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Keeping Workers Safe

HOW THE LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT CAN HELP

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Since returning from MariTrends in March, I've met with PVA members up and down the West Coast, from Hawaii to Alaska. Regardless of the size, type, or geography of the operation, a few things seem consistent. Demand is strong, and bookings are approaching (if not exceeding) pre-pandemic levels. Obviously, that's great news. People want to get back to in-person events with family and friends, enjoy a nice meal or a few drinks in a public space, and see our beautiful waterways and scenic places from the vantage point only a passenger vessel can provide. But it isn't all good news, unfortunately.

Those very same operators also discussed the struggle to find and retain enough labor to satisfy the demand. For some, it's finding qualified, credentialed mariners. For others, it's the lack of lower-wage, hourly workers. In some cases, it's a matter of finding someone who can pass a drug test, given the inconsistency between state and federal marijuana laws. For operators who may have sufficient crew right now, new variants and infections make it hard to keep crew healthy and reporting for work, day in and day out.

As a risk management professional, I'm always asking myself how I can best help my clients address their exposures. As vessel and associate members, I'm sure you do the same. When it comes to employees and how best to cover them, the issue can be anything but straightforward. For the workers in your retail shops or in the office, for example, you'll usually have State Act workers' compensation insurance. Unless you live in one of the four monopolistic states (like Washington, where I live), you'll buy that insurance in the private market. For your captains and crew, you'll typically look to your Protection and Indemnity (P&I) policy for coverage. But what about the employees who are not considered Jones Act seamen (and thus not covered under P&I) but may become injured in the course of maritime employment over or adjacent to navigable waters? This is where USL&H insurance may come into play.

Congress passed the Longshore and Harbor Workers' Compensation Act (USL&H) in 1927, during the Progressive Era in which many protections were put in place for U.S. workers. Recall that just seven years earlier, Congress passed the Merchant Marine Act of 1920 (a.k.a. the Jones Act), which provided protections for injured seamen. Though they provide similar protections, it's important to note that USL&H specifically excludes Jones Act seamen and those covered by State Act workers' compensation. As its name suggests, USL&H was meant to cover longshoremen, stevedores, and other shore-based employees like shipyard workers. Though it has been updated and amended several times, it's far from settled. In general, there are two key tests to consider when evaluating a potential USL&H exposure.

The first relates to the status of the employee. Section 902(3) defines an employee as "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker..." Unfortunately, several of these terms were left undefined and have been the subject of persistent litigation over the years. This section also includes several exclusions that further muddy the waters.

The second test is that of situs. Section 903(a) notes "compensation shall be payable under this [Act] in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel)." As with the status test, there are exclusions and undefined terms that continue to result in litigation and different interpretations, depending upon jurisdiction.

But a few things are settled. USL&H is a federal workers' compensation program administered by the U.S. Department of Labor, unlike State Act workers' compensation programs administered on a state-by-state basis. You can buy USL&H insurance on the private market, but companies offering this coverage must be DOL-approved and the market is very concentrated with few players. If you choose to self-insure this risk, that is also subject to DOL-approval. The majority of USL&H risk in the United States is self-insured through one of a few mutual associations. Regardless of whether you seek coverage through the private market or the mutuals, there's typically a minimum premium threshold of $10,000. For maritime employers that may have a very limited USL&H exposure, this can be cost-prohibitive. While I'm a firm believer in the ability of markets to address an economic need, this is an area where the market has failed the small maritime employer, at least in Washington state.

In 1992, the Washington Legislature found "the continued existence of a strong and healthy maritime industry in this state is threatened by the unavailability and excessive cost of workers' compensation coverage required by the United States longshoreman's and harbor worker's compensation act." To remedy this, the Legislature established the

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Washington Assigned Risk Plan (WARP) to make USL&H coverage available for employers unable to purchase it through the voluntary private insurance market. The WARP program is authorized in statute by RCW 48.22.070 and Chapter 22 of Title of the Washington Administrative Code. A 13-member Board of Governors oversees the program and includes representatives of maritime employers, organized labor, insurance companies, insurance brokers, and an obligatory seat for the Washington Department of Labor & Industries. Members are appointed by the Office of the Insurance Commissioner to three-year terms. WARP also employs an Executive Director and a General Counsel to manage day-to-day operations. The Plan works with a servicing carrier to process applications, determine premiums based on class codes and published rates, and to issue policies.

The WARP Board meets quarterly, and all meetings are open to the public. There is a robust process in place for reporting and adjudi-

cating claims and for resolving disputes when they arise. In many respects, WARP operates much like a traditional insurance company, in that it collects premiums from maritime employers, purchases reinsurance in the private market, pays claims, and invests the net proceeds in the financial market, subject to limitations imposed by the enabling legislation.

While the lack of affordable USL&H for small maritime employers may be an issue in other states, WARP is only available to Washington employers and/or those doing work in Washington. Over the 20 years WARP has been in place, it has served the needs of hundreds of small maritime employers representing thousands of workers.

As the industry continues to face staffing challenges, having robust and affordable USL&H coverage in place will help ease the burden if an injury does occur, and get employees healthy and back to work. If you have questions about WARP or USL&H coverage in general, reach out to Parker, Smith & Feek's Marine Practice Group.

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Mark H. Gleason is a licensed marine insurance broker with Parker, Smith & Feek, based in Seattle. He also sits on the Board of Governors for the Washington USL&H Assigned Risk Pool. He helps manage risk for a broad range of maritime businesses including passenger vessel operators, commercial fishing and seafood processing, marine contractors, shipyards and boatyards, and vendors and suppliers to the maritime industry. Prior to starting his career in insurance, Mark spent 24 years in the maritime industry including many years as a "boots on deck" commercial fishermen, as a researcher, and an advocate for the industry at both State and Federal level. He can be reached at mhgleason@psfinc.com, (425) 974-3011 (office), or (831) 410-6993 (mobile).