

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
OFFICE OF THE DIRECTOR

INITIAL STATEMENT OF REASONS

Subject Matter: Proposed changes to the definition of “Repeat Violation”
California Code of Regulations, title 8, section 334, subdivision (d)

Subject Matter of Proposed Rulemaking: Definition of Repeat Violation.

Section Affected: Amend Section 334(d).

PROBLEM STATEMENT

Section 18 of the Federal Occupational Safety and Health Act of 1970 authorizes the several states to administer their own occupational safety and health programs. Federal OSHA (hereinafter, “Fed/OSHA”) approves and monitors these “State Plans” and provides up to 50 percent of an approved State Plan’s operating costs. In order to gain and maintain Fed/OSHA approval, states must enforce job safety and health standards that are “at least as effective as” comparable federal standards. States also have the option to promulgate standards covering hazards that are not addressed by federal standards.

California is among the 27 states and other U.S. jurisdictions that have established State Plans for occupational safety and health. Pursuant to Labor Code sections 60.5 and 6308, the Division of Occupational Safety and Health (hereinafter, “the Division”) is charged with the administration and enforcement of the provisions of the California Occupational Safety and Health Act (Lab. Code, §§ 6300 et seq.), as well as other provision of law impacting the health and safety of employees in the State of California.

As part of its enforcement program, the Division issues citations with monetary civil penalties to employers for violations of the occupational safety and health standards set forth in title 8 of the California Code of Regulations (hereinafter, “8 CCR”). Pursuant to 8 CCR, section 334, the Division classifies citations (depending on the facts in any given case) as either “Regulatory,” “General,” “Serious,” “Willful,” or “Repeat,” or as a combination of such classifications. Section 334 also defines each citation classification.

Currently, 8 CCR, section 334(d) defines a “Repeat” violation 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, the Division finds that the employer has recommitted the same violation. Pursuant to section 334(d), the Division’s authority to issue a “Repeat” citation is limited not only by time, but also by geography. Thus, for employers that have “fixed establishments” (such as factories, terminals and stores) a “Repeat” citation is limited to the cited establishment. In other words, both the underlying and the subsequent “Repeat” violation must have occurred at the same work site or address. Conversely, for

employers with no fixed establishments (such as contractors who may work on projects all around the state) a “Repeat” citation must be based on prior violation cited within the same region of the Division. Field sanitation violations constitute an exception to the general rules set forth above, in that the Division may issue a “Repeat” citation based on a prior field sanitation violation by the employer anywhere in the State.

In its 2013 Federal Annual Monitoring and Evaluation (FAME) Report of California’s State Plan, Fed/OSHA indicated that California’s enforcement program’s rate of “Repeat” violations was lower than the Federal average and recommended that California consider employer history statewide when citing “Repeat” violations.¹

To ensure that the Division’s enforcement program remains as effective as Fed/OSHA’s program, the Director has initiated this rulemaking to (1) modify the look back period start date to the date the underlying citation becomes final (by order of the Occupational Safety and Health Appeals Board (hereinafter “Appeals Board”) or by operation of law) or when the cited violation had been abated, whichever occurs last in time, and (2) eliminate the fixed site and geographical limitations currently imposed under the current regulation for “Repeat” violations.

BENEFITS

The benefits of the proposed amendments include a statewide increase in workplace safety and health compliance, increase in overall abatement rates, decrease of unmeritorious appeals, and assurance that California’s Repeat violation enforcement program will remain as effective as Fed/OSHA’s program.

The elimination of the fixed site and geographical restrictions will increase worker safety by encouraging employers with multiple work sites to abate a workplace safety hazard statewide as opposed to the specific establishment or region where the hazard occurred to avoid liability for a Repeat violation.

The proposed amendments may also preserve state resources by reducing the number of appeals filed each year for the sole purpose of reducing or eliminating the “Repeat” look back period. Currently the requirement to abate/correct a violation is stayed when an employer files a docketed appeal with the Appeals Board, and remains stayed until withdrawal of the appeal or final disposition by the Appeals Board. Because a “Repeat” citation is based on a prior “corrected” violation occurring within the preceding three years, an employer can reduce its chances of receiving a “Repeat” citation by appealing each and every citation issued to it. By the time a citation has been addressed in a final order of the Appeals Board, thereby triggering the requirement to “correct” the underlying violation, the three-year window of liability for a “Repeat” citation may already have closed or there may only be a short amount of time

¹ FAME Report, *supra*, at page 12 and Appendix A, FY-Rec# 13-06, page A-2.

remaining until the expiration of the three-year window. As a result, the percentage of “Repeat” citations issued in California is significantly lower than the federal average, and the potential for receiving a “Repeat” citation has little deterrent effect, given the low possibility that an employer will commit a violation, be required to correct it, and recommit the same violation within the three year period, as currently defined.

