

OSHA Update

June 11, 2024

Presented by:

Eric E. Hobbs (Milwaukee)



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- Tucson
- Washington D. C.

Presenter



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Today's Agenda

- DOL Leadership
- OSHA Enforcement Trends
 - Enforcement data
 - Severe Violator Enforcement Program expansion
 - Instance-by-instance/"anti-grouping" policies
 - National/special emphasis programs
- Permitting unelected union organizers to participate in inspections
- Electronic submission of OSHA 300 Logs, 300A Summaries and 301 Forms
- Heat Illness Enforcement and Rulemaking

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DOL Leadership

Acting/Secretary of Labor Re-nominee



Julie Su
Deputy Secretary of Labor

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OSHRC Leadership

Nominee



Mark Eskanazi

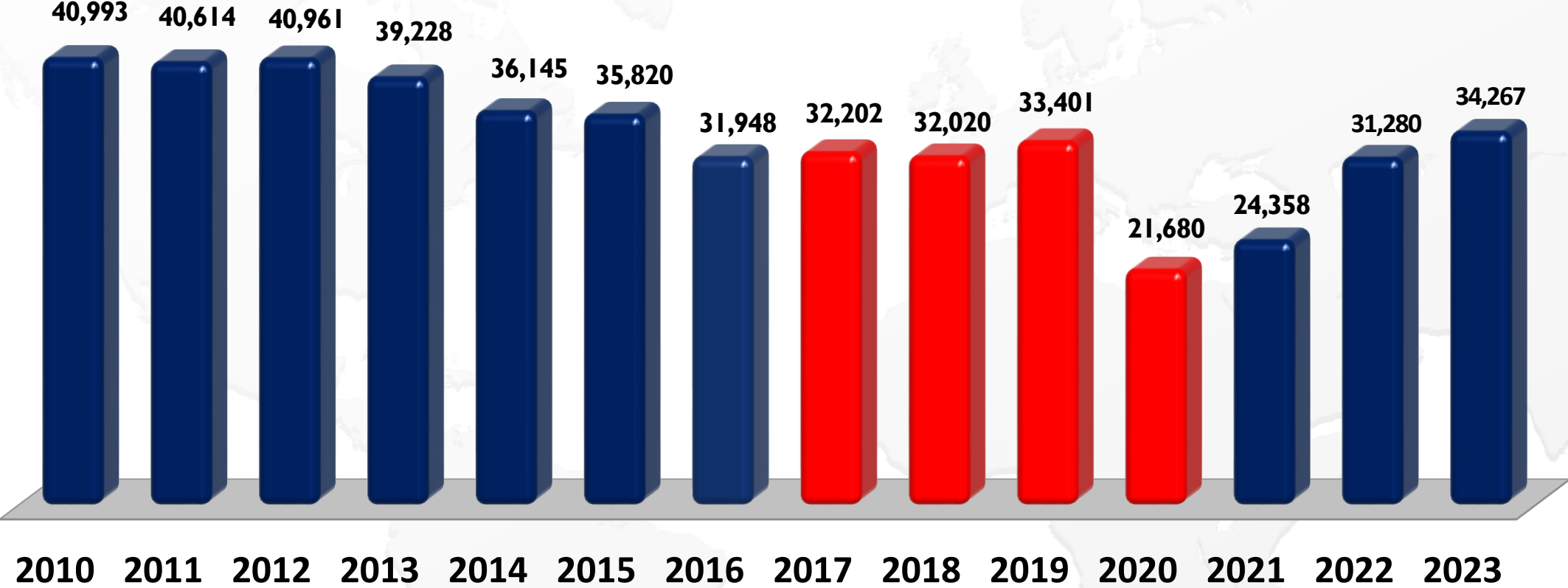
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OSHA Enforcement Trends and Data

OSHA Enforcement Budget and Staffing

- Lots of tentativeness in light of November and maybe January
- Continued turnover
 - Acting Director of Enforcement Programs: Scott Ketcham
 - Lots of new ADs and AADs
 - Lots of green CSHOs

