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of North America

OSHA Under the Trump Administration

September 27, 2017

Eric J. Conn

Chair of the OSHA Practice
at **Conn Maciel Carey LLP**

Eric J. Conn

econn@connmaciel.com / 202.909.2737

ERIC J. CONN is Chair of the OSHA • Workplace Safety Practice Group at **Conn Maciel Carey**, where he focuses his practice on all aspects of occupational safety & health law:

- Represents employers in inspections, investigations & enforcement actions involving OSHA, CSB, MSHA, & EPA
- Responds to and manages investigations of catastrophic industrial, construction, and manufacturing workplace accidents, including explosions and chemical releases
- Handles all aspects of OSHA litigation, from criminal prosecutions to appeals of citations
- Writes & speaks regularly on safety & health law issues
- Conducts safety training & compliance counseling

Agenda



Pres. Trump's Deregulatory Agenda

Electronic Recordkeeping Rule

Pres. Trump's 1st Regulatory Agenda

Future of OSHA Enforcement under Trump



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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.

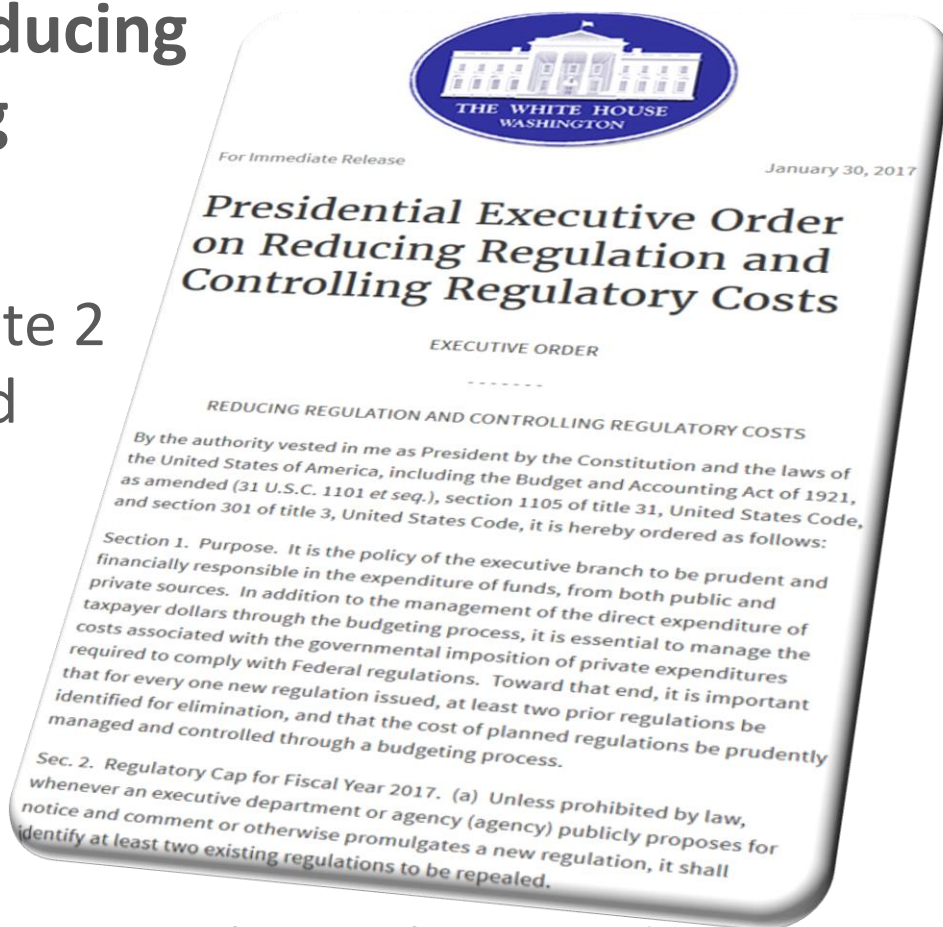
“Deconstruction of the administrative state.... If you look at these cabinet appointees, they were selected for a reason and that is the deconstruction. The way the progressive left runs, is if they can’t get it passed, they’re just going to put in some sort of regulation in an agency. That’s all going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



