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## Cal/OSHA Amendment Significantly Expands its Definition of “Repeat” Violations

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Effective January 1, 2017, Cal/OSHA will be utilizing a broader definition of “Repeat” violation under California’s Health and Safety Code. This is significant for California employers because if Cal/OSHA finds a Repeat violation, the employer could initially be subject to a penalty of up to \$70,000, and up to \$124,709 or more when Cal/OSHA updates its penalties as required by federal OSHA. According to OSHA, the purpose of the greater penalty for Repeat violations is to encourage an employer’s ongoing compliance with safety and health standards at all of its locations without requiring OSHA to engage in separate compliance actions at each location. Because Cal/OSHA has always previously limited Repeat violations to a single worksite reoccurrence, and because of the forthcoming increased penalty structure, California employers will need to develop a more strategic response to any citations they receive.

In its 2013 Federal Annual Monitoring and Evaluation (FAME) Report, federal OSHA found that California’s enforcement of Repeat violations was lower than the federal average and noted that the policy used by the state was different and less protective than that applied by federal law. As a result, Cal/OSHA was directed to amend California Code of Regulations Title 8, Section 334(d), to be consistent with the definition of a Repeat violation as used by Federal OSHA.

Currently, a Repeat violation is defined in section 334(d), as a violation where an employer has corrected, or indicated correction of, an earlier violation for which a citation was issued and, upon a subsequent inspection within **three years**, Cal/OSHA finds that the employer has **recommitted the same violation**. For employers with fixed establishments, section 334(d) currently limits Cal/OSHA’s authority to issue a repeat citation to the cited establishment, which means that both the underlying and the subsequent violation must have occurred at the **same work site or address**.

Now, however, California employers will be subject to a much broader definition of Repeat violation. Specifically, Cal/OSHA amended section 334(d) by:

1. Expanding the “look back” period of a Repeat violation from three years to five years.
2. Defining a Repeat violation as a substantially similar violation.
3. Increasing the geographic scope of a Repeat violation to any violation in the state.

### **Cal/OSHA Will Now Look Back Five Years**

The current three-year look-back period of a Repeat violation begins to run on the date of the conduct giving rise to the violation. But, if the employer appeals the citation, the appeal prevents the citation from becoming final, and a final citation is necessary for a Repeat violation to be found. As the three-year clock runs from the date of the conduct, the employer could minimize its chance of a Repeat violation by appealing every citation issued.

Cal/OSHA’s amendment eliminated an employer’s incentive to appeal solely to shorten or exhaust the look-back period. Now, the starting time for calculating the period begins at either:

- the date of the final order affirming the existence of a previous violation cited in the underlying citation;
- the date on which the underlying citation becomes final by operation of law; or
- the date of final abatement of the violation cited in the underlying citation.

Cal/OSHA also expanded the window of time for a Repeat violation from three years to five years, which is a policy change that federal OSHA made in 2010.<sup>1</sup>

### **Cal/OSHA Will Now Consider Substantially Similar Violations**

Cal/OSHA currently defines a Repeat violation as occurring when the employer has corrected, or indicated correction of an earlier violation, for which a citation was issued, and upon a later inspection is found to have committed the **same violation** again.

Cal/OSHA amended the rule to broadly allow it to find a Repeat violation for a violation of a “substantially similar” regulatory requirement. This change places Cal/OSHA directly in line with federal OSHA. The “substantially similar” standard is the language used by federal OSHA but is not officially defined by Cal/OSHA. Federal OSHA also does not have a regulatory definition of “substantially similar” but the term has been interpreted in policy documentation and numerous citation appeal decisions. As the term is undefined, employers will have some opportunity to influence the interpretation of what constitutes substantially similar violations supporting a Repeat violation in California, but this may be one area where the state adopts the federal interpretation. The greater scope naturally increases the frequency at which a Repeat violation could be issued.

### **Cal/OSHA Will Now Consider Statewide Violations**

The current rule defining the geographic scope of Repeat violations is that the later citation must involve the same factory, store, or other fixed establishment that was previously cited. But, for field sanitation standards, a Repeat violation is any subsequent violation state-wide, on the theory that farm labor contractors work up and down the state during a short span of time and, thus, violations at different sites in California are akin to Repeat violations.

Cal/OSHA eliminated the difference between field sanitation and other industries and removed the geographical restrictions that currently limit a Repeat violation to a specific facility or store. In other words, in determining whether to cite the employer for a Repeat violation, Cal/OSHA will consider any violation in

the state as opposed to violations at a specific location. Thus, for example, if Cal/OSHA finds a violation at a facility in Los Angeles, and if the employer has facilities in Sacramento and San Francisco, the agency will determine whether citations for substantially similar violations were issued at the facilities in those two cities.

### **Implications for Employers**

Starting in 2017, California employers can no longer focus solely on the financial implications of settling a citation or contesting it. Employers will have to be more strategic in their response. Because the Repeat classification and increased penalties are not directly limited to Serious violations, employers will even have to consider their acceptance or appeal of General and Regulatory citations.

Employers can initially focus even more attention on preventing workplace safety violations through comprehensive programs. However, if an employer receives a citation, it should carefully evaluate whether simply paying the citation is the best strategy and also should immediately determine whether it is in compliance with other standards that are “substantially similar” to the one for which it was cited at all of its California facilities. This increased focus will raise the cost of abatement for employers that do decide to accept a citation because they will need to ensure abatement at all of their locations to avoid future Repeat violations with their substantial penalties. Overall, this change will undoubtedly lead to more litigation over Cal/OSHA citations as employers will need to manage their citation history to avoid future Repeat violations occurring over a five-year period.