

Michael Taylor:

Hello everybody. This is Mike Taylor at the Greenberg Traurig law firm. I am the chair of the Greenberg Traurig OSHA Practice group. I am based out of our Washington, D.C. and Northern Virginia offices. Our firm has offices all over the world with about 2,200 lawyers. If you'd like to learn more about me or our OSHA Practice group, please go to [www.GTLaw.com](http://www.GTLaw.com).

Michael Taylor:

Today we have a special guest, Jordan Barab. Jordan joined OSHA as deputy assistant secretary of labor for occupational safety and health on April 13th, 2009. He previously served as special assistant to the assistant secretary of labor for OSHA from 1998 to 2001. He was also on the House education and labor committee as a senior labor policy advisor for health and safety from 2007 to 2009. He also worked on workplace safety and health issues for the U.S. Chemical Safety and Hazard Investigation Board from 2002 to 2007. He was a health and safety specialist for the AFL-CIO from 2001 to 2002, and he directed the safety and health program for the American Federation of State, County, Municipal Employees from 1982 to 1998. He also created and wrote the award-winning web blog Confined Space from 2003 to 2007. Welcome, Jordan.

Jordan Barab:

Thank you. Good to be here.

Michael Taylor:

Hey, it's a very pleased to have you here with us today. One of the questions I have is about your tenure with OSHA in 2009, and then the years following through that, what would you say were some of the agency's best accomplishment during that tenure?

Jordan Barab:

Well yeah, it was a long tenure and in fact, both I and David Michaels, who was the assistant secretary, spent longer at OSHA in those seven to eight years than any other previous, either head of OSHA or even a deputy assistant secretary, at least a political deputy. There were a lot of accomplishments.

Jordan Barab:

I think the ones probably that stand out in terms of those that the public would notice most, I think was our issuance of several important standards. First and foremost was the silica standard that protects a lot of construction workers and other workers against deadly silica dust. Also issued a beryllium standard. We updated a lot of the record-keeping requirements. For example, employers are now required to notify OSHA anytime there's a hospitalization or an amputation or the loss of an eye, in addition to the previous requirements, which were notifying OSHA in the case of a fatality or a catastrophe. That also increases OSHA's ability to get to where it needs to be.

Jordan Barab:

Otherwise, behind the scenes more accomplishments, we're really trying to refocus the agency more toward vulnerable workers, both in terms of approaching them in terms of outreach, compliance assistance training, Harwood Grants, and just general relationships with those organizations that have better access to vulnerable workers than OSHA would normally.

Michael Taylor:

You mentioned rule-making. If you had a magic pen, and you could rewrite the laws in terms of what OSHA has to do to promulgate a rule, what would you do? Is the process broken? How is it that EPAs promulgate so many rules, but OSHA doesn't?

Jordan Barab:

Yeah. I would say the process is pretty much broken. It took 20 years to get the silica standard out. It took about 20 years to get the beryllium standard out. Believe it or not, although we were, I think, fairly active on the regulatory side, we did not complete any standards that were begun in our administration. That's how long it takes, except for some of the record-keeping regulations. Smaller things. I do not believe that the founding fathers of OSHA ever intended on it taking 10 to 20 years for a single regulation to be issued or updated. That is not a good way to run a worker protection agency.

Jordan Barab:

What you have is a situation where, for example, OSHA regulates probably 600 chemicals and almost all of those are the same regulations that were issued in the early days of OSHA, which means they're based on science from the 1960s and 1970s. The other thing OSHA has is an enormous number and probably in the hundreds of standards that were passed that were issued also in those years that basically adopted industry consensus standards. Now those industry consensus standards typically get updated every three to five years, whereas OSHA's still basically enforcing industry consensus standards from 50 years ago. Obviously, it's not working.

