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The Longshore and Harbor Workers' Compensation Act Coverage

by Walter Isler, Principal

One of the great benefits of living near oceans, rivers or lakes is the beautiful waterfront vistas we get to enjoy. However, for those involved in the world of construction, those waters can also be dangerous to navigate in terms of Workers' Compensation insurance. Depending upon what kind of work they are doing and where it's being performed, the construction employee can literally be transformed into a Longshoreman without you being aware that the transformation has occurred.

Most of the time, employees are under the jurisdiction of their individual state Workers' Compensation laws. However, there are times when the location and status of your project will change the work comp jurisdiction to the United States Longshoreman and Harbor Workers Act, which is a Federal statute and can be found at <http://www.dol.gov/compliance/laws/comp-lhwca.htm>.

To qualify under the USL&H act, the worker must satisfy two components called Situs and Status:

- Situs is the location of the work being performed, which according to the law must be "on or near" a navigable waterway of the United States.
- Status is generally understood to be performing work that in some way aids or supports maritime navigation and/or commerce.

The frustration regarding USL&H is that there are gray areas in terms of what constitutes "near" and if work actually is in support of the maritime industry or not. The ultimate arbitrator of such questions is the Federal Courts, and therefore over time the definitions change and invariably expand via the decisions in court cases. This creates a bit of a moving target when trying to determine if you need USL&H coverage or not. To make matters worse, injured employees are motivated to seek coverage under USL&H jurisdiction if they can, because the benefits offered are typically more generous than what they would receive under their respective State Act statutes.

Determining status is important during the bidding process because standard work comp rates are typically lower than USL&H rates, and this could cause the job to lose a portion of the profit when USL&H rates have to be paid at a later date. Also, penalties for failure to maintain USL&H can be heavy with fines up to \$10,000 and the possibility of actual jail time of up to one year for the employer.

Insurance protection for this work comp exposure can be purchased with a separate policy, or via endorsement to your existing Worker's Compensation policy. For those situations in which USL&H jurisdiction is possible, but perhaps unlikely, minimum cost policies can be procured if the underwriter is in agreement with the risk assessment. These policies are typically charged at a low minimum premium (often no more than a few thousand dollars), but in the event of a qualifying loss they will pay benefits to the injured worker. The underwriter would then require payment for the standard USL&H rates for all applicable payroll on that project, but it's far better to have the coverage and pay the premium than not have the coverage at all.

Because of the uncertainty surrounding USL&H applicability and the associated costs and penalties that can result, we highly recommend that should a contractor be working near the waterfront that they consult with their insurance professionals at Parker, Smith & Feek to see if USL&H may apply.

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