

Adam Roseman:

Hello, everyone, and welcome to this week's episode of the Workplace Safety Review Podcast. Usually, Mike Taylor, the chair of Greenberg Traurig OSHA Practice Group, is your host. And I, Adam Roseman, an associate in the OSHA Practice Group, act as Robin to Mike's Batman. And as they say in the news business, today Mike is away on assignment. So today the dynamic duo is going to be a solo performance. By way of background, though, and for listeners who don't know, Mike is based out of our Washington DC and Northern Virginia offices. He's been practicing OSHA law for roughly 20 years and I'm an associate in Greenberg Traurig's Philadelphia office. And I'm a member of the law firms Labored Employment Group, as well as the OSHA Practice Group. So we are really excited about the guest today. cis joining us.

Adam Roseman:

Marc is the vice-president of employment policy at the U.S. Chamber of Commerce. Although Marc will discuss his position in the U.S. Chamber of Commerce in a bit more detail, generally he's responsible for developing and advocating the Chamber's response to OSHA matters, the Employee Free Choice Act and the Family Medical Leave Act and other labor and workplace issues. Marc, welcome to the Workplace Safety Review Podcast. Thank you so much for joining us.

Marc Freedman:

Well, thank you, Adam. I'm happy to be here.

Adam Roseman:

So let's get back to basics to start. Tell our listeners, everyone has heard of the Chamber of Commerce, right? Tell us what they [crosstalk 00:01:42]- Lots of people, I think, we hope, right? Lots of people have heard of it but don't know exactly what the Chamber does. And tell us about your role as vice-president of employment policy.

Marc Freedman:

Sure. So the Chamber of Commerce is actually, I hesitate to say just, but just a trade association. We operate like other trade associations. We just happen to represent a much broader cross section of employers. Lots of people have heard of local Chambers of Commerce. And in some cases, State Chambers of Commerce, we are the national level Chamber of Commerce. Our job is basically to advocate on behalf of our members in the various policy debates that affect them. So I work in the labor and employment space. As your intro noted, I cover a lot of different issues and quite a few others that didn't show up in the intro. We have lots of people with the Chamber who are covering just a whole array of things, from trade, energy, environment, tax, pretty much just anything that affects employers, we're going to be involved in.

Adam Roseman:

Right. And so let me ask, how did it come to be that you started working for the Chamber? So what's the career path here, that led you to this moment?

Marc Freedman:

I wish I could say it was more strategic and thought out than it turned out to be but I was at the Senate Small Business Committee, now more than 16 years ago, I had been involved in the effort to invalidate

OSHA's ergonomic standard in which the Chamber played a significant role. And so I came to the attention of the Chamber during that period and a position opened up to basically continue that work and I made the move. So I've been with the Chamber now for more than 16 years and have to say it's been a very rewarding place to be.

Adam Roseman:

Thank you. That is helpful, I think, for our listeners to understand exactly what the Chamber of Commerce is. So let's get right to top of mind issue that is, frankly we're almost at the year anniversary of the collective consciousness of the pandemic, but I want to start with something that is hot off the presses which is, the Department of Labor's Inspector General released a report, pretty tough one, yesterday, that discussed how OSHA has handled complaints and inspections during the pandemic. Can you tell the listeners a little bit about what that report said and how that might impact OSHA going forward?

Marc Freedman:

Sure. And I'm glad we're talking about this because it is really, I think, a top of mind issue these days about what OSHA is going to be doing. And there's a lot of guessing going on about what they might be putting out in terms of their emergency temporary standard. Let me step back for just a moment and set the stage. OSHA has proceeded throughout the COVID pandemic with the General Duty Clause approach to employers' requirements to protect employees and for people who aren't familiar with that, it's a very broad, as the name suggests, there's very broad departments that employers have to protect their... We're getting some feedback there. That employers have to protect their employees against known hazards, using known methods of abatement. The big debate has been whether OSHA should be issuing a specific standard and in particular, an emergency temporary standard, telling employers exactly how they're supposed to protect their employees. Democrats in Congress and the unions had been agitating for them to do this. OSHA resisted throughout the Trump years and relied on the General Duty Clause, coupled with very specific guidance that was largely driven by the CDC.

Marc Freedman:

And so this debate has been ongoing for the last several months, since basically a year ago. And it's now of course, reaching ahead because we have a new administration and the Biden administration, while not having said so explicitly, I think the smart money is on them coming out with an emergency temporary standard. And the president issued an executive order saying that if they're going to do so, they're right now supposed to be considering whether to do so, if they do so, that's supposed to be out by March 15th. So that date is fast approaching. So, that's a little bit of the backdrop. Now yesterday, the office of Inspector General in the Department of Labor, as you mentioned, issued a report reviewing what OSHA has done with respect to enforcement and handling complaints during the pandemic. And I think this report is going to be one of those data points that people go to in the debate about whether OSHA should issue in ETS.

