Speaker 1 (00:00):

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Speaker 2 (00:19):

Welcome back to the Greenberg Traurig's Workplace Safety Review podcast. I am your co-host, Adam Roseman. I'm co-hosting along with my colleague Josh Bernstein. Josh and I handle OSHA litigation and compliance for clients. And Josh brings an incredibly unique perspective as a veteran of the Solicitor's office handling OSHA cases and other labor and employment litigation. And we are here today to give an end-of-year wrap-up as we're only a couple of weeks away from the end of the year. An end-of-year wrap-up from the world of safety and health and what to expect in 2025. So welcome everybody and welcome back, Josh. Glad we could take the time and talk through what safety and health looked like in 2024 and what's coming up in 2025.

Speaker 1 (01:07):

Yeah, great. Good afternoon, Adam. How are you doing?

Speaker 2 (01:10):

Great. So Josh, as a veteran of the Solicitor's office before your time in private practice, can you tell us what life looks like inside the Solicitor's office when there's a change in administration, which we're going to get in a couple of weeks?

Speaker 1 (01:26):

Sure. I was a senior trial attorney in a regional Solicitor's office in the Department of Labor. The Solicitor obviously being the office that enforces and litigates on behalf of OSHA and other government agencies. We were in a regional office. I was there for about 16 years, which would include through several transfers and changes over of administrations. The regional office to the extent that we enforce the law and we don't make the law, we basically our day-to-day enforcement challenges didn't change much mostly on the overwhelming majority of the cases that we litigated. For example, fall protection is fall protection, whether you have a Democrat or a Republican in Washington. However, once in a while we did have some novel cases. For example, if we look at a heat case now, a heat case since there's no standards. They're trying to develop standards, which is something we may talk a little bit about on this podcast, things like that that would be considered novel and in the works.

(02:24):

It is entirely possible that if there's a very large case that's high profile that has had national office involvement, then perhaps one administration might be pushing that type of case and not wanting to resolve it to get it in front of a court. Whereas the new administration may have a different view on that and now might say just get rid of the case, or it's no longer a priority or it's no longer novel, or it's no longer of a high importance to us. So that's how it looked when the administration's changed every four years or so. Not much with regard to the overwhelming majority, but yes, it could impact a case here and there.

Speaker 2 (02:59):

You're telling our audience that if you've got an active OSHA citation in litigation that involves a couple of $100,000 or serious or willful or repeat, those aren't going away necessarily for the most part at the solicitor's level. It's business as usual.

Speaker 1 (03:14):

Precisely. Mostly all cases that are handled in the regional offices do not involve the national OSHA office or the National Solicitor's Office. If your case involves national OSHA or national solicitor, you will know because it will be a case like we just talked about. Perhaps a general duty clause case, perhaps a novel case like a willful 501 or a heat or something that is definitely novel and not clear cut. But yes, the overwhelming majority of cases will be business as usual even if a new administration takes office, or when the new administration takes office. Okay, that brings us to the second question, Adam, which is OSHA had several new rules that went into effect in 2024 which employers have begun to comply with. Will you refresh our recollection on some of those?

Speaker 2 (04:03):

Yeah, sure. So 2024 was certainly a busy year in the world of OSHA and a couple of new rules and amendments and changes to rules went into effect. The first is, and it's going to happen again in 2025, is that OSHA again increased its monetary penalties for OSHA citations. And recall just a few years ago, the penalties associated with OSHA citations were $7,000. And since then it's increased all the way up to 15, $16,000 and it will increase again a little bit in early 2025. And so the reality is the old sentiment, at least among some, was that OSHA citations were sort of the cost of doing business monetarily. That's really not the case anymore, especially when you've got two or three or five or 10 citations, the money becomes a lot more significant. So that's the first thing. The second big event in 2024 was OSHA walk around rule, which allowed employee representatives, even representatives of non-union employees to participate in OSHA walk around inspections at facilities.

(05:11):

Now, there are some caveats to that, the individual needs to be considered helpful or useful in the inspection. But the reality is OSHA's position through memos to regional offices was that it's really up to the compliance officer to determine whether someone is useful or reasonably necessary. And so this allowed employees of non-union work sites to have employee representatives during walk around inspections. So that was really one of the highest level changes. Another one was the record keeping requirements. In 2024, a number of high hazard employers and high hazard industries with over 100 people were required to submit their OSHA 300, 301 logs to OSHA. Some smaller pieces or some smaller changes was that there were some changes to the hazard communication standard, which is a standard related to informing employees about chemicals in the workplace. And I think what's most important there without getting into the nitty-gritty, is that it does reinforce that the hazard communication standard applies to all workplaces, not just chemical manufacturers.