Exec. Order 13771 2-For-1 Regulations

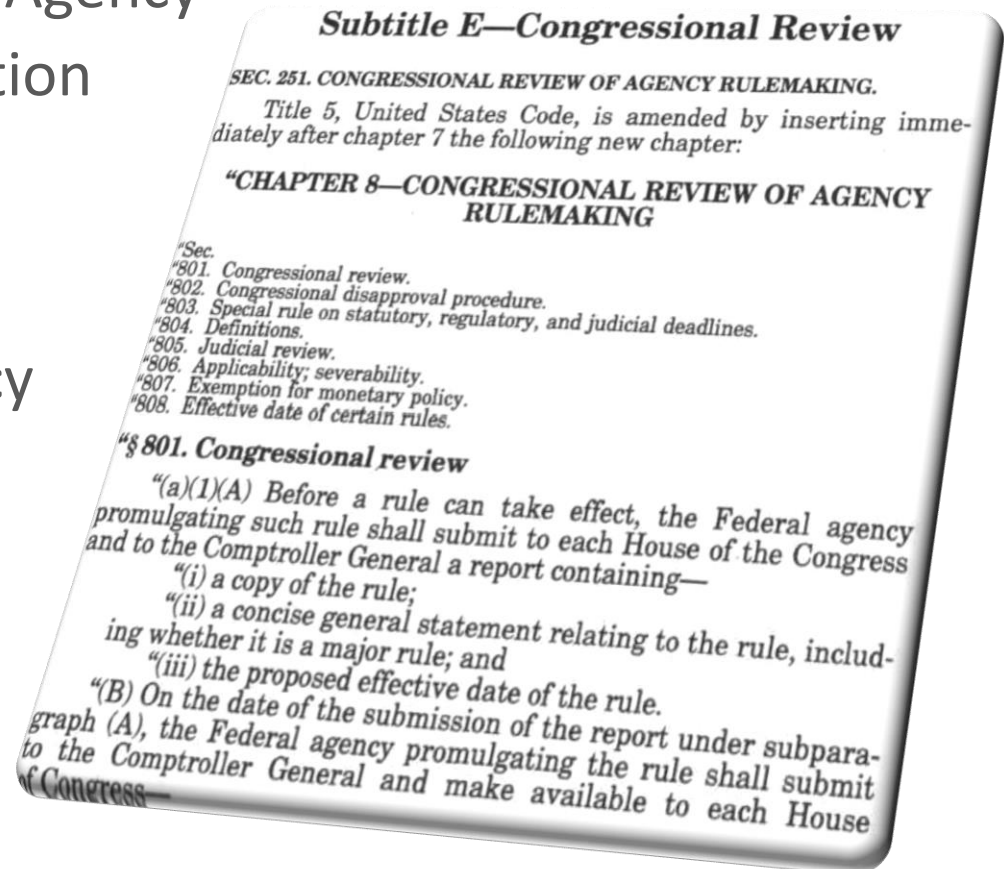
E.O. 13771 (1/30/17): “Reducing Regulation and Controlling Regulatory Costs”

- 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- Agencies must ensure total incremental costs of new & repealed regs not exceed \$0 unless required by law or by advice of OMB
- 4/15/17 - OMB guidance how E.O. to be implemented



Congressional Review Act

- Congressional Review Act of 1996 - expedited procedures for Congress to repeal federal Agency regulations by joint resolution
- Simple majority vote only
- CRA repeal prevents agency from ever promulgating a “substantially similar” reg
- Pres. signs w/in 60 “Legis. Days” of Final Rule



Congressional Review Act

- Only useful when outgoing Pres. enacts “midnight” rule, and the Pres. is replaced by Pres. and Congress of opposing party
- Used only once before – in transition from Clinton to Bush, Clinton’s “midnight” OSHA Ergonomics Standard repealed
- Heavy use in Trump Admin. (some awaiting Trump’s signature)
- OSHA-related regulations repealed by CRA
 - DOL rule re: “Clarification” of Continuing Obligation to Make Accurate Injury and Illness Records” (*Volks Rule*)
 - FAR/DOL “Fair Pay & Safe Workplaces” (*Contractor Blacklisting*)