Marc Freedman:

Having read it, I don't think the report is as strong on recommending that OSHA do an ETS, it's much more about how OSHA handled their enforcement and complaint procedures. And I think people have quickly forgotten what life was like back in March and April, May, of a year ago. It was vast confusion and chaos was the order of the day. People didn't know what this disease is all about. They didn't know what the best ways to protect themselves would be. And OSHA was in fact having to deal with it in the

same way that other employers were having to deal with it. So where they might normally have had onsite inspections, they had to back up and rely on virtual inspections, which I think we would all agree, and the report makes it clear, are not as effective as onsite inspections. But OSHA had to deal with travel restrictions and exposure questions in the same way that everybody else was dealing with them.

Marc Freedman:

The report mentions in a glancing way, the idea of OSHA issuing an emergency temporary standard, but it really does so in the context of that being able to help OSHA do better enforcement. And I think I would agree that if the question is, "What's the easiest thing for OSHA to enforce?" The answer would be an emergency temporary standard. But I'm not convinced and I don't think the report really goes to the question of whether an emergency temporary standard would provide better protection for employees. In fact, what OSHA did there in the intervening months, was issue an enormous amount of guidance and it's all listed in the report. And that was all very informative for employers and that was what employers were craving, was, "What am I supposed to do? How am I supposed to do it?" That kind of information is not what an emergency temporary standard is all about. So that's a long explanation for what the OIG did and where their report sits, I think it's going to be brought up as OSHA moves forward and presumably does something like an ETS.

Adam Roseman:

Yeah. Marc, I think you hit one thing that I think you could certainly see this report not being misconstrued but maybe not represented correctly which is, the way I read the report is maybe the way you did which was, the practical reality of OSHA as an employer, trying to protect their employees, i.e. compliance officers, and not sending them into multiple different worksites to be exposed. And it was almost the responsible thing and I read that report and walked away from it, saying, "Well, duh, of course the number of onsite inspections were down. Everyone knew that." And I agree with you, they stopped the well short of a, "You shall do an emergency temporary standard."

Marc Freedman:

Well, yeah, I mean, absolutely. OSHA was dealing with the same problems that everybody else was dealing with. Travel restrictions, their inspectors couldn't move around like they normally would. They were concerned about sending their inspectors into hot zone, workplaces, that type of thing. And so they had to take precautions just like everybody else did. So yeah, the other thing is, the report basically stops right where the executive orders stop. The executive order to OSHA from the president says, "Go forth and consider whether to issue an ETS." And the report basically echoes that and says, "OSHA should consider whether to issue an ETS." I mean, it doesn't really go beyond that point and I think that's appropriate. It's not the office of Inspector General's role to recommend policy. Their role is to oversee activities and investigate whether an agency has performed appropriately. And in this case, the question they were exploring was, "How did OSHA handle their inspections and complaints?"

Adam Roseman:

Right. Before we talk about the emergency temporary standard, which is top of mind, and we've got about 12 days until the deadline and the executive order comes due, but let's just take a step back. From your perspective in your unique position with the Chamber, is there anything you think OSHA could have done or should have done differently in responding to this pandemic to help employers, who in turn hopefully would help employees, right? Beyond the stuff that was mentioned in the report, is there anything that you think OSHA could have done differently?

Marc Freedman:

I don't know what the benefit of hindsight is here. I mean, I think they did a lot that people need to appreciate in terms of what they were facing. This was a new hazard that people would truly just try to understand on the fly. And if you look at where the thinking is now versus where it was in March or April, it's changed. We now understand this in terms of what the transmissibility is and what things lead to exposure in ways that we didn't understand back then. I don't have anything that I would say I would've hoped OSHA had done differently. I think they were scrambling just like everybody else and it was a very difficult time for them. There's another point to make about the COVID pandemic in the context of workplace safety.

Marc Freedman:

This is unlike any hazard we've ever dealt with in a context of workplace safety, right? So it's not just unique to the workplace. This is a workplace safety question in the context of a broader public health emergency. And so the goal is to reduce transmission in the workplace, so you reduce transmission everywhere else or in the broader context. It's just happens that workplaces are one setting where transmission can happen, as opposed to other workplace hazards that are focused on the workplace, this is a hazard that is everywhere. It just happens to be coming into the workplace.

