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Top 5 OSHA Issues to Track in 2018

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AMANDA R. STRAINIS-WALKER is a Partner in the OSHA • Workplace Safety Practice Group at **Conn Maciel Carey**, where she focuses her practice on occupational safety & health law:

- A former Presidential Appointee at the U.S. Department of Labor as a Special Assistant to the Assistant Secretary of Labor for OSHA
- Represents employers and trade associations in the full range of matters regarding the OSH Act
- Handles the full range of litigation related to contesting citations issued by OSHA
- Manages inspections and investigations by OSHA, the CSB, the EPA, MSHA, DOJ, & state and local regulators

Agenda

Top 5 OSHA Issues to Track in 2018

1. Leadership Changes at OSHA and OSHRC
2. (De)Regulatory Agenda
3. Future of E-Recordkeeping
4. Less Enforcement?
5. More Compliance Assistance / Cooperative Programs?





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OSHA Leadership Changes

New Political Leadership at OSHA

**Assistant Sec. of
Labor for OSHA**



Scott A. Mugno
VP of Safety at
FedEx Ground

**Dep. Assistant Sec.
of Labor for OSHA**



Loren E. Sweatt
Sr. Policy Advisor to House
Ed. & Workforce Committee

Other Personnel Changes at OSHA

- Retirements in Career Leadership Ranks
 - Deputy Assistant Secretary
 - Regional Administrators
 - Directorate Heads & Others
 - Area Directors
- Transfer of OSHA HR duties to OASAM
- Hiring freeze (now lifted) + attrition
- CSHO #s dropping precipitously
(119 fewer career staff & CSHOs)

Shifting Balance of Power at OSHRC



**Heather L.
MacDougall**
Chairwoman



**Cynthia L.
Attwood**
Commissioner



**James J.
Sullivan, Jr.**
Commissioner



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Pres. Trump's Efforts to Slash Government Regulations

“Deconstruction of the Administrative State”

Trump from Campaign Trail: Strive to keep fed government out of workplace, give more jurisdiction to States, and repeal rules recently promulgated by Obama Admin.

“Deconstruction of the administrative state.... If you look at these cabinet appointees, they were selected for a reason and that is the deconstruction. The way the progressive left runs, is if they can't get it passed, they're just going to put in some sort of regulation in an agency. That's all going to be deconstructed”

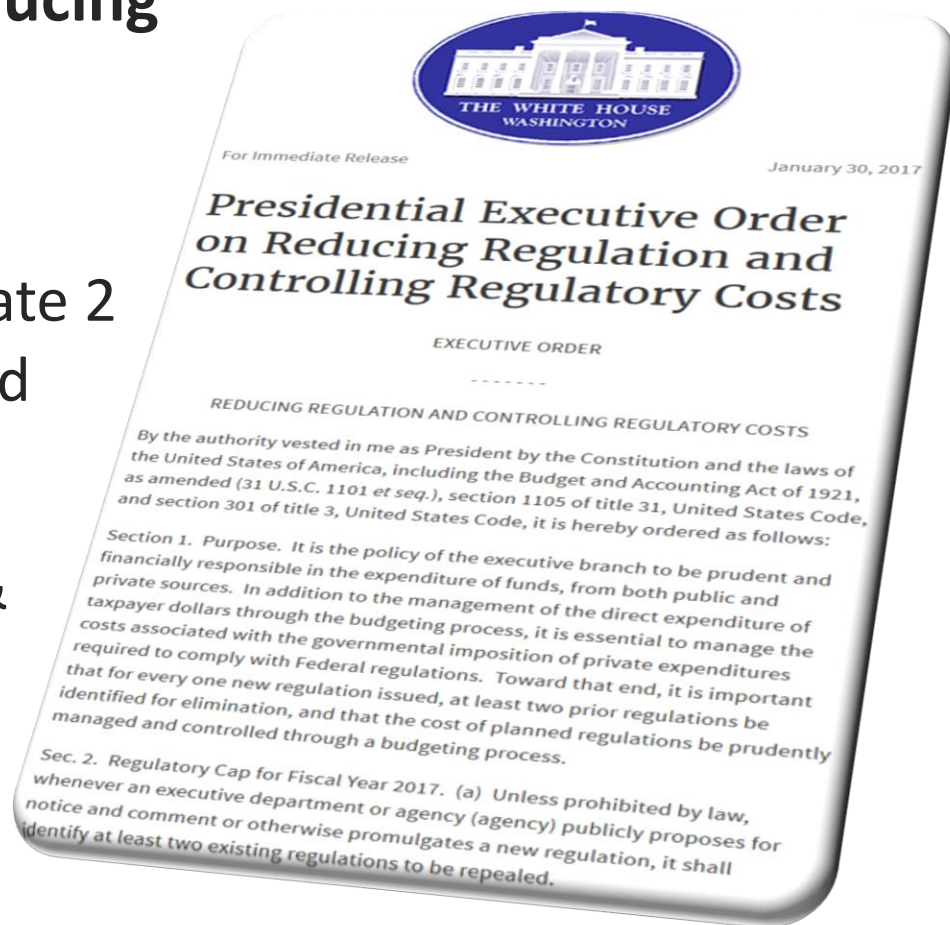
Early Acts of “Deconstruction”

