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Adam: [00:00:30] Welcome back, Workplace Safety Review Podcast fans. Today, we have an incredibly special guest with us, not only because he is an occupational safety and health expert, but because he is now our colleague. Today we have Josh Bernstein joining us as the guest. He is a trial lawyer who focuses on [00:01:00] labor and employment law, including occupational safety and health regulatory compliance. He's board certified in personal injury trial law by the Texas Board of Legal Specialization.

Now, before joining Greenberg Traurig and becoming the colleague of your dear hosts, Josh served as a senior trial attorney for the US Department of Labor. In this role, he acted as first chair attorney representing the Department of Labor in enforcing federal employment laws, including OSHA, MSHA, the Fair Labor Standards [00:01:30] Act, whistleblower laws, and EEO matters in federal and administrative courts in Texas and in the neighboring states.

He's also negotiated complex settlement agreements in numerous cases involving these statutes and regulations. Josh has a wide ranging experience providing counsel and pre-litigation advice regarding government investigations, and enforcing regulatory compliance in critical employer employee areas. Including safety and health, which is why we have him on [00:02:00] today. We are so excited to have Josh as our guest and even more excited to welcome him as a colleague. So Josh, welcome... I guess, two welcomes. Welcome to the podcast and welcome to Greenberg Traurig.

Josh Bernstein: Thank you, Adam for that very warm introduction.

Adam: So Josh, we just kind of want to start off, I know we gave your background, but if you can sort of add some color there. And also tell us and tell our listeners what [00:02:30] were you doing before you came to the dark side and before you came to the defense side, what were you doing for the Department of Labor?

Josh Bernstein: Sure, sure. I spent the last 16 years as a senior trial attorney in the Dallas Regional Solicitor's Office. We, as you said, enforced the labor and employment laws in Texas and the neighboring states. We do primarily litigation. In other words, any kind of agency that does an investigation, if an employer contests what is found by the agency, [00:03:00] it is sent to the solicitor's office to prosecute and litigate. So that was primarily what we did and what I did. And although there are numerous program areas like you mentioned, OSHA, wage and hour, EEO, et cetera, I did have a very big focus on OSHA.

And I have tried numerous cases in front of most of the current sitting ALJs around the nation. As a senior trial attorney, I also did a lot of what would be

called [00:03:30] pre-litigation advice and counsel. In other words, when a CSHO, when a compliance officer is in the field, they may have some issues that they encounter. Whether that be with witnesses, with documents, with an employer's counsel, they would frequently call me and I would be the go-to person to assist in pre-litigation matters as well. So those are kind of the main areas of OSHA work that I would do over the last 10, 15 years.

Adam: [00:04:00] Very cool.

Mike: Josh, this is Mike again. I'm echoing what Adam said. Welcome aboard. We're very, very excited to have you as part of our team. We're absolutely thrilled. You mentioned something about assisting CSHOs during the inspection phase. Can you describe or inform our audience about how does that happen? I know you mentioned that CSHOs will call you, but are there any cases where [00:04:30] they call you as soon as citations are issued and say we need some help? Or during the inspection phase, I guess?

Josh Bernstein: Sure. So as you probably know, the citations being issued is kind of the end of the process. After an incident occurs, whether it's an accident or a fatality or a complaint or for whatever reason, OSHA going out. OSHA, as you know, they have about six months in order to issue citations from the time that [00:05:00] they open their inspection. And so when I'm referring to some pre-lit assistance, I'm talking about what would occur while OSHA, while the CSHO was out there at the site, beginning their inspection. From the very first day, from the very first minute, sometimes there's issues with warrants. As you know, OSHA has the ability to inspect any site for any reason, but sometimes employers request that warrants be obtained. A lot of times when this occurs, the CSHOs [00:05:30] are caught a little off guard and they would call their boss. And their boss in the area office would call me and say, Hey, this employer wants a warrant, so what do we do? That's an example of a call that we would get from time to time.

