



# AN INTRODUCTION TO USL&H COVERAGE

## FEDERAL AND ADMIRALTY LAWS

- WHO IS COVERED?
- WHEN AND WHERE DO THEY APPLY?

# LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT

Although most states had adopted workers' compensation laws by 1920 to cover injuries to workers, efforts to apply these laws to maritime employment were held unconstitutional – an improper invasion by state governments into the federal government's interest in maritime matters. The Jones Act of 1920 extended the provisions of the Federal Employer's Liability Act of 1908 to seamen of U.S. flag vessels.

Thereafter, Congress enacted the Longshore and Harbor Workers' Compensation Act in 1927 (the "USL&H Act" or "LHWCA") to provide a workers' compensation system for maritime employees (other than seamen) who work on the navigable waters of the United States.

## WHERE DOES THE USL&H ACT APPLY?

For a claim to be within the jurisdiction of the USL&H Act, the accident must have occurred on or adjacent to navigable waters of the United States. This is often referred to as meeting the "situs test."

1. "Navigable waters" are those which are (i) either subject to the ebb and flow of the tide, or (ii) currently used, previously used, or have the potential to be used, to transport interstate commerce or foreign commerce. Generally, these are oceans and bays, plus certain lakes and rivers.
2. "Adjacent to the water" means on any pier, wharf, dry dock, terminal, building way, marine railway, or any adjoining other area customarily used in the loading, unloading, building, repairing, or dismantling of a vessel.
3. No distinct boundary exists determining where state act coverage ends and longshore coverage begins. Rather, the employee's job duties determine the appropriate jurisdiction.

## WHO IS SUBJECT TO THE USL&H ACT?

Employers who have employees engaged in full or part-time maritime employment are subject to the USL&H Act. The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in long-shoring operations, and any harbor worker including a ship repairman, shipbuilder, and ship-breaker. Generally, the following types of employees are excluded if they are covered by a state workers' compensation law:

1. Individuals employed exclusively to perform office clerical, secretarial, security, or data processing work;
2. Individuals employed by a club, camp, recreational operation, restaurant, museum, or retail outlet;
3. Individuals employed by a marina and who are not engaged in construction, replacement, or expansion of such marina (except

for routine maintenance);

4. Individuals who (i) are employed by suppliers, transporters, or vendors, (ii) are temporarily doing business on the premises of a maritime employer, and (iii) are not engaged in work normally performed by employees of that employer under the Act;
5. Aquaculture workers;
6. Individuals employed to:
  - build any recreational vessel under sixty-five feet in length;
  - repair any recreational vessel under sixty-five feet in length; or
  - dismantle any part of a recreational vessel under sixty-five feet in length in connection with the repair of such vessel;
7. A master or member of a crew of any vessel; or
8. Any person engaged by a master to load or unload or repair any small vessel under eighteen tons net.

More information is available at the Department of Labor website at [www.dol.gov](http://www.dol.gov).

## POSSIBLE MARITIME EMPLOYMENTS

The USL&H Act provides workers' compensation coverage to land-based maritime employees, while the Jones Act provides tort remedies to sea-based maritime workers. There are many additional situations involving possible coverage under the USL&H Act. Some of the more frequent are:

**Casual visitors on vessels:** Casual business visitors are generally subject to state workers' compensation laws. Other visitors, employed by a maritime employer, who make frequent trips to vessels or maritime sites to transact business may be covered by the USL&H Act. These include:

- Representatives of longshoremen's union;
- Employees of customhouse brokers;
- Insurance adjusters;
- Cargo handlers; and
- Steamship company employees.

**Dredging operations:** Historically, injuries to persons employed in dredging operations have been compensable under the USL&H Act when such operations are carried out in navigable waters. However, under certain circumstances, injured workers may be able to pursue Jones Act remedies when dredging is conducted from a vessel in navigation.

