

September 27, 2023

OSHA Update

January 16, 2023

Presented by:

Eric E. Hobbs (Milwaukee)



Atlanta
Austin
Berlin
Birmingham
Boston
Charleston
Charlotte
Chicago
Cleveland
Columbia
Columbus
Dallas
Denver
Detroit (Metro)
Greenville
Houston
Indianapolis
Kansas City
Las Vegas
London
Los Angeles
Memphis
Mexico City
Miami
Milwaukee
Minneapolis
Montréal
Morristown
Nashville
New Orleans
New York
Oklahoma City
Orange County
Paris
Philadelphia
Phoenix
Pittsburgh
Portland (ME)
Portland (OR)
Raleigh
Richmond
Sacramento
Salt Lake City
San Antonio
San Diego
San Francisco
Seattle
St. Louis
St. Thomas
Stamford
Tampa
Toronto
Torrance
Tucson
Washington D.C.

Ogletree
Deakins

Presenter



Eric E. Hobbs

Milwaukee, WI

eric.hobbs@ogletree.com

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

A light gray world map is visible in the background, centered on the Atlantic Ocean. A horizontal blue line runs across the top of the slide.

DOL Leadership

Acting/Secretary of Labor Re-nominee



Julie Su
Deputy Secretary of Labor

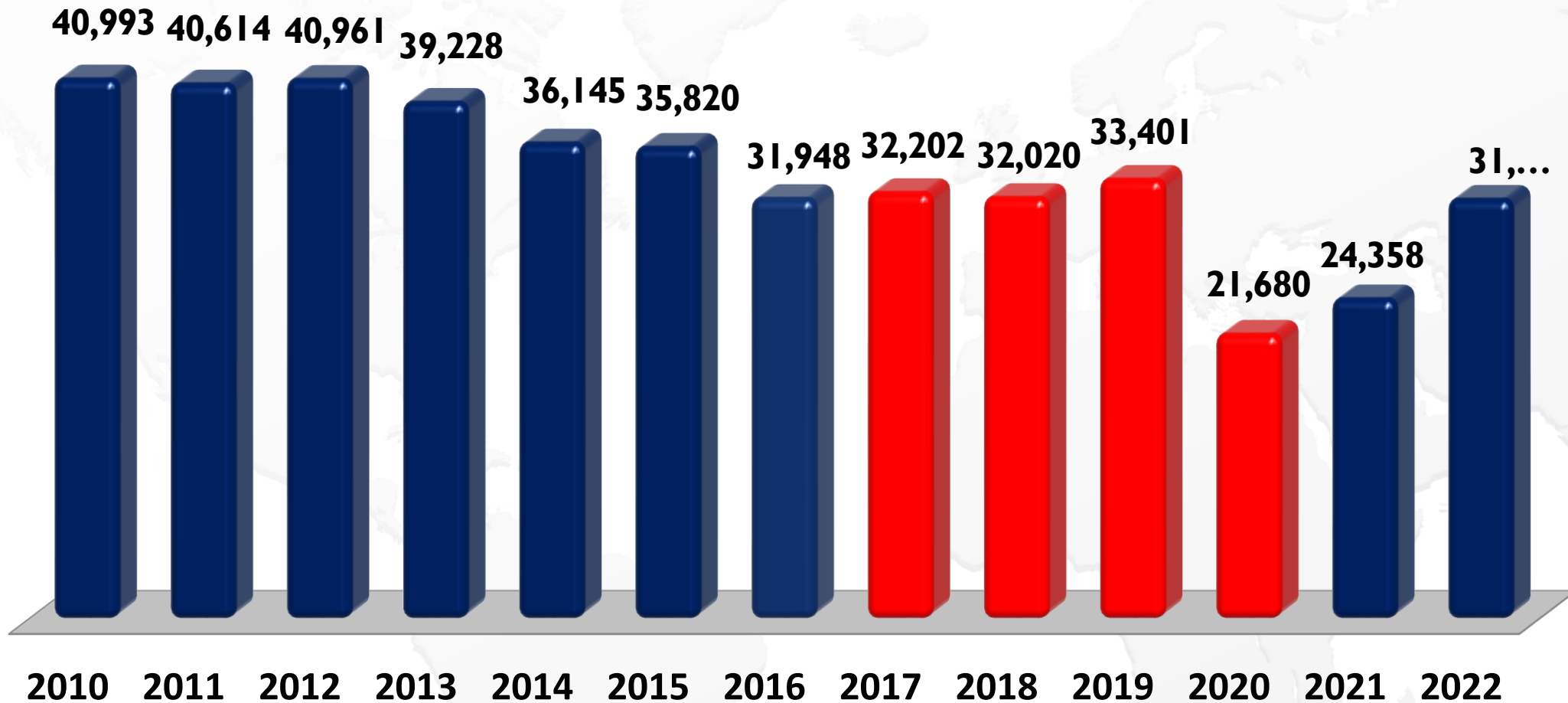
A light gray world map is visible in the background, centered on the Atlantic Ocean. A horizontal blue line is positioned above the title text.

