

**DEPARTMENT OF INDUSTRIAL RELATIONS, OFFICE OF THE
DIRECTOR**

**NOTICE OF PROPOSED RULEMAKING
CALIFORNIA CODE OF REGULATIONS, TITLE 8, CHAPTER, 3.2,
SUBCHAPTER 1**

SECTION 334

Prepared by:

Division of Occupational Safety and Health Legal Unit

TITLE 8. DEPARTMENT OF INDUSTRIAL RELATIONS
Notice published August 14, 2015

NOTICE OF PROPOSED RULEMAKING

The Director of Industrial Relations (hereinafter “Director”) proposes to adopt the proposed amendments to regulations concerning repeat violations of employee health and safety requirements, as described below, after considering all comments, objections and recommendations regarding the proposals.

PUBLIC HEARING

A public hearing has been scheduled to permit all interested persons the opportunity to present statements or arguments, oral or in writing, with respect to the proposed amendments, on the following date:

Date: Friday, October 2, 2015

Time: 10:00 a.m. to 5:00 p.m.

Place: Elihu Harris State Office Building – Room 1304
1515 Clay Street, Oakland, CA 94612

The State Office Building and meeting rooms are accessible to persons with mobility impairments. Alternate formats, assistive listening systems, sign language interpreters, or other types of reasonable accommodations to facilitate effective communication for persons with disabilities are available upon request. Please contact the State Wide Disability Accommodation Coordinator at 1-866-326-1616 (toll free), or through the California Relay Service by dialing 711 or 1-800-735-2929 (TTY/English) or 1-800-855-3000 (TTY/Spanish) as soon as possible to request assistance. Accommodation requests should be made as soon as possible. Requests for an Assistive Listening System or Communication Access Realtime Translation should be made no later than five (5) days before the hearing.

At the hearing, any person may present statements or arguments, orally or in writing, relevant to the proposed amendments described below in the Informative Digest. The Director requests, but does not require, that any persons who make oral comments at the hearing also provide a written copy of their comments. Equal weight will be accorded to oral comments and written materials.

Please note that public comment will begin promptly at 10:00 a.m. and will conclude when the last speaker has finished his or her presentation or at 5:00 p.m., whichever is earlier. If public comment concludes before the noon recess, no afternoon session will be held.

WRITTEN COMMENT PERIOD

Any interested person, or his or her authorized representative, may submit written comments relevant to the Proposed Rulemaking by mail or personal delivery to Greg Santiago, 1515 Clay

Street, Suite 1901, Oakland, CA 94612 or Denise Cardoso at the same address. Written comments also may be sent to Greg Santiago or Denise Cardoso via (1) e-mail to RepeatRulemakingComments@dir.ca.gov or (2) facsimile to (510) 286-7039. To be considered, written comments must be received no later than **5:00 p.m., Friday, October 2, 2015.**

AUTHORITY AND REFERENCE

Labor Code section 54 authorizes the Director to perform all duties, exercise all powers and jurisdiction, assume and discharge all responsibilities, and carry out and effect all purposes vested by law in the Department of Industrial Relations (hereinafter “Department”), except as otherwise expressly provided by the Labor Code. Labor Code section 55 authorizes the Director, in accordance with the provisions of Chapter 4.5 (commencing with Section 11371), Part 1, Division 3, Title 2 of the Government Code, to make rules and regulations that are reasonably necessary to carry out the provisions of the statute governing Director’s and Department’s general powers and duties, and to effectuate its purposes. Labor Code section 59 requires the Department, through its officers, to administer and enforce all laws imposing any duty, power, or function upon the offices or officers of the Department. Labor Code section 6319(c) requires the Director to adopt regulations covering the assessment of civil penalties under the Occupational Safety and Health Act, giving due consideration to the appropriateness of the penalty with respect to specified factors, including the history of previous violations. The proposals implements, interprets and makes specific Labor Code section 6317 which authorizes the issuance of a civil penalty against an employer after the Division of Occupational Safety and Health (hereinafter “Division”) has determined upon inspection or investigation, that an employer has violated Section 25910 of the Health and Safety Code or any promulgated occupational safety and health standard, rule, order, or regulation. The proposals also implements, interprets and makes specific Labor Code section 6429 which authorizes the issuance of a civil penalty up to \$70,000 for any employer that willfully or repeatedly violates an occupational safety or health order.