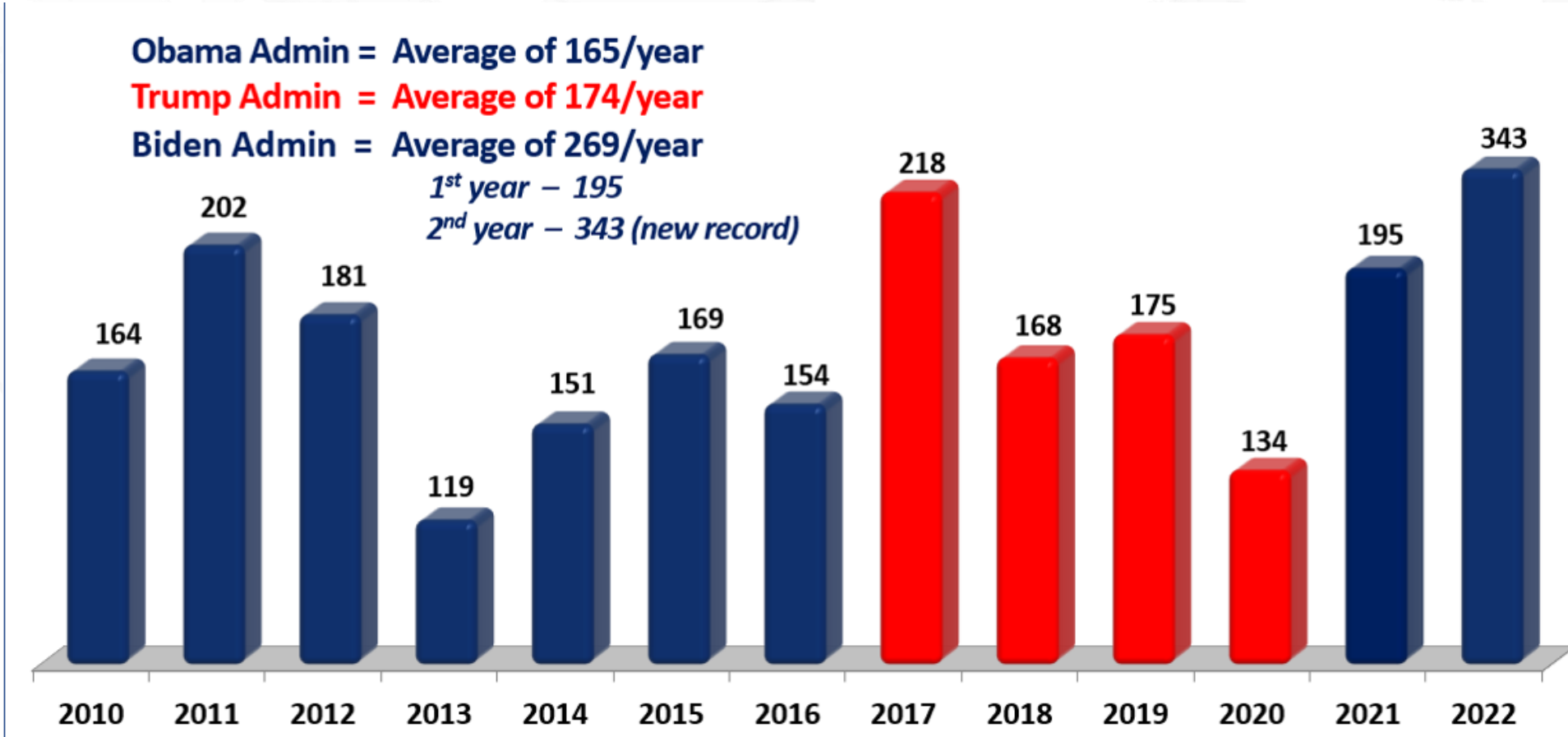
Total Fed OSHA Inspections



Penalties Keep Rising

Characterization	Historical	2016 (78% Increase)	2022*	2024* (As of 1/16/2024)
Other-than-Serious	\$7,000	\$12,471	\$15,625	\$16,131
Serious	\$7,000	\$12,471	\$15,625	\$16,131
Willful	\$70,000	\$124,709	\$156,259	\$161,323
Repeat	\$70,000	\$124,709	\$156,259	\$161,323
Failure to Abate	\$7,000 per day	\$12,471 per day	\$15,652 per day	\$16,131 per day

\$100K+ Penalty Enforcement Actions



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Instance-by-Instance Citations

Previous Policy

- Alleged violations characterized as **Willful plus** 1+ of these **aggravating criteria**:
 - Resulted in fatality or catastrophe
 - So many alleged violations as to undermine an effective safety program
 - Extensive history of violations and/or persistently high injury rates
 - Conduct as a whole = clear bad faith



New Instance-by-Instance Citation Policy

- January 26, 2023: OSHA significantly expands policy
- Now just “high-gravity” serious violations related to: falls, trenching, machine guarding, respiratory protection, PRCs, LOTO and other-than-serious (?) recordkeeping violations
- Caveat: OSHA still limited by language of the standard – “each” employee must be trained; “each” machine must be guarded; “each” employee in a trench must be protected; “each” work-related injury meeting the recording criteria must be on the OSHA 300 Log

