spread of the virus. We picked up on the fact that there was many mandatory responsibilities of the business based on those phase in

industry specific guidelines. So we adopted in, in reference, in my guideline, in their Nevada OSHA's guideline, we also notified, uh, the public that any mandatory requirement that comes out of the phase in, um, guidances would also be enforceable by us. And, uh, that's worked really well for us. I think there'll be able to address some of the situations become crossed.

Mike Taylor:

How'd you go about communicating that to folks?

Jess Lankford:

Well, the original onset was going back to some industry stakeholders we had, whether it was either the culinary union or the restaurant, Nevada restaurant association, all these different associations. We typically contact through our processes in our consultation group or through the division of industrial relations. We did a scatter email to them letting them notifying them that there was going to be some guidelines that were specific to certain businesses or all encompassing like for the Nevada OSHA guideline. And then we posted on our website and we also contacted, uh, the advisory council, which the state of Nevada uses to ensure that agencies like, uh, take the consultation training section or the Nevada occupational safety and health administration are doing their job. According to the statutes. Our advisory council meets once a year and gives it, um, gives us guidance on some of the things that they hear from the public.

Jess Lankford:

So we use them to get filter information back out, along with our review board here, which is made up of lay individuals from the community. Uh, we also use them to, so the initial influx of information went out through these mass mailings emailings and notifications to cer certain, um, stakeholder groups that we have. And that started the, that started the information to be distributed relatively well. And, uh, the public information officer for the department of business and also used their, their experience and their context locally to get the information out to media. So they, uh, media could identify where to find the information. Right.

Mike Taylor:

Yeah. Cause it sounds like you guys have been communicating what rules need to be followed when it comes to COVID 19 in the workplace.

Jess Lankford:

Yeah. And, uh, and so we were really working very hard to try to make sure we get the right information out there and, you know, with any large complex agency you have, it's also very important for, uh, myself as the administrator to make sure that the staff that I have, you know, exactly what I posted up. So we, you know, we had internal meetings, virtual meetings about what the guidelines mean and where we go. And, uh, obviously they're written on the broad side a little bit. So they, they encompass a big shadow when it comes to, how do you control a work site? Um, you know, so a lot of the work we're doing is based upon what you find, how you feel, how you interact with the employer, what you understand about the employer's intent, things like that, which is a little different for OSHA.

Jess Lankford:

Usually we're very black and white about what you've accomplished, where you're operating your safety process from. And then we scrutinize where that operations are really hidden, uh, you know, hitting the employee and where you're protecting the employee. In this particular situation, you have to be confident that the co the compliance officer is going to go out and get a good understanding of what's going on at this location to generate that, um, that perception or an understanding that the businesses in a good faith effort doing what they need to do to do the best they can. And, uh, you know, we get a lot of criticisms, but same time we're, we're getting a lot of great feedback from business and how we work with them. And I'll, um, how we're consulting with them to make sure that their processes are doing what we expect it to do.

Mike Taylor:

Right. Right. And I noticed that, um, you guys are going out and doing what what's called kind of like a first visit is that right?

Jess Lankford:

That's kind of like, that's a, I think that's a good way to say it. We call them observations. And in some instances, we're the division of industrial relations is using the safety consultation and training section to interact with organizations, whether it's at the municipality or county level or down to large businesses that want to develop processes, that's going to accomplish what we want. So almost all the agencies within the division of industrial relations is very busy working with, uh, the business community out here to try to help them through these rough and trying times you might say, right,

Mike Taylor:

So it's not just Nevada OSHA, but it may be, let's say a health inspector that's also going out and doing what's these first observations, is that right?

Jess Lankford:

That's very true. We've a teamed up in our working closely with local regulatory bodies, such as licensing divisions within the county and municipalities and the code enforcement groups. One of the reasons why that was something that developed in that realm, working with these other regulatory bodies is that often they have a lot shorter timeframe for being able to deal with the business. They have a lot more direct authority over the license of the business and the codes that they have to support while they're working there. So they have the opportunity to be a very fast remedy to situations we find where OSHA's work tends to take awhile because of the development of the inspection and how that inspection was forward. I think early in the onset of the pandemic, the governor knew that he needed to bring in more partners into the enforcement process, which was going to include counties and municipalities.