**Maritime construction:** Injuries to persons employed in marine construction are generally compensable under the USL&H Act when such construction is conducted upon, or adjacent to, navigable waters. This includes the construction of piers, bulkheads, breakwaters, and other structures over water. However, Jones Act remedies may be available for injuries sustained while working from a vessel, work platform, barge or dredge.

## COVERAGE AND RATES

The standard workers' compensation policy specifically excludes all federal coverages. Special endorsements must be attached to the policy to provide coverage under the USL&H Act and other federal workers' compensation acts. Most states establish separate premium rates for insurance under the USL&H Act.

## BENEFITS

Benefits under the USL&H Act may be more liberal than those of many states. USL&H Act benefits include:

- Maximum weekly disability and death benefits equal to two-thirds of the worker's average weekly wage, subject to a maximum of 200 percent of the national average weekly wage
- Loss of wage-earning capacity of the injured worker with certain non-scheduled permanent partial disabilities
- Elimination of the three-day waiting period if disability exceeds 14 days
- A weekly allowance payment to those undergoing approved rehabilitation programs
- Benefits are paid to those who are totally and permanently disabled, to a surviving spouse until death or remarriage, and to other eligible survivors who can prove dependency, subject to certain limits
- Attorneys' fees for claimants who successfully challenge a denial of benefits

## NOTICE OF COMPLIANCE

The employer must post a notice at the place of business showing that they have complied with the provisions of the USL&H Act by purchasing insurance (Form LS-241) or by qualifying as a self-insurer (Form LS-242). Form LS-241 is provided to an employer when its insurance carrier issues the policy. The US Department of Labor, Office of Workers' Compensation Programs provides Form LS-242 to an employer only when the employer is approved as a self-insurer.

## EXCLUSIVE REMEDY

Like state workers' compensation schemes, the USL&H Act is the "exclusive remedy" for an injured employee, meaning that the employee cannot sue his or her employer for injuries sustained in the course of employment. However, in certain circumstances, an injured worker can seek to recover damages due to negligence where the employer is also the vessel owner. This is commonly referred to as "dual capacity" since the employer is sued not for its role as an employer, but for its separate role as vessel owner. Dual capacity does not apply in the case of shipyard workers, who are barred from seeking such recovery from their employer in its role as vessel owner.

## CLAIMS REPORTING

An employee has thirty days to submit a Notice of Employee's Injury or Death (Form LS 201) to his or her employer. When an employee reports an accident or injury, or when an employer becomes aware of an accident or injury, the employer has ten (10) days to file two copies of the Employer's First Report of Injury or Occupational Illness (Form LS 202) with the U.S. Department of Labor, Office of Workers' Compensation Programs (OWCP). Failure to file a timely report can result in extending the statute of limitation and fines of up to \$11,000.

Once the insurer assumes the responsibility under the employer's USL&H, all subsequent actions are taken by the carrier. The first temporary disability payment is due on the 14th day after the employer has knowledge of the injury.

## REHABILITATION

Major rehabilitation provisions of the USL&H Act include:

- Requiring insurers to report to the OWCP all cases where rehabilitation is recommended or has commenced
- Suggesting that cases be referred to the OWCP rehabilitation specialist when rehabilitation is recommended by the treating physician, the employee requests it, or the employer/insurer believes it will assist in restoring the employee to meaningful employment
- Providing payment from the Special Fund of the U.S. Department of Labor for the cost of rehabilitation services under a recommended rehabilitation program when handled by the OWCP rehabilitation specialist
- Recommending that the employer/insurer continue to pay disability benefits during the duration of rehabilitation services

## Other Federal Compensation Acts

**Over the years, Congress has extended the applicability of the USL&H Act beyond its original scope:**

### THE DEFENSE BASE ACT

This act extends the USL&H Act to employees of U.S. contractors that have contracts with the United States government to perform services outside the continental United States. All workers enjoy coverage from the moment they sign an employment contract with the employer in the United States until their return and termination of their contract. Coverage is provided virtually 24 hours a day while they are stationed overseas; however, those injured in the United States may be covered as well. The Defense Base Act endorsement attached to the policy provides proper coverage.