New Instance-by-Instance Citation Policy

- When will OSHA use it? Where:
 - Willful, repeat or FTA violation within past five years
 - Failure to report a reportable injury/illness
 - Fatality/catastrophe
 - Recordkeeping – even though “other than serious” (??)
 - “**Deterrent effect**” (AD could decide necessary in almost any case – basis for challenge)

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New “Anti-Grouping” Citation Policy

New “Anti-Grouping” Policy

- January 26, 2023 (no coincidence) - Enforcement Memorandum to *Discourage Grouping of Citations*
 - “Reminder”: Offices have discretion not to group similar violations “in appropriate cases” to achieve *deterrent effect*
 - OSHA offices instructed not to group multiple similar citation items if evidence that
 - Worksite conditions giving rise to alleged violations are separate and distinct; or
 - Different conduct gave rise to different alleged violations

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Enforcement Programs/Positions

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National Emphasis Programs

NEP – Warehousing and Distribution

- July 13, 2023: New NEP for Warehousing and Distribution Centers
 - OSHA and Congress concerns about injury rates in warehousing operations
 - Focus on powered industrial vehicle operations, material handling/storage operations, walking-working surfaces, means of egress, and fire protection, among others
 - Heat – overlap of NEPs
 - “Blast from the past”: Ergonomic hazards to be assessed during inspections “where warranted”

NEP – Heat Illness

- April 8, 2022: New NEP for “Outdoor and Indoor Heat-Related Hazards”
 - Targets specific industries, specific activities, such as:
 - Working outdoors in areas announced by the National Weather Service to be undergoing a heat wave, **or**
 - Working indoors near radiant heat sources, such as foundries
 - Where temperature at/above 80°F + humidity at/above 40%

NEP – Heat Illness

- During a heat NEP inspection, CSHO will assess whether employer:
 - Provides accessible, cool drinking water at all times, at no cost;
 - Has a written heat illness and injury program and trains employees on hydration, heat illness signs, first aid, and summoning emergency personnel;
 - Monitors ambient temperatures, levels of work exertion at worksites;
 - Schedules rest and hydration breaks; ...

NEP – Heat Illness

- Provides access to shaded areas;
- Provides time for acclimatization of new and returning employees (recommended: work 20% of normal duration on first day, gradually increase duration over one- to two-week period);
- Schedules job rotations (e.g., earlier start times, employee rotation) to limit heat exposure; and
- Has implemented a “buddy” system for hot days.

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Recordkeeping STD – Musculoskeletal Disorders

Recordkeeping - MSDs

- May 2, 2024,: Interpretation of Recordkeeping Rule regarding first aid/medical treatment for musculoskeletal disorders (MSDs)
 - “First aid” defined by Rule; if not on the list = medical treatment beyond than first aid
 - Most MSDs treated with only first aid (nonprescription medication, hot/cold therapy, massage, etc.)

Recordkeeping - MSDs

- New:
 - Repeated application of first aid might result in violation of 1910.151(a): Employers must ensure readily availability of medical personnel for advice/consultation
 - Active Release Technique (“ART”) may morph into medical treatment (manipulation of flesh v. manipulation of skeleton)
 - Exercise/stretching – medical treatment where designed and administered to treat particular work-related injury/illness (i.e., MSD)

Recordkeeping - MSDs

- Prescribes questions for CSHO to pose to employees, ART practitioners
- Side-steps issue of determining work-relatedness of MSD – THE issue in MSD recordability cases
- Side-steps issue of employer knowledge that first aid has morphed into medical treatment



Rulemaking

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Third Party Participation in Inspections

Third Party Participation in Inspections

- August 30, 2023: Proposed rule amending 1903.8(c):
- “The representative(s) authorized by employees **may be an employee of the employer or a third party**. When the representative(s) authorized by employees is not an employee of the employer, they may accompany the Compliance Safety and Health Officer during the inspection **if, in the judgment of the Compliance Safety and Health Officer, good cause has been shown why accompaniment by a third party is reasonably necessary to the conduct of an effective and thorough physical inspection of the workplace** (including but not limited to because of their relevant knowledge, skills, or experience with hazards or conditions in the workplace or similar workplaces, or language or communication skills)”

Third Party Participation in Inspections

- Rationale

- “This rulemaking will clarify the right of workers and certified bargaining units to **specify a worker or union representative** to accompany an OSHA inspector during the inspection process/facility walkaround, **regardless of whether the representative is an employee of the employer**, if in the judgment of the CSHO such person is reasonably necessary to an effective and thorough physical inspection”
- “This includes knowledge, skills, or experience with particular hazards or conditions in the workplace or similar workplaces, as well as any **relevant language skills** a representative may have to facilitate better communication between workers and the CSHO”