(06:25):

It's the downstream folks as well. And so a number of employers use chemicals, even cleaning chemicals in their workplace and that the HazCom standard or hazard communication standard applies to them as well. In terms of very recent events, OSHA just announced a rule related to personal protective equipment in construction. And so this is not the general industry, this relates to the construction industry. And it really relates to the importance and requirements to have PPE be fit tested. And it's really an interesting nod to an increased diversity of employees in the construction industry, people of all sizes. And the importance of making sure that PPE fits, sort of a good practice common sense situation. So those are really the big administrative changes from the OSHA perspective. But I think

really one of the most important and impactful things that came in 2024 that's going to impact OSHA and a number of agencies that I'll ask Josh about, is the Supreme Court obviously issued a really important decision in Loper Bright which overturned Chevron and Chevron deference.

(07:34):

And so can you tell the audience a little bit about what Chevron deference was, what the court did, and I think most importantly, how does it impact OSHA litigation going forward?

Speaker 1 (07:44):

Sure. Chevron deference is a doctrine that was adopted by the Supreme Court many years ago, under which courts were essentially required to defer to an agency's interpretation of its own regulations. So I was a former attorney for the agency, and when I came forth in the court with a letter of interpretation or other testimony from someone from OSHA, for example, saying, this is how we interpret our own regs, that carried the day. That was the court under Chevron deference was required to defer to our published and reasonable interpretation of our own standards. Under Loper Bright, the US Supreme Court essentially overruled Chevron, meaning simply put, courts are no longer required to defer to an agency's interpretation of its own regulations. When I used to try cases for the agency, it was actually interesting because often employers would bring experts to the courtroom, experts who were non-OSHA people, but who would try to tell the judge how a certain standard should be interpreted. And said, I've been in this industry for 20, 30 years and I know what is meant by a certain regulation.

(09:09):

And under Chevron, a judge would often throw out or disregard or not give heavy weight to an employer's expert's opinion about what a standard meant. Sometimes often employers are dealing with what are called performance standards, which are slightly vague in that they give by definition an employer the opportunity to really determine how that standard is going to be abated or what safety measures an employer might want to take. And in dealing with performance standards, the OSHA often read words or terms or requirements into a certain regulation in order to hold what the employer was doing not permissible. And under Chevron, a court would be required to follow the agency's interpretation, and that is no more. With Loper Bright the court has thrown out Chevron and courts are no longer required to follow an agency's interpretation. So going forward, what that's going to look like, we don't know. But it probably may involve more input from both sides on what interpretation should be given to different standards, particularly performance standards and similar agency regulations.

Speaker 2 (10:23):

Now, Josh though, ultimately, am I correct that if an administrative law judge from OSHA or really any judge says, "Hey, this particular standard or regulation in question is unambiguous." If they make that threshold determination, we really don't actually end up getting to the who's interpretation rules the day. So one sort of shortcut here I would think is that ALJs could say, "Listen, in a lockout tag-out case, the lockout tag-out standard is clear on its face." We don't even get to whose interpretation is right because the words say what they say. So it seems very possible that ALJs, really any judges could take that position on OSHA standards.

Speaker 1 (11:05):

You're absolutely right. Technically and theoretically a discussion about interpretation and Chevron deference should not kick in unless you get past the threshold of is the standard itself ambiguous. In my experience in arguing these matters with ALJs, that threshold itself was often ambiguous. For example, we just talked a little bit about performance standards. And performance standards by their nature have

a lot of leeway. So when you're dealing with things that have a lot of leeway, judges want input but in the past they've really welcomed input from OSHA. For example, a letter of interpretation, these are things that are published on OSHA's website. We can all look at them. There are inquiries from employers on specific issues and answers given by the administration and the agency on how they interpret that question. It's a letter of interpretation by definition. Now, what weight's going to be given to those letters of interpretation?