Jordan Barab:

In terms of what can be done, I don't have a whole lot of answers. One thing that definitely should be done, and this is actually included in the Protecting America's Workers Act, which has been introduced in the House and Senate every year for the last probably decade at least, would be to repeat the allowance that OSHA was given in its early days, which is to basically adopt a version of all the industry consensus standards without going through the full rule-making process. That would at least update all the standards that OSHA has on the books now. That would be a major accomplishment.

Jordan Barab:

In terms of new standards, new hazards. There really needs to be something, I don't have all the answers here, but there needs to be something to make a much faster regulatory process without losing the robust public input that OSHA has. I think OSHA has probably the best public input processes of any agency in the federal government, but between that process and various other things that have gotten tacked on such as SBREFA, the small business, various assorted court decisions, executive orders, that type of thing. It again basically breaks the system, especially as the originators intended.

Michael Taylor:

Right. I totally agree. I think it's also fractured and needs to be repaired. Did you or did the agency, when you were there, engage in any kind of negotiated rule-making, and if so, what was your experience with that? Was it positive, negative?

Jordan Barab:

Yeah, we didn't. We did not engage in any formal negotiated rule-making. There have been occasions where OSHA has engaged in that, for example, in the steel erection standard. I personally have never been a big fan of that. It's a long process, as most rule-making is. Doesn't always come out with the best product, and I think OSHA tends to get sued anyway afterwards. It also tends to favor those with more resources.

Jordan Barab:

I was involved in a negotiated rule-making very early in my career. This was with the EPA, the AHERA regulation that dealt with asbestos in schools. They required me to be on-site every single day for weeks at a time. At the same time, I was the only, well actually there were two of us running the entire program, had asked me. Both of us were pretty much there as opposed to these large law firms, no offense, but large law firms who could send people there every day or numbers of people there every day and still run their normal operations.

Jordan Barab:

That's always been a problem. Now, one thing we did do with beryllium, beryllium had been something that OSHA had been struggling with for many years. There was incredible industry opposition, despite the fact that it was well known that OSHA needed a new beryllium standard. In fact, the Department of Energy had moved forward on that considerably beyond OSHA. The steelworkers did get together with the beryllium industry, and they worked through a number of the key issues such as what the permissible exposure limit was and outlined a standard that they could both agree with.

Jordan Barab:

We jumped in there and said, "Well, thanks. To speed things up, we will try to issue a standard based on what you all have agreed to." Obviously, it was still having to go through the various hoops and everything that OSHA normally has to go through, but that definitely sped up the process and decreased the litigation. There was still some litigation but decreased significantly the amount of litigation and opposition to that standard when we finally did issue it.

Michael Taylor:

Do you think that some standards or industries are more prone to have successful negotiated rule-making than others? For example, the PSM standard. Very good standard, but to me, needs to be updated to reflect the current status of cover processes in America. Would that be a standard that you think that could survive negotiated rule-making, so to speak?

Jordan Barab:

Yeah, I don't know. Again, I do think there's a great value in having the maximum amount of public input, which means industry input, labor input, and other input into all OSHA standards. As you know, right now, OSHA does. When the proposal is issued, there's a formal comment period. There are hearings, public hearings where anyone can testify and little known opportunity I think unique to OSHA is if you're a witness at an OSHA regulatory hearing, you also get to question other witnesses' hearings. For all of you who are not attorneys but always wanted to be attorneys, that's your opportunity to get up there and question witnesses.

Jordan Barab:

Then there's obviously a full review period after that for the hearings, so there is certainly opportunity for all of that input, as opposed to, again, a negotiated rule-making, which tends to go for the least common denominator. Again, from my experience, both in terms of the resources put in and the results that come out of it, haven't convinced me that's probably the best way to go.

Michael Taylor:

Right. One of the other accomplishments that you had with Dr. Michaels was the introduction of the press releases, right?

Jordan Barab:

Well, no, we did not introduce the press release. We did not invent the press release. OSHA throughout its history has always issued press releases [inaudible 00:11:32] big enforcement cases.