OSHA Enforcement Trends and Data

OSHA Enforcement Budget and Staffing

- OSHA's FY23 budget of \$632M – \$50M increase over 2022
- Biden's FY24 Budget Proposal – increase total OSHA budget by 17%, which would allow for 432 new full-time employees
- “Graying of the Agency” – more than 200 new CSHOs (of approx. 950 total) in the last year (1 in 5 of OSHA's CSHOs hired in last year – though many lost in 2023)
- First time in years – 100% of senior executive staff positions filled (all regions and all directorates)

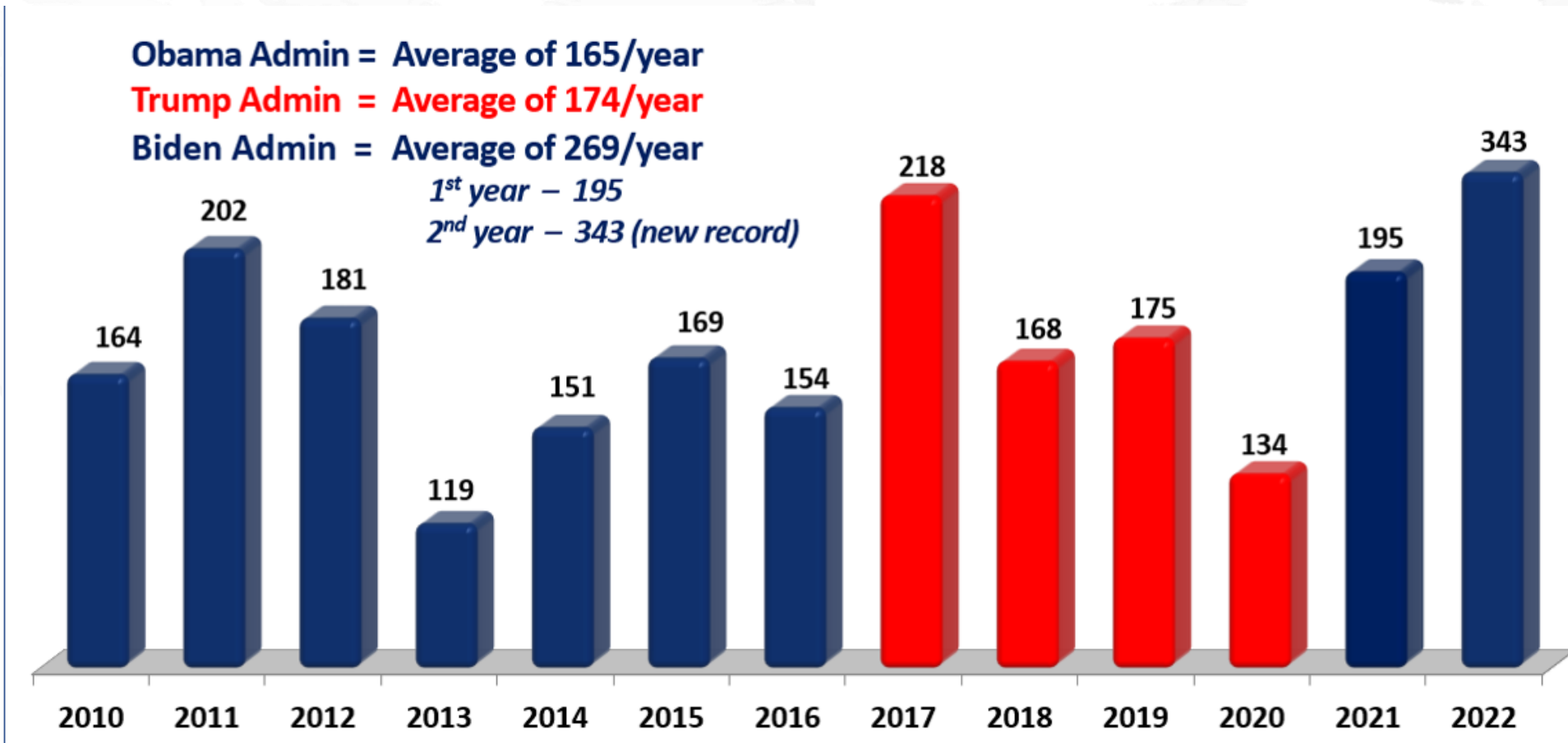
Total Fed OSHA Inspections



Penalties Keep Rising

Characterization	Historical	2016 (78% Increase)	2022*	2023* (As of 1/16/2023)
Other-than-Serious	\$7,000	\$12,471	\$14,502	\$15,625
Serious	\$7,000	\$12,471	\$14,502	\$15,625
Willful	\$70,000	\$124,709	\$145,027	\$156,259
Repeat	\$70,000	\$124,709	\$145,027	\$156,259
Failure to Abate	\$7,000 per day	\$12,471 per day	\$14,502 per day	\$15,625 per day

\$100K+ Penalty Enforcement Actions



A light gray world map is visible in the background, centered on the Atlantic Ocean. A horizontal blue line is positioned above the main title.

Severe Violator Enforcement Program

Recent Updates to SVEP

- On 9/15/22, OSHA announced updates to key elements of SVEP
- Most significant change is to the SVEP-qualifying criteria:
 - No change to **Fatality/Catastrophe Criterion** (1+ Willful or Repeat related to a death or 3+ hospitalizations) or the **Egregious Criterion** (any per-instance willful citation case)
 - Eliminates the **PSM Criterion** (3+ Willful / Repeat PSM citations)
 - Eliminates the **High Emphasis Hazard Criterion** (2+ Willful or Repeat citations related to one of the ≈10 high emphasis hazards)

Recent Updates to SVEP

- SVEP qualifying criteria expanded significantly
 - No longer matters what the violations are -- **2+ “High Gravity” Willful or Repeat citations** (or Failure to Abate notices) in the same inspection alleging violations of *any standard*

Recent Updates to SVEP

- In SVEP for 3-year term once “acceptable abatement verification” (new 2-year option w/enhanced settlement terms):
 - Abate SVEP violations and pay all penalties
 - Experience at least one follow-up inspection
 - Receive **no subsequent *related* “Serious” violation**
- The “Hotel California” program – once you check in, “you can never leave”

Consequences

- SVEP consequences the same
 - Mandatory follow-up inspections