(12:01):

And if an employer brings in an expert to say that that letter of interpretation shouldn't be given weight, what weight's going to be given to that expert saying that he or she has a different opinion? So the threshold inquiry of is the standard clear or ambiguous, and should we even be getting to this second deeper dive also remains to be seen how that is handled. So that brings us to the next question, which is how things are going to be handled because OSHA has several rules which are pending, and for example, heat. And I think just because the rule is pending doesn't mean OSHA is not issuing heat related violations. So we have some pending heat related cases out there, and we also have pending rules. And so would you share with us what's going on in 2025 and what that looks like regarding some of OSHA pending rulemaking efforts?

Speaker 2 (12:51):

First, the rulemaking process is a long and winding road and takes a number of years. And right now there are a few rulemaking processes in that pipeline. And really the two sort of biggest are OSHA's proposed heat stress standard. And right now importantly, they're in the sort of notice and comment period where employers and other relevant stakeholders have the opportunity to provide feedback to OSHA, comments to OSHA about the standard itself both broadly speaking and they can even dive into the nitty-gritty of a particular provision. And I believe comments from employers and other stakeholders are due in the middle of January right before the inauguration. And the heat standard or OSHA's proposed heat standard because right now OSHA does not have an outdoor or indoor heat standard, it's interesting. The proposed standard really reads pretty similar to a number of OSHA state plans indoor and outdoor heat standard, especially California.

(13:55):

So as our listeners know, federal OSHA exists and it has jurisdiction over a number of states. But there are some states that have their own OSHA state plans, California being one of them. And California has long had a heat stress standard, which requires a number of things, including respirate and the requirement to provide employees water and heat injury and illness prevention plans. And OSHA's proposed heat stress standard is very similar. And so for employers that operate in multiple states or really every state, including some of the clients we represent, one of the things we've sort of talked to them about is, "Hey, listen, you've got heat stress requirements in a number of states. OSHA is in the process of creating its own heat standard. Why don't we get ahead of the curve and start rolling that out, rolling out whatever you have in California or Oregon or Washington nationwide?" And generally speaking are okay with that because they've done it somewhere so they're okay doing it everywhere.

(14:56):

So that's really the number one sort of, I would say most watched standard itself or proposed rulemaking. The other one that I'm very interested in is the lockout tagout, any lockout tagout changes. And the only reason I'm particularly interested in it is the lockout tagout standard is an old standard that I think addresses issues from a day gone by. We've got advanced technology and robotics. And while the lockout tagout standard or any revisions to it or probably a ways away, there is a need from an OSHA perspective I think as a practitioner and for employers to get additional clarity on the lockout tagout

standard in light of additional technology. The reality is that it's very challenging to square today's technology with the requirements under the lockout tagout standard. And so I'm eager to see where that goes because I think there is a world where you can have a very good standard that addresses modern day technology and keeps employees safe. And so that's sort of my number one interest on a personal level. But I think those two rulemaking processes are going to be really interesting in the next administration and beyond.

Speaker 1 (16:10):

So in light of that, do you have any insight into whether either or both of these rulemaking efforts, either the lockout tagout and or the heat, will continue under the new administration? And second to that, regardless of what your insights are there, if I'm an employer and I have a current litigation or I'm working on a current citation that I've been cited for either lockout tagout or heat, how will what's going on with these rulemaking efforts affect my current cases?

Speaker 2 (16:40):

To your second point, I think the answer is not much. The rulemaking process is going to run in parallel to any litigation because any citation that's issued two, three, four, six months ago is under the current and existing lockout tagout standard or the general duty clause if it relates to heat. In terms of what happens in the future, certainly anyone's guess, but my inclination is that both the heat stress standard and lockout tagout standard and the rulemaking associated with both shouldn't be particularly controversial. They're helpful to both employers and employees. And so my hope is that these continue and maybe they don't continue as rapidly. But I don't see a wholesale abandonment of either of them, especially because both have sort of been in the pipeline for a bit. And I think there is a recognition, especially on the heat side, that this is a serious issue that heat stress can impact employees and does impact employees both in indoor workplaces and outdoor.

(17:43):

And I think it's interesting, we're going to talk about it more in a moment, is that President-elect Trump has nominated a congresswoman, Lori Chavez-DeRemer for Secretary of Labor. And she's a Republican congresswoman from Oregon, and she is a bit of a surprise pick that has shown some pro-employee bona fides and also some pro-employer. And so it's a little bit of a wild card right now. We'll get into that in a moment. But I think, Josh, one interesting thing as we talk about OSHA litigation is there's a really interesting case, could Kenrick Steel? Can you tell the audience a little bit about that and then how that relates to the Occupational Safety and Health Review Commission?