- Congressional Review Act (“CRA”) – used when outgoing Admin. enacts “midnight” rule
 - Used only once before – for Pres. Clinton’s “midnight” OSHA Ergonomics Standard in 2000-2001
 - Congress and Trump Admin. used CRA to kill 14 regulations, including two OSHA-related rules
 - DOL rule re: “Clarification” of Continuing Obligation to Make Accurate Injury & Illness Records” (*Volks Rule*)
 - FAR/DOL “Fair Pay & Safe Workplaces” (*Federal Government Contractor Blacklisting Rule*)

Exec. Order 13771 2-For-1 Regulations

E.O. 13771 (1/30/17): “Reducing Regulation and Controlling Regulatory Costs”

- Require agencies to eliminate 2 regs for each 1 promulgated
- Agencies must ensure total incremental costs of new & repealed regs not exceed \$0 unless required by law or by advice of OMB



Pres. Trump's First Two Regulatory / Deregulatory Agendas

- Published in July and December 2017
- Identifies fed agencies' rulemaking priorities
- Indicates status and prioritization of current rulemakings
- ID new/cancelled rulemaking efforts

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Agency Rule List - Update 2017

Department of Labor

Agency	Agency Stage of Rulemaking	Title	RIN
DOL/ETA	Proposed Rule Stage	Trade Adjustment Assistance for Workers	1205-AB78
DOL/ETA	Proposed Rule Stage	Drug Testing by States for Purposes of Determining Unemployment Compensation Eligibility	1205-AB81
DOL/ETA	Proposed Rule Stage	Apprenticeship Programs, Labor Standards for Registration, Amendment of Regulations	1205-AB82
DOL/ETA	Final Rule Stage	Senior Community Service Employment Program (SCSEP), Performance Accountability	1205-AB79
DOL/ETA	Final Rule Stage	Exercise of Time-Limited Authority to Increase the Fiscal Year 2017 Numerical Limitation for the H-2B Temporary Nonagricultural Worker Program	1205-AB84
DOL/EBSA	Prerule Stage	Request for Information on Fiduciary Rule and Prohibited Transaction Exemptions	1210-AB82
DOL/EBSA	Proposed Rule Stage	Delay or Amend Final Rule Amending Claims Procedure Regulations	1210-AB39
DOL/EBSA	Proposed Rule Stage	Revision of the Form 5500 Series and Implementing Related Regulations Under the Employee Retirement Income Security Act of 1974 (ERISA)	1210-AB63
DOL/EBSA	Final Rule Stage	Amendment of Abandoned Plan Program	1210-AB47
DOL/EBSA	Final Rule Stage	Electronic Filing of Apprenticeship & Training Notices, and Top Hat Plan Statements	1210-AB62
DOL/OSHA	Final Rule Stage	Adoption of Amended and Restated Voluntary Fiduciary Correction Program	1210-AB64
DOL/OSHA	Prerule Stage	Communication Tower Safety	1218-AC90
DOL/OSHA	Prerule Stage	Mechanical Power Presses Update	1218-AC98
DOL/OSHA	Prerule Stage	Powered Industrial Trucks	1218-AC99
DOL/OSHA	Prerule Stage	Look-Out/Tag-Out Update	1218-AD00
DOL/OSHA	Prerule Stage	Blood Lead Level for Medical Removal	1218-AD10
DOL/OSHA	Proposed Rule Stage	Occupational Exposure to Beryllium	1218-AB76
DOL/OSHA	Proposed Rule Stage	Quantitative Fit Testing Protocol: Amendment to the Final Rule on Respiratory Protection	1218-AC94
DOL/OSHA	Proposed Rule Stage	Crane Operator Qualification in Construction	1218-AC96
DOL/OSHA	Proposed Rule Stage	Cranes and Derricks in Construction: Exemption Expansions for Railroad Roadway Work	1218-AD07
DOL/OSHA	Proposed Rule Stage	Technical Corrections to 16 OSHA Standards	1218-AD12
DOL/OSHA	Proposed Rule Stage	Puerto Rico State Plan	1218-AD13
DOL/OSHA	Proposed Rule Stage	Improve Tracking of Workplace Injuries and Illnesses	1218-AD16
DOL/OSHA	Proposed Rule Stage	Tracking of Workplace Injuries and Illnesses	1218-AD17
DOL/OSHA	Final Rule Stage	Standards Improvement Project IV	1218-AC67