The proposed amendments will make California’s enforcement program more consistent with Fed/OSHA’s program, thereby ensuring continual Federal approval and funding of California’s State Plan.

PURPOSE AND NECESSITY

Amendment to section 334(d)

The purpose for the proposed amendments is to modify the “Repeat” look back period calculation and remove the existing geographical restrictions to broaden the Division’s ability to assess and cite Repeat violations. The proposed amendments are necessary to increase California’s rate of Repeat violations to that of the Federal average, thereby ensuring that the Division’s “Repeat” violation program remains at least as effective as the Federal program in order to continue receiving funding and approval as discussed above.²

Non-substantive changes. The proposed amendments delete the subsection headings “(1) General” and “(2) Field Sanitation Violations” because the proposed amendments eliminate the differences between field sanitation and other types of violations, rendering the segregation obsolete. These changes are necessary for clarity. The proposed amendments also replace the words “corrected” and “correction” with the words “abated” and “abatement,” respectively. The term “abatement” is more commonly used to describe the process of correcting a violation to come into compliance. Therefore, using the terms “abated” and “abatement” in section 334 would make it consistent with other related sections of 8 CCR. (See, for example, 8 CCR sections 332.1, 332.4, 333, and 336.) These changes are necessary for clarity and conformity.

The proposed amendments change the starting time for calculating the look back period for a “Repeat” violation under 8 CCR, section 334(d). Currently, the starting time for calculating the three year look back period begins to run on the date of the conduct giving rise to the earlier violation and continues to run even if the employer appeals the citation. However, the appeal immediately stays or puts off the citation from becoming final, a necessary element for the issuance of a Repeat violation. Because an appeal can delay the final adjudication of a citation from one to three years, an employer can minimize his/her chances of a future Repeat citation by appealing each and every citation issued, regardless of the merits of the appeal.

² 29 C.F.R. § 1902.3(d); *United Air Lines, Inc. v. Occupational Safety & Health Appeals Board* (1982) 32 Cal.3d 762, 772 (citing 29 U.S.C. § 667(b) & (c)(2)); *Gade v. National Solid Wastes* (1992) 505 U.S. 88, 96-97).

The proposed amendments eliminate this loophole by changing the starting time for calculating the three year look back period to either: (1) the date of the final order affirming the existence of the previous violation cited in the underlying citation; (2) the date on which the underlying citation becomes final by operation of law; or (3) the date of final abatement of the violation cited in the underlying citation. The proposed amendments create a disincentive for an employer to appeal a citation solely to shorten or exhaust the three year look back period. The proposed amendments will bring the regulation into greater alignment with its underlying purpose and intent.

The proposed amendments remove the geographical restrictions from the “Repeat” violation classification. The specific reason for removing the geographic restrictions is to encourage itinerant employers and employers with many locations to abate violations at all of their worksites statewide, and to make California’s Repeat violation enforcement standard more consistent with Fed/OSHA’s Repeat violation policy as recommended in the FAME Report

The concept of statewide enforcement of “Repeat” violations already exists for field sanitation standards, because many farm labor contractors work up and down the state over the course of a season. Consequently, the Division has long had the authority to issue “Repeat” citations to a farm labor contractor who, for example, allows its workers to use short-handled tools in violation of the law at different agricultural sites throughout California. The same need for effective enforcement exists in other industries. By amending section 334(d), the proposed amendments would allow the Division to cite a large contractor who violates the same standard on a statewide basis. Similarly, the proposed amendments would allow the Division to issue a “Repeat” citation to a chain retailer for a “Repeat” violation occurring in Sacramento based on an earlier citation issued for the same transgression in San Diego. By increasing the likelihood of receiving a “Repeat” citation (and thereby incurring a higher attendant civil penalty) the proposed amendments would at once greatly increase the deterrent effect of “Repeat” citations and would also help to foster increased compliance and uniformity of compliance statewide by large employers.

In addition, removing the geographic restrictions in section 334(d) helps ensure that Cal/OSHA’s Repeat violation enforcement standard is as effective as the Fed/OSHA’s Repeat violation policy. Fed/OSHA, in its previous FAME Reports dating back to 2010 identified Cal/OSHA’s failure to consider employer enforcement history statewide as a contributing factor to Cal/OSHA’s significantly lower rate of issuance of Repeat citations compared to the federal average.

The proposed amendments also delete subsection (d)(2), and its appurtenant heading and text, because the proposed amendments eliminate the differences between field sanitation and other types of violations, rendering the segregation obsolete. These changes are necessary for clarity.

