

# No Time Limit on Look Back Period for Repeat Citations

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June 29, 2018 Matthew Deffebach, Mini Kapoor

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PRACTICES OSHA, Labor and Employment

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In *Triumph Constr. Corp. v. Sec’y of Labor*, the Second Circuit Court of Appeals upheld a look back period for a repeat violation beyond the Commission’s “general” policy of three years to determine a repeat violation.<sup>1</sup>

In *Triumph*, an employee was injured in a cave-in at an excavation site. On February 13, 2015, Triumph was cited for violation of an OSHA excavation standard. The citation was classified as a repeat violation based on two previous citations, one in 2009 and another in 2011, issued for violation of the same standard. Triumph challenged the repeat classification of the citation on the basis that the Commission improperly looked beyond the three-year look back period allowed under its policy.

Specifically, Triumph contended that the OSHA Field Operations Manual in effect at the time of the citation dictated a three-year look back period for assessing repeat violations:

Although there are no statutory limitations on the length of time that a prior citation was issued as a basis for a repeated violation, the following policy shall generally be followed.

A citation will be issued as a repeated violation if ... [t]he citation is issued within 3 years of the final order date of the previous citation or within 3 years of the final abatement date, whichever is later.

The Court disagreed and held that the Manual did not limit the Commission to a three-year look back period. The Court found that the Manual explicitly noted that there were “no statutory limitations on the length of time that a prior citation was issued as a basis for a repeated violation” and that the policy was described as one that “shall *generally* be followed.” The Court further noted that the Manual was only a guide for OSHA personnel to promote efficiency and uniformity, and was not binding on OSHA or the Commission, and did not create any substantive rights for employers. Thus, the Court affirmed the repeat citation of the standard.

What could employers takeaway from *Triumph*?

Because under *Triumph*, a serious violation may lead to a repeat citation potentially anytime in the future, it would be prudent for employers to consider the risks associated with simply accepting a serious citation. This is particularly true for employers in the Second Circuit (New York, Vermont, Connecticut), but would also be prudent if OSHA successfully advances this interpretation in other federal OSHA states. While accepting a citation and paying a penalty may appear insignificant at the time, before doing so the employers should consider the potential consequences. Accepting a citation opens the door to receiving a repeat citation and the enhanced penalties associated with repeat classification. Employers should also consider the potential for future citations to be categorized as “willful.” In addition, employers should consider potential bad press that could result from repeat and/or willful citation and its impact on business relationships with the government and private parties.

*Triumph* is also a reminder that OSHA policies should be viewed by employers as general guidance only. The Court's view that the Commission was not limited by its general policies indicates that employers could be cited despite following this general guidance. Thus, mere conformance with OSHA policies with respect to any potential hazard is not a substitute for detailed analysis of the hazard under the specific circumstances.

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<sup>1</sup> 885 F.3d 95 (2nd Cir. 2018).