If the CSHO is allowed onto the property and allowed to conduct the inspection, they may want to interview some employees. Sometimes there's some issues with that. Sometimes employer's counsel insists that they represent both the employer and the employee, [00:06:00] meaning that the employer's counsel may want to sit in on employee interviews. The law only allows the employer's counsel to participate in interviews of supervisory personnel, not a lower hourly, non-supervisory personnel. But sometimes the employer's counsels for whatever reason try to get involved with that. And that would be another time when CSHOs would call their boss and the area directors, they'd say, [00:06:30] Hey, this attorney wants to sit in on these interviews. What do I do? And they would call me, and this is very time sensitive because as you know, when a CSHO's conducting an inspection, they're only out there for a day or two. Unless it's a gigantic weeks long thing, but usually it's a couple days. So they need to conduct the interview when they're out there. So that's a timely call.

Usually after a CSHO leaves a site, they might follow up with some document requests. Sometimes employers [00:07:00] have questions about the document

requests, maybe the document requests that the CSHO is asking for are over broad or they deal with areas that are not really within the scope of the inspection. And the employer's counsel will object and raise issues and say, let's narrow this. And in that instance, the CSHO would ask their supervisor, and their supervisor would ask me, Hey, how can we work this out? And maybe draft a more focused document request so that we can address the employer's councils [00:07:30] issues.

Those are some of the types of things that I would help with regularly while CSHOs were in the field, pre-lit. That would all fall under pre-lit assistance. That would all be within the six months, hopefully within the first couple of months of the six months, because if we were to get a call from CSHO attempting to do the things that I just listed, in let's say the fifth month of six months, there would be very little time to complete these tasks before the OSHA statute [00:08:00] would run.

Mike: Yeah. Josh, you mentioned about getting involved when warrants are requested. I don't think I've ever, I know I've never advised a client to make OSHA go get a warrant for a variety of reasons that I know of. But can you explain to our audience about what are the pros and cons of making OSHA go get a warrant? And how do you handle those situations?

Josh Bernstein: Sure. As an employer's counsel [00:08:30] now on your team together, I would concur with you and not recommend that an employer insist that OSHA get a warrant. In every instance that I've been involved with where an employer objected to a CSHO coming onto the property and insisted on getting a warrant, the OSHA attorneys, which is the solicitor's office, was able to get a warrant and ultimately conduct the inspection that they wanted to. Getting a warrant involves [00:09:00] going into federal district court in the local district where the employer is located. It is a lot of work for an employer and for us. It would be very time consuming and be very expensive, and at the end result would be the issuance of a warrant to allow OSHA to come onto the property. It seems in my experience, like it's a big waste of time and money and not an ideal way to start off a cooperative relationship between OSHA and an employer.

[00:09:30] Instead, if an employer has a question about why OSHA is out there or about the scope of what OSHA intends to do, it would be much more recommended for the employer's counsel to engage either the CSHO or the solicitor, and agree on the basis and the scope of the inspection. That is a way more reasonable way to [00:10:00] address anyone's concerns than insisting on a warrant. When I was at the solicitor's office and when we were able to engage employer's counsel and redefine perhaps what the scope of the inspection might be, or the basis of the inspection might be, almost always it would be resolved and allow OSHA and the compliance officers to continue their efforts. And fulfill their statutory obligation to conduct whatever inspection they [00:10:30] were intending to, without having to go into federal court to get a warrant.

Mike: One of the questions that I got several years ago is that, well, if we make OSHA go get a warrant, how long does that take for them to get a warrant? And will that minimize the time in which they can do the rest of the inspection and issue citations? In other words, the question I think I got was, does that toll the six month statute of limitations?

Josh Bernstein: The answer is no. [00:11:00] It will not toll the statute of limitations. And you are correct that in theory, delaying OSHA's inspection by insisting on a warrant will hamper OSHA's efforts to obtain information during their six month period. But I have found that it's really not a very productive tactic, because OSHA will ultimately obtain the information. They will ultimately be able to support the citations that they're intending to issue. And as [00:11:30] you know, once they issue citations and the employer contests them, if the employer contests them, it will go to the solicitor's office for full litigation. Where the solicitor can then conduct discovery, both written and oral. And so really, it's just a way to delay things, but you are achieving the same end result just a little bit later.

