

# A Very Different OSHA: What's the Latest in Rulemaking and Enforcement and What Are We Likely to See (and Not) in 2025?

Presented by:

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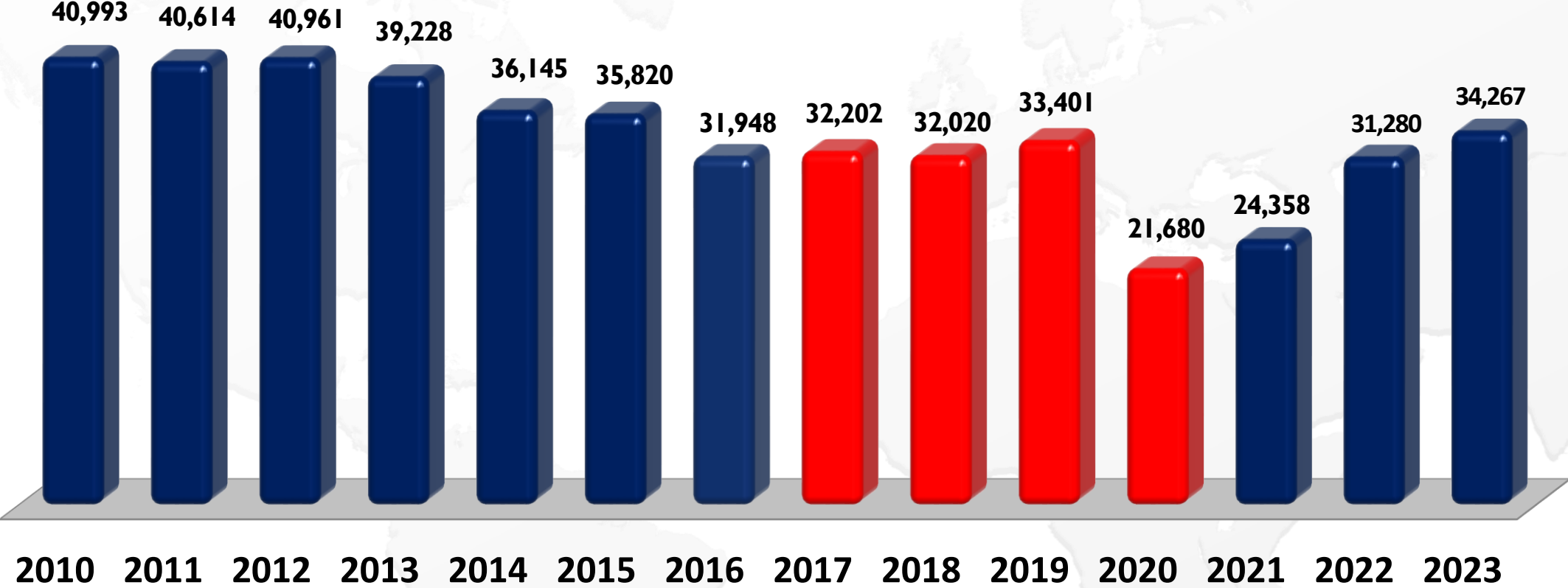
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# OSHA Enforcement Trends and Data

# OSHA Enforcement Budget and Staffing

- Lots of tentativeness in light of yesterday
  - Continued turnover
  - Acting Director of Enforcement Programs: Scott Ketcham
  - Lots of new ADs and AADs
  - Lots of green CSHOs
- Empowerment of Biden Administration

