

Mike Taylor:

Hello, everyone. Welcome to the third episode of the workplace safety review podcast. I am Mike Taylor. I am the chair of the Greenberg Traurig OSHA Practice group. And I'm based out of our Washington DC and Northern Virginia offices. Today's episode. We'll discuss OSHA's record keeping regulation as it relates to COVID-19. I'm very honored to have my good friend Hamid Arabzadeh as our special guests today. Hamid has two graduate degrees in industrial hygiene and occupational health sciences from McGill university is the founding principle of H R a environmental consultants incorporated and teaches graduate industrial hygiene and occupational health classes for the masters program at UCLA. Welcome Hamid.

Hamid Arabzadeh:

Good day to you, and thank you very much for your invitation. It is good to be with you.

Mike Taylor:

And thank you for agreeing to be here with us today and talk about what I think is a very, very timely topic. How many, as you know, that OSHA has a record keeping regulation and for the folks out there that may not know too much about the requirements of kind of give a little summary of what it is under the record, keeping regulation and employer has to record an injury or illness that is work-related and it must meet certain general recording criteria such as if the employee dies, uh, as a result of the injury illness there, they receive days away from work. If there's restricted work or transfer to another job as a result of the injury or illness, the employee receives medical treatment beyond first aid or receives a loss of consciousness, um, under 1904 0.7 B. And the issue that's starting to come about is whether employees who have contacted the virus, whether that's a recordable illness or not. Can you give the listeners a little bit of background on what OSHA's position was initially and what it is now?

Hamid Arabzadeh:

Surely Take a quick moment, perhaps to set the framework, uh, as, uh, on a broader scope and then get very quickly back to the important question that you mentioned. So thank you because of this, uh, you know, very complex and difficult pandemic that all of us, the world is facing in the us, because again, due to the emergency nature of it and all the other things that everybody has been dealing with, public health agencies, universities, public health departments, federal agencies, such as the FDA and the centers for disease control and prevention, and then OSHA and others, kind of the lines of regulatory authority became blurred. And I don't think all have come up that was bad at all, because this is what we call total worker health, if you will, which is a topic perhaps for another time, this is something that invest in Europe, Northwest Europe has been tried.

Hamid Arabzadeh:

So now depend any, it's kind of forced everybody to look at it that way, especially with organisms such as, uh, SARS cov two, which is the virus that causes COVID-19 and, you know, very important that, you know, print DePaul here that it's really hard to even ascertain where the case originated. So the reason I wanted to mention that is as I've had the pleasure of discussing this with you, by Mr. Taylor, you know, public health agencies are very involved, uh, occupational safety and health administration, and the 46 states OSHA plans are the same, but overall the lead has been the public health agencies. And now, again, just very quickly, uh, OSHA, uh, entities, including federal OSHA have been in my view, taking a bit of it backseat. And this is not at all a criticism. It's just the fact of life. Because as I said, this is more of a public health agent.

Hamid Arabzadeh:

Now OSHA has been involved that is getting more involved there. And when we've had outbreaks, most clear example has been meatpacking and there are colleagues in universities and others that are looking specifically at that. And of course in healthcare organizations, we still are against even other agencies looking at it. So having said that, getting back again to the more focused, the answer to your question, sir, is that, uh, you, to the fact that, uh, using an example, other communicable diseases, it is very difficult to establish where the infection was contracted. Now, if one works in a healthcare setting and is a respiratory therapist, we incubate a patient in advanced stages of COVID-19, uh, to then prepare them for ventilator, uh, you know, connection. And they, they come and they come up and have contracted the disease. I don't think it's a much argument that it was related to a work-related the issue then becomes what happens when somebody's worker has it.