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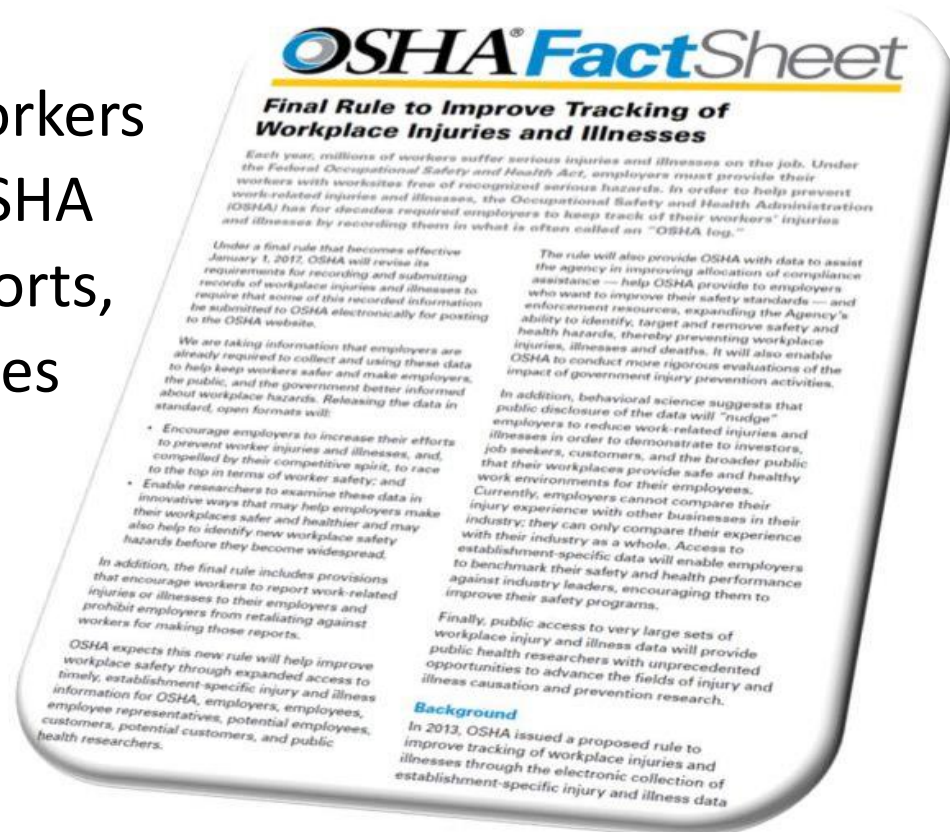
Electronic Injury and Illness Recordkeeping Rule

Injury Data Electronic Submission

Final Rule for Injury & Illness Recordkeeping Data Submission

3 Major Components:

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 certain “High Hazard Industries” to annually submit 300As
3. OSHA’s original intent was to publish the injury data



Delayed Reporting Deadlines

Recordkeeping
Forms for Year

2016

2017

2018 and
thereafter

Establishments
w/ 250+
Employees

300As

300 Logs,
300As & 301s

300 Logs,
300As & 301s

Establishments
w/ 20-249
Employees

300As

300As

300As

Deadline to
Submit Forms

Dec. 1, 2017

July 1, 2018

March 1, 2019
(March 1st each
subsequent year)

Status and Future of E-Recordkeeping Submission

- May 17, 2017 – OSHA announced indefinite delay of July 1st deadline to submit injury data
- June 28, 2017 – OSHA published a Notice of Proposed Rulemaking to extend injury data submission deadline to December 1, 2017
- Delay intended to allow new Administration time to decide what it wants to do with the rule (e.g., repeal / amend)
- August 1, 2017 – OSHA took the online portal live





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Electronic Injury and Illness Recordkeeping Rule

Anti-Retaliation Elements

Final Rule on Injury Reporting Policies

As of **December 1, 2016**, Employers were required to:

- Inform employees of right to report workplace injuries
- Inform employees of right to report work related injuries free from discrimination or retaliation
- Update injury reporting policies to remove “unreasonable” elements that may discourage employees from reporting (e.g., discipline for late reporting or violating vague safety rules, blanket **post-injury drug testing**, **safety incentive** or compensation programs tied to the injury rates)

Status of Anti-Retaliation Elements of the Rule

- Anti-Retaliation Elements (e.g., limits to post-incident drug tests and safety incentives) – currently in effect
- OSHA actively pursuing violations, but only where there is an aggrieved employee (first citations just issued)
- Obama's DOL filed a motion to dismiss Industry challenge in final days of Admin.
- Since Pres. Trump's inauguration, DOL withdrew motion to dismiss and moved to stay to allow time to reconsider Rule
- Legal challenge “stayed” (closed)



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Trump Administration's First Regulatory Agenda

Unified Agenda of Regulatory & Deregulatory Actions

- 1st Regulatory Agenda issued by Trump Administration
- Published on July 20, 2017
- IDs rulemaking priorities fed agencies will undertake
- Indicates prioritization of current rulemaking efforts and their status in the rulemaking process
- Identifies new and cancelled rulemaking efforts