OSHA Rules

Removed or moved to “Long Term Actions”

Vehicle Backing Hazards

Workplace Violence-Healthcare

Updates to Chemical PELs

Emergency Response and
Preparedness

Comprehensive Combustible
Dust Rule

PSM Rule Reform

Hearing Protection in
Construction

Infectious Diseases in Healthcare

Obstacles to OSHA Deregulation

- Missing political appointees at OSHA
- *“The Sec. may by rule promulgate, modify or revoke any occupational safety/health standard...to serve the objectives of the Act” - Sec. 6(b)(1)*
- *“Congress declares it to be its purpose and policy ... to assure so far as possible every working man and woman...safe and healthful working conditions” - Sec. 2(b)*
- *“‘Occupational safety & health standard’ means a standard which requires conditions...reasonably necessary or appropriate to provide safe or healthful...places of employment” Sec. 3(8)*
- Existing standard is not *“reasonably necessary or appropriate”*?
Deregulatory action is not *“arbitrary and capricious”*?



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Improve Tracking of Workplace Injuries and Illnesses



FEDERAL REGISTER

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Friday,

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November 8, 2013

Part III

Department of Labor

Occupational Safety and Health Administration
29 CFR Parts 1904 and 1952

Improve Tracking of Workplace Injuries and Illnesses; Proposed Rule

Injury Data Electronic Submission

May 12, 2016, OSHA published the Final Rule re: Injury and Illness Recordkeeping Electronic Data Submission

2 Major Provisions:

1. Establishments w/ 250+ workers must annually submit to OSHA 300 Logs, 301 Incident Reports, and 300A Annual Summaries
2. Establishments w/ 20 + workers in “High Hazard Industries” must annually submit 300A Annual Summaries



E-Recordkeeping Status

- Employers submitted 2016 300A data through 12/31/2017
- OSHA received approx. 214,000 submittals (Preamble projected approx. 450,000)
- Issued enforcement guidance to address non-responders
- Site-specific data to be used for inspection targeting
- OSHA refuses to publish or share in response to FOIA
- OSHA to issue NPRM to “reconsider, revise, or remove provisions of the prior rule”



State Plan Adoption of E-Recordkeeping Rule

- State plans are required to promulgate injury and illness recording and reporting requirements at least as effective as fed OSHA's 29 CFR part 1904
- With respect to the data submission requirements, fed OSHA has granted states flexibility how to collect injury data (i.e., use fed OSHA's portal or their own data collection sites)
- Most states are opting to use OSHA's ITA portal
- Not all states have updated their RK requirements yet (CA, WA, MD, SC, WY, UT, MN, VT)

Future of the E-Recordkeeping and Anti-Retaliation Rule

- Trump's 1st and 2nd Reg Agendas forecast a new rulemaking to rescind/amend E-Recordkeeping Rule
- Most likely changes:
 - Injury data limited to only 300A Annual Summaries for all employers in all years
 - Increase threshold trigger for “High Hazard Industries” or size threshold for covered small employers
 - Eliminate the Anti-Retaliation provisions
- July 1, 2018 is current deadline for next data submission, but as OSHA prepares to issue NPRM, that could change



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OSHA Enforcement Under a Trump Administration

Change Enforcement Philosophy?