TECHNICAL, THEORETICAL, AND/OR EMPIRICAL STUDY, REPORTS, OR DOCUMENTS

The Director relied on the “FY [fiscal year] 2013 Comprehensive Federal Annual Monitoring and Evaluation (FAME) Report” for the Division prepared by the U. S. Department of Labor and Fed/OSHA. A copy of this report can be found at:

https://www.osha.gov/dcsp/osp/efame/2013/ca_report.pdf

ECONOMIC IMPACT ASSESSMENT/ANALYSIS

Pursuant to Government Code, section 11346.3, subdivision (b), the Director anticipates the following economic impact will result from the proposed amendments:

The proposed amendments will have no significant effect on the creation or elimination of jobs within California. The proposed amendments do not modify or affect any existing occupational safety and health standard but instead requires the Division to consider employer history statewide when issuing “Repeat” violations and recalculate the starting time for calculating the three year look back period of a “Repeat” violation.

The Director anticipates that the removal of the geographic restrictions will result in approximately 150 to 180 additional “Repeat” citations issued in California annually. Currently, of the approximately 15,000 total citations issued by Cal/OSHA annually, slightly fewer than 50 of them are classified as “Repeat” violations.

The Director came to the range of 150 to 180 additional “Repeat” citations by comparing citations issued in 2008 to citations issued in 2013 for the purpose of determining how many 2013 citations could have been issued as Repeat citations based on 2008 citations issued to the same employer, irrespective of geographic location. Based on this comparison, the Division estimated that an additional 50 to 60 “Repeat” citations could have been issued in 2013 based on 2008 citations had the geographic restrictions been eliminated in 2008. To account for the fact that a “Repeat” citation may be issued during any of the three years of the look back period, the Division multiplied the “50 to 60” figure by three, thereby resulting in a final estimated range of 150 to 180 additional “Repeat” citations. The Division selected the comparison years of 2008 and 2013 because under the proposed amendments, the repeat citation look back period of 3 years only begins to run after the issuance of a final order affirming the existence of the previous violation cited in the underlying citation. This estimation relies on the assumption that it took at least two years for each citation issued in 2008 to become final in 2010, thus setting the look back period expiration time in 2013. It is important to note that the estimated range of 150 to 180 additional citations may be higher than the actual number of “Repeat” citations issued under the proposed amendments as this range does not factor in intangible calculations, such as greater employer compliance that the Director anticipates will result from the proposed amendments.

The Director does not anticipate that the proposed amendments will result in the creation of new businesses or the elimination of existing businesses within the state, or a change in the current safety standards. The Director further does not anticipate that the proposed amendments will result in any expansion of businesses currently doing business within the state. The proposed amendments contain no factors that would cause a business in California to expand as a result of its adoption.

The Director anticipates an increase in worker safety with the adoption of the proposed amendments. The proposed amendments will discourage businesses from recommitting an occupational safety and health standard and will encourage correction of cited hazards to avoid liability for Repeat violations. The Director expects more compliance with safety standards which will result in an overall increase in worker safety statewide. The Director further anticipates that the proposed amendments will ensure that the Division's "Repeat" violation standard remains at least as effective as Fed/OSHA's program.

EVIDENCE SUPPORTING FINDING OF NO SIGNIFICANT STATEWIDE ADVERSE ECONOMIC IMPACT DIRECTLY AFFECTING BUSINESS

The proposed amendments may affect businesses statewide, including small businesses, including, the ability of California businesses to compete with businesses in other states, however, the Director does not anticipate that the impact will be significant. The proposed amendments will level the playing field between California and other states with Repeat classifications consistent with the Federal standard. In doing so, the proposed amendments will make California less hospitable for employers with multiple worksites who commit "Repeat" violations. The Director does not anticipate that the economic impact on such employers will be significant because the proposed amendments will simply hold California employers to the federal "Repeat" standard.

REASONABLE ALTERNATIVES TO THE REGULATION AND THE AGENCY'S REASON FOR REJECTING SUCH ALTERNATIVES

The only alternative the Director is aware of is to take no action and keep the existing "Repeat" violation classification as is. The Director rejected this alternative because to continue receiving Federal funding and approval, the Division is required to maintain an enforcement program at least as effective as Fed/OSHA's program. The proposed amendments are necessary to ensure that California's enforcement remains as effective as the Federal program, and thus, help ensure continual Federal certification and funding of California's State Plan. Further, in its 2013 FAME Report, Fed/OSHA recommended that California consider employer history statewide when issuing "Repeat" violations to increase its rate of "Repeat" violations to that of the Federal average. No alternative has been proposed that would be less burdensome and equally effective

in achieving the purposes of this regulation in a manner that achieves the purposes of the Occupational Safety and Health Act

DUPLICATION OR CONFLICT WITH FEDERAL REGULATIONS

None.