INFORMATIVE DIGEST / POLICY STATEMENT OVERVIEW

Overview.

The proposed amendments makes California’s “Repeat” violation classification more consistent with Federal enforcement standards by eliminating the current geographic restrictions for issuing a “Repeat” citation, and recalculating the starting time for calculating the look back period for a “Repeat” violation.

The Division within the Department administers the California Occupational Safety and Health program pursuant to an agreement between the State of California and the Federal Occupational Safety and Health Administration (hereinafter “Fed/OSHA”). Under this agreement, California must demonstrate that its enforcement and occupational safety and health program is “at least as effective as” its Federal counterpart. In its 2013 Federal Annual Monitoring and Evaluation

(FAME) Report of California's State Plan, Fed/OSHA indicated that the Division's enforcement program's rate of "Repeat" violations was significantly lower than the Federal average because California did not consider employers' inspection history throughout the state. The Director has initiated this rulemaking to ensure that California's "Repeat" violation enforcement standard remains as effective as Fed/OSHA's which considers employers' enforcement history statewide when citing Repeat violations. The Director seeks to achieve this result by amending California's general "Repeat" violation definition to be more consistent with Fed/OSHA's definition.

Under the current Federal program, a "Repeat" violation exists when an employer in a Federal enforcement state previously has been cited, and the citation has become a final order of the U.S. Occupational Safety and Health Review Commission, for the same or similar violation of a standard at any facility in any Federal enforcement state within the last five years. In contrast, under California's current standard, a "Repeat" citation only can be issued if the following requirements are met: (1) the Division has previously cited the employer for a violation of a given standard; (2) the employer has abated the cited violation; (3) the employer violates the same standard within three years of the conduct of the earlier violation; and (4) with the exception of field sanitation, both violations occurred at the same establishment or within the same geographic region (collectively, "geographic restrictions"), depending on whether or not the employer has fixed locations.

The proposed amendments would make the Division's "Repeat" violation enforcement standard more consistent with the operative Federal standard by eliminating the geographic restrictions and recalculating when the "Repeat" violation look back period begins.

Anticipated Benefits of the Proposed Regulation.

The broad objective of the proposed amendments is to ensure that California's "Repeat" violation enforcement standard remains as effective as the Federal program. To that end, the proposed amendments change California's Repeat penalty classification (California Code of Regulations, title 8, section 334, subdivision (d)) to be more similar to that of the Federal program. This will result in greater consistency between both programs, and ensure future funding and State Plan approval when such changes become mandated by Fed/OSHA. Other benefits of the proposals include a statewide increase in workplace safety and health compliance. In particular, the broader liability imposed by the proposed amendments will motivate employers to ensure that abated violations stay abated and not recommitted. The elimination of geographical restrictions also will increase worker safety by requiring an employer with multiple sites to abate a workplace safety hazard statewide as opposed to in the specific establishment or region where the hazard occurred.

Determination of Inconsistency/Incompatibility with Existing State Regulations.

The Director has determined that the proposed amendments are not inconsistent or incompatible with existing regulations. After conducting a review for any regulations that would relate to or affect this area, the Director concluded that this is the only regulation that concerns the classification of occupational safety and health "Repeat" violations.

Proposed Amendments to Existing Regulation (Title 8, Section 334).

The purpose for the proposed amendments is to modify the text of section 334 of title 8 of the California Code of Regulations (“8 CCR”) to change how the “Repeat” look back period is calculated and remove the existing geographical restrictions.

Non-substantive Changes: The proposed amendments delete subsection heading “(1) General” and delete subsection “(2) Field Sanitation Violations” in its entirety to account for the elimination of the differences between field sanitation and other types of violations, rendering the latter item obsolete under the proposed amendments. The proposed amendments also replace the terms “corrected” and “correction” with the terms “abated” and “abatement.” 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, e.g., 8 CCR §§ 332.1, 332.4, 333, & 336.) starting time for calculating the look back period for a “Repeat” violation.