### OUTER CONTINENTAL SHELF LANDS ACT

This act extends the protection afforded under the USL&H Act to employees injured as a result of “any operations conducted on the outer Continental Shelf for the purpose of exploring for, developing, removing, or transporting by pipeline the natural resources or involving rights to the natural resources of the subsoil and embed of the outer Continental Shelf[.]” 43 U.S.C.A. Section 1333(b).

The outer Continental Shelf is generally understood to mean submerged lands beginning approximately three miles off the shore.

For example, employees who are injured on fixed oil platforms on the outer Continental Shelf are covered under the USL&H Act. However, workers on floating oil rigs maybe covered under the Jones Act.

The Outer Continental Shelf Lands Act endorsement attached to the policy provides the appropriate coverage.

### NON-APPROPRIATED FUND INSTRUMENTALITIES ACT

This act extends the provisions of the USL&H Act to employees of “non-appropriated fund” instrumentalities of the armed forces – that is, civilian employees of the Army and Air Force post exchanges, motion picture services, Navy ship stores ashore, and Navy or Coast Guard exchanges.

The Non-Appropriated Fund Instrumentalities Act endorsement, when attached to a policy, provides coverage for this exposure.

# GENERAL MARITIME LAW AND OTHER FEDERAL LEGISLATION

Seamen, as opposed to harbor workers and longshoremen, are protected in the event of injury or death by general maritime law and federal legislation. While these laws are complex, a basic understanding of them and their relationship with each other can be helpful.

## WHAT IS A SEAMAN?

Originally, a seaman was anyone engaged in duties connected with navigation of sailing vessels. Today, generally speaking, a seaman is anyone who is employed by or engaged in any capacity on a vessel and who contributes to the mission/operations and welfare of the vessel. For example, the following have been considered seamen: engineers, fishermen, ferryboat hands, pilots, pursers, bartenders (on cruise ships), bakers, cooks, painters.

## SEAMEN'S RIGHTS

Under general maritime law, a seaman receives unearned wages to the end of the voyage or end of the projected assignment to that vessel (for example, if the workers had two weeks left on the hitch) and maintenance and cure to the point of maximum medical improvement, i.e. when curative efforts have been exhausted and the seaman will not improve from additional treatment. The seaman is also entitled to transportation to and from medical appointments. These rights are a basic part of the contract of hire and are not dependent upon a finding of negligence. In addition, a seaman has a right to sue for damages from the owner of a vessel for injuries resulting from the vessel's unseaworthiness.

"Seaworthiness" is normally understood to mean that the ship's hull, appliances, appurtenances, and manning will be reasonably fit for its intended purpose. The standard is not perfection, but reasonable fitness. Unseaworthiness is not limited by the concept of negligence.

In order to receive benefits under general maritime law, all the claimant need only establish that the defendant was the owner or the person in control of the vessel, the claimant was a seaman or had come aboard to perform those services normally rendered by the crew, the vessel was unseaworthy in whole or part, and the proximate cause of the injury was the unseaworthiness of the vessel. Recovery under the concept of unseaworthiness extends not only to injuries but to death.

## JONES ACT (ALSO KNOWN AS THE MERCHANT MARINE ACT)

In addition to general maritime law, another key statute relating to injuries to seamen is the Jones Act.

Liability under the Jones Act is based upon negligence. The Act eliminates many defenses, including assumption of the risk and contributory negligence. However, the seaman's comparative negligence can be raised as a defense.

For the purposes of coverage under the Jones Act, the term "seaman" can differ from the definition that generally would apply under general maritime law. It is always a question of fact and is normally determined by application of the following test:

- Does the worker have a connection to a vessel (or an identifiable group of such vessel(s)) that is substantial in terms of both its duration and its nature?
- Is the vessel in navigation and engaged as an instrument of commerce or capable of transportation on navigable waters? The courts have interpreted this broadly. For instance, the vessel may be considered "in navigation" if moored to a pier, in a repair yard, temporarily attached to some object, or on its anchorage.
- Does the worker's duties contribute to the function of the vessel and assist in the furtherance of the vessel's mission?