And in my experience, when we had had to get warrants, sure, every federal jurisdiction is different. We would frequently request expedited [00:12:00] relief. Some judges would give expedited relief, meaning that within a day or a week or a couple weeks, a judge would hear and rule on a request for a warrant application. Other judges were not so quick to turn around a ruling. But I can tell you that in most every experience that I can recall, being in front of a federal district judge, they, as you know, all judges in any forum, in any conflict, [00:12:30] they appreciate when the two sides work together. They don't appreciate having disputes, which should not be before them, before them. And in every instance where we sought a warrant and we obtained a warrant, the judges were not really looking too kindly on the employer's counsel's refusal to cooperate with the OSHA council. Because these issues could be resolved by simply discussing the scope and on those things like I mentioned before. So yes, it is a delay tactic [00:13:00] in theory, but I don't think that it is a very successful delay tactic.

Mike: Right.

Adam: Hey, Josh, I know you spent a little bit of time during your career with the government as an acting area director of a OSHA office. So can you tell our listeners one, what is that position? And I think more importantly, what did you learn from being on that side of it? And sort of taking the lawyer hat off for half a minute, and give us [00:13:30] some insight into that process. Did you handle informal conferences? Sort of walk us through that.

Josh Bernstein: Sure. I took my lawyer hat off for about three months. When people in the federal government, it's not uncommon for them to take what are called acting temporary roles in completely different settings. A few years back, I was part of a leadership development program and each of the participants did a stint in a different role than a solicitor. It was [00:14:00] fortuitous that me being in Dallas and Fort Worth is about an hour away. And as you may know, the

structure of OSHA is that OSHA as an enforcement agency has area offices in the big cities. So our region, we were the legal counsel for this region. And all the local area offices of OSHA reported to or sent us, we were their legal counsel. So that would include Dallas, Fort Worth, Austin, and in the surrounding cities, [00:14:30] Oklahoma City, Little Rock, Houston, et cetera.

Those are where the OSHA area offices are, but there's only one solicitor's office of serving all of those area offices. So the Fort Worth area, OSHA area office, right about the time that I was looking for an opportunity to act in a role, their area director left. And so talking with the OSHA folks up in Washington, they had a vacancy. And in connection [00:15:00] with the leadership development program, I found myself as the Fort Worth area OSHA office area director for three months.

It was a very eye-opening role. One thing that I learned during that time is really the timeline of cases from the OSHA and the compliance officer's point of view, something I hadn't really thought about as an attorney. [00:15:30] When we as attorneys get cases and our client, whoever is the one in need of us providing them with legal counsel, we kind of assume as attorneys that our client is there and is ready, willing and able to assist us. And this is on their front burner and they want us to... It's on their mind and they need us to help them in short order.

That's not exactly the way it works with OSHA. With OSHA, when a compliance officer goes out and conducts [00:16:00] an inspection and then has six months to complete the inspection, when that compliance officer turns in that file and the citations are recommended and issued, from that compliance officer's point of view, their file is closed. And this is something that I learned as an area director. When their file is closed, in other words, if I'm a CSHO and I've completed my inspection and the citations are issued and I close it and get it off my desk, I move on to my next inspection. [00:16:30] I don't even know what happens to that case after the citations are issued. In other words, I don't necessarily know if they're contested. I don't know if they're settled at an informal, formal conference. I don't know if it's referred to the solicitor. I don't know what the solicitor is doing in terms of the litigation. I don't know if it's set for trial. I don't know any of these things.

I'm not involved as the CSHO in the process. After the citations, after I turn in my file and the citations are issued. What frequently happens is, 6 [00:17:00] to 12 months later, a solicitor is going to reach out to a CSHO and say, Hey man, or Hey CSHO, I need your help on some discovery. Or, we want to schedule some depositions. And the CSHO's first response may be, oh, I didn't realize this case was still in existence. I thought it was resolved. Or, oh, I didn't know this case was contested. And they don't have the file on their desk. They haven't thought about this for a year. And so [00:17:30] that perspective was something that I learned as the area director.