- Expectation from Trump/Acosta/Mugno OSHA has been a scaling back of Enforcement-heavy philosophy and balancing w/ compliance assistance
- Revising Enforcement Policies that tend to inflate civil penalties
- Retiring National, Regional & Local Emphasis Enforcement Programs
- Budget cuts to limit enforcement



Present Enforcement Reality

- Rich Mendelson (Acting Deputy Assistant at OSHA) and Tom Galassi (Director, Directorate of Enforcement):
 - *“OSHA will balance enforcement & compliance assistance, but will not back away from our enforcement mission”*
 - *“Enforcement and compliance assistance aren’t mutually exclusive. In fact, they’re complimentary. They’re both tools to accomplish our mission of workplace safety”*

Enforcement Emphasis Program

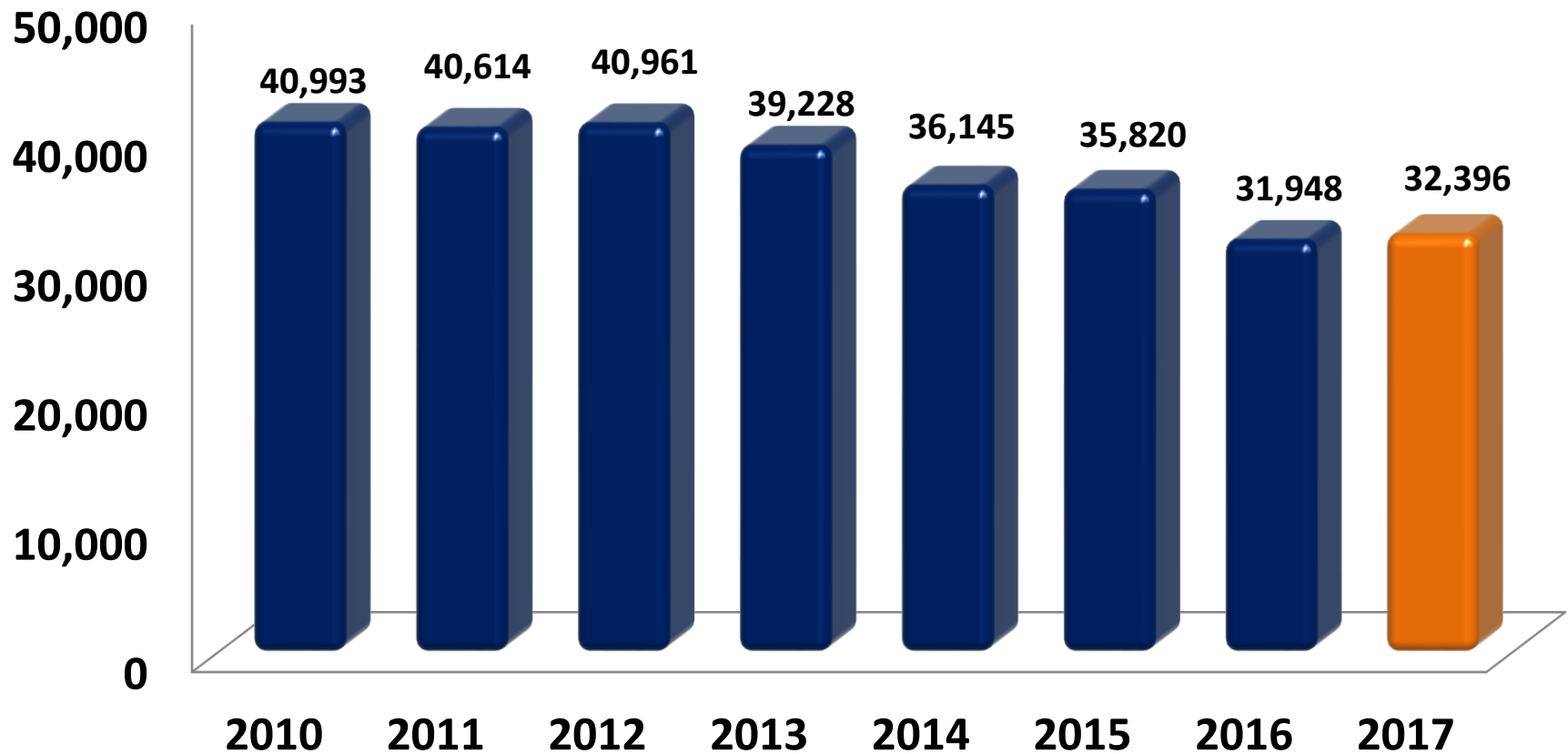
OSHA continues to implement:

- 150 Local and Regional Emphasis Programs
- 9 National Emphasis Programs

National Emphasis Programs:

1. Combustible Dust
2. Federal Agencies
3. Hazardous Machinery
4. Hexavalent Chromium
5. Lead
6. Primary Metal Industries
7. Process Safety Management
8. Shipbreaking
9. Trenching and Excavation

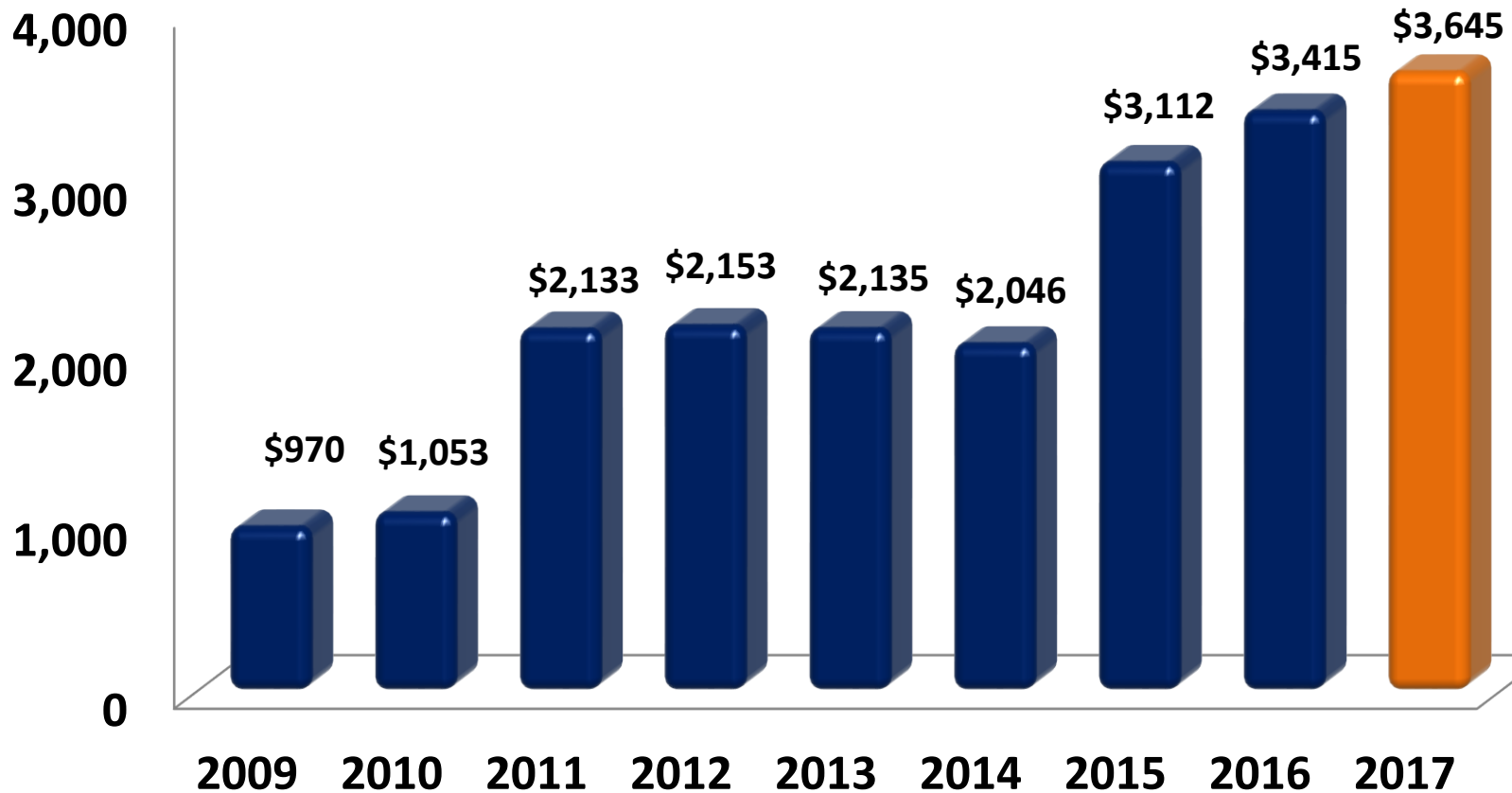
Total Fed OSHA Inspections