Jess Lankford:

And most recently you can see his, the governor's move moved state in Nevada's moved to provide more authority to the county, to manage over themselves, to spread the virus. That way that each individual county can either ramp up what kind of businesses are allowing to open or close. And just recently in Nevada, we saw that washer county, uh, bars are set to open relatively soon here because of their, um, dispersion rate of the virus and, and their numbers are, um, good enough to be able to say that there's a benefit in the county can manage themselves and move forward. Uh, early on the governor decided that they needed to be the, the line in the sand, basically for what you have to do to

be able to get a county to open up his businesses. But it's the county's responsibility to move forward on the process of either enforcing or developing plans and, uh, um, procedures. And that will, uh, you know, accommodate what the governor expects to happen when it comes to addressing the spread of the virus.

Mike Taylor:

Right. So if, how are you going about doing the first visits, uh, in other words, um, are you targeting certain industries or is it just people going out and about and observing, uh, at that point and then contacting Nevada OSHA and indicating whether or not the businesses are complying with either the general or industry specific rule. And at that point, you make a decision on whether you're going to open a formal inspection,

Jess Lankford:

Right. You know, the first visits and the observations we do, we temper the individuals doing it, whichever agency they come out of with the basic guidelines and a basic knowledge of what the expectations are, so that they have some sort of groundwork and knowledge of what, you know, compliance may or may not look like. And then if they feel that they find a situation, that's, non-compliant, they give them an a notice saying, you know, you, here's a notice saying the things that you need to do for, you know, for your business as OSHA requires. And then, and then we would give them the specific roadmap to recovery guideline, or another guideline that may apply to that specific business. And then they'll make the corrections. The second follow-up visit will always be an OSHA officer, uh, going out to take a look at what's going on and, and, um, trying to see what the business is doing compared to what the requirements are. Uh, so that's how we move through the processes is we're trying to get as many eyes on the ground as we possibly can take a look at it and see what's going on. And then when we identify something, then we'll, we'll move it up into either OSHA's realm where we, we create a list and send it out to the other regulatory groups. Um, yeah.

Mike Taylor:

And then how do you determine whether, um, to do a follow-up visit?

Jess Lankford:

Well, the follow-up visit will happen if, if we notify, if we get notified by DIR cause DIR the division of industrial lessons is running the observation process, because that's not an OSHA attribute, it's not something OSHA does. We don't wander around in and out of businesses to see if they're complying with the standards. We usually wait for referral or complaint, or, you know, in, in, in construction activities. A lot of times we can see things from the street, but we usually use confer referral of complaint. So early on, uh, we wanted to ensure that the observations were being managed by the state of Nevada, through the leadership, in the division of industrial relations. And what they do is they'll take a look at certain businesses that the initial visit didn't, it produced what appears to be a non-compliant situation. And they'll give us the name of the business and the address of the business. And they bring it to us as a list and say, here's some places we want you to do ups on because we know that the business has got the notice in hand because of the first visit. So they've already been identified that they have an issue there, and we'll go back out within five to 10 days. We've been trying to keep it around five days to take a look and see if those issues still exist. And if they do, then we immediately do an opening conference and initiate an interaction. Yeah.

Mike Taylor:

So if it's like an automotive shop, the first visit may be, Hey, we're seeing here are some of our concerns, give them the chance to fix it. And if they don't, then you may get a referral from, um, uh, DIR. Right?

Jess Lankford:

Exactly. Yeah. You'll get an, here's a notice to use what you need to fix it. And then we've been telling businesses, you can expect a follow-up visit from OSHA within five to 10 days.

Mike Taylor:

Yeah. It's it's uh it's but it's for those folks that are not fixing the initial observation is they're the ones that are susceptible of getting the ocean spectation. Is that right?