In other words, the attorneys had to really kind of refresh and say, Hey, I know you turned this case in last year, now it's heating up. We need you to dust it off. We need you to become more familiar with it again, and I need your support and involvement. So that was a perspective that I hadn't really thought about as being on the attorney side.

And a second perspective [00:18:00] is, like any office or any corporate office, OSHA has a statutory obligation to conduct these inspections, to open inspections, to close inspections, to complete inspections, to issue inspections. And they have their mandates, which are frequently statutory obligations and guidance coming from Washington and the Secretary of Labor. And so they are frequently operating within that framework. Trying [00:18:30] to get things open. How many cases have we opened? How many cases have we closed? How are we doing with moving cases along? Just like you and me, Mike and Adam, when our supervisors might look to us and say, how many cases have you opened? How many cases have you closed? How are you moving along your cases? And are we meeting our internal and external deadlines? Like the OSHA as an agency, as an office, the area director's responsible [00:19:00] for all of those things as well. And that was also not a perspective that I thought about much as a lawyer helping them.

Mike:

Josh, I want to ask one more question before the final question that Adam has. And this is really for my benefit. In almost every case that I've had in the last several years, whenever citations are issued and a notice of contest's filed, I always get a request from a solicitor's office for a 45 [00:19:30] day extension to talk about settlement. But that discussion never ends up happening. Why does a solicitor's office, if you can say, request the 45 day extension over and over and over again? Is it because the file doesn't get to you in time enough? I'm just trying to understand that request.

Josh Bernstein:

Sure. So as you probably know, when citations [00:20:00] are issued, a very quick timeline begins. The employer only has a couple of weeks to contest it, and the employer has to call the OSHA office, schedule the informal, et cetera. And once an employer timely files a notice of contest, just like the employer had only a couple of weeks, the solicitor only has a couple weeks, maybe three weeks to file a complaint. And so timelines are fast, and as we all know, as attorney's days and weeks can fly by and [00:20:30] we're all super busy. And so, when cases come into local offices, like to the Dallas Regional Solicitor's Office, it could be multiple cases coming in on a regular basis. And it's simply a function of trying to assign these cases and get attorneys to work on them and be able to work on them and be able to timely file complaints and be able to review the file and get the file.

As you said, getting the file is usually not a logistical issue, but [00:21:00] having the file, reviewing the file, getting it assigned to an attorney who has the time, and to give it the proper attention. I mean, we all know if we got a new case today, and we may or may not have the ability today to drop everything and look at this new case. If we could obtain another month of breathing room to do

that, it would probably be ideal. Judges routinely grant motions for extension of time to file an initial pleading routinely. And [00:21:30] yes, the basis that's put in there, 99.9% of the time is to give the parties an effort to talk. And what should happen is the parties should talk during that timeframe.

I can tell you that I as a solicitor, would always try to speak with the employer's counsel as well as OSHA to try to get the lay of the land during that extension period. So that I can tell and determine for myself, is this [00:22:00] a case that's going to be hotly contested and go to the mat down the road? Or, is this a case where we can maybe reach an agreement in a more efficient way and not just have a scorched earth situation here?

So I did utilize that timeframe and I would urge us as a team when we are in that timeframe to reach out to any OSHA council that filed such a motion. And say, Hey, you put [00:22:30] in here that you want an extension and we did not oppose it, and you said you put it in here because you wanted to talk to us. Let's talk. Let's figure this out. And so that would be a great opportunity. Now, obviously there's dozens and hundreds of solicitors around the country and everyone works differently. But I would say that it is very routine to seek that extension. It's very routine for it to be granted, and it is an opportunity for us to engage the solicitor [00:23:00] on the case and see what that case, the rest of that litigation might look like. And see if there's opportunity to reach a resolution.

