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## MARINE EMPLOYERS' LIABILITY COVERAGE: WHAT IS IT, AND DO YOU NEED IT? PART 1

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Unless your job is directly related to procuring, underwriting, or brokering insurance, it's very likely that commercial insurance is something of a mystery. Within the industry, it's widely accepted that marine insurance is among the oldest, if not the oldest, forms of insurance dating back to the Middle Ages. The "modern" era of marine insurance can be traced to the 1600s, when the first marine insurance statute was codified in England and Lloyd's coffeehouse was established in London. Marine insurance still relies on antiquated terms and obscure references to centuries-old English admiralty law, thus adding to the potential confusion. Taking that a step further, the issue of how marine employers should cover their employees is often described as a "grey area." This may be generous at best.

### State Act, USL&H, and the Jones Act

Most employers have at least a grudgingly good understanding of their State Act workers' compensation obligations and how best to satisfy those obligations via insurance. When considering coverages for workers, marine employers also need to consider the federal layer. Congress passed the Longshore and Harbor Workers' Compensation Act in 1927, during the progressive era in which many protections were put in place for U.S. workers. Commonly called USL&H or "Longshore," the U.S. Department of Labor administers this federal workers' compensation program. There are two tests that determine if USL&H applies: situs and status. There are also several exemptions to USL&H. But these are subjects for a different day.

There is one key point to make before moving to the discussion of marine employers' liability (MEL). With USL&H and the statutorily defined protections afforded injured workers, there is a tradeoff; workers give up the right to sue their employers for on-the-job injuries. This is not the case with the Jones Act. Do I have your attention now?

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The Merchant Marine Act of 1920, named for U.S. Senator Wesley Jones, was passed in large part to provide for national defense and to stimulate the U.S. shipping industry in the aftermath of World War I. Commonly referred to as the Jones Act, it is mostly known for its cabotage provisions and their impacts on U.S. shipbuilding, the carriage of goods, and the high cost of shipping to Hawaii and Puerto Rico. However, there is a provision dealing with seamen that keeps marine employers up at night. 46 U.S. Code § 30104 provides that, “A seaman injured in the course of employment or, if the seaman dies from the injury, the personal representative of the seaman may elect to bring a civil action at law, with the right of trial by jury, against the employer.” If I didn’t have your attention before, I certainly have it now. Next, let’s discuss MEL.

### Marine Employers’ Liability

Unlike State Act workers’ compensation and USL&H, there isn’t a state or federal agency that regulates or administers MEL coverage or approves forms and rates. To initiate an action, the injured seaman (or personal representative, if the seaman is deceased) must simply file a lawsuit in either state or federal district court asserting negligence on the part of the employer. If not otherwise settled between the parties, then the resolution of the lawsuit and any resulting damages is left to the courts.

Under the Jones Act, the burden of proof is significantly lower than most negligence cases. Typically, the plaintiff must prove the defendant’s negligence was the proximate cause of the injury or death. In layman’s terms, this means the defendant must prove the employer’s negligence

played a substantial part in causing the injury. But under the Jones Act, the plaintiff must only prove the employer’s negligence played any part, however small, in causing the injury. In other words, while there may have been several factors leading to the seaman’s injury, if the employer’s negligence was partially to blame for the injury, the employer may still be found liable. Keep in mind that there is no limit to the potential recovery. So, while there isn’t a legal requirement to carry MEL coverage (unlike State Act workers’ compensation and USL&H), it would be extremely prudent for any person or organization that employs persons on or around the navigable waters of the United States to determine if they have an MEL exposure.

Two seemingly simple questions determine whether there is an MEL exposure. First, is the injured worker a seaman? Second, did the injury happen on a vessel? If the answer to both questions is yes, there is an MEL exposure. If the answer to either question is no, there is no MEL exposure. Simple right? Not so much. This is where the grey area I mentioned earlier comes into play. The criteria used in determining the answers are not written in statute; they are determined in the courts, and the relevant case law continues to change over time.

In Part II of this article, I will dive deeper into these questions and review the current relevant case law. In the meantime, if you are a marine employer wondering whether you may have an MEL exposure, you should reach out to Parker, Smith & Feek’s Marine Practice Group for more information. You may save yourself a great deal of money and possibly even sleep a bit easier at night!

### References and Resources

1. Humbert O. Nelli, “The Earliest insurance Contract- A New Discovery.” *The Journal of Risk and Insurance*, XXXIX, No. 2 (June 1972), pp. 215-220.
2. US Department of Labor, Division of Federal Employees, Longshore and Harbor Workers Compensation. Website accessed September 2, 2021 at: [Division of Federal Employees’, Longshore and Harbor Workers’ Compensation \(DFELHWC\) | U.S. Department of Labor \(dol.gov\)](https://www.dol.gov).