Hamid Arabzadeh:

And we don't know where it came from. So now getting back, and I appreciate your patience getting back to this specific question, you're right, that the occupational health and safety regulatory agencies have been grappling with this topic. And again, in their defense, all of us have been looking at a virus that is relatively new. It is spread it's still is being, uh, Scott, as you know, two days ago, boards health organization had a statement, uh, by the, the doctors, uh, who is the head of the emerging diseases that maybe was misconstrued, uh, that, you know, the, the disease it's not spread as actively. Uh, if people are asymptomatic, then yesterday, they kind of correct it, that there is still a lot to be learned that the concern for, uh, your clients and the audience is a very valid concern talking about OSHA reporting. And that is that if it's over broad statement, uh, OSHA issues, and they have some of those that, you know, to just make it easy, let's just record and report any and all COVID-19 cases.

Hamid Arabzadeh:

In other words, if an employee calls in and says I've been tested positive, and I have nothing to magic, which most employers to look at, please stay home quarantine, seek medical care if you need to. So even if the worker is not sick, technically if we go to the extreme of this interpretation of some of OSHA and some state OSHA rulings, and the state I am located in California, California, then it may make it easy on the surface, but it causes a whole host of problem. Not the least of which is we are very interested as occupational health and safety professional to know what has been caused at workplace and what is not even in addition to the regulatory issues. So to me, this needs discussion, and I'm very glad to have this opportunity to join you, uh, with your tremendous expertise, uh, to decipher this.

Hamid Arabzadeh:

So what I believe would be a reasonable approach is what you actually summarize there in when you set the framework at the beginning of this conversation, and that is let's look and see for those workplaces that are relatively easy to establish that it is workplace related fine, but then for the rest of it, we need to have more of a thoughtful, comprehensive, and systematic approach, namely, uh, workplaces who can do their own tracking or tracing if you will, if an employee says a colchicine and the test is positive, the can then do an investigation to look at where when the employee was at the workplace where they have been, uh, you know, what work they were doing to raise a chance that this would be proven that it was contracted somewhere else. And this is not at all to just go and try and reduce the number of recordables, but it's just a much better approach. It's scientific approach. It's better to public health approach is better because if indeed it was contracted somewhere else, public health experts and authorities and agencies need to know. So it, so it doesn't even help anyone if we have over reporting of

work-related. And then of course it's the issue of reporting. So I'm going to stop here to let you lead us through the rest of the conversations.

Mike Taylor:

Well, let me, as you know, in the normal HSE world, we have instruments and we have wipe samples that we can use to determine whether an airborne contaminant is actually in the air or on the hard surfaces of a building here. The virus is invisible. We don't have any kind of measure to detect that to me. Cause I know OSHA first came out and said, Hey, it's not a recordable. And then they reverse course and said, well, it can be a recordable. And basically employers have to do a reasonable investigation to determine whether it was indeed work-related. So I see a, uh, an inconsistency here. Would you agree with that?

Hamid Arabzadeh:

When I said contact tracing, I really did not mean maybe that's not the right time to do anything outside the ward, but to actually see what has happened in the workplace, because, and the reason I say that is if indeed the agencies continue with the pronouncement that they have and kind of stick to it, which I hope, you know, over time, this will be evolving and modified as they receive expert opinion and feedback from employers and employees and everybody else, whatever the thing is to look at it at the workplace. But I do agree with you because this is opening a Pandora's box of concerns. Now there are other areas that maybe we can discuss in the future because if people have much more, uh, employees have more recordables, then it's going to impact their workers' compensation rates. And also, uh, you know, basically, uh, make him have a record and a history that may not be reflecting of reflective of their perhaps a good health and safety experience.

Hamid Arabzadeh:

And a lot of employers don't take a lot of pride, uh, along with their employees to, uh, have been, uh, you know, not having accidents and those kinds of things. Now, the issue also is that I know some governors, for example, have already issued statements saying that if it's, COVID-19 just, you have to consider as a compensable work-related illness and those cause a lot of issues as well. So I think this needs to be evolving. This needs to get feedback. And again, one thing, one aspect, which is of course in your area is OSHA and state agencies have not gone through a regulatory rulemaking. Post-process I understand it it's been, uh, you know, not a long time, but to meet unless the normal, uh, regulatory process. For example, in California, there is a California Cal OSHA standards board, which is an independent entity from Cal OSHA that sets their standards.