Mike: And it kind of sounds like perhaps next time the review commission revises its procedural rules that they extend the timeframe from 20 days to 30 or 45 days, so that the solicitor doesn't have to file such a motion.

Josh Bernstein: We like to say, when I was at the solicitor's office, we enforced the rules, we didn't make the rules. And so if the commission [00:23:30] in its infinite wisdom decides to do something like that, then we will all abide by the new timeframe.

Mike: Yeah. Awesome. Adam, last question.

Adam: Yeah. Hey Josh. So last question, kind of piggybacking on what Mike was asking. Sort of take us in the room, if you will. Obviously the solicitor only has limited resources and some cases are more challenging than others. What is the process? The case is litigated, it's getting up close to a hearing or a trial. What is [00:24:00] the regional solicitor thinking about? What the sort of line attorneys like yourself, in terms of, Hey, do we want to take this all the way? Do we want to try to reach a settlement? What's a good settlement look like? I mean, are there considerations that the regional solicitor's thinking about on cases?

Josh Bernstein: Yeah, I mean, I would say that is really like any other case and any other attorney. At the end of the day, when any attorney in any situation is assessing whether a case should be settled or tried, at least in [00:24:30] my experience as an almost 30 year board certified trial attorney, I would always ask the

question, what is being offered as part of a settlement, and is it likely or unlikely that we would be able to obtain more in the courtroom? Right? I mean, that's always the question, whether it's an OSHA case or any other case. If an employer's counsel is offering, and this is an offer that I have received many times, offering nothing. That OSHA vacate all items. Then it's really not much of [00:25:00] a settlement offer, and it really gives the solicitor zero incentive to try to resolve the case. Of course, they're going to get more at trial.

Even in a trial that goes poorly. A judge is more likely than not to split the baby and affirm certain things and vacate certain things. So that that's more than nothing. So that would be what will be going through the solicitor's mind in that instance.

Now, in an instance where there's actual negotiation going on [00:25:30] and an employer's counsel says, our client's willing to take these citations, but we're requesting that these be vacated, kind of like a split the baby type of settlement. That is a much harder place for the solicitor to be in, because then they're going to really have to drill down and see, am I likely to get more in the courtroom? And just like anybody, it's tremendous resources to take a case to trial. Witnesses, documents, time, [00:26:00] et cetera. I think in my experience, now we're on the same team as an employer's counsel.

I think that more often than not, reasonable settlement offers by employers to take certain things, take certain items to enhance safety measures. Remember, at the end of the day, OSHA's goal and the solicitor's goal as the council for OSHA, is to make the workplace safer. That's really their goal. So as an employer's council, if we could [00:26:30] make some gestures where we are revising policies, revising training, we are taking reasonable measures that are likely to make the workplace safer in light of what has occurred, or in light of what OSHA found or is alleging. And in addition, agree to accept certain violations in exchange for vacating others. That type of reasonable offer is going to make it very difficult for a solicitor to say, I think I'd rather [00:27:00] take my chances in court. Nobody's going to say that. Right. So it really depends on what is on the table, and is it likely that they'll be able to get more.

A lot of times in these cases, the classification is an issue, especially when willfuls and repeats are on the table. Sometimes, depending on the nature of the employer, the dollars are an issue. In my experience, usually the dollars are less important than the classification. [00:27:30] Most employers can pay fines and OSHA's usually in a position to offer a small reduction, a penalty reduction. You probably experienced that. But these are the kinds of things that if there's a reasonable offer on the table, then any attorney that's worth... That's a good attorney. Is going to say, we really need to seriously consider this offer and their efforts to make the workplace safer. And not just risk this just to go to trial. So that would be just the basic [00:28:00] things that would be going through a trial attorney's mind before deciding whether to take a case to trial.



Mike:

Terrific. Josh, thank you so much for being on the show, and again, we are thrilled to have you as part of our team. This was a very informative podcast. I'm sure our listeners will absolutely enjoy listening to this in the car or wherever they listen to it.

So stay tuned to the next episode of The Workplace Safety Podcast review. Stay safe out there, everybody.