Adam Roseman:

Yeah, no. And that makes sense. And that takes us to the emergency temporary standard discussion which is, quite candidly, a unique time to be thinking about an emergency temporary standard with some rays of sunshine in the pandemic with cases, thankfully going down a little bit right now and vaccine distribution and getting shots into people's arms going off, which is all good news. One, I guess the question is, do you still feel like the smart money is that OSHA is going to implement an emergency temporary standard? And then more importantly and I'd be curious what your thoughts are on this, because I think Mike and I have ours, what do you think that standard is going to look like [inaudible 00:14:30] models from which OSHA could [inaudible 00:14:32] and we can talk about them as well.

Marc Freedman:

Yeah. Right. Well, that's the question everyone's asking these days. I mean, it's one of the great guessing games around Washington, is what will OSHA put in this ETS? And depending upon how dark a world you live in, you can think if they're going to do something like California, which has caused a lot of problems for employers or you can think they're going to do something closer to Virginia, which really hasn't triggered the same response. I am unable to give you any answers. I mean, it could be any of the above or some hybrid of those or some other combination. It really is impossible to tell at this moment. I will say, as I mentioned before, I think the smart money is on them doing an ETS that the unions and the Democrats in Congress have all been agitating for this and I would really, really be shocked if OSHA decided that they weren't going to go forward with that at this point.

Marc Freedman:

It's just, all the tea leaves are there to say they're going to do this. One interesting question that I've been trying to figure out or waiting to see how OSHA handles, is, "What do they do about vaccines?" Because vaccines were not in the picture back when the different States issued their ETS's. This is a whole new landscape. As you point out, there's some rays of sunshine on the horizon but more importantly, how does OSHA take into account the concept that there are people in the workplace now,

who are largely, I won't say completely, but largely protected? Either they have natural immunity because they came to the disease or they've been vaccinated.

Marc Freedman:

What does that do for requirements about social distancing and PPE and those types of questions, that were driving the whole idea of workplace protections previously? Some people would actually tell you or make the argument that OSHA could go so far as to say, "Employers should require employees to get vaccinated." I don't think that's going to be the case. I think that's too far for OSHA to reach but they should recognize that vaccines have changed the whole question of how people get the disease or where they get the disease and figure out how to incorporate that into their thinking about an ETS.

Adam Roseman:

Yeah. And what's interesting, Mike and I have often talked about this and obviously there are some EEOC and ADA related concerns with the vaccines, but OSHA, much like any federal agency, likes to borrow from their own work obviously. And the Bloodborne Pathogens Standard, right? There's Hep B offerings, right? Hepatitis B offering the suite or I guess, series of shots. Do you think that the ETS could look something like that section of the Bloodborne Pathogens Standard which is, you have to offer it and if they decline, fine, you've got to keep records of that. So we essentially stop short of a mandate but it at least touches on the vaccine. And we're just trying to think about what that could look like?

Marc Freedman:

I think you raise a great point and particularly in the context of how much time they're going to have to develop this, I don't think they're going to have an opportunity to do a lot of new writing. They're going to want to rely on stuff that's already in the can for various provision. And I would point you also to the infectious disease standard that was under development during the Obama years. They went so far as to do a [SABRIVA 00:18:23], a small business review panel on it, which means they actually did have a draft standard at some point developed. They never got it out on the street as a proposal but obviously it exists in a way that they can come back to it. So I would not be surprised to see that be one of the sources for their approach here. And as you mentioned, the Bloodborne Pathogens Standard probably gives them some type of structure to use with respect to employers and getting their employees vaccinated.

Adam Roseman:

And so I guess, I'm going to ask you a question that's a bit of a hypothetical because you've not seen the regulation and no one has, we don't even know if it's going to come out. What do you project or what's your initial reaction to, the Chamber of Commerce represents employers, is there a wholesale rejection from the Chamber of an ETS or is it, "We need to wait and see, because we need to see if it looks more like California's or more like Virginia's, which not created the same outcry as California's."

Marc Freedman:

Yeah. We're definitely going to wait and see posture here. We were in court, the AFL-CIO sued OSHA to try and force them to issue an ETS, way the heck back in May or June, I think. And the Chamber filed an amicus brief opposing the AFL-CIO motion. So we're certainly on record is saying that we don't think that ETS is the best approach but elections have consequences and so we're going to have to see what approach they take and where they go with this. I'm not going to try and say that we're sitting here anxious to sue. That's not something we typically are excited about doing. So it's going to depend

entirely on what they put out as to what our level of opposition or challenging of it is going to be. I'm not going to say that we're sanguine about getting an ETS but what we say about it is going to depend on what they say.

