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HOW TO REDUCE RISK OF AN OSHA REPEAT CITATION

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INTRODUCTION

The Occupational Safety and Health Act of 1970 ("Act") is enforced by the Occupational Safety and Health Administration ("OSHA"), who has the duty to inspect workplaces and to issue citations if it determines that an employer is in violation of the Act. Most employers who are cited are frequently tempted to settle a citation quickly at the informal conference for a reduced penalty rather than contest the citation. But foregoing potential factual and legal defenses for a quick and easy resolution of a citation can create a much larger risk in the future: a "repeat" citation with substantial monetary penalties. A repeat citation can carry a penalty of up

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to $129,336 per citation item and will continue to increase annually in line with the consumer price index. Traditionally, a repeat citation would be issued when OSHA had previously cited the employer for a "substantially similar condition" and the Occupational Safety and Health Review Commission ("OSHRC") had affirmed the previous citation. Recently, a significant ruling from OSHRC increased OSHA's evidentiary burden to prove a repeat violation. This article will discuss what constitutes a repeat citation, OSHRC's recent decision involving a repeat citation that was favorable to employers, and practical advice and best practices for minimizing the risk of a repeat citation.

WHAT IS A REPEAT CITATION?

A repeat citation is a type of violation for which OSHA may cite an employer under section 17(a) of the Act if, as the name implies, OSHA has previously cited the employer for a "substantially similar condition" and the Occupational Safety and Health Review Commission has affirmed the previous citation. *See Secretary of Labor v. Potlatch Corp.*, 7 BNA OSHC 1061 (1979). Many employers are unaware of the nature of the various types of citations (General Duty Clause violation and/or violation of specific regulation) that can be considered "substantially similar" to be the basis for repeat citations. For example, OSHA can issue a repeat citation under the General Duty Clause[†] or base a repeat citation on a previous violation of the General Duty Clause. In its Field Operations Manual (FOM), OSHA states that, "hazards presenting serious physical harm or death may be cited under the general duty clause (including … repeated violations that would otherwise qualify as serious violations)." FOM, CPL 02-00-

[†] A General Duty Clause violation under Section 5(a)(1) of the Act, is not based upon a previously promulgated standard or regulation to address a defined "hazard." Rather OSHA only has to prove that there is a "generally recognized hazard likely to cause serious injury or death" to an employee.

160 (Aug. 2, 2016), p. 4-18; *see also Secretary of Labor v. Active Oil Service, Inc.*, 21 OSHC (BNA) 1184 (2005) (upholding a repeat citation of the General Duty Clause based on a previous citation issued under the General Duty Clause). In addition, OSHA can base a repeat citation of a specific regulation upon a prior citation under the General Duty Clause. *Secretary of Labor v. GEM Industrial, Inc.*, 21 OSAHRC LEXIS 106 (1996) (ALJ decision) (stating that "a violation of a standard can be repeated even though based on a previous violation of the general duty clause").

For those employers with more than one facility or worksite, an alleged repeat violation can occur at any of the employer's facilities or worksites nationwide in federal jurisdictions, regardless of where the initial citation occurred. Federal OSHA must use federal OSHA citations as the basis for a repeat citation. The FOM states that "[p]rior citations by State Plan States cannot be used as a basis for Federal OSHA repeated violations. Only violations that have become final orders of the [] Review Commission may be considered." (P. 4-22).‡ OSHA maintains a national online database (which is available to the public at http://www.osha.gov/pls/imis/establishment.html) on which an OSHA Compliance Officer can, and do, search for any citations previously issued to an employer anywhere in the nation.

While there is not any statutory time limit concerning the length of time between the date on which the repeat citation is issued and the date of the previous citation on which the repeat classification is based, set out in the Act, OSHA's policy states that, "the following policy shall generally be followed:

A citation will be issued as a repeated violation if:

‡ It should be noted that prior OSHA citations issued by a State OSHA program can be used by Federal OSHA to establish a "willful" violation.

a. The citation is issued within five years of the final order date of the previous citation or within five years of the final abatement date, whichever is later; and

b. If the previous citation was contested, within five years of the Review Commission's final order or the Court of Appeals final mandate.