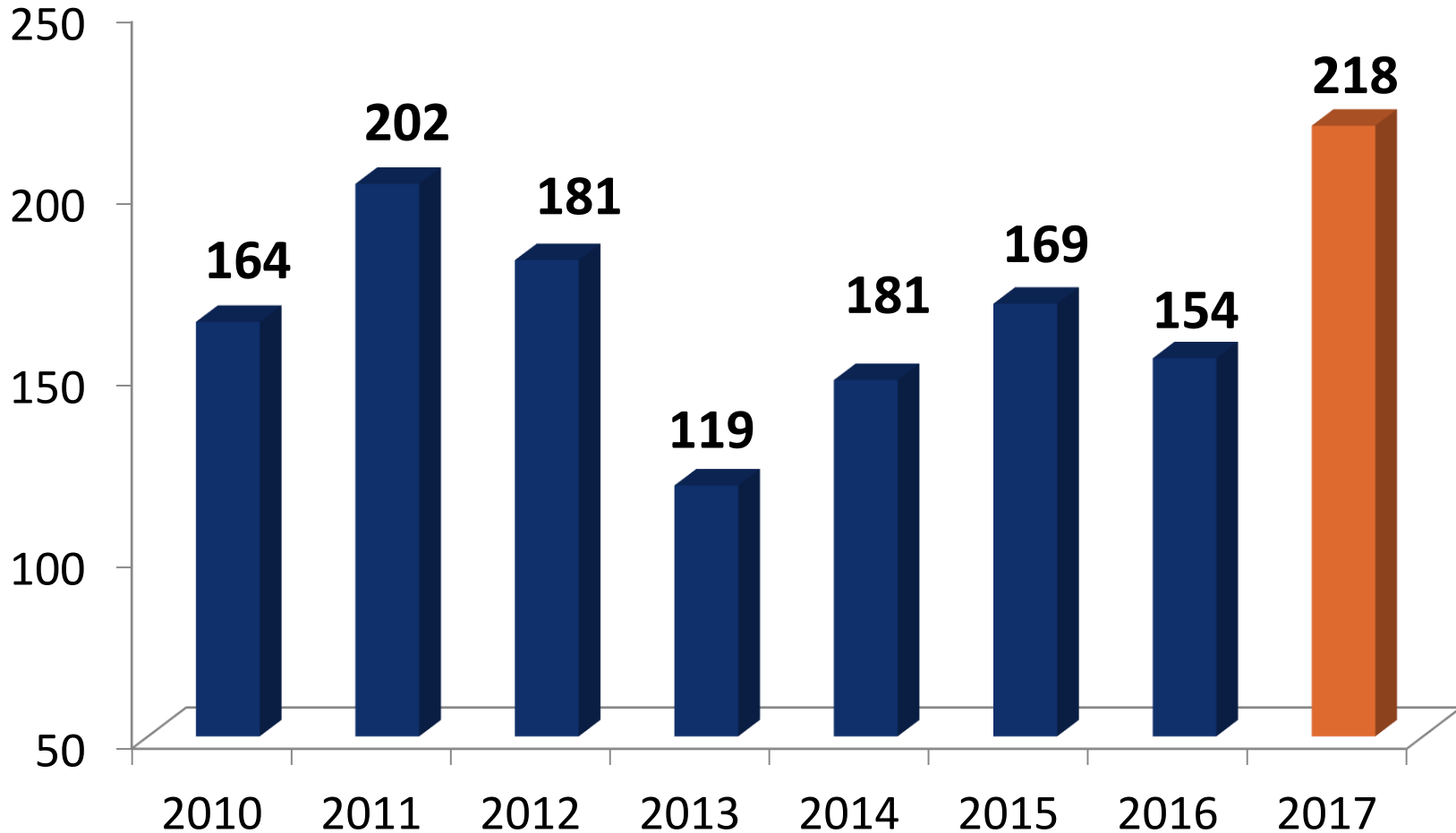
Civil Penalties Increase... again

Characterization	Historical Max Penalties	Aug. 2016 (After "catch-up")	Jan. 2018 (New Annual Bump)
Other than Serious	\$7,000	\$12,471	\$12,934
Serious	\$7,000	\$12,471	\$12,934
Willful	\$70,000	\$124,709	\$129,336
Repeat	\$70,000	\$124,709	\$129,336
Failure to Abate	\$7,000 per day	\$12,471 per day	\$12,934 per day