Michael Taylor:

Going back, because I was on a panel with Dr. Michaels, I think it was right around 2009 before OSHRC, so I just don't recall. So press releases did exist before your tenure, it just wasn't at the magnitude, is that right?

Jordan Barab:

Yeah. It's hard to say. Let me talk a little bit about a policy/philosophical background and then to what we actually did. Now, OSHA, as you know, is a very small agency. I think maybe this year, for the first time, the budget will approach \$700 million a year, which is barely a hiccup [inaudible 00:12:11] federal government. EPA's budget is somewhere between, I think, eight and nine billion a year. OSHA's a tiny agency, really has very small staff, very little capacity to really conduct the mission that it was assigned when it was created in 1971.

Jordan Barab:

It was always our focus when we were there to leverage those resources as much as we could, and to really try to make ourselves look bigger than we really were. One way to do that was to make sure there were... OSHA can do relatively few inspections a year [inaudible 00:12:50] citations and the OSHA penalties, especially then the OSHA penalty levels were very low. They're still low, but they were much lower at that point. What do you do to really leverage your influence? One of those things is not just to issue press releases because again, OSHA had always done that as all enforcement agencies have, but also to issue more press releases and to issue more impactful press releases.

Jordan Barab:

One of the first things I did, and I was there a good year before David arrived, before he was confirmed. First thing we did was basically simply lower the threshold of where press releases would be issued. Previously it was I think any citation over 75,000, and I think we reduced that to any citation over \$40,000, there would automatically be a press release. Then you issue other press releases depending on the issue, if it's something you really wanted to emphasize, for example, a workplace violence citation, which may be only \$7,000, but it's an area that OSHA was really moving into and wanted to put

out the word that this is something we're serious about, so we might issue a press release for a smaller one than that.

Jordan Barab:

Now, that was the first thing we did. Then we also tried to make them a little bit more informative and descriptive, not only about, obviously what we think went wrong and also what some of the solutions, what some of the ways you can prevent that. Also, as we moved in, we started getting more, I think, introducing, probably more rhetoric and passion into the press releases and David was quoted once, and it was a somewhat inaccurate quote, but nevertheless, he was quoted once as saying, "We want to use press releases to regulate through shame." In other words, shaming employers into using press releases to shame employers into doing the right thing.

Jordan Barab:

It wasn't really regulation by shaming. It was more enforcement by shaming, and it wasn't so much shaming as it is really trying to pressure and disincentivize cutting corners. We received a lot of criticism for that. Again, not the image that we had invented the press release, which again, we did not, but we did again increase the number of press releases and I think we tried to increase the impact of press releases.

Jordan Barab:

There were two things that came out of that. I think one is there have actually been academic studies showing that a press release will have an impact far beyond just the actual citation. If you issue a citation to a company and nobody talks about it, that company is impacted, hopefully if it's a smallish company that would be responsive to a relatively small OSHA fine. But if you issue a press release, you're not only impacting that company, but also other companies in that general geographic area, as well as companies within that industry, assuming it gets attention and publicity and industry publication. You really are leveraging OSHA's resources. Again, there've been academic studies showing that actually is the case.

Jordan Barab:

Secondly, and this is more anecdotal, but nevertheless, it's an anecdote that's been repeated a number of times. I've talked to many employer attorneys who have told me that their clients have come to them and basically said, "Listen, how do we get away from these OSHA press releases? We don't care about OSHA penalties. They're so small, they're pretty much a cost of doing business, but we really don't want the press release issued with our name in it." These attorneys' response were basically don't get cited. Make sure your workplace is safe. If in fact the impact of having more press releases and harder hitting press releases was influencing employers to make their workplaces safer, then I think that was a success.

Michael Taylor:

I am a OSHA practitioner myself and I do concur. I can tell you from my perspective, obviously let's say an oil refinery, for example, didn't want to have a press release, but if they read a press release that dealt with PSM, the idea would be I'd get calls and say, "Hey, well, maybe we need to take a second look at mechanical integrity." That's the interest that I saw in terms of trying to improve workplace safety in-

house. I do think those press releases did have some value in making employers not feel comfortable that everything's always okay and required them to take a second look, which is always good, right?