Adam Roseman:

Yeah. And it is worth noting for the listeners, there was a case out of California State Court that just came out, Marc, and I don't know if you've had a chance to take a look at it, where some employers did sue to try to enjoin California's emergency temporary standard. And interestingly, in a rather long opinion, the court did say, essentially there was enough evidence for Cal/OSHA to determine there was an emergency. Okay, fine. The question now, which is an interesting one is, we've got some ray of sunshine here. We've got some vaccinations happening and only going to increase. The question is, is this an emergency? And so I'm wondering, does the Chamber have a thought on that, knowing of course, that businesses, they're now a year into this and they've done certain things to survive. And so maybe businesses know how to operate under this new normal?

Marc Freedman:

Yeah, there's no question. That issue about whether an emergency temporary standard is warranted, is going to be, I think, one of the points of discussion. The statute lays out the conditions for an ATS and it talks about employees being exposed to grave danger and that an emergency temporary standard is necessary to protect employees from such great dangers. It doesn't quite define what an emergency is, type of thing. So I think we're in a different posture than we were back in the spring and summer, that is an issue that probably should be debated. Whether they move forward on an ETS or they do a longer rulemaking, would be an interesting question. Maybe there's room for something broader and with more of the protections of a rulemaking than what it ETS provides.

Marc Freedman:

I should note that in the emergency temporary standard setting under the statute, OSHA issues a regulation that goes into effect as an issuance and then it becomes the proposal for a final standard. And there's a six month window for OSHA to finalize that standard. So it's a very, very tight timeframe during which they'll take comments and then decide how to handle the final standard. So maybe there's an argument to say, "Don't do an ETS but do a fullblown rulemaking. Do it with the protections of analysis and small business input that this type of issue deserves." Because when this thing comes out, it's going to affect quite frankly, I think, every workplace in the country, at least every workplace where there are employees. And that's a tremendous scope of impact and trying to do something in an expedited fashion like this, without the normal protections of the rulemaking process, I think could lead to some really disastrous consequences.

Adam Roseman:

Yeah. And I'm curious what you've heard from your members of... A lot of businesses have been operating, depending on the state of course, have been operating under public health executive orders, mandatory face covering, social distancing, this enhanced disinfecting. So what have you heard from your members and also would the Chamber be necessarily opposed to a standard that, and I know you've not seen the standard and we're not sure yet, but a standard that just codifies some of the best COVID mitigation practices, right? So I'm curious what some of the members think on that?

Marc Freedman:

Well, frankly, an ETS that did only that would, I think, be the best of possible options. That would be the least disruptive and the most consistent with how employers could have been operating so far. It would still require a lot of things that some employers haven't had to do before. I would imagine there's a written program requirement and some other things, and there are going to be a lot of employers, as I mentioned, who have never confronted an OSHA standard before. Plus, even those employers who've been doing stuff, having a robust program, will very likely not have in place exactly what OSHA expects them to have in place. So there's going to need to be adjustments by, I think, any employer who has to come under the coverage of the OSHA, the new OSHA standard. So what you propose would be the best possible option. At this point, it's very hard to tell what we're going to see.

Adam Roseman:

Right. So let me switch gears for a moment and just have a few more questions for you. I saw a few weeks ago, the Chamber signed onto a letter to Congress, encouraging them to pass the SAFE TO WORK Act, providing COVID liability protections or certain liability protections I should say, for businesses. Can you tell the listeners about that legislation? And I'll tell you quite candidly, COVID liability shields, as they're called from one party, I suppose, that's a pretty hotly charged issue. And so, help the listeners understand and cut through that noise of what this legislation is and why the Chamber supports it?

Marc Freedman:

Yeah, sure. So this actually goes back to last year and the end of the Congress, in the last session, where there was in play the idea of a liability shield for a broad array of employers under a broad array of labor and employment laws. And the thinking here was that the trial bar, the plaintiff's bar, is very active looking for ways to sue companies and employers for lesser violations of exposing their employees or customers or whoever they think they can go after. And we wanted to protect these employers from what we would basically describe as the garden variety nuisance lawsuit. In other words, if the employer, if the company, was doing what they were told to be doing through the CDC guidance or other requirements that they had to follow, then they would be protected from this litigation. It would not protect employers who had shown a higher level of disregard.

Marc Freedman:

So if they were reckless or had some type of intentionality behind it, then this type of protection wouldn't apply to them and they'd still be vulnerable to lawsuits. It basically just raise the bar as to what type of lawsuits could be brought. Unfortunately, it was not included in the final COVID relief package at the end of the Congress. It was often put out there as if that was going to be the trade-off for language requiring OSHA to issue in ETS. The theory was that the Democrats would get that and the Republicans would give this liability protection. Neither of those made it into the final package and so that legislation, I think, is really not being actively considered right now in a Congress that's controlled by Democrats.

