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## Retail

### Chain Stores Uniquely Exposed to Citations For Repeat Violations, With Six-Figure Fines

It was the day before Christmas in 2013 when an OSHA inspector arrived at a Dollar Tree store in the Boston suburbs.

Amid what is typically a store's busiest shopping week of the year, the Occupational Safety and Health Administration inspector began walking through the store. According to OSHA records, the inspector found merchandise encroaching onto exit routes and boxes stacked haphazardly. Trash was piled in a storage area and access to a 600-volt electrical box in the store's receiving area was blocked.

Before leaving, the inspector notified the store's management about the problems, an OSHA account of the inspection said. On follow-up visits, the inspector found the problems hadn't been corrected, showing what OSHA called the management's "unacceptable disregard for employee health and safety."

**Six-Figure Fines.** Six months after the first visit, OSHA proposed a \$177,800 fine against the Dollar Tree store for three willful violations and one serious violation (44 OSHR 644, 7/10/14).

Six-figure fines for blocked exits, badly stacked boxes of merchandise and obstructed storage room aisles have become common under the current OSHA administration. As of August, four chain store retailers together faced more than \$1 million in proposed federal fines and had paid OSHA about \$650,000 in penalties during the past five years:

- CVS Health Corp.: current proposed fines total \$217,980; paid fines total \$145,000,
- Dollar Tree Stores Inc.: current proposed fines total \$537,000; paid fines total \$233,280,
- Forever 21 Inc.: current proposed fines total 171,250; paid fines total \$116,025 and
- Rite Aid Corp.: current proposed fines total \$95,100; paid fines total \$148,000.

**'Flexibility With Discretion.'** The high fines and repeat violations have "captured the attention of our members," Lisa LaBruno, senior vice president of retail operations for the Retail Leaders Industry Association, told Bloomberg BNA.

For the association, LaBruno said, an issue is whether the repeat citations and high fines are warranted.

"I think it all has to come down to fairness," she explained.

Bruno, an attorney who previously worked for Home Depot and as an assistant country prosecutor, said she hopes OSHA uses "appropriate flexibility with discretion" during the inspection and review process.

While using repeat violations may be an effective tool in some cases, LaBruno said, OSHA should also consider that, overall, stores are safe for workers and customers.

"Clearly, they are doing something right," she said.

**'Part of Our Toolbox.'** Often high penalties for retailers result from OSHA citing stores as repeat violators, even though the violation hadn't been previously found at the store.

Under OSHA's current repeat violator policy, in place since 2010, a serious violation that is substantially similar to a violation cited at another store with the same ownership within the past five years can be cited as a repeat violation (40 OSHR 357, 4/29/10).

The fine for a serious violation is capped at \$7,000, and the upgrade to repeat violation means OSHA can propose a fine as high as \$70,000.

Tom Galassi, director of OSHA's Directorate of Enforcement Programs, defended the practice of citing the chains for repeat violations.

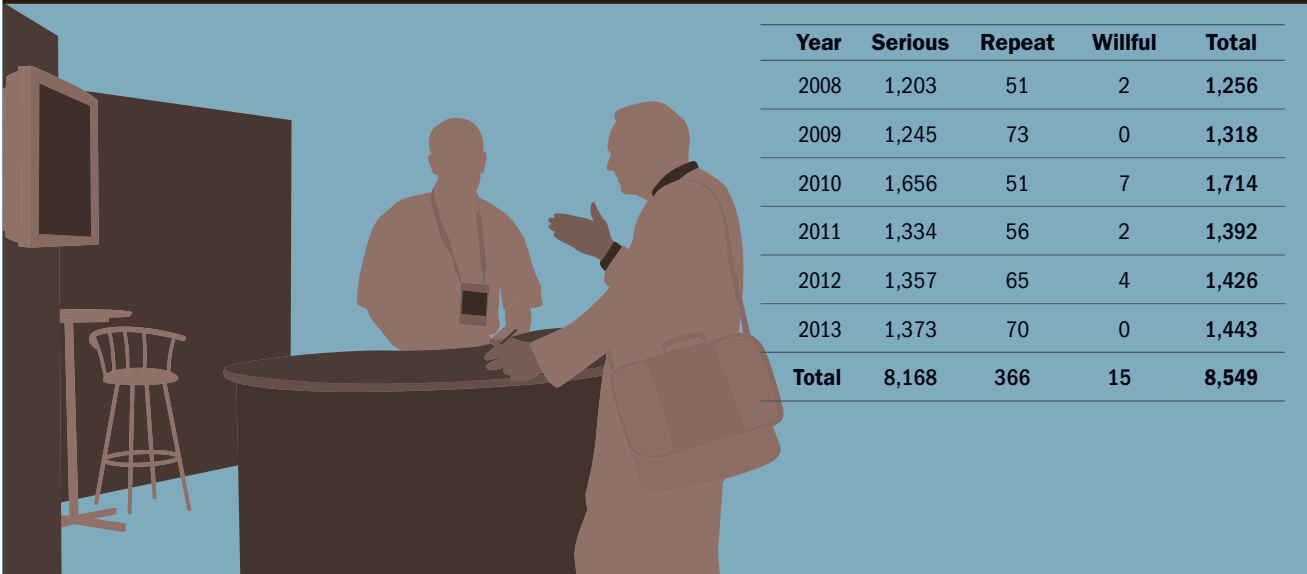
"Number one, our statute calls for it," Galassi told Bloomberg BNA. "It basically says where there is a substantially similar type of violation or condition occurring, OSHA can assess a repeat classification. It's part of our toolbox, so to speak."