FOM, CPL 02-00-160 (Aug. 2, 2016), 4-23. This reflects a recent change to OSHA's policy, as prior to 2016 the time limitation was three years. Despite this amended policy, OSHA has not always followed its policy, and the Review Commission has held that the time limitation contained in OSHA's Field Inspection Reference Manual ("FIRM")[§] cannot be used as a defense to a repeat citation. *See, e.g., Secretary of Labor v. Active Oil Service, Inc.*, 21 OSHC (BNA) 1184 (2005) (holding that "[t]he Commission has long held that the amount of time between violations does not affect whether a violation is repeated.").

As indicated, repeat violations can carry proposed penalties of up to $129,336. Thus, to an uninformed employer, it may appear that a harmless "serious" or "other than serious" citation, with a nominal proposed monetary penalty, may be settled as a seemingly inconsequential matter. However, such action may lay the foundation for a subsequent repeat citation and a $129,336 penalty at any of an employer's facilities or worksites across the nation for years to come. For this reason, informed employers who realize this potential exposure are now aggressively defending any citation that is not factually or legally valid.

[§] OSHA's repeat citation policy was previously contained in its Field Inspection Reference Manual, CPL 02-00-103 (Sept. 26, 1994) ("FIRM"). OSHA replaced the FIRM with the FOM in 2009. CPL 02-00-148 (Jan. 9, 2009).

WHAT OSHA TRADITIONALLY MUST SHOW TO ESTABLISH A REPEAT VIOLATION

OSHA has the initial burden of proof to demonstrate that the subsequent citation is "substantially similar" to the previous citation. The principle factor to be considered when determining whether a violation is repeated is whether the prior and instant violations resulted in "substantially similar hazards." *Secretary of Labor v. Stone Container Corp.*, 14 BNA OSHC 1757 (1990). Therefore, OSHA can attempt to meet its initial burden merely by demonstrating that the previous and current citations allege violations of the same standard. *Secretary of Labor v. Wal-Mart Super Center*, 20 OSHC (BNA) 1729 (2003). Unfortunately, the potential employer liability can be expanded because the two citations do not have to fall under the same specific standard – OSHA can meet its burden even if the two citations allege violations of different specific standards. This issue is clearly illustrated in the case of *Potlatch Corporation*, which sets forth the standard in determining whether OSHA has properly classified a citation as repeat, including the following example of two citations of separate standards that would nonetheless qualify as a repeat violation:

> If two employees performing construction work such as painting were exposed to a 20 foot fall from an unguarded scaffold, the employer would be in violation of 29 C.F.R. § 1926.451(a)(4); a subsequent citation based on exposure of the same employees to a 20 foot fall while using the same unguarded scaffold to replace light bulbs would be a violation of 29 C.F.R. § 1910.28(a)(3).

Potlatch, 7 OSHC at 1063. In addition, the employees and the scaffold described in the *Potlatch* example above do not have to be the same. Rather, the two citations can involve completely separate employees at completely separate facilities across the country. Thus, anytime an employer voluntarily accepts a citation, including an informal settlement, OSHA may use the

citation as the basis for a repeat citation involving not only the same standard, but also any substantially similar hazard in any of the employer's facilities anywhere in the nation.

ANGELICA TEXTILE SERVICES, INC.: ENHANCED OSHA BURDEN TO ESTABLISH A REPEAT CITATION

On September 30, 2008, OSHA issued a citation to Angelica Textile Services, Inc., a commercial laundry, alleging ten serious and four repeat items. After the parties filed cross motions for summary judgment, Administrative Law Judge John H. Schumacher issued a decision affirming two of the serious items and vacating the remaining twelve items. The Secretary of Labor appealed, arguing that the judge improperly vacated two repeat citations that alleged deficiencies of permit required confined spaces (PRCS) and lockout / tagout (LOTO) procedures.

On July 24, 2018, nearly a decade after the citations were issued, the Occupational Safety and Health Review Commission affirmed the previously vacated citation items, but characterized and reclassified them as serious rather than repeat violations, and issued a single reduced penalty of $7,000. Most importantly, the majority opinion refined the definition of what OSHA must prove to establish a Repeat violation. Previously, OSHA took the position that all it had to show to meet the "substantial similarity" standard was merely the same type of equipment or process or regulation that was involved in the prior violation. The Review Commission clarified that a showing of substantial similarity can be rebutted with a showing of "disparate conditions and hazards associated with these violations of the same standard." As a result, OSHA's burden of proof has been greatly increased to establish a Repeat violation.