Substantive Changes: The proposed amendments also change the starting time for calculating the “Repeat” look back period. Under California’s current enforcement standard, for an occupational safety and health violation to be considered a “Repeat” violation, the conduct giving rise to the earlier violation must have occurred within the three years immediately preceding the conduct resulting in the later violation. The proposed amendments would change this calculation so that the look back period would begin to run from the latest of the following dates: (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 became final by operation of law; or (3) the date of final abatement of the violation cited in the underlying citation.

The proposed amendments further remove the existing establishment site and geographic region restrictions. With the exception of field sanitation violations, for an occupational safety and health violation be considered a “Repeat violation under California’s existing enforcement standards, the violation must be based on a prior violation cited either (1) at the same work site or address for businesses with fixed establishments such as factories and stores; or (2) within the same Region of the Division for businesses such as construction and excavation which have no fixed establishments. The proposed elimination of the geographic restrictions would subject employers with multiple work sites in California to repeat penalties based on previous citations issued, regardless of the location or region of the original citation. This change will make the Division’s “Repeat” violation standard consistent with Fed/OSHA’s “Repeat” violation standard which considers employer’s enforcement history across all of the employer’s locations within Fed/OSHA jurisdictions when determining “Repeat” violations.

DISCLOSURE REGARDING THE PROPOSED RULEMAKING

The Director has made the following initial determinations.

Mandate on local agencies and school districts: None. The proposed amendments do not impose a mandate on local agencies or school districts. The Director has determined that the proposed amendments do not impose a mandate requiring reimbursement by the State pursuant to Part 7 (commencing with section 17500) of Division 4 of the Government Code because the proposed amendments do not constitute a “new program or higher level of service of an existing program within the meaning of section 6 of Article XIII B of the California Constitution.” The California Supreme Court has established that a “program” within the meaning of section 6 of Article XIII of the California Constitution is one which carries out the governmental function of providing services to the public, or which, to implement a state policy, imposes unique requirements on local governments and does not apply generally to all residents and entities in the state. The proposed amendments do not require any local agency to carry out the governmental function of providing services to the public.

Cost or savings to any state agency: State agencies that repeatedly violate an occupational safety and health standard within three years of an initial violation could be subject to additional civil penalties as a result of the proposed amendments. Such penalties are reimbursable to the California State University and University of California, pursuant to Labor Code section 6434, and to the California Department of Forestry and Fire Protection, pursuant to Labor Code section 6434.5. The Director has determined that the Division will incur costs in litigating appeals of some additional repeat citations. In 2013, “Repeat” citations were appealed at a rate of 52%. If the proposed amendments result in the issuance of approximately 180 additional repeat citations as projected, then based on 2013’s 52% appeal rate, the Director anticipates the proposed amendments will result in an additional 94 employer appeals annually, requiring the expenditure of state resources related to litigation costs. The Director further anticipates that such costs ultimately will be offset by the recalculation of the repeat look back period start time, which will likely result in a decrease in the overall number of appeals going forward.

Cost to any local agency or school district which must be reimbursed in accordance with Government Code sections 17500 through 17630 and Nondiscretionary Costs/Savings to Local Agencies: The proposed amendment contains no costs to a local agency or school district that are reimbursable pursuant to Government Code sections 17500 through 176300. Under the proposed amendments, local agencies and school districts that repeatedly violate an occupational safety and health standard within three years of an initial violation would be subject to nondiscretionary costs associated with additional civil penalties. Although not reimbursable under Government Code sections 17500 through 17630, such civil penalties may be reimbursable pursuant to Labor

Code section 6434 or 6434.5 for certain qualifying local government agencies and school districts. There are no nondiscretionary savings to local agencies or school districts.