**Repeat Violation Expansion.** The growing focus of inspections on repeat violations can be seen across all industries, agency enforcement records show. Since Fiscal 2008, the last full year of the Bush administration's OSHA, the annual number of repeat federal violations expanded from 2,762 in 2008 to 3,139 in 2013, representing a 14 percent increase. In 2013, repeat violations accounted for 4.0 percent of federal violations, while in 2008 they were 3.2 percent of violations.

For retail inspections, OSHA issued 51 repeat violations in 2008 followed by 73 repeat violations in 2009, the first year of the Obama administration. After falling to 51 repeat violations in 2010, the annual count has increased every year, reaching 70 repeat violations during 2013.

Across all types of stores during 2013, federal OSHA and state programs conducted 3,600 inspections, 4 percent of the year's total inspections, OSHA enforcement records show.

## Retail Violations 2008–2013



Source: OSHA

A BNA Graphic/oshr07g4

**‘Frustrating.’** Attorneys representing retailers in appeals of OSHA citations told Bloomberg BNA they question how OSHA applies its definition of “repeat” and whether the citations protect workers from the predominant safety and health hazard of retail work—musculoskeletal injuries such as strains from lifting.

While two stores in different regions share the same ownership, the stores may have different layouts, sales volumes, employee turnover and staff demographics, said Matthew Deffebach, chair of the labor and employment practice group at Haynes & Boone LLP in Houston.

“Many aspects do not get considered in repeat citations,” Deffebach said. “The application of repeat citations is frustrating.”

Howard Sokol of Holland & Knight LLP’s New York office summed up his objection to OSHA’s use of repeat violations to cite chain stores by asking, “How would someone in Brooklyn know what had happened in Springfield, Pa., five years earlier?”

Jim Stanley, president of the safety consulting company FDRsafety LLC and former OSHA career service deputy assistant secretary, said the complication for chain store companies is ensuring corporate safety policies are followed by each employee at every location.

“The real challenge is in situations you can’t control at a corporate level,” Stanley told Bloomberg BNA.

At the store level, employees should look for hazards and correct them based on the risk, Stanley said. Employees shouldn’t get caught up in looking for what they think are OSHA violations.

When an OSHA inspector does arrive at a store, the manager should call his bosses.

“The bells should be ringing companywide,” Stanley said.

Stanley also questioned how OSHA applies repeat violations to chain stores. For example, one company with hundreds of locations was required by OSHA to have equipment training programs for each store even though the stores were essentially identical, Stanley

said. Yet, if OSHA inspects one of the stores, the possibility of a repeat violation puts every store at risk.

**More Expensive, More Quickly.** The possibility of being cited for a repeat violation years later has prompted some employers to challenge serious violations that carried small fines in order to avoid being hit later with repeat violations, said James L. Curtis of Seyfarth Shaw LLP.

Employers used to look at the short-term cost benefit of contesting a citation, Curtis said. Now employers need to consider the nationwide impact of a citation in case a later repeat violation is cited.

“It becomes much more expensive, much more quickly,” Curtis said about OSHA escalating serious violations to repeat and willful violations.

Defending a store against OSHA citations begins with knowing OSHA’s rules and complying with them, the attorneys said. A store manager who can show there was a written safety and health plan in place and that employees were trained has a strong case for dismissal or reduction of citations.

Deffebach gave the example of a store where a worker had left boxes in an aisle, in violation of store policy, and yet the store was still cited.

“Often [the violation] is the result of someone doing something they were told not to do,” Deffebach said. Managers need to document the disciplinary process to show that workers who left packages in aisles were punished.

**Ownership Issues.** Sometimes there is an issue of whether a store cited for a repeat violation shares the same ownership as the store originally cited, Curtis said.

For example, the owner of a franchise store can’t be cited for a repeat violation resulting from an earlier violation at another store owned by someone else, Curtis said. And the franchising company isn’t cited because it doesn’t own the stores. The Occupational Safety and Health Act allows OSHA only to cite the employer, not a joint employer, Curtis said.

In two recent cases, the National Labor Relations Board's general counsel and a federal district judge ruled that legal actions seeking to hold fast-food franchisors liable for the conduct of franchise owners could continue (44 OSHR 900, 9/25/14).

So far, OSHA hasn't issued violations making similar connections.

"Would they be successful? I'd like to think no," Curtis said.

**Inspections for the Holidays.** Another attorney criticized OSHA's practice of inspecting stores during busy shopping times.

Directives for 2013 retail emphasis programs in central Pennsylvania and Delaware called for inspectors to visit department stores during the summer and back-to-school shopping seasons and while stores were preparing for holiday sales (43 OSHR 630, 6/27/13).

The Pennsylvania directive said, "The intent is to conduct the inspections at peak sales seasons when stockrooms are potentially stacked beyond capacity."

Galassi defended the policy of inspecting stores during peak shopping times.

"Employers need to protect the workers for all circumstances reasonably foreseeable," the enforcement

director said. "You can't say, 'I'm just going to protect them during the slow times.'"

FDRsafety's Stanley said that if store officials believe they can't handle an inspection during an especially hectic day, they can delay the inspection by insisting OSHA obtain a warrant from a federal judge to enter the store.

**No Warning Tickets.** Critics of the OSHA directive suggest the agency could allow stores to correct easily abated hazards, such as boxes blocking an aisle, rather than citing the stores.

A citation sends the employer a clear message on what was wrong, what needs to be done to fix the problem and when the corrections need to be made, Galassi countered.

"If you just go in and give them a little warning ticket, they'll say, 'Oh, yeah, I'll get that next time,'" Galassi said.

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