Hamid Arabzadeh:

There is a period for public comment and all the other things that you are an expert in, for sure, otherwise this is not going to be something valid or solid, and it's going to be years in discussions in courts and everything else. So I think it behooves everybody to kind of take a moment apart for everybody experts, attorneys, the regulatory agencies, employers, employees, representative to get together and come up with something that is solid as much as possible. It's a pain and it's not a reactive. And I don't think there is any, uh, you know, urgency. Now it may be that employer employers are going to record this, but not necessarily in their OSHA log three hundreds, but record them. So then the rulemaking is complete, then it can be more deciphered. But I, uh, do not agree that, uh, you know, having a blanket statement that all of these are recordable is going to serve anyone,

Mike Taylor:

Correct? Because if it's indeed work-related and you require, uh, an employee to quarantine for 14 days, fed, OSHA says that's recordable. And what this does on one hand, you don't want to over record your injuries and illnesses because it could damage your raise, your workers' comp costs. A lot of companies when you're contracted with them, they want to make sure that you have low injury and illness rates. And at the same time, on the other hand, if they're under inclusive in what they're recording, now, let's say an employer doesn't record anything at all. And six months down the road, a OSHA compliance officer shows up. And one of the very first things they ask for is your record keeping documents. And if it says that you had no recordables for COVID-19 during this pandemic, it could trigger a keeping audit.

Hamid Arabzadeh:

No, I completely agree. I look at it, uh, beyond the regulatory, you know, because my field goal in happy hour is protect workers. And then I help employers comply. And I do not see an overbroad approach, uh, helping, uh, you know, worker health and safety or workplace safety. And it is going to have a lot ramifications. There are many, many employers that are subcontractors to major company and those companies based on their own insurance based on their own policies require employers, subcontractors, as you mentioned to have a robust health and safety program have good performance, and this is going to call those subcontractors a lot of issues. Now, nobody denied that companies stopped small, large, they need to have a comprehensive COVID-19 prevention program, but that's different from, uh, you know, having somebody a worker develop symptoms, or I'm sorry, nothing to them just be positive.

Hamid Arabzadeh:

And also then there are so many other complexities where companies use, uh, labor agencies and all of it. So I really would believe, and I would urge, uh, you know, uh, regulatory agencies to look at this much more closely. And one of the major areas that I think is important is especially the OSHA states with their own O-Shot plan for them to also advise their elected officials, that there is both science and legal matters here. And it's not something to jump on and have a reactive, uh, or announcements on it because it's going to cause issues, which at the end is not going to be conducive to providing employment.

Mike Taylor:

Right? Indeed. Also, what about, you know, for those listeners that may not know OSHA I'm looks at this record, keeping data to get, you know, simply put an idea of what's going on in the health and safety world, where the hazards are, what are the industries that tend to have more hazards than others? In other words, a lot of recording of COVID-19 may skew the data as to what's really happening out there. Does that make sense

Hamid Arabzadeh:

As you know, that, um, not all of OSHA and going to state OSHA inspections are related to basically the experiences, the rates of injury and illnesses of companies. And that goes back to the original thought that talk we had, I agree with you is that if the data is based on the premise of over reporting and even all shows, limited resources are not going to be spent on where they should be. And in other words, if a company shows a lot of cases, and then you realize that it really wasn't workplace related, then it's going to have a focus on an employer, not to mention the other arms that we mentioned earlier that may cause, and then they're going to not be able to look at those places where they shoot they, if they

find places. As I mentioned, like health care organizations, where there's significant increase, they said, it's very easier to know that it's workplace related.