Labor Code section 6434 provides that any occupational safety and health civil or administrative penalty levied against a school district, county board of education, county superintendent of schools, charter school, community college district, California State University, University of California, joint powers agency performing education functions is deposited into the Workplace Health and Safety Revolving Fund. Any school district, county board of education, county superintendent of schools, charter school, community college district, California State University, University of California, or joint powers agency performing education functions may apply for a refund of their civil penalty, with interest, if all conditions previously cited have been abated, any other outstanding citations have been abated, and if there have been no serious violation issued to the same entity within two years of the date of the original violation.

Labor Code section 6434.5 provides that an occupational safety and health civil or administrative penalty levied against a public police or city, county, or special district fire department or the California Department of Forestry and Fire Protection is deposited into the Workers' Compensation Administration Revolving Fund. Any public police or city, county, or special district fire department or the California Department of Forestry and Fire Protection may apply for a refund of any occupational safety and health civil or administrative penalty assessed, with interest, if all conditions previously cited have been abated, the agency has abated any other outstanding citation, and the agency has not been cited by the Division for a serious violation within two years of the date of the original violation.

The exact number of "Repeat" citations that will be issued to any such school district or governmental agency (hereinafter, collectively, referred to as "governmental entities") under the proposed amendments is unknown. However, based on a comparison of 2008 and 2013 Repeat citation data, the Director estimates that the proposed amendments will result in an increase of six "Repeat" citations annually to governmental entities that may be eligible for reimbursement under Labor Code sections 6434 or 6434.5. An analysis of 2008 and 2013 Repeat citation data revealed that only one governmental entity was eligible for reimbursement under the aforementioned Labor Code sections. It is unknown whether or not such entity applied for or received reimbursement.

An exact dollar amount of reimbursable costs to governmental entities also is unknown. The maximum "Repeat" penalty is statutorily set at \$70,000. From 2009 to 2013, the governmental entities eligible for reimbursement under Labor Code sections 6434 and 6434.5 collectively were required to pay civil penalties ranging from \$160,000 to \$237,000 annually. Such range accounts for the total penalties paid regardless of classification (e.g., "Regulatory," "General," "Serious," "Willful," or "Repeat."). An increase of six repeat citations with appurtenant civil penalties set at

the statutory maximum of \$70,000 each would result in an annual increase ranging from \$580,000 to \$727,000. It is unlikely, however, that the additional six “Repeat” citations would each result in a civil penalty totaling \$70,000. Such costs also are reimbursable if the qualifying governmental entity abates the occupational safety and health hazard and applies for a reimbursement pursuant to the aforementioned code sections.

Cost or savings in Federal funding to the state: None.

Cost impacts on representative private persons or business: The Director anticipates that the proposed amendments will increase the number of “Repeat” citations issued annually by 150 to 180 citations. However, the Director is unaware of any cost impacts that a representative private person or business operating in compliance with title 8 would necessarily incur in complying with the proposed amendments.

Business Impact: The Director has determined that the proposed amendment will not have a significant statewide adverse economic impact directly affecting businesses, including the ability of California businesses to compete with businesses in other states. The proposals do not impose any new or additional requirement on California businesses. The effects of the proposals will be limited to businesses that repeatedly violate an occupational safety and health standard, order, or special order, or section 25910 of the Health and Safety Code within a three year period. The Director anticipates that between 150 and 180 businesses will be affected by the proposals annually. Such businesses will be subject to the penalties provided under section 336 of the title 8 regulations.¹ The Director does not anticipate that the proposals or any resulting penalties will result in the creation or elimination of any jobs, businesses, investments or innovations. The proposed amendments are neutral in their treatment of California businesses as compared to businesses from other states.

Results of the economic impact assessment/analysis

Creation, Elimination, or Expansion of Jobs or Businesses: The Director has made initial determinations that (1) these proposals will not affect the creation or elimination of jobs within the State of California; (2) these proposals will not affect the creation of new businesses or the elimination of existing businesses within the State of California; and (3) these proposals will not affect the expansion of businesses currently doing business within the State of California.

Reporting Requirements (Finding under Government Code section 11346.3(c)): None.