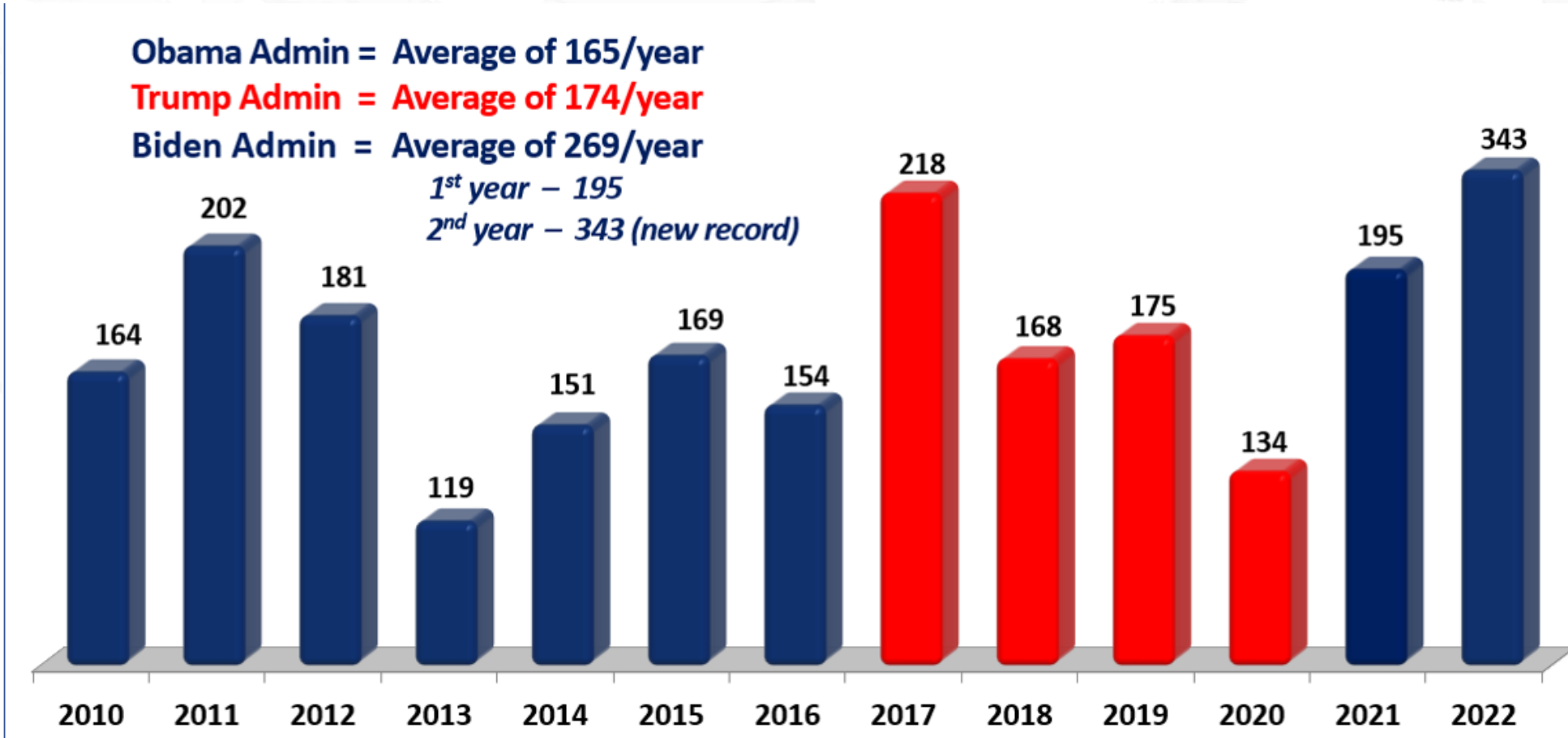
# Total Fed OSHA Inspections



# Penalties Keep Rising

Characterization	Historical	2016 (78% Increase)	2022 (25% Increase)	2025* *As of 1/15/2025
Other-than-Serious	\$7,000	\$12,471	\$15,625	\$16,550
Serious	\$7,000	\$12,471	\$15,625	\$16,550
Willfull	\$70,000	\$124,709	\$156,259	\$165,514
Repeat	\$70,000	\$124,709	\$156,259	\$165,514
Failure to Abate	\$7,000 per day	\$12,471 per day	\$15,625 per day	\$16,550 per day

# \$100K+ Penalty Enforcement Actions



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# Instance-by-Instance Citations

# New Policy

- January 26, 2023: Significant expansion
- Any “high-gravity” serious violation related to falls, trenching, machine guarding, respiratory protection, PRCs, LOTO and other-than-serious (?) recordkeeping violations is enough
- 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)

- Unlikely to be applied under new Administration; may be revised.



# “Anti-Grouping” Citation Policy

# New 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

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# Heat Illness Prevention

# 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%

Might or might not survive under the new Administration and/or be enforced by it

# 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.



# Heat Illness Prevention

Might or might not survive under the new Administration and/or be enforced by it

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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)
  - Prescribes questions for CSHO to pose to employees, ART practitioners

# Recordkeeping - MSDs

- 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



# Recordkeeping STD – Musculoskeletal Disorders

Unlikely to survive under new Administration ...but may not be withdrawn.