Jess Lankford:

That's correct. Yeah. That's the, they're the ones that we come back and see substantially similar situation where, you know, um, a good example early on was grocery stores. You know, grocery stores have a very complex process that takes a lot of foot traffic. And that's one of the things that I keyed on very early was, was the, the governor puts out or the, the COVID mitigation task force puts out information on a, on a dashboard every day about the, um, number of cases per 100,000 people in any particular area in Nevada runs right now, it's running at about 2,400 cases or a little over per 100,000 people. So when I took that number and I, uh, early on and kind of did the algorithm backwards and realize that currently for every 500 people, you can suspect maybe 12 individuals will have the virus because of that saturation rate.

Jess Lankford:

Right. But what I did is I looked at the number of complaints I started getting in. If I got a lot of complaints in a certain industry sector in that industry sector, I could look at it and say, Hey, that industry sector is going to have a tremendous amount of foot traffic, like, you know, Smith stores or something like that. Then I know that the volume of foot traffic is creating an exposure rate for the employee based on those, some of those basic saturation statistics. So that's kind of how I started focusing the work in the field and in grocery stores, what I told the co the compliance officers right off the bat is I would just go into the parking lot. And if you see, um, somebody gathering carts, you know, are they wearing a mask or the wearing gloves when he gathered the carts and things like that.

Jess Lankford:

And if they, if they're not wearing a mask and not wearing gloves, and we may be suspect that maybe that business doesn't have as much control over it as staff is that we, we expect them to have when it comes to these conditions and then make an approach to the building and see if there's a sign up. Or if there's somebody talking, they're telling you to wear masks and things like that. And how are they controlling the interior? You know, if you're not seeing things like that at the onset, then their union, and move forward a little bit more to find if there's any non-compliant issues inside and then, then leave or, or make the notification. If you're not seeing those conditions and you see signs outside, and there's so many standards saying, Hey, we really want you to have a mask on, and you go in that door, you come out. This one to us, that business is making a good faith effort to do what it needs to do to protect its own staff and protect the people that walked through the door. We turn around and walk away from

it and go to another place. Cause you know, the volume of businesses we've got to try to look at is overwhelming when we started the first start of this process. Right.

Mike Taylor:

Right. How many inspections have you guys done since the, since the pandemic began, meaning, um, just COVID inspections, it looks like it's been some of the data I've seen, it's been over 1200, something like that, is that right? I think

Jess Lankford:

That's a good, a good estimate. The number changes and goes up on a daily basis. Um, but I can tell you that my, my unprogrammed activity log, my UPA logged, it has 3,600 businesses on it. I would say probably 90% of the, those on that list are getting an inquiry letter from us or an inspection initiated because of other background allegations within the complaint. You know, and I, I think I mentioned earlier when we were warming up that sometimes it's not only COVID related, sometimes there's other allegations about code violations and we're taking a special notice to those because now we've got two different realms going on. If it's only COVID related, based upon our own guidances, then some of those cases are being flagged or coated with an S code that identifies are, we're going to ship it out to a local regulatory authority.

Jess Lankford:

Some kind of let them take a look at it, whether it's either code enforcement or licensing or DPS or whoever else that the particular organization wants to use to try to get the word out. And, um, we keep close communication with those groups so that if they, um, they go in and address the population moving around and either as good or not good, they can address that. But if they strongly suspect that there's exposure to the employees too, then they will refer back to us and say, we, we believe that ocean needs to be interacted with this group too. So then that happens. We often are some businesses that just weren't wearing masks. And, uh, they weren't requiring our staff to wear masks period. And they, they would slick at licensing enforcement people and say, well, they all have medical conditions. They don't have to wear masks so that we will go out there and tell them to produce information, to show us what the medical condition is.

Jess Lankford:

Right. That's got a lot of people kind of upset with us, but I, it is part of the job as an ocean specter, you know, to, you have to understand the limitations of the employee. And we've had, we have found certain conditions, medical conditions that would seriously limit somebody in the ability to wear a face covering of any kind, you know, and they crop up every once in a while they, they will happen. And some of them are unique. You know, claustrophobia is a really good one, bad eczema, extreme eczema reasons where anything touching your skin causes a rash is something we said, Hey, that's a good reason to not wear a face covering, but not being able to wear a face covering doesn't mean the business doesn't have to have some form of protection for that employee. They need to try to escalate their efforts to something else, whether it's either a face shield or with a chin cuff on it, so that it still controls that breathing zone or, you know, move into a, like an engineering control of some kind, right. You know, all very complicated situations and issues that come up when we do our investigation. So, you know, uh, it's still giving us, uh, a good ripe fields business, you know, certainly

Mike Taylor:

Not boring. All right. Certainly not

Jess Lankford:

Strange. It's like everyday you come to work and you just say, what is going to happen today? Something's going to happen. I got to change everything, you know? Yeah. Speaking

Mike Taylor:

Of that, speaking of that, I noticed you guys also have the authority to cease a mandate that employers cease, uh, operations until they actually achieve compliance. Have you done that yet?

