



# Can OSHA Look Back Farther than 5 Years for Repeat Citations? Recent Court Decision Reaffirms that there Is No Limitation on OSHA's Repeat Violation Period

Insights

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Until 2015, it was the practice of the Occupational Safety and Health Administration (OSHA) to look back only three years to establish “repeat” violations under the Occupational Safety and Health Act (OSH Act). In 2015, OSHA increased that period to five years. The United States Court of Appeals for the 2nd Circuit reminded us this week that OSHA is actually not bound by *any* temporal limitation to establish repeat violations.

Under the OSH Act, civil violations of OSHA regulations are classified in various ways, including willful, repeat, serious, or other-than-serious. The higher the classification, the larger the penalty. While the current penalty cap for a serious violation is \$12,934, the penalty cap for repeat violations is roughly ten times that amount, \$129,336.

While the OSH Act and OSHA regulations do not specify the time-period that OSHA can consider when determining whether an alleged violation is a repeat offense, OSHA’s Field Operations Manual (FOM)—which is OSHA’s guiding document for enforcing OSHA regulations—provides that OSHA shall “generally” consider a violation to be “repeat” if the citation “is issued within five years of the final order of the previous citation or within five years of the final abatement date.” OSHA revised the FOM in 2015 to increase this look back period from three years.

## **Triumph Construction Corp. v. Secretary of Labor**

On February 14, 2018, however, the 2nd Circuit reaffirmed that the period of time set forth in the FOM is not binding on OSHA. At issue in that case, *Triumph Construction Corporation v. Secretary of Labor*, was whether the three year or five year look back period applied to a February 13, 2015 repeat citation issued to Triumph Construction Corporation, as OSHA relied upon a prior citation occurring more than three years prior to establish the repeat violation.

While Triumph argued that OSHA’s decision to extend the look back period from three years was arbitrary, the 2nd Circuit found that it did not matter whether the FOM prescribed a three year or five year look back period. Noting that neither the OSH Act nor the regulations promulgated under the Act set forth any time period that limits the issuance of repeat citations, the court held, citing previous OSH Review Commission precedent, that the time limitation set forth in the FOM “is only a guide” and “is not binding on OSHA or the Commission.” In other words, OSHA is not restricted to

looking back to only a certain period of time in classifying violations as repeat.

### **What takeaways should employers have from this decision?**

First and foremost, employers should continue to effectuate their safety policies and to emphasize a safety-first culture in the workplace. This is the best practice to avoid most OSHA inspections and citation.

Second, employers should seriously consider whether to contest citations to which they have a good faith defense so that those citations do not later form the basis of a repeat citation. The cost-benefit analysis for contesting non-repeat citations has changed. If an employer previously believed that contesting a \$12,500 serious citation was not worth the legal cost, the risk of being hit with a repeat violation \$125,000 several years down the road may tilt the balance toward contesting those lesser citations. Pay special attention to any citation that involves a routine activity, task, or equipment where a repeat is more likely to arise in the future.

Third, employers should maintain robust records and data on prior OSHA inspections and citations to ensure that future citations concerning the same hazards do not occur. This will hopefully prevent the issuance of a repeat citation, no matter what the repeat time period OSHA may attempt to enforce.

Although the *Triumph* court didn't create new law, its decision reminds us that OSHA has broad enforcement discretion with respect to its repeat violation period. Remain proactive in your efforts to develop a robust safety program in order to minimize OSHA citations and avoid the higher penalties associated with repeat citations.

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