Adam Roseman:

Right. Right. But I think it was worth explaining to the listeners what that liability shield means, especially because some state legislatures have something similar. I think a few states have. But it sounds to me, at least based on what you're telling us is that, that legislation standing alone likely isn't going to get a ton of traction at the moment.

Marc Freedman:

No, it's not going to survive in a congress that's controlled by Democrats. It was a Republican concept and it had to be seen as a trade off to something else. And at this point, there isn't really anything on the other side of to trade off with it. When Biden won the election in November, the pressure for Congress to pass legislation, forcing an OSHA ETS, went away. The Democrats weren't going to pass legislation telling in a friendly OSHA that they had to do this. And so the whole concept of a possible deal there really, I think, faded out. But as you noted and it is true, several states are putting in place laws that are in this direction. And I think those are helpful to a lot of companies and employers in those settings. And I should reiterate, it does not protect them from all losses, only the really low-level losses.

Adam Roseman:

Right. And so a couple of broader questions for you, Marc. As you noted, elections have consequences and that means a change in the guard at the agency levels. Sitting here today in your position, what have you seen both in the operations of OSHA under this new administration so far, as opposed to the previous one, and then the same question goes for the DOL generally? Are employers right? They care about safety issues but they care about other issues too, wage an hour, et cetera, et cetera. What are some of the two or three big ticket items that you've got your eye on, that really is a see-change from where we were before the November election?

Marc Freedman:

Yeah, I think that's a great question to explore. So I would start at the top and say employers should expect a much more aggressive posture on enforcement. I mean, I think that goes without saying. I expect to see something that looks a lot like what the Obama administration looked like in this case. I expect to see OSHA coming out with stiffer penalties and less willingness to negotiate and find a settlement. And on that question, and I think it bleeds over into the Wage and Hour Division as well in the same way, and in that question, those two divisions are united by being under the control of the Solicitor of Labor. The Solicitor of Labor is a very interesting person and I often say it's the most important person in a department that nobody thinks about. They are technically the number three person in the hierarchy and that office controls both the regulatory and enforcement agendas of the department.

Marc Freedman:

So when a regulation is being developed, they oversee whether the agency has done all the things they're supposed to do or whether it can be done as a regulation or something less, like guidance. I think we saw in the Obama years that they put out some stuff as guidance, that we thought should have been done as a rule making. And similarly, as I mentioned, they control the enforcement agenda. And so, to the extent that an agency's is going to be very tough in citations and enforcement, so a lot of that is driven by the Solicitor's Office and the overall department approach to how to do these things. So I would start with the enforcement agenda and say employers should expect to see a very aggressive approach there. I would also say, and this is an OSHA Pacific question, that we should expect to see the return of the so-called shaming news releases.

Marc Freedman:

It was one of the features of the Obama administration that when OSHA issued citations, they would come out with a big news release talking about how many hundreds of thousands of hours they just assessed, blah, blah, blah. And the problem with that is that, as the case moved along and it was finally resolved, there was never a catch-up release that said, "Well, and this employer was able to negotiate



and settle of for considerably lower number of dollars." So if you're out there looking for someone to do work, or you're looking for a contractor or something, and they happened to have had an OSHA citation, there was a press release out there that would follow them as far as the internet went.

Marc Freedman:

So we found those press releases to be rather problematic but I would expect to see those return. A lot of what's going to determine the OSHA agenda is still not yet in place because we don't have a nominee yet. They have an acting assistant secretary, which I do. I don't expect them to be the nominee. Jim Frederick, they don't nominate people from that position to become the nominee. So, I don't know what we're going to see, depending upon the nominee. That'll be an interesting thing. The Wage and Hour Division has already been active.

Marc Freedman:

They've just yesterday issued an extension of the independent contractor regulations effective date, that was supposed to go into effect on March 8th. It's now been pushed out 60 days to May 7th. And then we do expect that they're going to go into that regulation and probably change it substantially. I also think there's going to be several other regulations in the region of our space that are going to undergo changes. The joint-employer regulation, for sure. And then quite possibly the overtime regulation as well.

Adam Roseman:

I think, Marc, that's all good points. And my goodness, you may be one of the busier men in the DC area, given all the changes and helping employers. And we cannot thank you enough for your time and your insights today. And for listeners, your Podcast Safety Review Team is working to line up more guests from the industry and hope to be coming at you with a new episode in short order. So again, thanks for listening and thank you, Marc, for joining us today, to giving us your insights and for the listeners, please stay tuned for the next episode of the Workplace Safety Review Podcast.