 - “Shaming” through placement on SVEP Log posted on OSHA’s website
 - Letters to CEO and potential notification of entities within the supply chain

A light gray world map is visible in the background, centered on the Atlantic Ocean. A horizontal blue line is positioned above the title.

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 “high-gravity” serious violations related to: falls, trenching, machine guarding, respiratory protection, PRCs, LOTO and other-than-serious recordkeeping violations
- However, 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:
 - Employer has received a willful, repeat or FTA violation within past five years
 - Employer allegedly failed to report a reportable injury/illness
 - Proposed citations are related to a fatality/catastrophe
 - Proposed citations are for recordkeeping – even though “other than serious”
 - To achieve “**deterrent effect**” (wild card – Area Director could decide necessary in almost any case)

A faint, light gray world map is visible in the background of the slide. A solid dark blue horizontal line is positioned above the main title.

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 a) worksite conditions giving rise to alleged violations are separate and distinct or b) different conduct gave rise to different alleged violations

A light gray world map is visible in the background, centered on the Atlantic Ocean. A horizontal blue line is positioned above the main title.

National/Special Emphasis Programs

NEPs

- February 7, 2023: Site-Specific Targeting Program (SST) re-issued
 - Wall-to-wall inspections where establishment has DART rate above industry average
 - Electronic submission of OSHA 300A forms (below) => easier for OSHA to place employees in SST
- January 30, 2023: Combustible Dust NEP re-issued – commercial bakeries, grain handling, power generation, lumber

NEPs

- May 1, 2023: Falls NEP reissued – construction, tree trimming/removal, rooftop mechanical work, window cleaning, billboard maintenance
- July 13, 2023: New NEP for Warehousing and Distribution Centers
 - OSHA and Congress concerns about injury rates in warehousing operations
 - “Blast from the past”: Ergonomic hazards to be assessed during inspections “where warranted”
- Old NEPs still in place, e.g., amputations, PITs, lead, silica

A light gray world map is visible in the background, centered on the Atlantic Ocean. A horizontal blue line is positioned above the title text.