Jordan Barab:

Yeah, definitely. Anything you can get to... Some employers will do the right thing anyway [inaudible 00:17:33]. There are others though that hope nothing bad will happen and maybe OSHA will never show up. They're more complacent than others and actually hopefully these kind of things can shake them out of their complacency.

Michael Taylor:

Right. You mentioned about the budget, about EPA's compared to OSHA's budget. I don't remember the number, but I remember right around the time that you became deputy assistant secretary in 2009, I think I recall that at one point there was either a thousand or 1,100 or 1,200 OSHA enforcement inspectors and today there's maybe what, 800? Am I off base on that?

Jordan Barab:

Yeah, that's about right. During the latter days of the Trump administration, OSHA hit an all-time low for enforcement staff. Now that was partly a result of the budget, so basically OSHA had basically been flat funded since 2010 and also a result of OSHA just doing a piss poor job of hiring during the Trump [inaudible 00:18:40].

Michael Taylor:

What would you do if you had the magic pin to try to get back to the normal staffing? Is that going to be a problem for the agency over the next five years, regardless of who's president?

Jordan Barab:

It always is. I would also argue, first of all, that even getting back to the normal staffing is not good enough. Right now, the AFL-CIO does these calculations every year, and they've found that if OSHA were to inspect every workplace just once it would take over 160 years and even back in the early days of the Obama administration, I think that number was maybe 130, 140 years, so that's not good. Is it too much to ask that OSHA should be able to inspect every workplace once a century, maybe?-

Michael Taylor:

It probably is.

Jordan Barab:

... or even much more frequently than that. OSHA's responsible for something like eight million workplaces around the country, in between the numbers you were citing were only federal OSHA. Even if you double that, when you consider the State Plans, you're still not close to where you should be to have a real presence in most American workplaces. Let me put it this way. If I decide to go out today, and I'm running errands all day and decide I'm going to drive 20 miles over the speed limit all day long today around the D.C. area, I'll probably come home with about 20 tickets, just [inaudible 00:20:16] assuming I don't get pulled over. If I run around DC all day and put workers up on roofs without fall protection, the chances are nobody will notice.

Michael Taylor:

That's so true. In addition to understaffing, put it to you this way, I often tell folks that being a compliance officer is a noble position. In my view, they're asked to do the impossible and what I mean by that, well, one day they could be in an oil refinery. The next day they could be at a bakery. The next day they could be at a hospital, a construction site. That's a daunting task. What is your view about the kind of training that the compliance officers receive while they're employed with the agency? Does it need to be improved, and if so, how would you go about doing that?

Jordan Barab:

Well, yeah, training is important. OSHA has a training center, as you probably know, in the Chicago suburbs. It's a very good training center. Has always been very highly renowned. [inaudible 00:21:22] OSHA new inspector, you basically go through about three years of courses before you're turned loose. There are specialized courses, for example, in PSM and other areas, but you're right. They have to be jacks of all trades, and they could always use more training to reach the expertise level that they need.

Jordan Barab:

Now, OSHA also has alliances and arrangements with a lot of industry associations where our inspectors could also get additional training, more specialized training, which is also important. But again, given the size of the agency, there is no choice, but to have your expertise spread widely. California on the other hand, and this is partly through legislation, but they have a much larger cadre of PSM specialists, very exclusively PSM specialists, that focus on California's refineries and other PSM facilities then federal OSHA does. A lot of that again comes back to a function of not having enough money to hire adequate staff to really do that.

Michael Taylor:

Right. It all comes back to that. During your tenure with Dr. Michaels, what can you tell my audience about the oversight federal OSHA has on State Plan states and did you come across any particular states where you thought, "Ah, gee, gosh. You're falling behind here"?