Office of Information and Regulatory Affairs
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Agency Rule List - Update 2017

Department of Labor

Agency	Agenda, State 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-AB85
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	Perule 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 Regulation	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	Perule Stage	Communication Tower Safety	1218-AC90
DOL/OSHA	Perule Stage	Mechanical Power Presses Update	1218-AC98
DOL/OSHA	Perule Stage	Powered Industrial Trucks	1218-AC89
DOL/OSHA	Perule Stage	Lock-Out/Tag-Out Update	1218-AD09
DOL/OSHA	Perule Stage	Blood Lead Level for Medical Removal	1218-AD00
DOL/OSHA	Proposed Rule Stage	Occupational Exposure to Beryllium	1218-AD10
DOL/OSHA	Proposed Rule Stage	Quantitative Fit Testing Protocol: Amendment to the Final Rule on Respiratory Protection	1218-AB76
DOL/OSHA	Proposed Rule Stage	Crane Operator Qualification in Construction	1218-AC94
DOL/OSHA	Proposed Rule Stage	Cranes and Derricks in Construction: Exemption Expansions for Railroad Roadway Work	1218-AC86
DOL/OSHA	Proposed Rule Stage	Technical Corrections to 16 OSHA Standards	1218-AD07
DOL/OSHA	Proposed Rule Stage	Puerto Rico State Plan	1218-AD12
DOL/OSHA	Proposed Rule Stage	Improve Tracking of Workplace Injuries and Illnesses	1218-AD13
DOL/OSHA	Proposed Rule Stage	Tracking of Workplace Injuries and Illnesses	1218-AD16
DOL/OSHA	Final Rule Stage	Standards Improvement Project IV	1218-AC67

Rules Removed from OSHA's Reg Agenda

Comprehensive rule addressing
combustible dust;

Updates to various chemical PELs;

Hearing protection in Construction; and

Vehicle backing hazards in general
industry and construction

Rules Moved to “Long-Term Actions”

- Numerous rules moved from Active to “Long-Term Actions”
- Effectively indefinitely delays progress on these rules
- Major rulemakings moved from active agenda:
 - Workplace Violence
 - Reforms to PSM standard
 - Emergency Response and Preparedness
 - Infectious Disease in Healthcare

Revisiting Electronic Recordkeeping Rule

- Two actions related to OSHA's E-Recordkeeping rule
 1. Extends deadline to make first electronic submissions of 300A data to December 1, 2017; and
 2. Specifies intent "to issue proposal to reconsider, revise, or remove provisions" of E-Recordkeeping rule
- Predictions for Possible Revisions to Rule:
 - Limit scope of injury data required to be submitted
 - Increase in threshold DART rate for "High Hazard Industry"
 - Increase threshold of employees to be covered by standard
 - Eliminate or cut scope of anti-retaliation provisions



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OSHA Enforcement Under a Trump Administration

Changing Enforcement Philosophy

- Expect OSHA under Trump / Acosta to scale back Enforcement-Heavy Philosophy
- Shift budget / personnel back to balance enforcement and compliance assistance
- Restore respect for / value of VPP
- Revise Field Operations Manual and Enforcement Policies that inflated civil penalties



Change to “Repeat” Violation Policies?



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-up inspections / hand select past violators for inspection)

Focus on Repeat Violations

	2002	2005	2008	2011	2012	2013	2014	2015	2016
Serious	58,845	61,018	67,052	62,115	57,112	56,661	49,616	47,934	42,984
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%
Willful	331	747	517	594	423	319	439	527	524

OSHA's Repeat Violation Policies

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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?