Participation of Union Organizers During OSHA Inspections

Union Organizer Participation in Inspections

- OSHA has initiated rulemaking per 2016 lost litigation
 - On August 30, 2023, OSHA issued a proposed rule
 - *“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”*
 - Position is inconsistent with National Labor Relations Act and OSH Act

A faint, light gray world map is visible in the background of the slide, centered behind the text.

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

Electronic Submission

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

- I. 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
 - 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

- Benefit for union organizers
 - **Campaign Message:** “Look how much safer XYZ Company’s union facilities are compared to non-union facilities”
 - **Campaign Message:** “We organized the Dallas facility of XYZ Warehousing Company, and their sprain/strain/repetitive motion injuries fell by 30% -- we can do that for you too if you elect us”

Electronic Submission

- Boon for plaintiffs' lawyers
 - Injured employee is generally limited to workers' compensation and cannot get tort damages **unless** intentional conduct on part of the employer
 - For example, OSHA 300 Logs and 301 Forms show that employer had multiple amputations at various facilities
 - Can plaintiff's lawyer argue that failure to guard machinery properly after multiple amputations shows intent?
 - Maybe

Electronic Submission

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



A light gray world map is visible in the background, centered on the Atlantic Ocean. A horizontal blue line runs across the top of the slide, just above the title.

Emergency Responders Rule

New Emergency Responders Proposed Rule

- Released December 21, 2023; to be published in January of 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 to follow

A light gray world map is visible in the background, centered on the Atlantic Ocean. A horizontal blue line is positioned above the title text.

Heat Illness: Rulemaking and Enforcement

Heat Stress – OSHA's Agenda

- Develop federal OSHA heat illness standard
 - Before Biden Administration term ends?
 - 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 Stress – State Standards?

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

Heat Stress – Rulemaking and Enforcement

- First Wave: Rulemaking
 - On October 27, 2021, OSHA issued ANPRM
- Second Wave: Enforcement
 - On April 8, 2022, OSHA issued National Emphasis Program (CPL 3-00-024)
- Driving it? Climate change
 - EO 14008 – “Tackling the Climate Crisis at Home and Abroad”
 - Multi-agency effort

Heat Stress – Next Steps

- When will OSHA publish proposal?
 - Unclear
 - Again, according to National Office, OSHA would like (at least) to propose a standard during current Administration's term
 - National Advisory Committee on Occupational Safety and Health Heat Work Group met on April 27, 2023, to discuss recommendations for final standard
 - OSHA convened SBREFA panel on possible standard on August 25, 2023
 - SBREFA panel issued its report on November 3, 2023

Heat Stress – Next Steps

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

Heat Stress – Enforcement

- As noted above, on April 8, 2022, new National Emphasis Program: CPL 03-00-024, “Outdoor and Indoor Heat-Related Hazards”
- Announced by former Labor Secretary Marty Walsh and Vice President Kamala Harris at union training center in Philadelphia
- Targets specific industries and 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



Heat Stress – Enforcement

- Best steps employer can take
 - Develop written program
 - Provide water – have plan to make sure there is always cool water on site
 - Mandate scheduled rest breaks – not enough to say “take a break when you need it”
 - OSHA believes peer pressure/”wanting to be tough” prevents employees from taking breaks
 - (In Ogletree’s experience, there is some truth to this...)
 - Allow for unscheduled breaks
 - Provide shade or air-conditioned areas to rest (could include work trucks)

Heat Stress – Enforcement

- While OSHA prefers stepped-up acclimatization schedule, something simpler typically suffices: e.g., new employees given least strenuous jobs and are carefully monitored (buddy system)
- Emergency response procedures
 - Employees need to be trained in exactly what to do – remove clothes; pour cool water on the person; get them out of the sun
 - Condition employees to call 911 even if they are not sure it is an actual emergency – heat stress can kill quickly

Heat Stress – Enforcement

- Training
 - Signs and symptoms of heat exposure
 - Working with “buddies” who can monitor each other for heat exposure
 - Provisions of employer’s program
 - Impact of conditioning, medications/personal medical conditions on susceptibility to heat stress
 - If certain conditions or certain medications, speak with doctor about ability to handle heat
 - ADA prevents employer from inquiring => so put onus on employee
 - Downside: Maybe more accommodation requests

Questions?



Thank you!

Eric E. Hobbs

Ogletree, Deakins, Nash, Smoak & Stewart, P.C.

1243 N. 10th Street, Suite 200

Milwaukee, WI 53205

eric.hobbs@ogletree.com

Phone: 414.239.6414 (office); 414.704.70123 (cell)



Ogletree
Deakins