Jess Lankford:

Nope. We haven't done it yet. Um, the, that we've always had that authority, the cease and desist orders are an injunction based on not allowing employees to be exposed to a hazard anymore. You know, OSHA always has that authority at some, at some point in all its work, but we haven't had to do it related to COVID yet. And, uh, that's one of the things I want, you know, I think that everybody needs to realize is that Nevada businesses really turned around and stepped into their role. And, um, I was going to say, make our job easier. It's not been easy, but we, we see an overwhelming response to our feedback when it comes to certain things. And a lot, uh, if you want me to look at that COVID UPA lists, you know, 3,600 businesses and we've only done, you know, 1200 investigations or inspections out of it. That's a good sign, you know, about a third, that means two thirds or of the people we've found, just stepped into it, you know, so

Mike Taylor:

Right. One of the ways that OSHA can, um, do an inspection is through a complaint or a referral from let's say media, how many complaints have been filed with OSHA, whether it's, Hey, my employer is not mandating face mask or, um, they are not using pro appropriate hand-washing facilities, things like that. How many complaints have you gotten from employees?

Jess Lankford:

Um, on that I can tell you on the, on the COVID EPA list, it's roughly about a third or a complaint and the two thirds referrals, you know, so dumb industries, we're getting a tremendous amount of referral activity. And that would be like, um, retail, obviously general retail is just encompasses anything from, you know, shoe stores to gun stores, you know, and I just put them all in one list. Um, notice in a general retail group, we're getting a tremendous amount of, of referral work where we're getting a lot of complaint work from, uh, casinos, you know, the gaming establishments and things like that. I segregated that group out in my charts and I noticed that the, the complaints are always the leading group, always leading the leading factor in that particular industry sector. And, uh, schools were starting to, uh, to come up now with the, with the onset of the school year and stuff. We, you know, we had a rush of complaints based on what the schools, uh, districts intended to do. So those were, you know, complaint heavy also in medical facilities was complaint heavy compared to referrals,

Mike Taylor:

Right? Well, with both in the past, um, you know, for the folks out there that may not know if OSHA gets a complaint from someone, um, whether it's an employee at a workplace or, uh, a referral from a media source, OSHA, the option to sometimes send an employer, a letter saying, Hey, we got this complaint,

please let us know what you're doing to address the concerns and OSHA may or may not come out and doing a formal inspection. Um, how are you determining, uh, are you doing that in the, in response to some of the COVID complaints?

Jess Lankford:

Yeah, well, we're doing that with, uh, inquiry work like that pro predominately with all of them, you know, it's just, the volume is so high that we're just, we're just putting inquiry letters out and trying to gain a knowledge of what the business is doing to respond to the pandemic. Um, and, uh, once we started and matter of fact, we're at the back end of the process. Now we're getting a little bit of a tsunami of, of inquiry responses in, so we're trying to refocus, uh, some staff members to make sure that they're getting read at an adequate rate. So our productivity is up because we got a lot of these responses coming back in. And depending on what the response is, the district managers will decide whether they're going to initiate an infield inspection based on what the response of the business is. You know, so, I mean, in some extreme cases, you get a business to just tells you we're not going to do anything, you know, uh, whatever it's a fraud or whatever.

Jess Lankford:

And that kind of gives us an indicator that we need to deal with that business more, or, uh, or we find that they do almost everything we want, and there's a couple of weak points in their process. We may just call them or send them another letter back, same with some suggestions, how to do it and, and kind of button it up that way. So we don't have to send people into the field and we can keep them here reserved for like, uh, you know, like we were talking about earlier, statutory required responses, fatality responses, things like that, all that background work that we have to do once we know about it. So it's a constant battle of balance right now. You're trying to figure out what you need to address. You need to get out there. Um, seeing a name repeated several times on the list, obviously gets a lot of attention.