If the answer to all three questions is yes, the worker is likely to be found to be a "seaman" for the purpose of the Jones Act. The Jones Act gives seamen a right to trial by jury and incorporates the provisions of the Federal Employer's Liability Act into maritime law.

To be considered in the employ of the vessel, the injured party need not have signed “ship’s articles” (an agreement between the captain and the seaman), as long as she or he is working aboard the vessel. The general maritime law, however, will not protect a mere volunteer assisting the crew in its activities.

While in the general sense the term “vessel” includes all navigable structures intended for or capable of transportation, there is no set legal definition. The meaning of the term is continually being expanded and extended by the courts – and even covers mobile off-shore drilling platforms.

A worker’s status as either a seaman or longshoreman/harbor worker is often the subject of litigation and may present an exposure to the employer that was not anticipated. For example, workers painting from a paint raft or skiff have been deemed to be seamen entitled to recoveries under the Jones Act because the raft or skiff was a “vessel.”

A seaman’s rights under the Jones Act, as well as under maritime law, are conditioned by the contractual agreement of employment for serving aboard a vessel. This means the seaman’s rights continue while on shore, provided the employee is acting within the course of their employment.

### **DEATH ON THE HIGH SEAS ACT**

Prior to passing the Jones Act, Congress enacted the “Death on the High Seas Act.” This act allows the personal representative of any deceased person to recover damages from the vessel when the death is caused by a wrongful act on the high seas – that is, beyond three miles from the shore of any state or territory. Recovery under the Death on the High Seas Act requires proof of negligence or unseaworthiness for liability to attach.

In sum, a seaman is entitled to many remedies – both under general maritime law and federal statutes. The seaman is always entitled to transportation, wages, maintenance and cure, independent of any other remedies.

### **OBTAINING COVERAGE**

Liability coverage for operators, owners, and charterers of vessels is generally afforded by a Marine Protection and Indemnity Policy (P&I), which is a ship operator’s liability policy. This specialty coverage is available through marine liability underwriters. In addition to non-employee coverages, the P&I policy protects the insured for liability under the general maritime law, the Jones Act, and the Death on the High Seas Act.

If the employer does not buy a P&I policy, or if the employer wishes to cover all employment-related coverages on a single workers’ compensation policy, coverage for employee injuries may be provided under a workers’ compensation policy endorsed to provide USL&H and Maritime Employers Liability coverages.

It’s important to remember that because coverage for vessel operations is essentially liability coverage, the limit of liability must be in line with the employer’s overall insurance program.

### **PRODUCER’S ROLE**

Obtaining appropriate coverage for a maritime employer requires determining what laws may apply. That determination necessarily includes reviewing:

- The nature, type, and full description of the vessel and its personnel
- The place, time, and all circumstances of hiring
- Where the employee eats and sleeps and what the terms of hiring were – that is, how long and on what basis of pay (hourly, daily, monthly, or other)
- Whether the employee is contractually bound to the vessel or group of vessels or has a lien on the vessel for wages
- What the employee’s job duties encompass, in detail

As a professional agent or broker, you can’t afford to overlook exposures your client may have. While this publication briefly summarizes the laws covering injuries to maritime employees, this publication is for informational purposes only and does not constitute legal advice. You should consult with an attorney regarding the specific application of any law described in this communication and to ensure that no other laws may apply.

For specific information regarding coverage for your maritime employer client’s exposures, contact your StarStone underwriter.

**This brochure provides general information on various laws and does not constitute legal advice.**

When considering an employer's insurance needs, coverages should meet the requirements of the workers' compensation laws of states where the employer has operations; however, attention to state laws alone may not be enough. Federal laws apply broadly both at the waterfront and to employees working aboard vessels.

The application of workers' compensation laws covering maritime employment can be complex and confusing. Employers with a maritime exposure need to understand how Federal and Admiralty laws may affect their employees.

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