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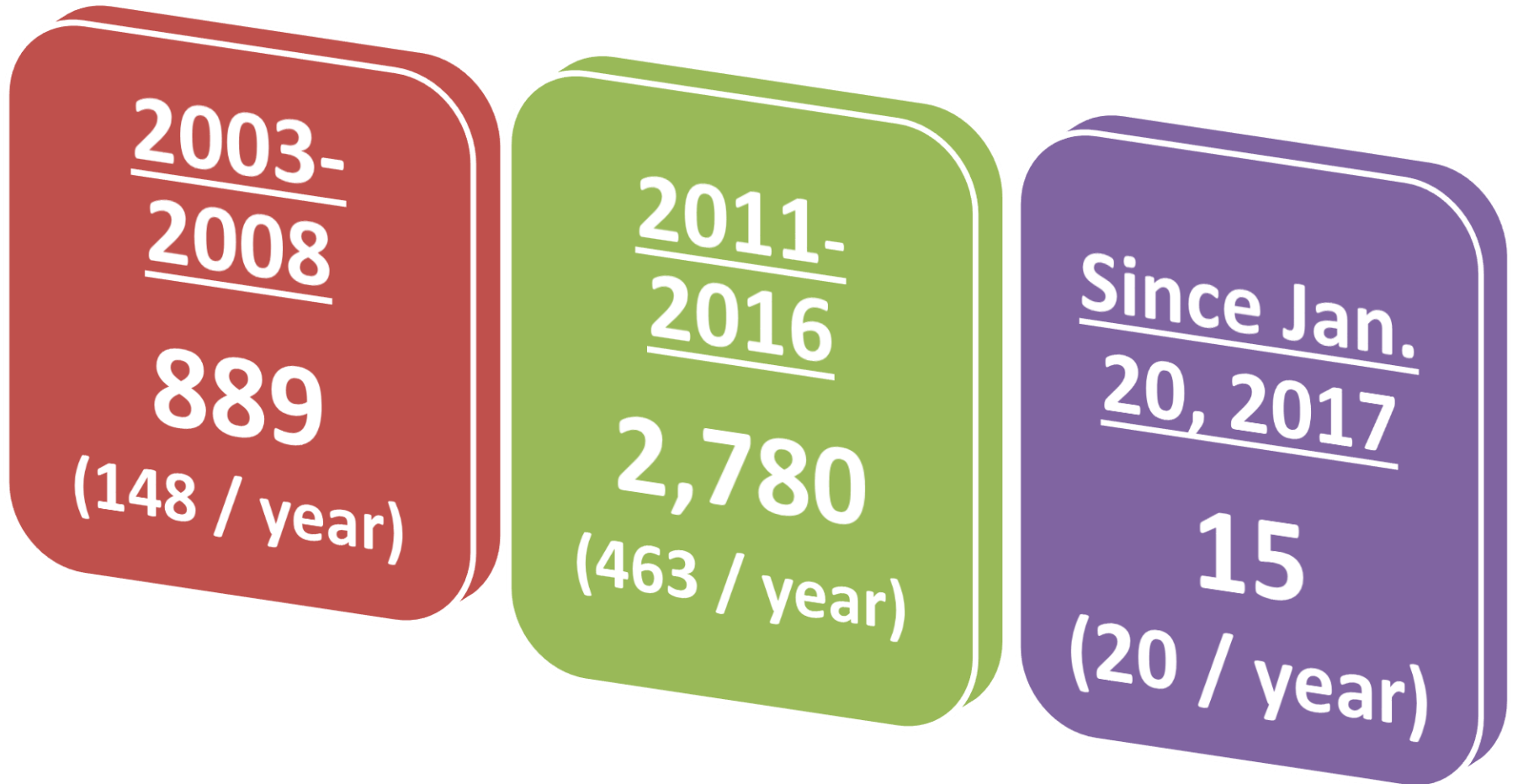
End of Public Shaming?

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



the **OSHA DEFENSE** report



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2017 **OSHA** WEBINAR series

Top 5 OSHA Issues in 2017
Wednesday, January 25th

Slips, Trips and Falls Rule
Thursday, February 8th

Standards Improvement Project: Changes to LOTO
Tuesday, March 28th

New Cal/OSHA Enforcement Issues
Tuesday, April 11th

OSHA's New E-Recordkeeping & Anti-Retaliation Rule
Tuesday, May 16th

Interpretations and Variances: New Regulatory Strategy
Tuesday, June 6th

Multi-and Joint-Employers, Contractors and Temps
Tuesday, July 11th

OSHA Status of Pres. Trump's De-Regulatory Agenda
Tuesday, August 15th

OSHA's New Leadership Team
Tuesday, September 12th

Addressing Employee Complaints
Tuesday, October 17th

OSHA's Fatality & Injury Reporting
Tuesday, November 14th

OSHA PSM and EPA RMP Update
Tuesday, December 12th

Check out our OSHA Blog:

the **OSHA DEFENSE** report



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QUESTIONS?



Contact Information



ERIC J. CONN

Chair, OSHA • Workplace Safety Group

Conn Maciel Carey LLP

Washington, D.C.

202.909.2737

econn@connmaciel.com