Average Penalty Per Serious Violation



Cases w/ Total Proposed Penalty of \$100K+



OSHA's Repeat Violation Policies

OSHA Historically:

- Treated workplaces as individual, independent establishments
- Limited its review of employers' OSHA records to 3 years
- Reactive Philosophy (less likely to revisit workplaces within a few years)

OSHA Under Obama:

- Treats workplaces in a corporate family as 1 workplace
- Look back 5 yrs at employers' record of enforcement
- Proactive Targeting (more follow-ups / target past violators for inspection)
- Redefine successor

OSHA Under Trump:

- Return to 3 year look back period?
- Extend exemptions due to recent inspections?
- Retire numerous emphasis programs and restore Reactive Inspection Focus?
- Change successorship analysis to return to alter ego model?

Focus on Repeat Violations

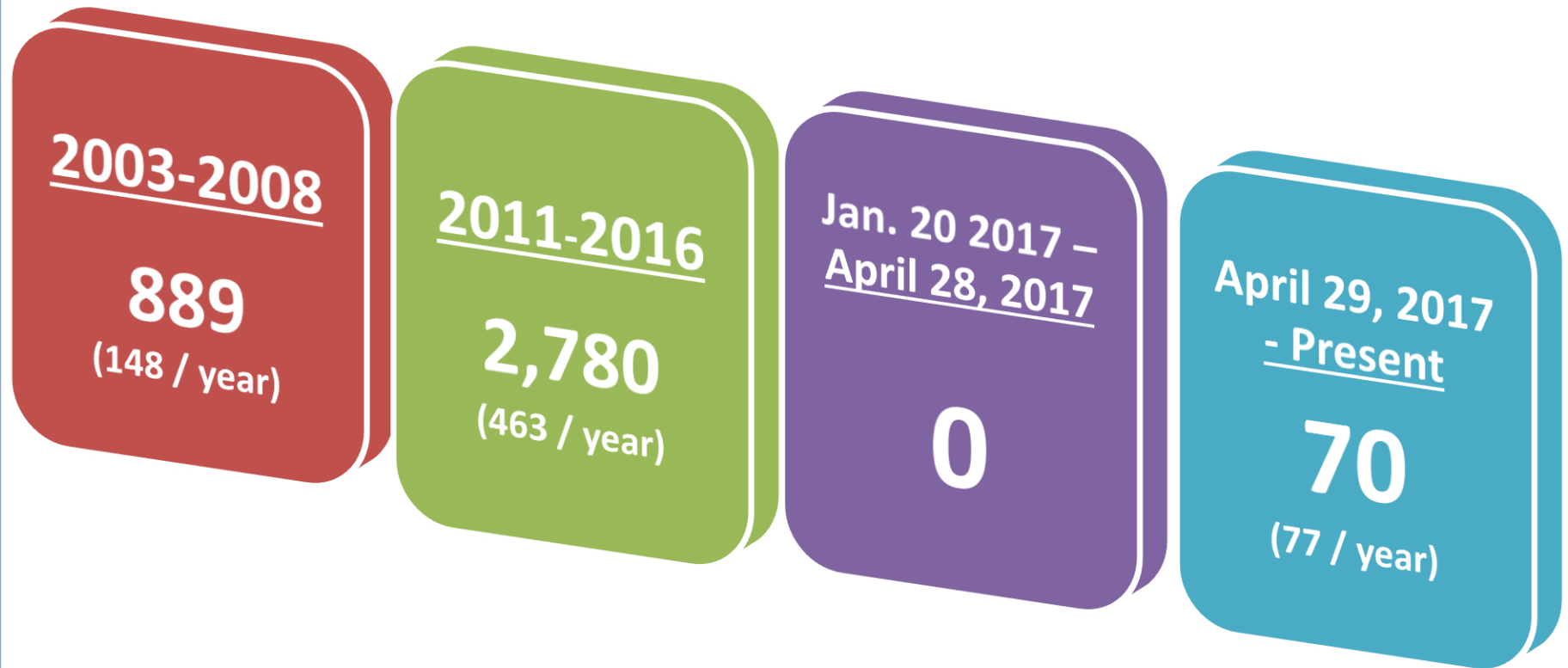
	2002	2005	2008	2011	2012	2013	2014	2015	2016	2017
Serious	58,845	61,018	67,052	62,115	57,112	56,661	49,616	47,934	42,984	36,802
Repeat	1,867 2.4%	2,350 2.7%	2,817 3.2%	3,229 3.7%	3,034 3.8%	3,193 4.0%	2,968 4.4%	3,088 4.7%	3,146 5.3%	2,771 5.5%
Willful	331	747	517	594	423	319	439	527	524	319