The decision also refined what defenses an employer may have for a Repeat citation based upon the abatement actions it took to abate the earlier violation. At the outset, the Review

Commission rejected using a mechanical application of a test for establishing a repeat classification. Applied to the facts of the case, the Review Commission noted that the prior PRCS citation identified "critical deficiencies" in the employer's compliance program. In response to the prior citation, the Company **"actively sought out and eliminated similar hazards,"** including developing a PRCS program specific to the condition cited. The majority in *Angelica* noted that the abatement efforts of the Company resulted in reduced citations in the current matter. Similarly, the Review Commission noted that the prior LOTO citation to the Company had identified a "comprehensive failure." However, the present case involved established procedures, as well as surveys completed for machines that the Company had undertaken in the interim. Rather than lacking the previous comprehensive procedures, there were only two discrete deficiencies in the employer's current program.

Significantly, the Review Commission also noted in a footnote that the Secretary had accepted the Company's prior abatement method, thus giving no basis to conclude that the Company knew that its interim safety precautions and corrective actions were inadequate to be compliant.

After comparing the employer's attempts at compliance with the prior and subsequent citations, the Review Commission reasoned that, while the prior citations had been a complete failure to comply, the current citations reflected only minimal deficiencies. In other words, **"[the Company] took affirmative steps to achieve compliance and avoid similar violations in the future."** Because of these interim abatement actions, the Review Commission concluded that there was no basis for a Repeat citation.

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HOW TO PROTECT YOUR EMPLOYEES AND YOUR BUSINESS FROM REPEAT CITATIONS

In light of the *Angelica* decision, it will be much more difficult for OSHA to prove Repeat citations. Traditionally, if the employer settles a citation or it becomes the final order of the Commission following litigation, it is critical to alert the employer's management at each of its facilities or worksites across the country of each citation and the underlying hazard. Employers should take timely measures to abate the cited hazard at the cited worksite and to prevent future employee exposure to the hazard at every worksite. In addition, if the employer eventually agrees to accept a citation, the employer should attempt to have the Alleged Violation Description ("AVD"), which is the factual description of how the violation occurred contained in the body of the citation itself, carefully revised to limit and accurately describe the hazard to reflect the specific facts and circumstances of the hazard so that it will be much more difficult for OSHA to prove that the hazard alleged in any future citation is "substantially similar" to the hazard alleged in the prior citation.

In light of the *Angelica* decision, following the acceptance of a citation, employers must also take steps to establish that it acted in good faith and took effective and documented action to correct the initial violation. Employers should **"actively [seek] out and eliminate[] similar hazards,"** or **"[take] affirmative steps to achieve compliance and avoid similar violations in the future."** As there is no mechanical way to avoid a Repeat citation, and the corrective actions taken will depend on the factual circumstances surrounding the citation, employers should consult experienced counsel for guidance on what constitutes abatement of the citation and how to properly document such actions.

If the employer is unfortunate enough to receive a repeat citation, it should develop a defense strategy to contest the classification of the citation as repeat; that is, that the new citation is not "substantially similar" to the prior citation. While the employer cannot defend the prior citations themselves, it must be prepared to put forward documentary and testimonial evidence to establish that the previously cited hazardous condition did not create a substantially similar hazard as alleged in the subsequent repeat citation. If these steps are taken, the employer will be prepared to argue that the prior citation was not "substantially similar" to the present citation, as well as any other legal or factual defenses that may exist to refute the subsequent citation.

CONCLUSION

When an employer receives a citation from Federal OSHA or a state agency, it must carefully consider the potential for a repeat citation prior to settling the citation for any reason. If the employer accepts a citation without undertaking the foregoing analysis, the potential liability for a repeat citation will clearly exist in the future.

NOTE: If you wish to receive complimentary copies of this article and future articles on OSHA and employment law related topics, please contact Mark A. Lies, II at mlies@seyfarth.com to be added to the address list.