Jordan Barab:

Yeah. The State Plans have always been challenging, I should say. I've been involved with State Plans for a long time. When I was at AFSCME, AFSCME is a union of public employees and there are a lot of people that still don't know that OSHA does not cover public employees except in State Plan states. I spent the first good part of my career dealing only with OSHA State Plan states. I was very familiar with how they operate and basically some of them are very good and some of them aren't, but overall it's kind of like herding cats. You've got 21 full State Plans, plus another five public employee only State Plans. They all want to do their own thing, even though it is federal OSHA's responsibility to oversee them and to ensure that they are quote-unquote "at least as protective as" the federal program.

Jordan Barab:

A few things when we first got there. We again wanted to try to tighten that up and some of the things we did were, for example, require all the State Plan states to adopt OSHA National Emphasis Program, because we figured when OSHA had compiled enough evidence to actually issue a National Emphasis

Program, and we didn't do all that many, it was supposed to be a National Emphasis Program meant not just in the 26 states or the 29 states that federal OSHA enforced in.

Jordan Barab:

A few other things we did. At that point, OSHA penalties were even lower than they are now, as I mentioned before, and most of the State Plans were even lower than federal OSHA and some of the State Plans were significantly lower. I think when I got there, the average OSHA penalty was somewhere in the neighborhood of between 1,500 and \$2,000. The State Plan, some of the State Plans, were as down as low as two and \$300. Now in 2016, Congress raised OSHA's penalties, and we required the states to follow through. Some of them still have not done that. They resisted. They resisted the National Emphasis Program thing, and they resisted a number of other things that we tried to do as well.

Jordan Barab:

That's the issues that we have with the states. They want to do their own thing and don't necessarily interpret being just as effective as federal OSHA the same way the feds do. Also, they quite legitimately argue that [inaudible 00:25:30] funded very well, which is [inaudible 00:25:32]. The State Plan funding line item in the OSHA budget tends to lag behind the rest of the OSHA budget, which is not very good. Anyway, one of the structural problems there is that federal OSHA doesn't have that many tools to address problems with the State Plans.

Jordan Barab:

Basically the only tool that federal OSHA has is the death penalty. If it's not satisfied with what a state is doing, OSHA can remove that OSHA State Plan. Now, that doesn't really do anybody any good. OSHA ends up having to enforce all that, which means they end up spending a lot more money. Public employees in that state lose their coverage. It takes a long time to do that. Again, nobody really wins with the outcome of that.

Jordan Barab:

We did try to build a little bit more flexibility into it. You may all recall, I think in 2010-ish, somewhere around there, OSHA changed its residential roofing requirements. When the roofing standard had come out, I think in the early '90s, residential was essentially exempted from a lot of the requirements of the roofing standard for what may or may not have been good reasons back then, but whatever the reasons were back then, they no longer applied in 2010, 2011.

Jordan Barab:

We basically brought residential roofing up to the same level as commercial roofing, which it was intended to be when the standard was issued in the first place. We also obviously told the State Plans that they had to do that as well. They resisted. About half dozen of them resisted, and we finally got most of them on board. Arizona came right out there and said, "Not only are we not doing this. We're passing a law saying that we're not [inaudible 00:27:15] to the old ones," and screw you. We weren't going to take that, so we basically arranged to basically federal OSHA would take over Arizona's construction sector.

Jordan Barab:



Now, we couldn't just declare that. There's a whole bunch of stuff in the OSHA law about what has to go on and other regulations, and it became a two-year process. When we finally got to the end of that process where we said, "All right, we're taking over your construction sector," they basically changed their minds. We went through this whole long lengthy painful process only to be basically back where we should have been for that. We've also tried doing other things with some of the other states. Some of the states have problems because of funding issues.

Jordan Barab:

We, for example, took over a good part of Hawaii's plan because they didn't have the funding even to run the State Plan and helped them get back up to the level they needed to be at. We did other things that we've managed to do as well to try to put a little bit more flexibility in there than just again just the death penalty, but ultimately it's way too difficult. Whole system is rigid to really oversee the State Plans adequately, and something should be changed in the law to fix that as well.