# Rulemaking





**COVID-19 Standard for Healthcare Standard**

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# Third Party Participation in Inspections (“Walkaround Rule”)

# Walkaround Rule

- 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)”

# Walkaround Rule

- 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”

# Walkaround Rule

- 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
- Summary judgment motion pending
- House has introduced resolution to strike under Congressional Review Act
- Will new Administration take steps to withdraw/undo the rule or just not follow it?



# Walkaround Rule

- Will new Administration take steps to withdraw/undo the rule or just not follow it?

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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
  - Not published as final





**Emergency Responders**

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# Heat Illness Prevention

# Heat Illness – Current State Standards

- Currently state standards in California, Colorado, Minnesota, Nevada, Oregon, and Washington,
  - Generally include specific requirements for: heat acclimatization, quantities of potable water, triggering temps around 80 degrees F, rest/shade
- Maryland
  - 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 Proposed Rule

- July 2, 2024: Fed-OSHA announced proposed standard
- Would apply to all employers in Fed-OSHA states
- Would apply to outdoor and indoor heat conditions
- Trigger would be employee exposure to heat index of at least 80°F for > 15 minutes within 60-minute period
- Additional requirements if heat index of > 90°F
  - More breaks
  - Buddy system
  - Training

# Heat Illness – OSHA’s Proposed Rule

- Proposed rule would require written “heat illness prevention plan” (“HIIPP”)
  - “Comprehensive list of the types of work activities covered by the [HIIPP]”;
  - Description of how employer complies with standard;
  - Means employer will use to monitor temperatures (e.g., heat index or wet bulb globe temperature);
  - Emergency phone numbers and procedures employees must follow when employee experiences signs and symptoms of heat-related illness; and
  - List of “heat safety coordinators” with “authority to ensure compliance with all aspects of the HIIPP”

# Heat Illness – Next Steps

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- Comment closed December 30, 2024
- If published as final, certain to be challenged in courts
- Vulnerable



# Heat Illness Prevention Standard

But continued enforcement under NEP/General Duty Clause?



# Decisions



# *Loper Bright/Relentless*

- Decided by Supreme Court July 3, 2024
- Eradicates “Chevron deference” requirement
- 40 years of decisions
- New principle: Where executive agency is interpreting vague statute, final word as to what statute means is court’s, not agency’s
- Next principle to be challenged: *Auer/Kisor* – where agency interprets its own, vague regulation, court must defer to that interpretation so long as reasonable

# Jarkesy

- Decided by Supreme Court June 27, 2024
- Applies to constitutionality of decision-making by agency ALJs where civil penalties are sought
- Issue being decided must resemble one in “common law”
- Purpose of penalty must be to punish or deter
- Court seemed to imply ALJ resolution of OSHA citations/penalties does not run afoul of principle of case/Seventh Amendment
- But Court did not reverse decision of Court of Appeals, which found ALJ use more generally unconstitutional

# Allstates Refractory Contractors

- Supreme Court declined to hear employer appeal on July 2, 2024
- Employer alleged that Congress unconstitutionally ceded power to OSHA to establish safety and health standards in violation of non-delegation doctrine
- Squarely on point of Court's decision in *Loper Bright/Relentless*
- Justices Gorsuch and Thomas would have granted review
- Justice Thomas in dissent: "If this far-reaching grant of authority does not impermissibly confer legislative power on an agency, it is hard to imagine what would."
- Be careful what you wish for ....



# So What about the Next Four Years?

# The Next Four Years

- What's old is new again
- Remember first term
  - Never in four years nominated a candidate for confirmation as OSHA chief
  - “Two for one” deregulation
  - Redirected OSHA monies from enforcement (hiring, rulemaking, enforcement directives) to assistance
  - Put fear in hearts of bureaucrats wanting to be aggressive
- More money for voluntary programs, as well as assistance
- No regulation – or deregulation?

# Secretary of Labor Nominee



Lori Chavez-DeRemer  
Congresswoman R-Ore.

# Solicitor of Labor



# Assistant Secretary of Labor - OSHA





# Commissioners



Cynthia Attwood

# Nominees



# Questions?



# Thank you!

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