Hamid Arabzadeh:

Then of course, they need to focus the meatpacking industry. The data is coming out. There are studies that he shows you it's very clear, but least two it's good degree clear that workplace has a lot to do with it. So I think those are the legitimate and valid areas to look at, but not others. And then all the other socioeconomic aspects that an employer may be over and over impacted and then causes other issues. So I think if it is done very properly with scientific measure on their proper legal and regulatory environments, it's a good thing. Of course, everybody wants to know if an employee is having major problems because they don't have proper social distancing. They don't have the program in place and all of those things, but if they've done all of it and they still have a case, maybe the, you know, they are in a region where it just, there is just more cases for whatever reason. So I agree with you that they cannot just do it this way and then have employers subject to inspections, uh, and then miss those that really need to be inspected. And then the other thing I just wanted to add quickly is that it almost then can be punitive for those employers who do all the record keeping and maybe over report. And then those who are under report may just have a cleaner record, which is not reflected in the reality of it. And that's another reason

Mike Taylor:

I haven't looked at a lot of the state plan states. Um, some states have their own OSHA plan and as a result of that, they have their own record keeping regulation. I do know, um, what are other states doing? I do know that California recently came out with a proclamation that they're of the view that you presume, correct me if I'm wrong. I mean, you presume that COVID-19 is indeed work-related, but if you require them to quarantine for 14 days or more, hello, HSA, doesn't consider that to be days away from work.

Hamid Arabzadeh:

Right? So, but you know, it's interesting because, uh, for shot, of course, they can speak much better to this as you well know in the OSHA act of 1917 state or shots have the ability to, uh, you know, have their own regulations as long as they are as, or more stringent of the federal OSHA. There may be a case California elsewhere that they may be more stringent than some of the federal Shaw pronouncement and less stringent. And that would be a complexity added on top of everything else. But in California, there, from what we've heard so far is that reporting would be for any hospitalization related to COVID-19 and recording should be for anything, any employee who is positive, regardless of where it was contracted that the 14 day you're right originally it was thought that, uh, you know, it should be recordable. Now we hear that it's not, and that's very, it would be less stringent at least one on the surface, federal OSHA.

Hamid Arabzadeh:

I think so really, I think the important thing do they, I can see this at least temporary result is for employers to make a note of all of the COVID-19 cases, but not officially have their OSHA 300. And again, I'm not saying that I don't want it to be out of compliance. I'm just saying this, maybe a suggestion that federal OSHA and the state OSHA can consider tell employers just recorded, but not an OSHA log 300. And we will put this in a folder. So we are in compliance with your overall general guidance. And then when you figure this out through a rule-making process, then we can decide which one of these are

really recordable. And then employers also can as much as possible keep records of, uh, if they have cameras, if they have, again, as long as it's legally, uh, you know, possible the records of, uh, you know, employees coming in and out. So at some point then look at all of them or even start looking at them now, but do not officially have those recorded. And if OSHA agrees to that, then it gives everybody including the agencies time to catch their breath and come up because what has happened right now, and this pronouncements are very confusing. And with all the negative impacts that we've discussed, that's

Mike Taylor:

A great idea how made. So in other words, you're saying you have your regular injury and illness logs, but create a separate file just for COVID

Hamid Arabzadeh:

Right. And that's better. I talked to your attorneys, you know, that legal minds like yourself, do it in a proper way. So then you are in compliance with the spirit of what ocean shows are saying. Keep records in records, in terms of documentation employee, a employee B employee C. This is the day they came in. This is what they did. And then whenever the dock set is set up, if you will, then they can go and look at all of it because I'm also very concerned about the lost work days. I mean, to me, this is going to have a major impact on workers' comp cases, and it's going to cause havoc. I mean, and I'm not overstating it. So this has to be well thought out. This is not something to decide in a spirit of a moment. I really have never seen that during a crisis of any kind that we haven't had, the rulemaking and pronouncements of this kind. And, uh, you know, let's say pat majored natural emergencies disasters, or the huge oyster speed. It took a year or two before we had comprehensive regulations, laws, and others to how to deal with them, to just do this right now. It is not, uh, very, very, uh, you know, practical, if nothing else. I think that that would be an important matter to consider.

Mike Taylor:

Well, thank you very much. I mean, uh, being with us today, we really value your intellect and I'm sure the listeners will gather a lot from your presentation here today. Our, our, our conversation, um, and listeners stay tuned for the next episode of the workplace safety review podcast. [inaudible].