Speaker 1 (18:23):

The Occupational Safety and Health Review Commission is essentially the appellate body. It's the judicial body that hears, it's the body that's been appointed to essentially adjudicate safety and health matters. The commission appoints ALJs, administrative law judges and they are the first round of hearing and an adjudicating cases. And then an employer in theory, would have the right to appeal a judicial determination to the commission itself, as a second round of trying to have its safety and health citations adjudicated. So that's what OSHRC is, and it is an extremely important entity for an employer because that's where the employer has the opportunity to challenge citations once it's been cited. Now, Kenrick's Steel is an interesting case that was recently filed in September in New Jersey. And gold fashion, an employer was cited for several willful violations, approximately $350,000 in penalties.

(19:18):

And in addition to challenging, we didn't commit the violations, we didn't commit anything willfully, et cetera, the attorneys took a very interesting approach to also argue that OSHA itself, or the OSHRC itself and the ALJs itself and the Secretary of Labor and the solicitors that are charged with enforcing and litigating these matters are all unconstitutional. In other words, Kenrick's Steel lawyers said before we even get to the merits of what we've been accused of doing wrong from a safety and health point of view, we don't believe that the administrative law judges and the Occupational Safety and Health Commission and the Solicitor of Labor and the Secretary of Labor, have the right under the Constitution to adjudicate this matter in the first place. It sounds like a crazy argument, sounds like it's far-fetched, however, it's not. And under the current administration or actually under the current makeup of the Supreme Court, the Supreme Court has actually been hearing similar cases and making some very striking rulings in recent years.

(20:24):

Now, when I was at the Department of Labor a number of years ago, the same exact challenge was made to FMSCHRIC the Federal Mine Safety and Health Commission. FMSCHRIC, the Mine Safety Commission and OSHRC, the Occupational Safety OSHA Commission are basically parallel and identical. One deals with mines, one deals with above ground. But the challenge to FMSCHRIC was actually heard by the court and it was the exact same challenge. The challenge was essentially that with regard to the ALJs, the administrative law judges, because they essentially adjudicate matters similar to a real judge or a federally appointed judge, a district judge, they need to be appointed in the same manner. The Constitution requires that those types of judges be appointed by the President not by the commission as a body. And I believe it was the Jones case in 2018, which the court actually held that those FMSCHRIC ALJs were improperly appointed by the Commission and therefore they were unconstitutional.

(21:28):

And so what happened? What happened was the court ruled that the Federal Mine Safety and Health Commission had to cure that constitutional defect by essentially having every single one of its ALJs be reappointed and re-ratified in the proper way. Is that an easy fix or is that a hard fix? At that time, it was a fix that resulted in a numerous month delay. And it also resulted in every single case that was originally heard by improper, unconstitutionally appointed judge have to be re-heard and so forth. Now we are facing the same exact issue. So if this challenge is upheld and if it is found by the current Supreme Court that the OSHA ALJs were improperly appointed by the OSHA Commission, OSHRC, in the same way that the Mine Safety were years earlier... And by the way, there have been two or three or four other cases in the last year or two under the current makeup of the Supreme Court where the same exact challenges were made to the FTC and the SEC and other government agencies.

(22:42):

And outcome has been very consistent in each of those, meaning that the judicial power according to the current Supreme Court, belongs in the courts and not in the agencies. So they have found huge problems with the way that judges are appointed in these agencies. And so that brings us to what happens here if this a challenge to OSHRC stands? Now, if each of the ALJs have to be reappointed or reassigned in some way by the commission itself, that's going to be a problem. Why? Because the commission itself doesn't actually exist in its full capacity right now. The OSHA commission, the OSHRC is a three-member body, and for the last number of years they have not had a quorum. They've only had one commissioner. Commissioners are typically appointed for three-year term, and when they fall off they could be renominated as is very common. But they need to be re-approved by the Senate.