Jess Lankford:

Uh, we have industry sectors. We're very focused on the medical groups and, uh, uh, care facilities and things like that are under a lot of scrutiny and, uh, from us and from the public and from the media themselves, you know, so we need to continue to be vigilant about looking at different locations, you know, and then, like I said earlier, uh, foot traffic plays heavy with me right now when we started this process in late April early may, the saturation rate was about six individuals suspect with the virus for every 500. We're now up to 12 individuals for every 500. And, uh, I'm hoping that number drops back down because that's just all relates to exposures, you know? So you start looking at those numbers and how they spread out amongst the people that do work. It scares you sometimes.

Mike Taylor:

And I know we've talked about, um, you know, you're giving these employers an opportunity to do the right thing and they don't have to be, um, 100% compliant all the time. Cause it's basically impossible, but you know, I've always told clients, even before this, COVID hit, if you have a safety rule and you communicate it to employees and you train employees on it and you take steps to discover whether they're violating your safety rule. And if you find that they're violating a safety rule and you discipline them, uh, there's a very good chance that you'll be able to persuade OSHA that, Hey, there's no way I could have known that he or she was, you're not going to wear PPE for that day. Is that kind of the guidance that you've been given? Uh, some of the employers when dealing with COVID as well?

Jess Lankford:

Absolutely. You know, I think your eloquent description of exactly all the, all the benchmarks we have to hit, uh, as a business, to be able to show that you're responding to a rule, whatever rule it is, and you've done what you needed to do. That's, that's exactly what we do with every business, you know, is, is we want them to understand what, uh, I think what the layers of the obligation of the business is X compared to what, uh, we would see if we think that there's employee misconduct and we have to deal with employee misconduct every time we do an inspection of any kind. And, um, you know, the old rule of thumb for a compliance officer is, is you're going to cite what you see and your supervisor's the one that makes the decision about the employee misconduct. You don't make that decision in the field.

Jess Lankford:

You, you let the documentation show employee misconduct. So when we deal with business, you know, we sometimes will start going down paths where, Hey, if you train this guy, can I get that training record? And how long ago was it okay. It was just two weeks ago. Great. And you start dragging all this information in, and the employer thinks you're just being, you know, an overzealous inspector, not realizing that, that inspector's gathering that information, that proves employee misconduct. And then you take that information and put it forward to your supervisor and say, Hey, in this particular case, under this allegation, I think it was employee misconduct. And here's the reason why, and, and, um, in the background, we'll do that every time. And right now with the COVID thing, there was a big, a wave of dissent at first were from business saying, Hey, you guys are just out there.

Jess Lankford:

Uh, just citing us as soon as you see somebody without a mask and that's not fair. And it's like, well, I don't believe that's happening. And let's take a look at what was going on, you know, cause you have to filter through the, what people say on the media to what was really going on. And that's when we realized we needed to talk to the staff. And this is like late April saying, Hey, you know, um, one person without a mask is not meaning that the business hasn't attempted to do what they needed to do employee without the mask on does not mean the entire business is faulted for not protecting your employees. So you're going to have to go in and do a, um, an adequate inspection to understand the parameters around that and whether it's employee misconduct or whether it's a medical condition that limits it, you know, little things like that. So yeah, absolutely. We have to, we have to make sure we're doing the right thing, you know, to, um, to do a couple of things. And one of the important thing for us is to not only protect employees rights, but it's protect the employer rights also.

Mike Taylor:

Well, that is super Jess. Hey, we really appreciate you being on the podcast today. It's a wealth of information. I know your job is definitely not easy, but it sounds like you got a very efficient program. That's going on to deal with a very important and ever-changing, uh, hazard in the workplace because the virus is invisible. So it's hard to detect where it is at any given time. And thank you Jess, for being with us today and stay tuned for the next episode of the workplace safety review podcast.

Speaker 3:

[inaudible].