Regulation By Shaming



“In some cases, ‘**regulation by shaming**’ may be the most effective means for OSHA to encourage elimination of life-threatening hazards, and we will not hesitate to publicize the names of violators, especially when their actions place the safety and health of workers in danger. To do this, we will issue more hard-hitting press releases that explain more clearly why we cited a specific employer.”

Enforcement Press Releases





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Compliance Assistance and Cooperative Programs

Restoring Compliance Assistance

- New look *osha.gov* website & “Quick Takes” emails
- OSHA working with employers
 - Compliance assistance resources and programs
 - Increased use of and reasonableness of LOIs
 - Cooperative and recognition programs
 - Consultation Audits and Training
 - Partnerships and Alliances
- Open to variances?
- Restoring respect and value to VPP?





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And one more thing...

PPE for BBP?

PPE for BBP: Is it required?

- 1993 Standard Interpretation Letter
 - Outlined adequate procedures to prevent exposure to manual sorters
 - No reasonable anticipation of contact with blood by sorters
 - Must analyze work practices if exposure incident occurs
- 2003 Standard Interpretation Letter
 - Exposure is determined by assessing job tasks that may involve reasonably anticipated exposure
 - Steadily increasing number of Americans are self-injecting = more syringes in waste stream
 - Employer must offer pre-exposure Hepatitis vaccine
 - Assume sharps found in waste stream are contaminated
 - Determining reasonably anticipated exposure should be done facility-by-facility and job-task-by-job-task basis

PPE for BBP: Is it required?

- July 2017 Corporate-Wide Settlement Agreement
 - NY recycler agreed to revise Exposure Control Plan at EACH facility
 - Every worker (including temps) who manually sorts has exposure to BBP
 - Every sorter will be issued appropriate PPE, including puncture-resistant gloves
- April 2018 OSHRC decision
 - Repeat citation for failing to provide PPE to employees working in sorting rooms with mixed commercial and residential waste
 - After recyclables removed, various types of medical waste found in waste stream
 - Employer relied on work practices and cut gloves → did not eliminate exposure
 - Safety manager conceded needle stick(s) occurred
 - OSHRC concludes puncture-resistant gloves are required

the **OSHA DEFENSE** report



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• • • 2018 **OSHA WEBINAR** series • • •

OSHA Year in Review and Forecast

Tuesday, January 16th

Unlock the Mysteries of OSHA's Lockout/Tagout Standard

Tuesday, February 20th

OSHA's New Leadership Team

Tuesday, March 20th

OSHA's New Silica & Beryllium Rules

Tuesday, April 17th

OSHA's New E-Recordkeeping & Anti-Retaliation Rule

Tuesday, May 15th

Joint- and Multi-Employers, Contractors and Temps

Tuesday, June 5th

New Cal/OSHA Enforcement Issues

Tuesday, July 10th

Status and Future of OSHA's Policy of Public Shaming

Tuesday, August 21st

Walking/Working Surfaces Update

Tuesday, September 18th

Repeat, Willful & Egregious Violations

Tuesday, October 16th

Process Safety Update: OSHA PSM and EPA RMP

Tuesday, November 13th

OSHA and the ADA: How Two Labor Laws Can Align and Diverge

Tuesday, December 4th

Check out our OSHA Blog:

the **OSHA DEFENSE** report



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www.OSHADefenseReport.com

QUESTIONS?



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