Third-Party Participation in Inspections

- Position inconsistent with NLRA, OSHA Act, Fourth Amendment
- Lawsuit filed May 21, 2024
 - W.D. Texas – same court as struck OSHA “interpretation” of 1903.8(c) in 2016
 - Amendment is inconsistent with National Labor Relations Act, OSH Act, Fourth Amendment
- House has introduced resolution to strike under Congressional Review Act

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Electronic Submission of OSHA 300 Logs, 300A Annual Summaries and 301 Forms

Electronic Submission

Biden administration: Effective January 2024, two electronic submission requirements –

1. OSHA 300A forms – three categories of establishment:
 - a) 200 or more employees
 - b) 20 – 249 employees in industries listed in Appendix A
 - c) 100 or more employees in industries listed in Appendix B
2. OSHA 300 Logs and 301 Forms – establishments with 100 or more employees in industries listed in Appendix B

Electronic Submission

- Who is in Appendix A (300A Summaries)? Everyone
 - Agriculture, construction, **manufacturing**, utilities, grocery, transportation (most), retail (most); health care (most), recreation (sports, amusement parks, gambling); warehousing and storage

Electronic Submission

- Who is **not** in Appendix B (300 Logs and 301 Forms)?
 - Utilities, construction, many types of manufacturing, many types of health care
 - **Paper manufacturing**
 - Why? Appendix B includes only industries with an average Total Case Rate of 3.5 or more cases per 100 employees
 - So Appendix B is narrower than Appendix A
- All electronically submitted data will be posted on OSHA's website and accessible by the public

Electronic Submission

- Problem in all cases
 - Raw data doesn't tell the whole story
 - The devil is in the details



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Emergency Responders

New Proposed Rule

- Published February 5, 2024
 - Would:
 - Replace Fire Brigade Standard, 1910.156
 - Expand breadth, reach of protections of first responders
 - Cover private fire departments, such as those inside plants; pre-hospital private emergency medical services providers; private technical rescue teams; emergency response agencies in state plan states
 - Include medical baseline exams, medical monitoring where exposed frequently to toxins
 - Comment period extended on June 3, 2024, to June 22, 2024

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Heat Illness

Heat Illness – Current State Standards

- Currently state standards in California, Colorado, Minnesota, Oregon, and Washington,
 - Generally include specific requirements for: heat acclimatization, quantities of potable water, triggering temps around 80 degrees F, rest/shade
- Nevada and Maryland
 - February 28, 2022: Nevada OSHA published draft regulation, requiring employer adoption of heat illness program and action where heat index reaches 90 degrees (wet-bulb globe temperature)
 - October 7, 2022: Maryland OSHA proposed standard, which generally focuses on heat illness once worker is sick, not on requirements for hazard controls to prevent heat-related illness

Heat Illness – OSHA’s Agenda

- Develop Federal OSHA heat illness standard
 - Before Biden Administration term ends – the hope
 - CRA – “midnight regulations”
- Continue to engage in active enforcement of heat stress guidance through General Duty Clause
- Provide educational materials for employers and employees

Heat Illness – Word on the Street

- OSHA may “cut-and-paste” from state OSHA plan requirements, BUT – sense is that on issues like acclimatization, OSHA does not like flexibility some state OSHA standards allow
- Recent word from OSHA:
 - Trigger temperature will be 80 degrees if employer depends on weather reports.
 - If requirements are triggered, 15-minute rest breaks every two hours would be mandatory.
 - Indoor workplaces with temperatures under 80 degrees would be exempt (from what is not clear)

Heat Illness – Many Issues

- Examples of unanswered questions and mystery
 - Would a building site require multiple temperature readings to account for different shade and airflow?
 - When does an outdoor worksite become an indoor worksite?
 - How distinguish very vulnerable from vulnerable from less vulnerable with one-size-fits-all approach?

Heat Illness – Challenge

- How much damage did Supreme Court do to OSHA's rulemaking authority in the COVID ETS case?
- Vulnerable to challenge? Without question



Speaking of Ergonomics ...

Watch

- Warehouse Worker Protection Act
 - May 2, 2024: Introduced in Senate (Democratic sponsors)
 - June 5, 2024: Introduced in House (Democratic and Republican sponsors)
 - Senate bill would require OSHA to adopt ergonomics standard
 - Despite title, would apply to all employers subject to FLSA
- Unlikely to pass both chambers

Questions?



Thank you!

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