Benefits of the proposed amendments: The proposed amendments will ensure that the Division’s “Repeat” violation standard remains as effective as the Federal program. Such increase is

¹ Cal Code Regs., tit. 8, section 336 subdiv. (d)(1) & (12), (e)(1)& (g).

necessary to guarantee the continued receipt of Federal funding for and approval of California Occupational Safety and Health program. The proposals will benefit California employees by creating an effective deterrent against employers who repeatedly violate occupational safety or health regulations within a three year period.

Known Cost Impacts on Representative Private Person or Business: The proposed amendments seeks to ensure that the Division's "Repeat" enforcement program remains consistent with the broad liability established under the Federal program. There are no direct costs associated with the proposals; however, the additional businesses cited as a result of the proposals will be subject to the corresponding appurtenant civil penalties. The Director concludes that any adverse economic impact, including the ability of California businesses to compete with businesses in other states, will not be significant. The Director is not aware of any cost impact that a representative private person or business not cited would necessarily incur in reasonable compliance with the proposed action.

Effect on small business: The Director anticipates that small businesses will be impacted by the proposed amendments' removal of the existing geographical restrictions and change to how the "Repeat" look back period is calculated. However, only small businesses with multiple worksites may experience an increase in the issuance of "Repeat" citation due to the elimination of geographic restrictions under the proposed amendments. The proposals' change in how the look back period is calculated is not expected to significantly impact the number of "Repeat" citations issued to small businesses compared to the existing calculation. The proposals do not impose any significant economic effect independent of the penalties appurtenant to the regulation. The proposed amendments are neutral in their treatment of small businesses as compared to larger businesses in the state. The attendant penalties for businesses with fewer employees are lower than those with a greater number of employees.

Effect on housing cost: None.

CONSIDERATION OF ALTERNATIVES

In accordance with Government Code section 11346.5, subdivision (a)(13), the Director must determine that no reasonable alternative she considered or that otherwise have been identified and brought to her attention would be more effective in carrying out the purpose for which the action is proposed, or would be as effective as the proposed action and less burdensome to affected private persons than the proposed action, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

The Director invites interested persons to present statements or arguments with respect to alternatives to the proposed amendments at the scheduled hearing or during the written comment period.

CONTACT PERSONS

Non-substantive inquiries concerning this action, such as requests for copies of the text of the proposed amendments, and the location of public records, may be directed to Mary Ann David at (510) 286-7348 or mdavid@dir.ca.gov. Inquiries regarding the substance of the proposed amendments may be directed to Greg Santiago or Denise Cardoso (back-up contact) at (510) 286-7348 or RepeatRulemakingComments@dir.ca.gov.

AVAILABILITY OF STATEMENT OF REASONS AND TEXT OF PROPOSED REGULATION / INTERNET ACCESS

An Initial Statement of Reasons, the text of the proposal, and other information upon which the rulemaking is based, have been prepared and are available from the contact person named in this Notice. The Director will have the entire rulemaking file available for inspection and copying throughout the rulemaking process at 1515 Clay Street, Suite 1901, Oakland, CA 94612. The Initial Statement of Reasons, this Notice of Proposed Rulemaking, and text of the Proposed Regulation also may be accessed through the agency's Internet website at www.dir.ca.gov/dosh/rulemaking/dosh_rulemaking_proposed.html.

AVAILABILITY OF CHANGED OR MODIFIED TEXT

After holding the hearing and considering all timely and relevant comments received, the Director may adopt the proposals substantially as described in this Notice. If the Director makes modifications which are sufficiently related to the originally proposed text, she will make the modified text (with the changes clearly indicated) available to the public for at least 15 days before she adopts the amendments as revised. Any such modifications also will be posted on the Director's website.

Please send requests for copies of any modified amendments to the attention of Mary Ann David at the above telephone number or e-mail address. The Director will accept written comments on the modified regulations for 15 days after the date on which they are made available.

AVAILABILITY OF THE FINAL STATEMENT OF REASONS

Upon its completion, copies of the Final Statement of Reasons may be obtained by contacting Mary Ann David at the above telephone number or e-mail address.