Michael Taylor:

To be sure, and correct me if I'm wrong too, does federal OSHA fund half of the State Plan state, is that right, in other words...?

Jordan Barab:

Yeah. Federal OSHA is required to fund up to half. Now, a lot of the states overspend and what I mean by that is OSHA establishes what the state needs to spend and OSHA will match that amount, but some of the states overmatch. In other words, they'll actually put more money into the state program than is actually required by OSHA. Now, the number of states that overmatch and the level of overmatching has gone down over the last several years because of basic budget issues. Again, OSHA being flat funded, but yeah, OSHA does have to fund at least half of the State Plan.

Michael Taylor:

As you're aware, OSHA recently published or promulgated an emergency temporary standard for COVID in healthcare settings. My question is, does that mean now that all the State Plan states have to adopt that standard or be even more stringent in that standard? It's an unusual situation because these standards are normally supposed to be for about six months because it's an emergency, but I was just curious as to whether now does that mean these State Plan states have to either incorporate this standard by reference or have the standard but be more vigorous?

Jordan Barab:

Yeah, they do have to adopt it by reference. I don't know exactly... That's a good question. I'm not sure exactly how that works now. As you mentioned, it's emergency temporary standards is only supposed to last for six months. Nobody's quite sure what happens at the end of that six months if OSHA can't then issue a permanent standard, which obviously [inaudible 00:30:21] able to. Normally after OSHA issues a standard, State Plans are given six months to adopt that standard, either an identical standard or a standard that is more stringent. Obviously there would be different deadlines now, and that's a good question. I'm not sure exactly what deadline OSHA has given the State Plans to adopt the standard.

Michael Taylor:

One final question, Jordan, when you were there, was the agency working on a airborne transmission disease standard, and if so, do you know if it's still in the works in that maybe that's what will end up being promulgated once the emergency standard for COVID expires?

Jordan Barab:

Well, actually OSHA was working on an overall infectious disease standard, not just airborne. As you may remember in, I think, 1991, OSHA issued its bloodborne pathogen standard. That covered all diseases that were transmitted through the bloodborne route, which was mainly HIV and hepatitis AB, actually hepatitis B and C and some other diseases.

Jordan Barab:

Essentially what that did more or less was codify CDC guidance, but OSHA had never issued any other standards that would apply to any other communicable diseases [inaudible 00:31:43] airborne route. Those were transmitted through a dermal route, through touching, oral, fecal, whatever, there are many other ways that communicable diseases are [inaudible 00:31:53]. None of those were covered except for bloodborne.

Jordan Barab:

The idea behind the infectious disease standard, which we started in 2009 and in the wake of H1N1 would have been basically to cover all the rest of the infectious diseases out there, again codify more or less CDC guidance. We got somewhere on that. Not really far enough. We didn't quite get to the proposal stage before the administration ended and then the Trump administration put it on the long-term agenda, which means basically they weren't going to totally deep-six it, but they weren't going to work on it either. That's where it remained until I think last week the Biden administration issued it's first regulatory agenda and released the infectious disease standard from the long-term agenda.

Michael Taylor:

So it's possible that we may see that in the coming months.

Jordan Barab:

Yeah. I don't know how many months. Again, it hasn't gotten to the proposal stage yet and again, I'll go back to complaining about the OSHA's regulatory process. It can often be a good two years just from the time the proposal is issued until a standard is issued. Again, we aren't even at the proposal stage yet. I would measure it probably more in years than in [inaudible 00:33:21].

Michael Taylor:

We've come full circle. Hey Jordan, thank you so much for being on the show. This has been awesome. It's been a privilege to have you on here. Very, very informative and thank you very, very much.

Jordan Barab:

Well, you're welcome, and thanks for inviting me.

Michael Taylor:

You bet, and stay tuned for the next episode of the Workplace Safety Review podcast. Goodbye everybody.