(23:39):

And in the last number of years, a couple of commissioners have resigned, a couple have been appointed, a couple have been re-nominated. But the Senate has languished in re-affirming commissioners. And at the end of the day, for example, for the entire calendar year of 2024 the OSHRC did not have a quorum. There was only one commissioner, and therefore there were zero cases that were heard by OSHRC as an appellate body. So that is a problem for an employer who's seeking to appeal a lower ruling. And it's a problem for an employer seeking to have its challenges adjudicated. And it's a problem if the current Kenrick Steel case rules that the cure is that the commission has to reappoint all of its ALJs because the commission doesn't even have a quorum. So basically this case could be an enormous problem. It remains to be seen how it's going to be handled. It remains to be seen what the current court, I think it's in perhaps the Sixth Circuit or Third Circuit in New Jersey.

Speaker 2 (24:40):

Third Circuit.

Speaker 1 (24:41):

Third Circuit. Well, it's actually currently in district court in New Jersey. But as it goes up the chain, it's interesting to see what the third circuit will do with it and perhaps the US Supreme Court. And as we move forward, it will be interesting to see how the makeup of OSHRC can resume a quorum and how these challenges to the constitutionality of the body itself will be received.

Speaker 2 (25:04):

So Josh, I know we're running out of time here, and we talked briefly about President-elect Trump's nominee for Secretary of Labor. And like I had mentioned, she's a Republican congresswoman from Oregon. And she's one of only a few Republican members of the house to vote for the Pro Act, which is a bill that's very pro-union, which is not passed. She's also interestingly, the daughter of a Teamster and a supporter of unions and labor rights. So it's a really interesting pick, and I think everyone is sort of looking into each other sort of cautiously optimistic or curious about her. But let me ask you, Josh, any word in terms of who might lead the Occupational Safety and Health Administration, which we know is a little bit lower than the Secretary of Labor? And when might we get an answer on that? The sort of who and when as the last question.

Speaker 1 (25:56):

As we have seen, the incoming president has acted quickly in announcing who he intends to nominate in January for some higher profile roles like Secretary of State and those kinds of things. The Department of Labor is way down on the tone and pull. And within the Department of Labor, certainly the head of OSHA, the title of that position is actually the Assistant Secretary of Labor for OSHA has to be put in place in a similar fashion. It's essentially a political appointee, not a career person. So it has to be nominated by the president and approved by the Senate. And in my 15 plus years working with OSHA, there were numerous times where we would go for a very, very, very long time, months if not years, with an acting assistant secretary. Someone acting in that role simply because the president and or the Senate got around to having a hearing on these things.

(26:45):

So it's very likely that someone not be in that role immediately. The current assistant secretary, Doug Parker will likely step down as a career appointee. It's unlikely that he will continue with the new administration. There have been a few names thrown around in the news about who might take over, who incoming President Trump might seek to fill this role of the head of OSHA. One of them happens to

be a woman by the name of Heather MacDougall. Heather MacDougall is a well-known known quantity to folks in the OSHA world in that she was actually a member of the Occupational Safety and Health Review Commission for a few years. She was actually the chairwoman of the commission for a few years. And during that time, she authored numerous high-profile cases and she wasn't in the majority. She authored numerous high-profile dissents. So she's a well-known quantity from that perspective.

(27:38):

When she resigned from that position, she became the head of Safety and Health for Amazon, which as everybody knows is one of the largest employers in the United States dealing with typical issues with such a large workforce, including union issues. So if she becomes the nominee and if Mr. DeRemer becomes the nominee for the Secretary of Labor, it will be interesting to see how their two union backgrounds jive. One fun fact, the last thing I'll share about Ms. MacDougall if she becomes a nominee is after she worked with Amazon, she actually spent a few years working with the law firm that is actually the law firm that has filed the constitutional challenge to OSHRC. So she was a former OSHRC commissioner, then she wound up working for a law firm that is alleging that the entire OSHRC body is unconstitutional. So if she becomes the head of OSHA, it will be interesting to see what that holds in store for the safety and health community.

Speaker 2 (28:36):

Josh, and to our listeners, that's all the time we have today. And certainly it'll be an interesting 2025 as it always is when there's a transition in administration. The hope is that we continue to work with employers, to keep employees safe. And we'll be back in a couple of weeks in the new year with some exciting guests. And thank you so much for listening to the Workplace Safety and Health Podcast. Josh, thank you for joining us and being my co-host.

Speaker 1 (29:05):

Always a pleasure, Adam.